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March 17, 2003

VIA FACSIMILE

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

Re: January 17, 2003 request for comment (corporate fraud)

Dear Judge Murphy:

We write to add our views to others submitted in response to the Commission's January 17, 2003 request for comment. In addition, we ask that this letter serve as the Practitioners' Advisory Group's ("PAG") written testimony for the public hearing scheduled for March 25, 2003.¹

The PAG has already commented extensively on the amendments proposed in response to Sarbanes-Oxley, including our correspondence dated December 12, 2002, November 15, 2002, and September 18, 2002. While we remain convinced that the Commission went too far in passing the emergency amendments on January 8, 2003, we have previously set forth those concerns at length and will not repeat them here. Instead, we will focus on the Issues for Comment set forth in the January 17, 2003 Federal Register notice. In that regard, we rely not only on our previous letters to the Commission but also on the thoughtful comments of Indiana University Law Professor Frank O. Bowman, III, contained in his February 10, 2003 letter to the Commission. The PAG strongly opposes the adoption of a new loss table (options 1A-1C) or a new base offense keyed to the statutory maximum of the offense of conviction.

¹ We wish to express our appreciation to PAG member David F. Axelrod for his assistance in drafting this letter.

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REVISING THE LOSS TABLE

The Department of Justice's ("DOJ") arguments in support of the proposed increases in the loss table and/or the base offense level do not square with reality. For instance, it is at least implicit in DOJ's arguments in favor of increasing the loss table contained in U.S.S.G. §2B1.1 that sentences for white-collar offenders are not sufficiently severe. That is convincingly refuted by Professor Bowman, who points out, among other things, that there cannot be a general deterrent rationale for increasing the loss table, since DOJ's own statistics show that the rate of property crime has been dropping steadily since 1974 (Bowman letter at 2).

It is, of course, always possible to argue that more severe sentences would reduce the crime rate even more. However, common sense suggests that at least with respect to white-collar crimes, we are far beyond the point of diminishing returns in that regard. DOJ's limited resources would better be devoted to increased enforcement, rather than locking up a relatively small number of offenders and throwing away the key. Furthermore, the approach advocated by DOJ is counterproductive because it lulls policymakers, and the public, into thinking that meaningful action has been taken. To the contrary, where, as here, offenders are already facing extremely stiff sentences, increasing sentencing ranges does little to reduce criminal activity.

Nor is revision of the loss table justified by other commonplace arguments, such as that sentences for white-collar offenders are insufficiently severe to deter specific categories of potential offenders. As Professor Bowman points out, examination of the guidelines presently applicable to even moderately serious white-collar offenders – those at whom Sarbanes-Oxley is directed – reveals sentences that are substantial, even in comparison to those imposed for violent crimes and drug-related offenses (Bowman letter at 13). Professor Bowman illustrates the point with a series of hypothetical examples that we respectfully urge the Commission to examine carefully. They demonstrate, among other things, that when low-level offenders are excluded from the calculus, DOJ's statistics reveal that the present Guidelines are more than adequate to deal with white-collar crime. (See Bowman letter at 9, 12-13.)

Numerous other statistics are available to prove that the perception that white-collar offenders are treated leniently – vigorously promoted by DOJ – is just plain wrong. As you know, the guidelines for economic crimes have been increased repeatedly since 1987, causing very substantial increases in sentences, with the further result that the percentage of white-collar offenders who are sentenced to imprisonment increased dramatically throughout the 1990s. For instance, the Commission's own statistics demonstrate that the rate of imprisonment for fraud increased from 56.7% in 1992 to 69.2% in 2001.

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The severity with which white-collar offenders are treated is also shown by the relatively low rate of departures for such offenders. For instance, while defendants who are convicted of drug trafficking receive downward departures 44% of the time, white-collar offenders who commit fraud, embezzlement and forgery/counterfeiting receive downward departures in just 28%, 18% and 19% of such cases, respectively. (Behre and Ifrah, *Courts not soft on fraud, theft crimes*, National Law Journal, March 10, 2003 attached as Exhibit A.) In other words, white-collar offenders are less likely than other classes of defendants to receive departures and avoid the high sentences mandated by the Guidelines. The authors of that article point out:

This flies in the face of today's frenzied conventional wisdom concerning corporate wrongdoers, and draws into question whether reform is truly needed.

