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March 17, 2003

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, DC 20002

RE: Comment on January 22, 2003 Temporary, Emergency Amendments
To the Sentencing Guidelines and Commentary

Dear Mr. Courlander,

We are writing you in our capacities as Chairs of the White Collar Defense and Legislative Committees of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers. We write in response to the Request for Public Comment, published on January 22, 2003, relating to the Notice of Promulgation of Temporary, Emergency Amendments to the Sentencing Guidelines and Commentary published on that date. 68 Fed. Reg. 3080 (January 22, 2003). While DCACDL recognizes the need for criminal sentences that are adequate to punish and deter the perpetrators of corporate and financial fraud, we believe the previous Guidelines were sufficient for that purpose, and that the Commission's proposed Amendments simply implement a reflexive and unnecessary increase in penalties, which is likely to lead to unfairness and confusion in the application of the Guidelines, and even the deterrence of socially-beneficial conduct. Therefore, we urge the Commission not to recommend that the Temporary Emergency Guidelines become permanent. We also vigorously urge the Commission not to recommend even *greater* increases, which we understand the Department of Justice is requesting.

I. There Is No Need to Increase Sentences Across the Board for Economic Offenses

In terms of both length and incidence, "federal economic crime sentences are at an all-time high." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of Frank Bowman). Last summer's legislative flurry made numerous changes to the criminal law, adding new crimes and increasing – significantly – the maximum penalties for violation of existing statutes. However, as some commentators have noted, these changes "may not add much to the existing scheme of criminal penalties," H. Bloomenthal, Sarbanes-Oxley Act in Perspective 128 (Thomson West 2002), and "the greatest practical impact of Sarbanes-Oxley's criminal provisions may ultimately be felt at sentencing." Falvey & Wolfman, The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury?, Andrews Securities Litigation and Regulation Reporter 17 (October 9, 2002). Therefore, it is critical that any amendments to the Guidelines be carefully considered. According to the Commission, the new Amendments "implement directives to the Commission contained in sections 805, 905 and 1104 of the Sarbanes-Oxley Act of 2002." However, those directives merely required the Commission to "ensure" that the Sentencing Guidelines are "sufficient" to punish and deter the perpetrators of corporate and financial fraud. DCACDL believes that by reflexively increasing penalties, the Amendments proposed by the Commission are likely to lead to unfairness and confusion in the application of the Guidelines, and even to deter conduct that ought to be encouraged, rather than discouraged.

Barely a year ago, after the disclosure of events at Enron Corp., then-SEC Chairman Harvey Pitt testified before Congress that no new laws were needed to combat corporate and financial fraud. Hearing of the House Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises, House Comm. on Financial Services, 107th Cong. (Feb. 4, 2002) (statement of Harvey L. Pitt, Chairman, U.S. Securities and Exchange Commission). Others have argued that the laws existing prior to the "legislative tidal wave [that] swept Washington" last summer, Falvey & Wolfman, supra, were sufficient to deter and punish this kind of malfeasance. For example, in testimony before the Senate Judiciary Committee's Subcommittee on Crime and Drugs, former Deputy Attorney General George Terwilliger described the laws existing prior to last summer as providing "ample tools with which prosecutors can address commercial crime," and penalties which "can be quite severe where the economic impact of the criminal activity is substantial." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of George J. Terwilliger, III).

The perception that white collar defendants are "coddled" at sentencing and routinely receive a "slap on the wrist," Cong. Rec. S6547 (July 10, 2002) (statement of Senator Hatch), is largely, if not completely, unfounded. Even if it was once the case, "one can no longer look at white-collar sentencing and immediately pronounce it a travesty which reflexively favors defendants whose backgrounds look like those of the judges who sentence them," and there is "no persuasive evidence that would justify a blanket injunction from Congress to the Sentencing Commission to raise economic sentences across the board."¹ Bowman, supra. Arthur Andersen

¹ Of course, in the Sarbanes-Oxley Act, Congress did not mandate that the Sentencing Commission raise *any* sentences.

was indicted, convicted and put out of business under federal laws that predated the Sarbanes-Oxley Act, and WorldCom officers face up to 65 years in prison on charges that they violated pre-Sarbanes-Oxley law. See H. Bloomenthal, supra, at 128 (“[t]he adequacy of * * * existing penalties is illustrated by the charges filed against the WorldCom defendants”).

