

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

Diana E. Murphy, Chair
Ruben Castillo, Vice Chair
William K. Sessions, III, Vice Chair
John R. Steer, Vice Chair
Sterling Johnson, Jr., Commissioner
Joe Kendall, Commissioner
Michael E. O'Neill, Commissioner
Michael J. Gaines, Commissioner (ex officio)
Michael E. Horowitz, Commissioner (ex officio)



March 29, 2001

MEMORANDUM

TO: Chair Murphy
Commissioners
Tim McGrath
Susan Hayes
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment – Last Minute Submission

Attached for your reference is a letter of comment that just came in the door from the ABA Tax Section Committee on Civil and Criminal Tax Penalties.

David F. Axelrod
Direct Dial (614) 464-8246
Facsimile (614) 719-4612
E-Mail - dfaelrod@vssp.com

March 29, 2001

VIA E-MAIL Donald A. Purdy, Jr., Esq.

Chief Deputy, General Counsel
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Comments on Economic Crimes Package

Dear Mr. Purdy:

As we discussed, I enclose a draft of what we believe will be the final comments of the ABA Tax Section Committee on Civil and Criminal Tax Penalties on the proposed amendments to the Sentencing Guidelines that affect tax crimes. As I mentioned, these comments have not yet been reviewed or approved by the Chair of the Tax Section.

Thank you for your courtesy and assistance.

Very truly yours,

/s/

David F. Axelrod
Chairman of the ABA Tax Section
Committee on Civil and Criminal Tax
Penalties

DFA/bas
Attachment

cc: Bryan C. Skarlatos, Esq. (via e-mail, w/ attachment)
03/29/01 - 8835678

Daniel T. Hartnett, Esq. (via e-mail w/ attachment)
Kathryn M. Keneally, Esq. (via e-mail w/ attachment)

COMMENTS CONCERNING PROPOSED AMENDMENTS TO THE UNITED STATES SENTENCING GUIDELINES

The following comments relating to the United States Sentencing Guidelines are the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These Comments were prepared by individual members of the Committee on Civil and Criminal Tax Penalties. Principal responsibility was exercised by Bryan C. Skarlatos and Daniel T. Hartnett. The Comments were reviewed by John Barrie of the Section's Committee on Government Submissions and by Karen Hawkins, Council Director for the Committee on Civil and Criminal Tax Penalties.

Although members of the Tax Section who participated in preparing and reviewing these comments represent clients who may be affected by the proposed amendments to the United States Sentencing Guidelines, no such member (or firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development of, the specific subject matter of this proposal.

Contact Persons: Bryan C. Skarlatos
 Kostelanetz & Fink, LLP
 530 Fifth Avenue
 New York, NY 10036
 (212)808-8100
 Facsimile: (212) 808-8108
 bskarlatos@kflaw.com

 Daniel T. Hartnett
 Martin, Brown and Sullivan Ltd.
 321 South Plymouth Court
 10th Floor
 Chicago, IL 60604
 (312) 360-5020
 Facsimile: (312) 360-5026
 hartnett@mbslaw.com

Date: March 27, 2001

INTRODUCTION

In the current amendment cycle, the Sentencing Commission is considering changes to United States Sentencing Guidelines, Part S (Money Laundering And Monetary Transaction Reporting) and Part T (Offenses Involving Taxation) (the "Proposed Amendments"). The Commission has invited comments on the Proposed Amendments. We appreciate the opportunity to offer the Commission the perspective of the defense practice with regard to criminal sentencing.

PROPOSED AMENDMENT 20 MONEY LAUNDERING

1. The Proposal To Combine §2S1.1 and §2S1.2

Proposed Amendment 20 would consolidate the two money laundering guidelines, §2S1.1 and §2S1.2 into one new guidelines applicable to all offenses under 18 U.S.C. §1956 and §1957. The primary purpose of the amendment is to tie the offense levels for money laundering more closely to the underlying criminal conduct that was the source of the dirty money.

The Sentencing Reform Act of 1984 created the United States Sentencing Guidelines in order to achieve three main objectives: honesty, uniformity and proportionality.¹ The proposed amendments to United States Sentencing Guidelines §§2S1.1 and 2S1.2 (the "Proposed Amendments") substantially further the objectives of uniformity and proportionality and should be adopted.