Finally, to revise the loss table would be a vastly overbroad response to the problems at which Sarbanes-Oxley was directed. The loss table obviously applies to many categories of offenses that have nothing to do with the sort of corporate fraud that motivated Congress. Furthermore, approximately 20 or so guidelines, many having nothing to do with corporate fraud, incorporate the 2B1.1 loss table by cross-reference. It does not appear that any consideration has been given to the significant increase in severity of this myriad of offenses, or its effect on sentencing policy.

INCREASING THE BASE OFFENSE LEVEL

The arguments for increasing the base offense levels for certain targeted economic crimes (those carrying statutory maximum sentences of ten or twenty years) are equally unpersuasive for the reasons cited above and for the additional reason that this proposed amendment invites charging abuse. For instance, the two violations that will most often be affected by this proposed amendment are mail and wire fraud (18 U.S.C. §§ 1341 and 1343, respectively), each of which now carries a maximum sentence of twenty years imprisonment. The malleability of those statutes is beyond dispute. This proposed amendment increases the prosecutor's ability to decide the sentence at the time of indictment through the simple expedient of charging mail or wire fraud to increase the sentence, or another offense carrying a lesser maximum, to lower it.

Additionally, the statistics cited in support of this proposed amendment are unreliable. Indeed, it is impossible to forecast the effect of this sort of proposal because of the change it would make in the prosecutor's incentives in filing charges and negotiating plea agreements. In that light, it cannot reliably be predicted whom this proposal would affect, or how.

Most importantly, the Commission should refrain from amending the Guidelines because there has been no meaningful opportunity to evaluate the

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effect of the most recent amendments, contained in the Economic Crime Package of 2001. Those amendments will cause very significant sentencing increases for almost all white-collar offenders who have committed even moderately serious crimes. However, since those amendments apply only to offenses committed after November 1, 2001, there is not yet any meaningful data on their effect. (Bowman letter at 8.)

We implore the Commission not to succumb to pressure to amend the loss table merely to satisfy a public perception created by a few, high profile cases. The burden should be on DOJ to demonstrate through statistics or other reliable evidence a concrete need for amendment. It has failed to do so, choosing instead to rely on the overly simplistic – and incorrect – assumption that Sarbanes-Oxley requires such amendment.

The sort of constant tinkering advocated by DOJ threatens to undermine the Guidelines' fundamental purpose "to achieve reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." (U.S.S.G. Chapter 1, Part A, 2. *The Statutory Mission*.) Surely, Congress did not intend for two similarly situated defendants to receive significantly different sentences solely because their offenses occurred on different dates. Such temporal disparity, however, will inevitably result, especially if the Commission revises guidelines, such as those contained in the Economic Crimes Package, that have barely become effective.

The PAG is troubled by what we see as a "politicalization" of sentencing policy. There is a disturbing and counterproductive trend to respond to high profile criminal episodes with higher sentencing ranges for that "type" of offender. This enables politicians and DOJ officials to chant the mantra of "tough on crime," because he or she supported increasing sentencing ranges. As noted above, increased sentences do little to reduce criminal activity where, as here, sentencing ranges are already high. Even worse, this approach enables policymakers to avoid the difficult task of figuring out how to craft policies that might really work.

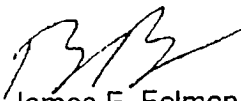
It seems to us that the Sentencing Commission's duty is to resist "political" approaches to criminal justice in general, and sentencing policy in particular. The Commission should ensure that the sentencing ranges available to district judges are fair and appropriate in light of the particular offender and offense. Unfortunately, we appear headed on a course reminiscent of the "war against drugs," where politics drove sentencing policy and it is now generally acknowledged that Congress and the Commission went too far.

In closing, we urge the Commission not to discard the five years of work that achieved the Economic Crimes Package of 2001. The guidelines applicable to economic crimes should not be amended unless and until the Commission has a concrete reason for doing so.