Commentators have warned against the urge to overreact to recent disclosures of corporate and financial fraud, e.g., Terwilliger, supra, and even Congress recognized this danger in passing the Sarbanes-Oxley Act. See Cong. Rec. S6746 (July 10, 2002) (statement of Senator Biden). Such an overreaction would result not only in unduly harsh penalties, but will also deter socially-beneficial conduct. Corporate officials increase earnings – and benefit shareholders – by taking lawful risks. However, “[f]inancial accounting and reporting is not always an exact science,” Terwilliger, supra, and “[i]n many cases, corporate ‘wrongdoing’ only gets labeled as such with the benefit of hindsight.” Welsh, Sarbanes-Oxley and the Cost of Criminalization, 20 Andrews Securities Litigation and Regulation Reporter 16 (Feb. 26, 2003). Increasingly draconian penalties can only lead rational executives to be more and more risk-averse, to the possible detriment of the very shareholders legislation like the Sarbanes-Oxley Act is meant to protect.

This is particularly true given that the new Amendments follow hard on the heels of the November 2001 amendments, which significantly increased the penalties faced by white collar defendants. Simply put, the criminal justice system has had insufficient experience under the 2001 amendments to determine whether they are sufficient to deter and punish the conduct at which the new Amendments are aimed. It is worth bearing in mind that most, if not all, of the conduct that led to the Sarbanes-Oxley Act – including alleged malfeasance at Enron, WorldCom and Adelphia – occurred prior to the 2001 Guideline amendments.

And increased penalties can also discourage desirable conduct in the arena of the criminal justice system. For example, as penalties mount, potential defendants are less and less likely to examine their own (and their colleagues’) conduct, or to disclose potential wrongdoing to authorities. See Terwilliger, supra. Perhaps, as one commentator has suggested, a more efficient means of policing corporate conduct is to provide incentives for “good” behavior in this regard. Id. For example, the Department of Justice Antitrust Division offers “amnesty” in order to encourage those who might otherwise be charged with criminal violations to make early disclosures of wrongful conduct, and to cooperate in its investigations.

II. Specific Amendments Contain Unwarranted, and Unfair, Increases

The Amendments would increase the punishments for certain offenses – in some cases significantly – as compared to the punishments applicable under current Guidelines. For example, under the Amendments, Guideline § 2B1.1 – which currently provides for a 4-level enhancement where the crime involved 50 or more victims – would provide for a 6-level enhancement where the crime involved more than 250 victims. The rationale offered by the Commission for this change is that it “reflects the extensive nature of, and the large scale victimization caused by, certain fraud offenses.” However, the offenses at issue were certainly considered by the Commission in its adoption of a 4-level increase for crimes involving more

than 50 victims, and there appears to be no evidence to suggest that an additional 2-level enhancement (and, in Zone D of the Sentencing Table, a minimum additional 6-12 months' imprisonment) is necessary to punish and deter those who would commit large-scale fraud. Moreover, as a practical matter, this provision will overlap to a great extent with the proposed § 2B1.1(b)(12)(B), which provides a 4-level enhancement where an offense jeopardizes the solvency or financial security of publicly-traded companies, or those that employ more than 1000. See, e.g., Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of John C. Coffee, Jr.).

Similarly, the Amendments would provide for a 4-level enhancement where the offense involved a violation of securities law by an officer or director of a publicly-traded company. The rationale for this enhancement is identical to that for Guideline § 3B1.3, which provides an enhancement where the defendant abuses a position of trust, and the Commission notes that the new enhancement would obviate the need for courts "to determine specifically" whether a particular defendant abused a position of trust. However, the Commission fails to explain its rationale for providing a 4-level enhancement for corporate officers and directors who abuse that particular position of trust, while providing only a 2-level enhancement to others who violate positions of trust that may make their victims even more vulnerable.

The Amendments also would increase the Offense Level for obstruction of justice, Guideline § 2J1.2, by increasing the Base Offense Level from 12 to 14, and providing for a 2-level enhancement if the offense (A) involved the destruction, alteration or fabrication of a "substantial number" of records; (B) involved the selection and alteration or destruction of "any essential or especially probative record, document or tangible object;" or (C) was "otherwise extensive in scope, planning or preparation." The net effect of these changes will likely be a 4-level increase in the Offense Level in *all* cases involving destruction, alteration or fabrication of records, because in any such case, prosecutors will be able to argue either that the defendant affected a "substantial number" of records or, if not, that he selected an "essential or especially probative record." Again, in Zone D of the Sentencing Table, a 4-level increase in Offense Level increases a defendant's prison sentence by at least nine months, and often by much more, and there appears to be no evidence that such an increase is needed to deter or punish the obstruction of justice.