A report prepared by the United States Sentencing Commission on the Proposed Amendments presents a compelling argument for revision of the money laundering guidelines.² The primary money laundering sections, 18 U.S.C. §§1956 and 1957, were enacted just six months before the sentencing guidelines were submitted to Congress in April 1986. As a result, the Sentencing Commission had no empirical evidence of how the money laundering laws would be applied and was forced to rely instead on the legislative history in determining the appropriate level of punishment. The legislative history, as well as information from the Department of Justice (the "DOJ") about how it intended to apply the new laws, indicated that the statutes were intended to combat large scale drug trafficking, organized crime and complex financial crimes. Based on the severity of these crimes, the Sentencing Commission developed a correspondingly severe penalty structure for the money laundering guidelines.

¹ United States Sentencing Commission, Guidelines Manual, §1A.3 (Nov. 2000).

² United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report at 3 and 4.

Over time, however, it became apparent that prosecutors and courts were applying the money laundering laws to more garden variety frauds that were less serious than the drug and complex financial crimes which were the primary targets of the money laundering laws. In some cases, the more expansive interpretation of the money laundering laws lead to an asymmetry between the magnitude of the sentence and the severity of the conduct being punished. This asymmetry impaired the objective of proportionality which is one of the goals underlying the sentencing guidelines.

Courts addressed the asymmetry and consequent unfairness inherent in the money laundering guidelines by developing ways to avoid application of those guidelines in certain cases. With increasing frequency, courts have determined that less complex fraud cases either do not constitute money laundering at all or fall outside the heartland of the money laundering guidelines. The tendency by the courts to address the asymmetry in the money laundering guidelines on a case by case basis has impaired the objective of uniformity which is another goal underlying the sentencing guidelines.

In 1995, the Sentencing Commission responded to public critique of the money laundering guidelines by adopting amendments that are substantially the same as the Proposed Amendments. However, the Department of Justice (the "DOJ") opposed the amendments and, ultimately, they were rejected by Congress because of Congress' perception that the sentencing anomalies the amendments were intended to cure arose in relatively few cases and that such rare anomalies did not justify a sweeping modification of the guidelines.³

A subsequent report by the Department of Justice ("DOJ") states that it has taken steps internally to insure that the money laundering laws and sever sentencing guidelines are not used in cases were money laundering is minimal or incident to the underlying crime.⁴

In the years since Congress rejected the amendments and the DOJ drafted its report, prosecutors have continued to charge money laundering in routine fraud cases and courts have continued to seek ways to avoid application of the money laundering guidelines. In a

³ H.R. Rep. No. 104-272, at 14-15, reprinted in 1995 U.S.C.C.A.N. 335, 348-49.

⁴ Department of Justice, Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering, at 14 (June 17, 1996).

memorandum dated February 28, 1995, the Sentencing Commission stated that appellate courts have routinely rejected defendants' arguments to depart from the money laundering guidelines because the conduct being sentenced falls outside the heartland of money laundering.⁵ The state of the law has since changed and several Courts of Appeals now approve of downward departures to avoid application of the money laundering guidelines for conduct that outside the heartland of money laundering. See e.g., *United States v. Caba*, 104 F. 3d 354 (2nd Cir. 1996); *United States v. Smith*, 186 F.3d 290 (3rd Cir. 1999); *United States v. Hemmingson*, 157 F. 3d 347 (5th Cir. 1998); *United States v. Woods*, 159 F. 3d 1132 (8th Cir. 1998).

We believe that courts will continue to seek ways to avoid the asymmetry inherent in the application of the money laundering guidelines to routine fraud cases and different courts will continue to reach different conclusions on similar facts thereby contributing to the unfairness and uncertainty in the sentencing process. The DOJ's position that the guidelines should not be changed and that it can address the above-described problems through internal policies gives local prosecutors too much discretion and, at the very least, allows prosecutors to use the threat of a disproportionately harsh sentence as a club in plea negotiations.

Adoption of the Proposed Amendments will further the objective of proportionality underlying the sentencing guidelines by tying the severity of the sentence more closely to the conduct being punished. In addition, the Proposed Amendments will further the objective of uniformity by virtually eliminating downward departures for conduct that is outside the heartland of money laundering and by limiting the ability of local prosecutors to choose among varying levels of punishment. Accordingly, we strongly support the adoption of the Proposed Amendments.