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As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners regarding the difficult and important matters before the Commission.

Sincerely,



James E. Felman
Barry Boss

Enclosure

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Kenneth Cohen, Esq.

EXHIBIT A

THE NATIONAL
LAW JOURNAL

IN FOCUS

MONDAY, MARCH 10, 2003

WHITE-COLLAR CRIME

Courts not soft on fraud, theft crimes

Drug trafficking defendants have a greater chance of downward departures.

By Kirby D. Behre and A. Jeff Ifrah

SPECIAL TO THE NATIONAL LAW JOURNAL

THE DEPARTMENT of Justice (DOJ) claims that white-collar criminals are treated too leniently and is taking immediate steps to rectify this perceived inequality. In particular, DOJ recently claimed that white-collar defendants are granted far more departures from mandatory sentencing guidelines than the average criminal, and in some instances are permitted to serve their sentences in halfway houses. In a letter dated Oct. 1, 2002, to Diana E. Murphy, the chairwoman of the U.S. Sentencing Commission, DOJ has asked the commission—which established and modifies the guidelines that govern federal sentencing—to consider limiting the availability of exceptions to the application of those guidelines that DOJ contends are being “successfully invoked by white collar criminal defendants, who typically have sophisticated counsel.” In that letter, the DOJ advocated for a policy that would make “prison time...the rule, not the exception, for those who violate the law in the course of doing business.”

The problem is that reality does not confirm DOJ's perception. Exceptions to the sentencing rules can wreak havoc on the uniformity of the federal sentencing structure, and such exceptions, known as “departures,” are doled out to a significant number of defendants in a wide variety of jurisdictions across the country. But DOJ's own statistics suggest that white-collar defendants don't benefit disproportionately from such departures. In fact, in several large jurisdictions, white-collar defendants receive departures less frequently than defendants overall. Nationally, drug dealers receive departures far more often than white-collar defendants. The problem that requires attention and study is the great disparity among different jurisdictions in the frequency with which departures are granted, and the disparity among defendants convicted of different types of crimes, which results primarily from the

inconsistent standards and practices used by federal prosecutors across the country.

The Sentencing Reform Act of 1984 was designed to eliminate unwarranted sentencing disparity by establishing a consistent system of federal sentencing. See S. Rep. No. 98-225, at 39 (1983), reprinted in 1984 U.S.C.A.N. 3220. In order to implement this objective, Congress created the U.S. Sentencing Commission. In 1988, the commission promulgated the Federal Sentencing Guidelines, which today is over 500 pages long and the product of more than 600 amendments. The guidelines contain lengthy and complex provisions that attempt to cover almost every conceivable relevant, aggravating or mitigating circumstance that a judge is likely to consider in sentencing a defendant.

By applying the facts of a case and the defendant's criminal history and personal characteristics to the guidelines provisions, a judge arrives at an offense level from which a very narrow sentencing range is determined. Except when the court grants a departure, a defendant's sentence must be within that range.

The law permits deviation from the guidelines range only if the court finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” 18 U.S.C. 3553(b). Put another way, only if a case is outside “the heartland” of guidelines cases may a sentencing court depart from the rigid guidelines formula. *Koon v. United States*, 518 U.S. 81, 96 (1996). Thus, the guidelines were intended to be the rule, and departures the rare exception.

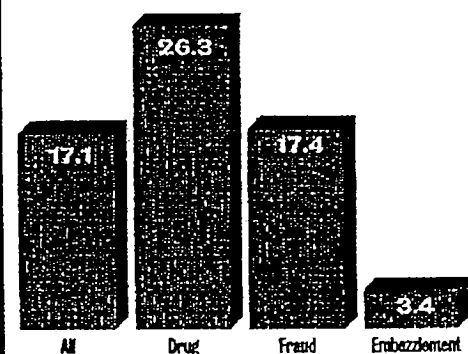
Declining figures

With all the publicity surrounding a few high-profile corporate criminal and securities investigations, one might think that we were in the middle of a white-collar crime wave. Sentencing statistics strongly suggest that is not the case.

