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March 26, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Amendment: Money Laundering

Dear Judge Murphy:

We write on behalf of the National Association of Criminal Defense Lawyers to express our position regarding the proposed Money Laundering Guideline Amendments. We commend the Commission staff for the extensive work that it has done in an effort to resolve current application problems with the existing money laundering guidelines. It is the experience of our membership that the existing money laundering guidelines often result in significantly enhanced levels of punishment over the underlying offense from which illegal proceeds were derived and that prosecutors have utilized this disparity to exert leverage in the plea bargaining process. The Commission has recognized this potential for abuse in its past analysis of the money laundering guidelines.

The NACDL endorses the provisions of the proposed guidelines which tie the offense level for direct money laundering to the underlying criminal conduct that was the source of the criminally derived funds. We believe that this structure will

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1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036

Tel: (202) 872-8600

Fax: (202) 872-8690

E-mail: assist@nacdl.org

Website: www.criminaljustice.org

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dramatically decrease the potential for anomalous applications and coercive plea bargaining practices. While the proposed amendment is a marked improvement over the existing guidelines, there are several features of the proposal that we believe should be changed. Although the proposed amendment fails in several respects to cure underlying problems with the money laundering guidelines, we do wish to indicate our strong support for an amendment following the basic structure proposed by the Commission during this amendment cycle.

In this regard, we urge the Commission to reject the position of the United States Department of Justice expressed in a February 8, 2001, letter to you by Robert S. Mueller, Acting Deputy Attorney General. In his letter, Mr. Mueller indicated that while he shared the concern that some sentences under the existing guideline were too severe, especially in small scale fraud cases, the Department of Justice could not support the current proposal. Mr. Mueller suggested that the Commission refrain from acting on a money laundering amendment in order to allow the Department of Justice to more fully examine the proposal and provide alternative proposals. Mr. Mueller's comments ignore the extensive six year effort by the Commission to deal with this problem.

The Department of Justice suggestion that additional review is necessary disregards the significant effort by the Commission staff, the Department of Justice, and the Defense Bar in the drafting of these amendments. We urge the Commission to act upon and adopt amendments this cycle and to reject the Department's suggestion for deferral until the next amendment cycle. The current guidelines produce unnecessarily harsh sentences in a variety of cases. Given the recognition of this problem, the guidelines should not be permitted to continue in their current form.

The Commission has requested comments on whether application of subsection (a)(1) should

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be expanded to include offenders who otherwise would be accountable on the basis of section 1B1.3(a)(1)(B). While the Commission's proposal to extend the reach of section (a)(1) to relevant conduct under section 1B1.3(a)(1)(A) is consistent with the structure of the guideline and would tie culpability for underlying offenses to the offense level for money laundering, the provisions of section 1B1.3(a)(1)(B) would expand the reach of this section beyond the limits apparently intended by the drafters of the amendment. Application Note Two to section 1B1.3 clarifies that jointly undertaking criminal activity encompasses a range of conduct beyond that normally encompassed within the concept of direct responsibility for criminal activity, which underlies the concept of direct money laundering.

The proposed Specific Offense Characteristic under § (b)(2)(A) provides for an increase in the offense level if "the defendant was in the business of laundering funds." Proposed Application Note 4 suggests a totality of the circumstances test to determine whether a defendant was engaged in "the business of laundering funds." Subparagraph (B) of Application Note 4 sets forth four factors which a court can consider in applying the totality of circumstances test. The definition of "engaging in the business" is inherently vague and may lead to disparate applications of the guideline. The NACDL favors an adjustment that would lend itself to more precise determination. For example, Application Note 4(B)(iv) would increase the offense level for prior money laundering convictions. Relevant conduct will also draw in other related money laundering offense conduct. Under the Guidelines's real offense sentencing structure, these determinations should be left to relevant conduct and prior criminal history. Otherwise, this guideline would represent a marked departure from the overall structure of the Guidelines, which utilize criminal history and relevant conduct to

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deal with the breadth of a defendant's criminal activities. Use of an "engaging in the business" standard would lead to potential duplicative counting for these elements and would be at odds with other guidelines' treatment of career or repeat offenders.

Proposed § (b)(2)(B) adds as a Specific Offense Characteristic promoting further criminal conduct. The NACDL opposes a promotional Specific Offense Characteristic. While true promotional money laundering as statutorily defined — for example, in § 1956(a)(1)(A)(i) or § 1956(a)(2)(A) — is dealt with as a serious offense, the proposed guidelines would expand the reach of promotional money laundering. In the event that the Commission includes the Specific Offense Characteristic, the NACDL favors the addition of the bracketed language to require that such activities significantly promote further criminal conduct; similarly, the bracketed language in proposed Application Note 5 should be included to limit the reach of the promotional enhancement. These additions do not eliminate our concerns or alter our position that the Commission should entirely delete the Specific Offense Characteristic relating to promotion.