2. Other Proposals

The Commission has noted that there may be cases in which "third-party" money launderers will receive a higher base offense level than the offender who committed the underlying offense. This can happen when the base offense level for the offender who committed the underlining offense is determined with reference to the amount of the loss but the based offence level for the "third party" launderer is determined with reference to the gross amount of laundered funds. The Commission has suggested three alternatives to deal with this type of case: allow a downward departure; create a specific rule that the offense level be determined by the lesser of the amount of the laundered funds or the amount of the loss; or do nothing. In our view, the preferable alternative is to create a specific rule that the offense level is determined with reference to the amount of the laundered funds or the amount of the loss, whichever is less. The codification of such a rule will promote certainty and uniformity.

⁵ "[A]ppellate courts (apart from the early decision in *Skinner*) appear to have uniformly rejected such departures." Memorandum of the Money Laundering Working Group, at 4 (February 28, 1995).

The Commission has invited comments on the following enhancements: (1) whether the proposed enhancement for sophisticated concealment should apply to all forms of concealment; (2) whether there should be an enhancement if a defendant launders funds with the intent to engage in conduct constituting a violation of §7201 or §7206 of the Internal Revenue Code; and (3) whether there should be an enhancement if a defendant is a "direct" money launderer, no other enhancement applies and the value of the laundered funds is greater than \$10,000.

These enhancements insure that there will be an upward adjustment every time a defendant's conduct happens to fall within the definition of money laundering regardless of whether the crime is the aggravated type of conduct that Congress originally intended to combat with the money laundering statutes. This is contrary to the overall thrust of the current amendments which were designed to avoid disproportionate sentences in ordinary fraud cases that also happen to violate the money laundering statutes. Accordingly, we believe it is appropriate to limit enhancements to only those cases which involve additional aggravating money laundering conduct.

We have chosen not to comment on the following issues: (1) whether application of §2S1.1(a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B); (2) whether eligibility for an enhancement under §2S1.1(b)(2)(A) should be expanded to include "direct" money launderers who launder the criminally derived proceeds of others in addition to their own criminally derived proceeds; (3) whether there should be a downward adjustment for defendants who are convicted under 18 U.S.C. §1957 who did not commit the underlying offense and to whom no other enhancement applies; (4) whether a conviction for money laundering should be grouped with a conviction for the underlying offense; and (5) whether a conviction under 18 U.S.C. §1960 is more appropriately referenced under §2T2.2 or §2S1.3.

PROPOSED AMENDMENT 12 OFFENSES INVOLVING TAXATION

Proposed Amendment 12 change two guidelines provisions affecting sentencing in criminal income tax cases: options for the tax loss table of §2T4.1, which translates a particular amount of tax loss to a particular offense level (Proposed Amendment 12, Part B); and a methodology for computing tax loss in situations where a defendant's misconduct causes tax loss at both the corporate and individual levels (Proposed Amendment 12, Part F). The Commission has also invited comments on three topics related to criminal tax case sentencing (Proposed Amendment 12, Part G).

3. Proposed Amendment 12, Part B: Options for Changes to the Tax Loss Table of §2T4.1

The two Options for changing the tax loss tables in §2T4.1 reduce to 14 from 21 the number of tax loss break-points which correspond to particular offense levels. Both proposals embrace two-level changes between the break-points, rather than the one-level changes under the tax loss table currently in place. Compared to the current table, Option One prescribes generally higher offense levels for tax losses less than \$200,000; both Options assign roughly similar offense levels to tax losses exceeding \$200,000.

While the goal of simplifying any aspect of tax case sentencing is laudable, reductions in the number of offense levels may not reduce as much controversy as may be hoped. IRS agents and prosecutors are acutely aware of the tax loss offense levels. Working a case to find enough tax loss to arrive at a given offense level so that a prison sentence results after allowing for the acceptance of responsibility adjustment may be a natural tendency. On the other hand, defense counsel is duty-bound and client-stimulated to strive to reduce the tax loss computation and qualify for a lesser offense level. Reducing the number of offense level triggers will not eliminate that advocacy, and with a two-level benefit/detriment at issue, may even intensify it.