According to DOJ's Bureau of Justice Statistics, since 1994, economic crimes have

DOWNWARD DEPARTURES

Percentage of defendants receiving “substantial assistance” downward departures, by type of crime, in 2001.



Source: United States Sentencing Commission

declined steadily, despite the fact that the U.S. population grew by 20 million people. While the average length of sentences for violent offenders has declined since 1994, the average length of white-collar sentences has increased during that same period. During the 1990s the number of economic offenders sentenced to prison continually increased. The number of white-collar defendants sentenced to prison instead of probation is increasing as is the length of those prison terms. On the other hand, violent offenders have been receiving less significant sentences each year since 1994.

Significantly, one out of every three criminal defendants receives a downward departure. In practice, sentences above those dictated by the guidelines are extremely rare, so the vast majority of departures result in sentences below those dictated by the guidelines. Nationally, departures from the guidelines sentencing range have increased steadily over the past five years and are now granted in approximately 36% of all cases.

Contrary to the leniency myth, white-collar defendants in many regions are more likely to be sentenced within the guidelines range than the average defendant. For example, according to statistics compiled by DOJ's Bureau of Justice Statistics, 70% of the white collar defendants in

Kirby D. Behre is a partner and A. Jeff Ifrah is an associate at the Washington office of Paul, Hastings, Janofsky & Walker, are co-authors of the treatise *Federal Sentencing for Business Crimes* (LexisNexis/Matthew Bender). Behre is a former assistant U.S. attorney and Ifrah is a former military prosecutor.

the 9th U.S. Circuit Court of Appeals were sentenced within the guidelines range, despite the fact that, as noted below, only 50% of all defendants in that circuit received guidelines sentences. In other circuits, white collar defendants face greater odds of receiving a guidelines sentence than the average defendant. In the 2d Circuit, 62% of white-collar defendants were sentenced in accordance with the guidelines calculation range, while 57.5% of all defendants received guidelines sentences. In the 4th Circuit, more than four out of five white-collar defendants were sentenced within the guidelines range, while three out of four defendants overall received a guidelines sentence. In the 11th Circuit, 76% of all white-collar defendants were sentenced in accordance with the guideline calculation range, compared to 72% overall.

White-collar defendants fared no better than drug dealers. While defendants who are convicted of drug trafficking (22,882 nationally in fiscal year 2001) receive downward departures 44% of the time, white-collar defendants who commit fraud, embezzlement and forgery/counterfeiting receive downward departures in just 28%, 18% and 19% of such cases, respectively. Clearly, white-collar criminals receive departures at a rate far below the national average and far below the national average for drug dealers.

Whether white-collar defendants are compared nationally to all defendants, or regionally to all defendants, it is clear that they receive fewer departures from the sentences mandated by the guidelines. This flies in the face of today's frenzied conventional wisdom concerning corporate wrongdoers, and draws into question whether reform is truly needed.

Disparate treatment exists

The disparate, harsher treatment white-collar defendants receive is part of a larger disparity problem by circuit and courthouse. In some jurisdictions, the percentage of cases involving departures from the guidelines far exceeds 50%. In Arizona, federal criminal defendants were sentenced outside of the guidelines range more than 70% of the time in 2001. Defendants in southern California and eastern Washington were sentenced outside of the guidelines range 58% of the time. Half of all defendants in the entire 9th Circuit received departures from the guidelines range. Several other jurisdictions just missed a 50% departure rate. In central Illinois, southern Iowa and southern Ohio, defendants received departures in approximately 47% of all cases. And in the 2d Circuit, 42.5% of all defendants received departures. See www.uscc.gov/linktojp.htm (Table 26).

In contrast, for defendants in several other jurisdictions the odds were far greater that they would not receive a departure. Approximately 90% of all defendants in Utah, West Virginia and the Eastern District of Virginia were sentenced within the guidelines range. Several other

jurisdictions apply the guidelines in approximately 80% of criminal cases: central California, Puerto Rico, the Middle District of North Carolina, eastern Louisiana, western Kentucky, southern Illinois, Wisconsin, eastern Arkansas, northern Oklahoma and southern Florida.