Subsection (b)(2)(C) provides as a Specific Offense Characteristic sophisticated concealment. Both the language of the Specific Offense Characteristic and Application Note 6 should include language indicating that the conduct was intended to conceal. The inclusion of an intent element is necessary since several of the examples of sophisticated concealment in Application Note 6 could be regular course of business transaction unrelated to any intent to conceal a transaction. For example, layering of transactions may be a legitimate business purpose in certain types of commercial transactions that should not give rise to a sophisticated concealment enhancement unless it was done with the intent to conceal. Similarly, transmission of funds derived in the United States

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to locations outside the United States may be a necessary part of legitimate and routine business transactions. Again, the inclusion of an intent element will limit the sophisticated concealment adjustment to conduct intended to conceal the transaction.

The NACDL opposes the inclusion of Specific Offense Characteristic (b)(2)(D). The list of subsections in § 1956 includes most of the major subsections contained in that statute. We can perceive little rationale for increasing a sentence for the large majority of cases that will be prosecuted under the money laundering statutes through the Specific Offense Characteristic.

The NACDL supports the two-level downward adjustment under proposed § (b)(4) in cases where the defendant has done little more than knowingly receive the proceeds of illegal activity. In such cases a less severe penalty is justified.

The NACDL supports an addition to Application Note 3 regarding the value of laundered funds for certain defendants. Whether the departure language of Option 1 or the approach of Option 2 is adopted, the Commission should include a provision designed to deal with the situation where the amount of laundered funds derived from a fraud transaction could be greater than the fraud loss itself. A failure to adopt one of these options could produce anomalous guideline applications. For example, in a white collar fraud case, a defendant could pad a legitimate claim by a small percentage. This padding would be accomplished by fraudulent misrepresentations. A party who was convicted of the fraud would in many cases be sentenced under section 2F1.1 based upon the amount of the misrepresentational element of the claim, not the legitimate underlying claim itself. For money laundering purposes, however, the total amount of the claim would be the funds laundered. Absent one of these options, money laundering will become a more significant offense than the underlying

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offense. A defendant convicted of the underlying fraud would be punished less severely than an individual who laundered the proceeds.

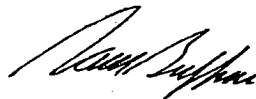
The Commission is aware from its staff working papers of the circuit conflict on grouping money laundering and fraud or drug counts. The proposed amendments will effectively eliminate the circuit conflict because of the coupling of direct money laundering to the underlying offense. The Commission should, however, address the cases that will not be sentenced under the amended guideline prior to its adoption or because of *ex post facto* problems. The Commission's commentary on the adoption of any amendment should address its preferences regarding retroactive application of the principle that direct money laundering in fraud and drug cases should be sentenced under the underlying fraud or drug guidelines.

We appreciate the opportunity to provide our comments to the Commission and are prepared to provide any additional information that may be of use to the Commission.

Very truly yours,



Martin G. Weinberg, Chair
NACDL Money Laundering Task Force



Samuel J. Buffone, Vice Chair
NACDL Money Laundering Task Force

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NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

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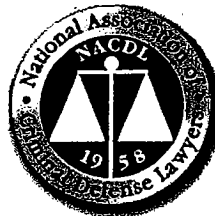
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Greenwood, SC

Ellen Zucker
Boston, MA

John K. Zwerling
Alexandria, VA

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Stuart M. Staller



March 26, 2001

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

We write on behalf of the National Association of Criminal Defense Lawyers (NACDL), the preeminent national association of criminal defense attorneys with 10,500 members and 30,000 state and local affiliate members who are private defense attorneys, public defenders, law professors, and judges. Each of us is committed to ensuring fairness and due process of law for persons accused of or convicted of crime. These comments relate to the Economic Crime Package and related amendments, *i.e.*, Amendments 12, 13 and 14. NACDL will submit separate comments on the Money Laundering guidelines and the Immigration guidelines.

As you prepare to vote on this year's proposed amendments, we ask you to keep in mind that the rate of incarceration in the United States is the greatest of any civilized nation. In this regard, we quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, who describes the "disturbing state of affairs," in which our criminal justice systems finds itself.

Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark [since Judge Posner wrote this in 1995, the prison population now exceeds two-million persons], mark us as the most penal of civilized nations...