Both proposed options for modifying the tax loss table to achieve the reduced number of offense levels necessarily will result in punishment increases in a number of cases. Option One produces greater increases in punishment over the current tax loss table. We are concerned that collateral damage resulting from increased sentences in criminal income tax cases will outweigh the system's likely small efficiency gain from the reduction in the number of offense levels.

A proposal to increase the offense levels from those prescribed by the current tax loss table seems unnecessary in view of indications that the present regimen functions satisfactorily in identifying an appropriate punishment. A review of the various Sourcebooks of Federal Sentencing Statistics for the years 1996-1999, discloses fairly consistent patterns of sentencing in tax cases. Table 27⁶ indicates that roughly 75% of all tax offense defendants are sentenced within the guideline range, and roughly 24% receive downward departures, including some 15% receiving substantial assistance departures. Upward departures have occurred in no more than .6% of the cases; in fiscal 1999, there were no upward departures. Table 29⁷ indicates that of the cases sentenced within the guideline range, between 70% and 78% of defendants are sentenced at the guidelines minimum, another 10% to 15% at the mid-point or less, and less than 10% at the guidelines maximum.

⁶ Table 27, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics, 1995, 1996, 1997, 1998 and 1999.

⁷ Table 29, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics, 1995, 1996, 1997, 1998 and 1999.

We interpret the statistics as telling us that sentencing judges find the current punishment levels for tax offenders to be appropriate in the overwhelming majority of cases. Were the ranges perceived to be too light for tax crimes sentencing, we would expect to see significant numbers of defendants sentenced in the upper reaches of the ranges, and meaningful numbers of upward departures. If the tax offense levels are to be altered at all, the compression of some 75% of the cases at the guidelines minimum speaks of the need to reduce, not increase, the offense levels for tax offenses.

We assume some of the rationale for increasing the punishment at most levels of tax loss is to achieve greater general deterrence. We acknowledge the **position** that because so few income tax cases are prosecuted each year, sentences in these cases must be sufficiently punitive as to deter the public from tax criminality. Yet there is another aspect of general deterrence which is being overlooked in the emphasis on punitiveness.

The number of prosecutions of federal tax offenders is remarkably small. Our anecdotal experience is that the number of IRS enforcement activities of all kinds, including examinations, collection activity, and criminal investigations has declined precipitously since 1999. Yet the numbers of tax returns filed continues to grow:

	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
Returns filed ⁸	208,975,000	216,510,000	222,481,000 (est.)	228,118,000 (est.)
Guideline Offenders in Tax Category ⁹	851	996	859	728

The risk of criminal prosecution is exceedingly small and declining. Our experience with criminal tax defendants suggests that at least for legal-source income tax offenders, the likelihood of criminal prosecution is the lever of deterrence, not the degree of punishment imposed upon those successfully prosecuted. For this group, the current pains of federal conviction - exposure to a term of imprisonment, the loss of professional standing, shame, embarrassment for family members, and the economic punishments - are acute. Without increases in the number of prosecutions brought, we believe the prospect of criminal prosecution is not a meaningful part of a taxpayer's decision-making when deciding whether to cheat in connection with taxes. It does not appear that increasing the punishment component will increase deterrence.

⁸ 1997 Internal Revenue Service Annual Data Book, Publication 55B for 1996 and 1997 data; IRS Statistics of Income Bulletin, Winter 1999/2000, Publication 1136, Rev. 2/00.

⁹ Table 3, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics 1996, 1997, 1998 and 1999.

2. Proposed Amendment 12, Part F: Prescribing a Methodology for Computing Tax Loss Where the Defendant's Misconduct Causes Tax Loss at the Corporate and Individual Levels & Clarifying That Tax Loss Does Not Include State or Local Tax Loss

Two approaches have emerged from the circuit courts of appeals for computing tax loss when a defendant's conduct causes both corporate income tax loss and individual income tax loss. To take an example, under both approaches, the defendant who skims \$100,000 of corporate income causes a tax loss of \$34,000 at the corporate level. The issue is whether the individual income tax loss should be figured on the entire \$100,000 the defendant received, or on the net amount of \$66,000 to take into account the amount of tax deemed to arise at the corporate level. One approach, articulated in *United States v. Cseplo*, 42 F.3d 360 (6th Cir. 1994), calculates the tax loss at the corporate level, then adds the tax loss at the individual level without reduction for the amount of tax deemed to arise at the corporate level. The other approach, expressed in *United States v. Harvey*, 996 F.2d 919 (7th Cir. 1993), reduces the amount of tax loss at the individual level by the amount of tax deemed to arise at the corporate level, before adding the two amounts to calculate the entire tax loss. We believe the commission's proposal to adopt the *Harvey* methodology is well considered.