This wild fluctuation among jurisdictions creates obvious inequalities. Why should a defendant in central California face an 80% chance that the guidelines calculation will apply, when defendants in southern California face only a 41% chance that the guidelines will apply? Why should 90% of all defendants in eastern Virginia receive sentences pursuant to the guidelines calculation, when, just a few hours away in eastern Pennsylvania, only 52% of all defendants receive a sentence consistent with that calculation?

Prosecutors control the most important aspects of the sentencing process via the plea agreements they negotiate with 95% of all criminal defendants. See Bureau of Justice Statistics, Federal Criminal Case Processing, 2001, <http://fjsrc.urban.org/noframe/compbtl.htm#other>. Plea agreements often contain provisions regarding the government's promise to seek a departure from the guidelines if a defendant cooperates in the government's investigation. In 2000, two-thirds of all departures granted nationwide resulted from recommendations made by prosecutors that the sentencing judge depart downward for "substantial assistance." See U.S. Sentencing Guidelines § 5K1.1. (In 2001, that number dipped to approximately one-half of all departures.) The remainder of the departures are granted directly by the court at the request of the defendant.

Within prosecutor's discretion

The decision to request a departure is exclusively that of the prosecutor, and in the majority of states there are no national, specific rules or procedures for a prosecutor to follow in determining whether to make such a recommendation. Such prosecutorial discretion "if unchecked, has the potential to recreate the very disparities that the Sentencing Reform Act sought to alleviate." Stephen Schulhofer and Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Era*, 91 Nw. U. L. Rev. 1284 (1997).

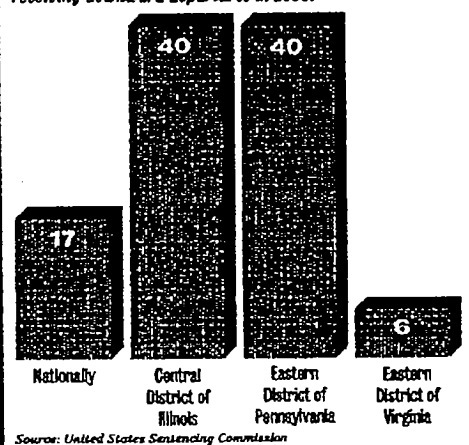
Perhaps due to the lack of defined procedures governing the request for such a departure, inconsistencies exist in the way prosecutors exercise their departure power. Nationally, substantial assistance departures are granted in approximately 17% of all cases. In the central district of Illinois and the eastern district of Pennsylvania, 40% of all defendants receive a

substantial assistance departure. In the 3d and 6th circuits such departures are granted almost 30% of the time. Yet in the 5th and 9th circuits they are generally granted in only 10% of all cases and in Arizona, South Dakota and the Eastern District of Virginia only 6% of defendants receive such departures.

Statistics on substantial assistance departures for white-collar defendants in these regions suggest they fare approximately the same or worse than the average criminal defendant. For example, in the 3d and 6th circuits white-collar

GEOGRAPHIC DISPARITIES

Percentages, in various federal district courts, of defendants receiving downward departures in 2001.



defendants are granted substantial assistance departures in only 24% and 13%, respectively, of all cases. Nationwide, 17% of all defendants receive substantial assistance departures, those convicted of drug-trafficking offenses receive such departures at a 26% rate. But persons convicted of embezzlement offenses receive such departures at a 3.4% rate nationwide. Other white-collar defendants facing fraud (17%), forgery/counterfeiting (11.5%) and tax (17.5%) charges also fare worse than drug dealers.

The myth that white-collar defendants receive lenient sentences is belied by the government's own actions and statistics. But there is a larger underlying problem with the federal sentencing structure today. The guidelines have removed most of the judicial discretion in sentencing, but the sheer number of exceptions threatens to swallow those rules. The striking lack of uniformity in application nationwide strongly suggests that discretion is alive and well in the sentencing process. But it is federal prosecutors—employed by DOJ—who possess most of that discretion, not judges. **NLS**

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FROM: Barry Boss on behalf of the Practitioners' Advisory Group

DATE: March 17, 2003

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