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1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036

Tel: (202) 872-8600

E-mail: assist@nacdl.org

Fax: (202) 872-8690

Website: www.criminaljustice.org

[W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest....

Perhaps in the fullness of time the growing of marijuana plants, the "manipulation" of financial markets, the sale of pornographic magazines, the bribery of foreign government officials, the facilitation of suicide by the terminally ill, and the violation of arcane regulations governing the financing of political campaigns will come to seem objects of criminal punishment not much more appropriate than "dishonoring the race." [J]udges on the one hand should not be eager enlists in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that ... reduce individual human beings to numbers or objects...

Richard A. Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advise to judges applies with equal force to you, who as Sentencing Commissioners, have been entrusted with establishing federal sentencing guidelines.

We are cognizant that with respect to these amendments, the Commission is responding to those critics who believe that sentences with respect to economic crimes are too lenient. No empirical evidence to support increased penalties has been submitted by the government or by those judges on the Judicial Conference of the United States who propose increased penalties, however. Indeed, any perception that these guidelines do not provide sufficiently severe penalties is belied by the actual sentences being imposed by federal judges on actual defendants. In most cases, judges are sentencing at the lowest ends of the guideline range.

In addition, the government itself has conceded that it lacks any empirical evidence that harsher penalties will deter persons from committing economic crimes.

Further, because these guidelines are driven by the aggregated amount of "loss" as determined under relevant conduct, the proposed increases will result in the same injustices that now permeate drug sentences – an overstatement of the culpability of non-violent, first-time offenders, who are essential but ministerial members of larger criminal enterprises. It is not unusual, for example, to find an employer or ringleader who devises, controls and puts in place a fraudulent scheme for his own profit but which ensnares ministerial employees who are then drawn into the

NACDL's Comment's on the Economic Crime Package

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illegal web by perceived fears of losing otherwise legitimate jobs. This happens in medical fraud cases, where the secretary is asked to falsify records or in schemes to defraud customers, where the accounting clerk knowingly processes documents reflecting false statements. There are also those cases where there are intervening causes for the loss not related to the defendant's fraud but where the defendant is nevertheless held accountable for the entire amount of loss. Also, there are those cases where a fraudulent contract is negotiated for the benefit of the employer without any actual gain to the defendant. Quite often also, persons committing these crimes are motivated by misguided attempts to salvage a failing enterprise or by other dire financial circumstances not subject to consideration under the federal sentencing guidelines as a ground for downward departure but which nevertheless mitigate the circumstances of the offense.

Lastly, to the extent that the concern of those advocating increased penalties for economic crimes is really one of discomfort with draconian sentences for drug offenders, NACDL shares the concern that those sentences are excessive, and further, that they are largely the result of mandatory minimum legislation without basis in sound sentencing policy. As studies have shown, federal drug sentences are not just viscerally disturbing, but create a host of problems not encountered elsewhere in the Guidelines, including guideline circumvention, disparity among sentences depending on the bent of the prosecutor, and undue prosecutorial power in inducing plea bargains. The cure surely cannot be to make the misguided drug sentencing policy a benchmark for sentencing in other types of cases, thus infecting the system with all of its problems.

In sum, it hardly seems sound to increase penalties for all offenses because a very small proportion of the most severe fraud offenses may warrant harsher penalties. For those cases, an upward departure is the more appropriate solution. In the absence of any empirical evidence to support increased penalties, the Commission should not adopt amendments that will limit the number of persons who will be eligible to receive a "sentence other than imprisonment." Accordingly, rather than raise penalties for economic crimes, the Commission should abide by the congressional mandate in 28 U.S.C. §994(j) which requires it to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first time offender who has not been convicted of a crime of violence or an otherwise serious offense...."

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Amendments 12, 13 and 14.

Our comments here focus on the Economic Crime Package and related amendments, *i.e.*, Amendments 12, 13, and 14. The Practitioners' Advisory Group, the Federal Public and Community Defenders, and the New York Council of Defense Lawyers have provided extensive written comments on these proposals. Our purpose here is to express NACDL's support for positions treated in more detail in those organizations' submissions, and to add our thoughts and contribute alternatives where appropriate.

NACDL will comment in a separate submission on proposed Amendment 20 regarding money laundering. We understand that the Department of Justice has asked the Commission to delay consideration of changes to the money laundering guidelines until the next amendment cycle. If the Commission does defer consideration of Amendment 20, NACDL requests that the Commission also defer consideration of the Economic Crime Package because of the close relationship between the two.

