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RIYADH - IN AFFILIATION WITH THE
LAW OFFICE OF ABDULAZIZ H. FAHAD

March 1, 2001

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: Comments On Proposed New Guideline For Fraud

Dear Members of the Sentencing Commission:

I submit for the Commission's consideration my comments to the proposed new guideline for fraud. By way of background, I am a former Justice Department Fraud Section prosecutor from the pre-guidelines era. In private practice, I specialize in white collar criminal defense. I have become familiar with § 2F1.1, the current fraud guideline, by handling several cases in which it was applied to calculate the sentence.

I understand that the Commission's proposed amendment would consolidate the fraud guideline with theft in a revised § 2B1.1. I have reviewed the proposed guideline and have the following comments:

1. Loss. In many typical fraud cases, loss is a hotly contested issue, which the government chooses to avoid by not even attempting to prove at trial. For example, in a case involving complex financial transactions and the submission of allegedly false financial information to a bank, the government will request, and be granted, jury instructions that state that it is no defense that the bank did not rely on the information, or did not suffer a loss. Indeed, a defendant can be convicted without any evidence of loss in the record. Then, for sentencing purposes, the responsibility for applying the guidelines is given to a probation officer, who did not attend the trial and is not familiar with the complex financial transactions involved in the case. Nevertheless, the probation officer must write a presentence report and ascertain the loss. In my experience, the probation officer is ill-equipped for this task because of this lack of familiarity, combined with the absence of clear evidence in the record establishing loss. To alleviate this problem, the probation officer merely contacts the government case agent, such as the FBI, to get the government's version of the loss amount and then adopts that figure to apply the guideline level. The defense is immediately at a disadvantage, having to play "catch up" by

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filing objections to the presentence report and trying to convince the court to order the probation officer to change the report.

This determination of loss becomes more important than the actual trial because it drives the guideline level. Yet the loss calculation lacks the precision, and fairness, that the guidelines assume it to have. This is compounded by the fact that, even if a defendant is acquitted on the majority of the counts against him, these counts are still considered "relevant conduct" to be used by the probation officer, in consultation with the case agent, to come up with a loss figure. When loss has not been litigated at trial, which is often the case, the post-trial calculation of loss is an inherently unreliable and unfair basis to determine the sentence.

For these reasons, and because fraud cases involve too much double counting (discussed below), I do not believe there is any good reason to change the loss table to increase the offense level for various amounts of loss. The proposed new guideline would add anywhere from one to six additional guideline levels based on loss. This will only increase the unfairness of the arbitrary manner in which loss is calculated. Regardless of what causation standard is used in the new guideline (actual loss, reasonably foreseeable loss, intended loss, etc.), in complex financial cases the loss calculation is performed by someone who is simply not familiar enough with the evidence to determine even a reasonably accurate dollar amount. Therefore, I respectfully suggest that the Commission not exacerbate this problem by increasing the penalties for loss.

2. More than minimal planning. I enthusiastically support the elimination of this enhancement, as proposed by the new guideline. This is currently an automatic 2-level increase, because in any case with any amount of loss, it is automatically assumed that it involved more than minimal planning. This has led to double counting with § 3B1.1 – leader or organizer, which is a 4-level increase. Defendants who are considered leaders or organizers of conduct that is considered "extensive" under § 3B1.1, are also considered to have engaged in "more than minimal planning." The result is double counting two different guidelines, for a total increase of 6 levels, for the same conduct.

While the proposed elimination of "more than minimal planning" will alleviate this double-counting, it does so only by increasing the loss table point levels. For the reasons discussed above, I do not believe that these increases are appropriate. Furthermore, the same double-counting problem will arise with the proposed increase for "sophisticated means" in § 2B1.1(b)(10) of the proposed amendment. This increase of 2 levels (or, alternatively, an increase up to level 12) will also be satisfied by someone being a leader or organizer. The net result will still be a double counting of two guidelines, for a total increase of 6 levels, for the same conduct.

In any fraud case in which an extensive loss is calculated, the probation officer will automatically include an increase under § 3B1.1 on the theory that the defendant was the leader or organizer of conduct that was "extensive," even if no one else is prosecuted. These enhancements, i.e., more than minimal planning, sophisticated means, and leader/organizer,

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should all be eliminated as redundant to the initial determination that a significant loss was caused. That is, the increased offense levels that correspond with the increased loss amounts already take into account the increased "sophistication" and the "extensiveness" of the underlying offense.

3. Retroactive Effect. The proposed amendment represents a major change to the fraud guideline. Because of the breadth of the proposed changes, it is difficult to determine which particular provisions will result in lower sentences for defendants already sentenced. Therefore, it is respectfully suggested that the amendment, if adopted, be designated for retroactive application under § 1B1.10(c), in order that defendants who have already been sentenced based on inaccurate loss calculations and double counted enhancements receive the benefit of whatever relief the amendment provides them.

Finally, in the money laundering area (§ 2S1.1) the amendment includes a specific Application Note (Note 7) that states that the conviction for money laundering should be grouped with the counts of conviction for the underlying offense. This amendment will definitely benefit some defendants who received extra guideline levels due to the separate grouping of money laundering. Therefore, retroactive effect should be given to this amendment.

Thank you for the opportunity to submit these comments.

Sincerely,



Terence J. Lynam