Reducing the amount of tax loss at the individual level by the amount of tax deemed to arise at the corporate level is faithful to the structure of the Internal Revenue Code, which recognizes the corporation as a separate taxpayer. It also avoids a **significant** double counting problem. In addition, the computational mechanism is easily understood and implemented.

The addition to Application Note 1 which clarifies that a tax loss does not include state or local tax loss is also a well considered change by the Commission. Often, the same misconduct involved in the federal offense results in deficiencies in state or local income taxes. Internal Revenue Agents, the first and often only, informed resource for tax loss computations, are generally not acquainted with the technicalities of state and local tax matters. Probation officers certainly are not. This clarification provides welcome guidance and eliminates one area of potential complication in tax case sentencings.

3. Proposed Amendment 12, Part G: 3 Issues for Comment

We request that the Commission consider these views on the first three of the five topics presented for comment in the Economic Crime Package. We have refrained from commenting on the remaining topics as they are not related to criminal tax cases.

A. Issue 1: The Alternative Methodology for Computing Tax Loss Where the Defendant's Misconduct Affects Both Corporate and Individual Tax Liabilities.

In expressing our support for the *Harvey* methodology, it goes without saying that we view the *Cseplo* methodology to be the less attractive alternative. The *Cseplo* approach in situations where a defendant's misconduct causes losses of both corporate income tax and individual income tax totals the two kinds of tax loss with no reduction for the tax attributable at the corporate level. While this alternative methodology may appear simpler, it is no more "simple" than the *Harvey* approach, and the drawback of overstating the tax loss, is a considerable one. The proposed amendment based on the *Harvey* rationale is preferable for its greater accuracy, fairness, and comparable ease of application.

B. Issue 2: Whether to Include Interest and Penalties in Attempted Evasion of Payment Cases

Evasion of payment prosecutions are rare. The paradigm is the case in which the Internal Revenue Service ("IRS") has assessed the tax liability upon completion of what is usually a lengthy process involving notice to the taxpayer and the opportunity to communicate relevant information to the IRS. While generalizations are necessarily limited, our anecdotal experience is that these defendants are often highly committed to resisting their obligations to pay their taxes. As such, they are unintended beneficiaries of the current policy of not including interest or penalties in the tax loss computation.

Not uncommonly, interest and penalties dwarf the tax portion of an assessed liability. In seeking to evade the payment of an already assessed liability, the defendant plainly intends to evade the liability in its entirety. Thus, interest and penalties are fairly encompassed within "the loss that would have resulted had the offense been successfully completed," §2T1.1(c)(1), in evasion of payment cases. We therefore support the inclusion of interest and penalties in the computation of tax loss to be warranted in the limited class of evasion of payment cases.

C. Issue 3: Whether the "Sophisticated Concealment" Enhancement in §2T1.1(b)(2) and §2T1.4(b)(2) Should Be Conformed to the "Sophisticated Means" Enhancement in §2F1.1(b)(6)(c)

As it is currently applied, the "sophisticated concealment" enhancement for tax cases suffers a serious problem of over inclusion, thus frustrating the Commission's intent for the enhancement in tax cases. Given the over-inclusion problem, which we attribute to an inappropriate extrapolation from the sophisticated means standard from theft and fraud cases, we see a need not to conform, but to distinguish, the two.

First, the goal of increasing the offense level for sophisticated conduct in tax cases, under whatever rubric, is appropriate. Sophisticated conduct is harder for the IRS to detect, and harder to investigate and prove at trial. Additionally, sophisticated conduct corrodes

the confidence taxpayers must have in our voluntary compliance tax system that everyone else is paying their fair share of taxes, too.