I. NACDL Supports Consolidation of the Theft, Property Destruction, and Fraud Guidelines (Amendment 12, Part A).

NACDL joins the other defense organizations in supporting consolidation of USSG §§ 2B1.1, 2B1.3 and 2F1.1. We support use of the existing fraud table with a base offense level of six as long as a one or two-point decrease is adopted for cases involving a loss less than or equal to \$1,000. As the Federal and Community Defenders note in their submission, at very low levels one level can dictate available sentencing options. Since consolidation requires a choice between the higher levels for fraud and the lower levels for theft at amounts of \$1,000 or less, and since courts are sentencing at the minimum of the range in the vast majority of both theft and fraud cases, the Commission should adopt the lower levels.

NACDL also supports the elimination of the "more than minimal planning" enhancement. As the Commission notes, there is potential overlap between this and the sophisticated means enhancement. The sophisticated means enhancement is a superior indicator of heightened culpability by virtue of its definition; while the broad "more than minimal planning" enhancement has become routine in most cases. NACDL opposes incorporating the "more than minimal planning" enhancement in a consolidated loss table because to do so would impose unwarranted punishment on those few defendants who engage in minimal or no planning. If the enhancement is incorporated in a consolidated loss table, a specific offense characteristic providing for a two-point decrease should be added for those cases in which it does not exist.¹

¹ See United States Sentencing Commission, White Collar Working Group Report (April 1993) at 23, 36.

NACDL joins the Federal and Community Defenders and the New York Council of Defense Lawyers with respect to the other proposals and issues for comment in Proposed Amendment 12, Part A.

II. NACDL Opposes Any Revision to the Consolidated Loss Table by Increasing Offense Levels Beyond Those Contained in the Current Fraud Table (Amendment 12, Part B).

NACDL joins the Practitioners' Advisory Group, the Federal Public and Community Defenders, and the New York Council of Defense Lawyers in opposing any increase in the loss tables for economic crime cases. The Committee on Criminal Law of the Judicial Conference of the United States, along with the Department of Justice, have spearheaded efforts to implement an increase. The Committee states that offense levels for white collar offenses are "too low" based on considerations of proportionality, deterrence, and just punishment, and that there is a need to simplify which would be advanced by consolidating the loss tables for the fraud and theft guidelines with fewer, 2-level loss tables.² With no attempt at justification, the Department of Justice baldly claims that sentences in white collar crime cases are "far too lenient." Neither offers any empirical or other support for a supposedly necessary increase.

NACDL believes that there is no justification supported in fact or logic for an increase in the loss table at any level. As the Commission has said, "the guidelines represent an approach that begins with, and builds upon, empirical data."³ If so, any increase in the loss tables would be unwarranted and unwise.

- At the inception of the Guidelines, offense levels for economic crimes (among all others) were set above the average reflected in pre-Guidelines practice.⁴ Offense levels in the fraud and theft tables were increased again in 1989 "to provide additional deterrence and better reflect the seriousness of the conduct,"⁵ though without empirical evidence indicating a failure of prior levels to adequately deter or punish.

² Summary: Proposed Definition of Loss and Loss Table by the Committee on Criminal Law at 1.

³ USSG, Ch.1, Pt.A, intro. comment. 3.

⁴ Id.

⁵ USSG App. C, amendments 99 and 154.

- Amendments to the guidelines applicable to economic crimes have kept pace with any real or perceived need for increased sentences.
 - Over the years since 1989, specific offense characteristics have been added to reflect increased seriousness based on a particular factor in a particular case. See USSG §§ 2B1.1(6)(A), 2F1.1(7)(A) (substantially jeopardized safety and soundness of a financial institution); USSG §§ 2B1.1(6)(B), 2F1.1(7)(B) (affected a financial institution and the defendant derived more than \$1 million in gross receipts); USSG § 2B1.1(7) (misappropriation of trade secrets and defendant knew or intended it to benefit a foreign entity); USSG § 2B1.1(7) (theft from a national cemetery); USSG § 2F1.1(5) (sophisticated means, etc.); USSG § 2F1.1(3) (mass marketing).
 - To encourage greater flexibility to increase or decrease sentences for economic crimes, the commentary to USSG § 2F1.1 was amended in 1993 to invite upward or downward departure when the loss overstates or understates the seriousness of fraud offenses. See USSG § 2F1.1, comment. (n.11). The commentary to USSG § 2B1.1 was amended in 1997 to invite upward departure when the loss understates the seriousness of theft offenses. See USSG § 2B1.1, comment. (n.14).
- Empirical data collected by the Commission demonstrates that in the judgment of sentencing courts in individual cases, the loss tables set in 1989, specific offense characteristics added subsequently, and use of the departure power have been more than adequate to reflect the seriousness of economic crime.
 - The percentage of sentences for economic crimes at the guideline minimum far exceed those at the guideline maximum. For example, in 1999, 61.9% of defendants sentenced for fraud received the guideline minimum while only 12.2% received the maximum. Similarly, in theft cases, the minimum was imposed in 68.8% of the cases while the maximum was imposed in only 10.4% of the cases.⁶
 - The trend in sentencing economic crime offenders at the minimum end of the range has increased. For example, the percentage of fraud defendants sentenced at the minimum has risen from 46.5% in 1996 to 58.3% in 1997 to 59.7% in 1998

⁶ 1999 Sourcebook of Federal Sentencing Statistics, Table 29. Statistics for the year 2000 are not yet available.

to 61.9% in 1999.⁷ The same is true of the percentage of minimum larceny sentences, which has increased from 61.9% in 1996 to 68.8% in 1999.⁸ Data from 1998 and 1999 reflects a trend to sentence slightly fewer defendants at the guideline maximum, with the percentage for fraud defendants decreasing from 13.7% in 1998 to 12.2% in 1999, and that for theft defendants decreasing from 11.6% to 10.4%.⁹

- In those cases where departures were granted in fraud and larceny cases for reasons other than substantial assistance, downward departures have increased slightly, ranging in fraud cases from 8.5% in 1996 to 9.7% in 1999, and in larceny cases from 6.5% in 1996 to 7% in 1999. At the same time, upward departures have decreased slightly, ranging in fraud cases from 1.3% in 1996 to .7 % in 1999, and in larceny cases from 1.4% in 1996 to .3% in 1999.¹⁰

In sum, judges are not prevented by the current system from imposing sentences in economic crime cases that are as high as those judges, in their considered judgment in individual cases, determine are necessary to achieve just punishment. Whatever sense the judges on the Criminal Law Committee or the Department of Justice might have to the contrary, it is unsubstantiated and not representative of the views of the broader judiciary.

To the extent that the concern of the Committee on Criminal Law for proportionality is really one of discomfort with draconian sentences for drug offenders, NACDL shares the concern that those sentences are excessive,¹¹ and further, that they are largely the result of mandatory minimum

⁷ 1996 Sourcebook of Federal Sentencing Statistics, Table 27; 1997 Sourcebook of Federal Sentencing Statistics, Table 29; 1998 Sourcebook of Federal Sentencing Statistics, Table 29; 1999 Sourcebook of Federal Sentencing Statistics, Table 29.

⁸ Id.

⁹ 1998 Sourcebook of Federal Sentencing Statistics, Table 29; 1999 Sourcebook of Federal Sentencing Statistics, Table 29.

¹⁰ 1998 Sourcebook of Federal Sentencing Statistics, Table 27; 1999 Sourcebook of Federal Sentencing Statistics, Table 27.

¹¹ We do not believe this issue is properly characterized as one of disproportionality or unwarranted disparity as would require the Commission to raise penalties for economic crimes. Congress directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who

legislation without basis in sound sentencing policy. As studies have shown, federal drug sentences are not just viscerally disturbing, but create a host of problems not encountered elsewhere in the Guidelines, including guideline circumvention, disparity among sentences depending on the bent of the prosecutor, and undue prosecutorial power in inducing plea bargains.¹² The cure surely cannot be to make the misguided drug sentencing policy a benchmark for sentencing in other types of cases, thus infecting the system with all of its problems. A fair and rational system of sentencing can be achieved only by repealing the mandatory minimum laws and adjusting the Guidelines accordingly.¹³

have been found guilty of similar conduct.” 18 U.S.C. § 991(b)(1)(B). As the Commission has recognized, “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity,” and “[s]imple uniformity – sentencing every offender to five years – destroys proportionality [by] lump[ing] together offenses that are different in important respects.” See USSG Ch. 1, Pt. A, intro. comment. 3. There can be no doubt that drug and white collar offenses differ in important respects, though we believe that sentences in drug cases are unwarrantedly severe largely due to Congress’s choice to impose mandatory minimum sentences in these cases.