The problem plaguing the sophisticated conduct enhancement in tax cases, a problem we believe to have worsened in recent years, lies in discriminating conduct which is unexceptional as tax fraud, but which may be thought sophisticated in relation to other offenses. By definition, tax fraud involves “any conduct, the likely effect of which would be to mislead or conceal,”¹⁰ so the offense in its simplest form requires a misguided attention to detail not necessarily seen in other species of criminality; the enhancement is thus properly reserved for situations where there is genuinely complex concealment in an offense ordinarily **involving** a measure of sophistication.

The “subjective determination” language of Application Note 6 in the 1987 version of §2T1.1 (“Whether ‘sophisticated means’ were employed (§2T1.1(b)(2)) requires a subjective determination similar to that in §2F1.1(b)(2).”) confirmed the idea that the “sophistication” was to be evaluated with regard to tax fraud. The 1989 Amendment to Application Note 6, (“Sophisticated means” as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case.”) affirmed again that the measure of sophistication was derived from the tax fraud area, and not from the universe of federal criminal misconduct.

Despite the prior commentary, the “sophisticated means” concept suffered from the judicial equivalent of inflation. Pointing to commentary defining “sophisticated” as “either more complex or demonstrates greater intricacy or greater planning than the routine tax evasion case,” trial courts applied the former adjustment almost routinely and sometimes to conduct which simply was not sophisticated.¹¹ While the 1998 reformulation, “especially complex or especially intricate offense conduct” emphasizes that the enhancement punishes complexity or intricacy beyond a presumptive baseline of each, our experience is that the district courts find garden variety tax fraud to qualify. Resort to the Court of Appeals is often uncertain in light of the clear error rule. *See e.g., United States v. Kontny*, Case No. 00-3006 (7th Cir., Jan. 4, 2001) for a discussion culminating in the Court’s conclusion that the enhancement applies in the great number of cases today because prosecutors now prosecute cases which exceed the standard for the increase: what the Sentencing Commission figured to be the average level of sophistication for criminal tax fraud at the time the guideline was promulgated in 1987.

¹⁰ *Spies v. United States*, 317 U.S. 492, 499 (1943).

¹¹ *See e.g., United States v. Bhagavan*, 116 F.3d 189 (7th Cir. 1997)(instructing office manager to alter client account records to reflect phony discounts or credits and not permitting outside accountant access to records not sufficiently sophisticated); *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995)(claiming false refunds for unpaid withholding taxes); *United States v. Stokes*, 998 F.2d 279 (5th Cir. 1993)(deposit of embezzled funds into fictitiously named accounts and failure to disclose embezzled income to return preparer).

We trace the current situation to the Commission's 1989 effort to deploy an objective standard, coupled with the paucity of criminal tax prosecutions. No federal judge has experience with a sufficient number of criminal tax fraud cases to be able to have comfort with what constitutes an "average" level of sophistication for tax offenses, thus making impossible the task of reliably determining what is "especially complex" or "especially intricate". Lacking that reference point, but striving to use some type of objective standard, federal judges often appear to rely on their concepts of sophistication as assessed in regard to all federal criminal offenses. Thus, in practice, there is currently no difference in application between the sophisticated concealment enhancement under §§ 2T1.1(b)(2) and 2T.1.4(b)(2) and the sophisticated means enhancement under §2F1.1(b)(6)(c).

The practical consequence is that the sophisticated conduct enhancement almost has become automatic in tax fraud cases. Effectively, this automatically increases offense levels in tax fraud cases by two levels. We believe this leads to a number of tax fraud defendants being punished more severely than the Commission intended.

Conforming the verbal formulation of the sophisticated conduct enhancements for tax fraud, on the one hand, and theft and fraud, on the other, will not affect current practice, because the two are already interpreted the same way. However, the formulation we have now is not what we believe the Commission intends in the tax fraud area. We encourage the Commission to emphasize a more selective application of the sophisticated concealment enhancement in tax cases. The base offense levels for tax fraud offenses are already slightly higher than those for a given loss amount than fraud and theft offenses.

With the advent of the 2-point adjustment for Less Serious Economic Crimes under §5A1.2, we believe it is important to address the over-inclusiveness problem now. This new ameliorative adjustment disqualifies persons receiving the sophisticated concealment enhancement under §2T1.1(b)(2). To the extent the sophisticated concealment enhancement is over applied, it frustrates the intent of §5A1.2 for a class of cases to which it rightly ought to apply.