¹² Studies conducted by Professor Stephen Schulhofer and former Commissioner Ilene Nagel have found that bargaining in contravention of strict Guidelines requirements occurs in at least 20-35% of cases resolved through guilty plea and up to 90% in some jurisdictions. See Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period, 91 Nw. U. L. Rev. 1284, 1290-92 (1997) (hereinafter “Guideline Circumvention”). They found that guideline circumvention is “particularly pronounced in drug cases in which guideline sentences are anchored by mandatory minimum sentence levels.” See Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 535 (1992). This, they found, was often attributable to individual prosecutors’ sense that the correct sentence was “unfair,” “unnecessarily long and overly harsh.” *Id.* at 535-35; see also Guideline Circumvention, 91 Nw. U. L. Rev. at 1306. See also U.S. Gen. Accounting Office, Sentencing Guidelines: Central Questions Remain Unanswered 16 (1992) (study showed that prosecutors who affected sentences through bargaining did so “largely to ‘circumvent’ the guidelines for sympathetic offenders, especially to avoid mandatory minimum sentences”). Schulhofer and Nagel found that this created wide disparity among and within jurisdictions since it depends on the views of individual prosecutors. The other side of the coin, of course, is the threat of sentencing “by the book,” making a plea offer “irresistible, even for the defendant with a legitimate legal defense, or the factually innocent defendant with a substantial likelihood of acquittal at trial.” See Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Plea Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231,

¹³ See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999) (advocating abolition of mandatory minimum sentences which frustrate the careful calibration of sentences the Guidelines were intended to accomplish); Julie R. O’Sullivan, In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System, 91 Nw. U. L. Rev. 1342, 1416-17 (1997) (“obvious solution” to improper prosecutorial manipulation “is for Congress and the Commission

Moreover, the proponents of increased offense levels have pointed to no evidence that longer terms of imprisonment deter economic crime better than current levels. As IRS Commissioner Rossotti conceded at the hearing on March 19, 2001, there is no evidence indicating that higher sentences deter tax evasion offenses. Nor is there any evidence of which we are aware that higher sentences deter any other type of economic crime. Indeed, as noted by the Practitioners' Advisory Group, there is empirical evidence that the deterrent impact in economic crime cases comes from the criminal process itself rather than the period of imprisonment.¹⁴

Finally, there is no need based on simplification or otherwise to increase current offense levels in order to consolidate the loss tables. Concerns about complexity stem primarily from inconsistent and unclear definitions and ambiguous instructions in the guidelines rather than the number or breadth of offense levels.¹⁵

III. NACDL Opposes Any Listing of Aggravating and Mitigating Factors as Specific Offense Characteristics in Fraud and Theft Cases (Amendment 13).

NACDL opposes both options that have been proposed for the courts' consideration of a list of aggravating and mitigating factors with corresponding two- or four-level increases and decreases. While we do agree that loss is not the only or necessarily the best indicator of culpability, we believe, at this time, that other factors are best left to the more refined, individualized determinations available through the departure power. As the empirical data shows, judges are sentencing at the minimum in the majority of those cases in which the departure power is not used, demonstrating that sentences in most cases are as high as the judiciary believes necessary, and are departing infrequently (up or down) in cases that for one reason or another are unusual.

NACDL, moreover, has serious misgivings about the use of the listed factors as specific offense characteristics. As a general matter, we are aware of no evidence and feel no confidence that these particular factors necessarily reflect increased or decreased culpability in cases across the board. We believe that a number of these by virtue of their broad definitions create the danger of

to reconsider whether the onerous levels of punishment mandated by statute and Guidelines, particularly in drug cases, are truly necessary given penal goals.”).

¹⁴ Submission of the Practitioners' Advisory Group to the United States Sentencing Commission Regarding Proposed Economic Crimes Amendment at 6.

¹⁵ United States Sentencing Commission, Staff Discussion Paper, Level of Detail in Chapter Two at 13.

being applied as routinely and meaninglessly as the 'more than minimal planning' enhancement.¹⁶ If one or more of them are present in an individual case, certainly the parties can bring them to the attention of the court for its careful consideration as a basis for departure. Moreover, many of the aggravating factors in both options appear to present double counting,¹⁷ significant overlap,¹⁸ and inconsistencies¹⁹ with other guideline provisions. Finally, both options would invite unnecessary litigation, with the prosecution claiming the presence of as many aggravating factors as possible in every case, and the defense claiming the presence of as many mitigating factors as possible in every case, with the likely result a wash.

Though both options state that a sentencing court would not be precluded from departing based on a listed factor by virtue of its having applied that factor, we believe that overall these provisions would undermine and dilute the departure power and the body of law that has developed around it. All of the proposed aggravating and mitigating factors are available now as bases for departure in an unusual case. NACDL believes that current application note 11 and Chapter 5 provide as much guidance as is needed.

¹⁶ Examples include "non-monetary" harm, psychological or emotional harm (always reasonably foreseeable), and endangerment of the solvency of a victim (often the case). As to aggravation for making a false statement to facilitate another crime, examples of frauds not furthered by false statements do not easily come to mind.

¹⁷ For example, both options call for consideration of the number of victims, a factor already taken into account in proposed § 2B1.1(b)(2) and which would create the anomalous results pointed out by the Federal and Community Defenders. Another example is Option 1, proposed aggravating factor ii (false statements to facilitate another crime), which in a bankruptcy fraud case would double count the defendant's false statement pursuant to proposed specific offense characteristic (b)(8)(B).

¹⁸ A number of the proposed aggravating factors overlap with other specific offense characteristics. For example, reasonably foreseeable physical harm is nearly indistinguishable from conscious or reckless disregard of death or serious bodily injury, and loss of confidence in an important institution significantly overlaps with jeopardizing the safety and soundness of a financial institution.

¹⁹ For example, defining a loss at or near the high or low end of the range as an aggravating or mitigating factor undermines the purpose of the loss table, and is likely to be completely fortuitous and therefore without bearing on culpability. As to aggravating factors for making false statements/committing the crime in order to facilitate another crime, it appears that this factor could operate inconsistently and create double counting with respect to the guideline for the "other crime" and the grouping rules, and may too easily permit the government to obtain an increase for "another crime" in a case in which there is insufficient evidence not only to charge and prove that crime beyond a reasonable doubt, but to obtain an upward departure on that basis.

However, an expanded list of suggestions for both upward and downward departure in the commentary is preferable to the proposals defining these various circumstances as specific offense characteristics to be weighed and balanced. NACDL therefore proposes non-exhaustive lists based on current application note 11, the Commission's proposals for aggravating and mitigating circumstances, and its proposals for suggested grounds for departure.

Upward Departure

- NACDL proposes amending the Commission's proposed application note 2(G)(i)(I), as follows:

A primary objective of the *defendant in committing the* offense was an aggravating, non-monetary objective. For example, a primary objective of the *defendant in committing the* offense was to inflict emotional harm.

The italicized language makes clear that only the defendant's intent may be considered, and not that of someone for whose conduct he is accountable under § 1B1.3.

- NACDL proposes amending the Commission's proposed application note 2(G)(i)(I), as follows:

The offense caused substantial non-monetary harm *of a kind or to a degree that is extraordinary and that was reasonably foreseeable to the defendant under the circumstances as he or she knew them*. For example, the offense caused *reasonably foreseeable* physical harm, *severe* psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

As written, application note 2(G)(i)(II) would invite departure in a case that is not out of the ordinary. It can be said that almost any theft or fraud causes some psychological discomfort and that any crime risks even severe psychological or emotional harm, depending on the victim. NACDL believes that deleting the word "risked," inserting the concept of reasonable foreseeability (both as in current application note 11(c)) and inserting the other italicized language will cover only those circumstances that may warrant departure.

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- NACDL opposes the Commission's proposed application note 2(G)(i)(III) suggesting upward departure for interest, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss, for all of the reasons that these matters should not be included in loss, including difficulty of definition and measurement and that it would treat similar defendants differently. The Committee on Criminal Law apparently agrees with this view, as it has not included this as a suggested basis for upward departure.

- NACDL opposes the Commission's proposed application note 2(G)(i)(IV) because it is too broadly applicable and therefore does not describe an unusual case. It also runs contrary to the concepts of both actual and intended loss. If the Commission decides to include it, NACDL suggests the following replacement:

The defendant knowingly created a significant risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

- NACDL does not oppose inclusion of the following suggestion for upward departure:

In committing the offense, the defendant knowingly or recklessly destroyed or damaged irreplaceable items of cultural, historical or archeological significance.

- NACDL does not object to inclusion of the remaining factors in current application note 11, i.e., (b) false statements to facilitate another offense, (d) national security or military readiness, (e) loss of confidence in an important institution, and (f) solvency of one or more victims.

Downward Departure

- NACDL supports the Commission's proposed application note 2(G)(ii)(I).

- NACDL joins the Federal and Community Defenders in recommending that proposed application note 2(G)(ii)(II) be amended as follows:

The loss significantly exceeds the greater of the defendant's actual or intended personal gain *or otherwise* significantly overstates the culpability of the defendant.

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- NACDL proposes adding the following further suggestions for downward departure:

Prior to detection of the offense, the defendant made significant efforts to limit the harm caused by the crime.

The defendant's attempted offense was impossible or extremely unrealistic.

The defendant did not commit the offense for commercial advantage or financial gain.

The defendant committed the offense because of extreme financial hardship not caused by the defendant and beyond the defendant's control.

The defendant neither intended to profit nor actually profited from the offense, and did not commit the offense for the purpose of inflicting non-monetary harm.

IV. NACDL Opposes Intended Loss as an Alternative Measure of Loss in Completed Crimes (Amendment 12, Part C).

NACDL opposes the General Rule proposed for the commentary to a consolidated guideline that would make loss the greater of actual or intended loss in all cases. For the reasons stated in the submissions of the Federal and Community Defenders and the Practitioners' Advisory Group, we strongly support maintaining the current system of using intended loss if greater than actual loss only in sentencing inchoate crimes, and the following proposal for the commentary to a consolidated guideline:

For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed.

If the Commission adopts intended loss as an alternative measure of loss if greater than actual loss in sentencing all fraud and theft crimes, the definition of intended loss should be amended to clarify, as set forth in the submissions of the Federal and Community Defenders and the Practitioners' Advisory Group, that (1) the loss must be "the pecuniary harm that the *defendant purposely* intended to cause," (2) the bracketed language concerning impossible intended loss be included at minimum and clarified to ensure that a fraudulent insurance claim seeking \$50,000 for a \$10,000 car would not be counted, and (3) the credits principle applies.

V. NACDL's Positions With Respect to Other Proposals for the Definition of Loss (Amendment 12, Part C).

NACDL takes the following positions with respect to the other proposals for the definition of loss:

- **Actual Loss** NACDL supports the definition of "actual loss" in Option 1 if a limitation is added to the concept of reasonable foreseeability, for the reasons set forth in the submission of the Federal and Community Defenders. NACDL proposes that in the first sentence of the second paragraph, the phrase "as the defendant knew them" be added after "circumstances of the particular case." NACDL also proposes that an example based on *United States v. Marlatt*, 24 F.3d 1005 (7th Cir. 1994) be included as an illustration.
- **Exclusion of Interest** NACDL supports Option 1 which would exclude interest of all kinds from the calculation of loss for the reasons set forth in the submissions of the Federal and Community Defenders, the Practitioners' Advisory Group and the New York Council of Lawyers.
- **Unlicensed Services, Unapproved Goods** NACDL opposes proposed application note 2(C)(iii)(IV)(2), which would not permit exclusion from loss the value of goods and services that, though unlicensed or unapproved, do have value, for the reasons set forth in the submissions of the Practitioners' Advisory Group and the New York Council of Lawyers.
- **Ponzi schemes** NACDL supports Option 1 which would exclude from loss the value returned up to the amount of the principal investment but no more for the reasons set forth in the submissions of the Federal and Community Defenders, the Practitioners' Advisory Group and the New York Council of Lawyers.
- **Estimation of Loss** Proposed application note 2(D) begins by stating that "the court need only make a reasonable estimate of the loss." NACDL believes that the word "only" and the absence of reference to the evidence in the case, denigrates the court's fact finding function as to a factor with a large impact on the ultimate sentence. NACDL proposes that the first sentence be replaced with the following: "In order to determine the applicable offense level, the court must make a reasonable estimate of the loss based on the evidence in the case." NACDL also joins the Federal and Community Defenders in opposing the commentary which purports to dictate a deferential standard of review on appeal because, as the Defenders note, an appellate court may be in just as good a position to determine loss based on the evidence in the record. NACDL therefore supports deletion of the second and third sentences of proposed note 2(D) and the citation to 18 U.S.C. § 3742(e) and (f).

- Gain NACDL supports Option 4, which would require the use of gain only if the victim's loss cannot reasonably be determined for the seasons set forth in the submissions of the Federal and Community Defenders and the New York Council of Lawyers.

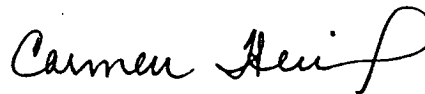
VI. NACDL Supports the Sentencing Table Amendment and the Alternative Sentencing Amendment (Amendment 14).

NACDL supports both Option 1 and Option 2 and joins with the New York Council of Criminal Defense Lawyers in urging the Commission to adopt both proposals. If the Commission is willing to adopt only one or the other, NACDL supports Option 1. Expanding Zones B and C of the sentencing table for defendants in criminal history categories I and II will give judges greater flexibility in imposing an appropriate sentencing option for a defendant with little or no criminal history where home detention or probation will serve the goals of sentencing as well as or better than incarceration. As the Committee on Criminal Law notes in its submission, the data shows that judges use their discretion to fashion non-incarceration sentences sparingly.²⁰

We greatly appreciate the Commission's consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Edward A. Mallett,
NACDL President



Carmen Hernandez, Chair
Amy Baron-Evans

NACDL Federal Sentencing Guidelines Committee

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Summary: Proposed Definition of Loss and Loss Table by the Committee on Criminal Law at 8 & n.11.