In addition to unfairly and unnecessarily increasing penalties, the Amendments also are likely to sow new confusion in the application of the Guidelines, and particularly the Loss Table at § 2B1.1. The Amendment's addition of the reduction in the value of equity securities to the list of factors that may be considered will only exacerbate the difficulties that already exist in calculating "loss" under the Guidelines. The Sarbanes-Oxley Act was no doubt passed, in some degree, in response to concern over the declines in value of equity securities during the late 1990s, see Cong. Rec. S7426 (statement of Sen. Biden), but those declines are more likely the result of legitimate market corrections than criminal activity. See Welsh, supra ("During the period 1994 to 2000, there was considerable focus in America on the second half of the investment equation - return. * * * The near-relentless downward march of the markets, from late 1999 to early 2002, was to a large extent the product of little more than that unavoidable other half of the investment equation - risk"). In civil litigation, a plaintiff must prove not only a

decline in stock price, but also "loss causation;" *i.e.*, that the decline was caused by the defendant's acts, and not other factors such as economic news or conditions facing an entire industry. Thus, "the sheer stock market decline is not necessarily an accurate proxy for the 'reasonably foreseeable pecuniary harm'" specified in the Guidelines' definition of "loss." Coffee, supra.

And even to the extent the decline in the value of equity securities is properly considered to be caused by a criminal defendant, the Amendments fail to account for the real impact of such "loss." As one commentator has noted, "[t]o the [G]uidelines, it does not matter whether the loss is incurred by a single pension fund that may be insured against the loss (thereby distributing the loss broadly throughout the economy), or the loss is incurred by hundreds of small investors whose life savings are wiped out." Hearing of the Senate Subcommittee on Crime and Drugs, Senate Comm. on the Judiciary, Penalties for White Collar Crime: Are We Really Getting Tough on Crime? (July 10, 2002) (testimony of Paul Rosenzweig).

III. The Increased Sentences Contemplated by the Amendments Are Not Necessary to Deter Corporate and Economic Crimes, or to Remedy Any Disparity in Sentences Received by "White Collar" and Other Defendants

The critical issue in these Amendments is the fate of non-violent, first time, economic offenders. The rationales most often cited for heightened penalties like those proposed in the Amendments are the supposed need to increase punishment in order to bolster deterrence, and the need to ameliorate a perceived "penalty gap" between the treatment received by "white collar" and "blue collar" defendants at sentencing. However, neither justification bears scrutiny.

In the public rush to strike out at economic crime, we must not lose sight of the fact that the reasons for incarcerating violent offenders do not apply with equal force to first-time, non-violent, economic offenders. See Bowman, supra. While it is no doubt a catastrophic loss to be swindled out of one's life savings, for most of us, no amount of money can compensate for the murder or sexual assault of, or crippling injury to, ourselves or our loved ones. The proverbial choice "your money or your life" is an easy one and no one seriously questions the need to lock up violent predators. The need for incarceration of non-violent, first time economic offenders is less clear.

The question whether the size of a sentence, or its likelihood, is more effective in deterring criminal conduct is one that has received considerable attention. However, "[t]he consensus of criminologists is that likelihood of apprehension is far more important than the severity of punishment." Coffee, supra. In his testimony before the Senate Judiciary Committee, Professor Coffee quoted Professor Daniel Nagin of Carnegie Mellon University:

[C]ompliance is nearly perfect when detection risk is very certain, and compliance is nearly zero when detection risk is negligible. * * * The flip side of this conclusion * * * is that draconian penalties are unlikely to be an effective substitute for a more-difficult-to-achieve alternative of effective detection and prosecution.

Id.; see also Rosenzweig, supra ("Increasing maximum sentences and revising the [S]entencing [G]uidelines only go part way towards addressing the problem and are much the less important aspect where change is needed. What really drives the [deterrence] equation is the fraud that goes undetected."). As a result of research like this, the Sentencing Commission originally adopted a scheme of "short but definite" sentences. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 23 (1988). By blindly increasing penalties, the Amendments abandon this principle in favor of "an election-year solution to crime." Coffee, supra.

Certainly, punishment is called for, and we believe the existing guidelines serve precisely that purpose. However, the threat of additional incarceration likely has little additional deterrence effect. For most potential first time economic offenders, the *realistic* threat of arrest and conviction is the most effective deterrent. Because the loss of reputation and resulting restitution and fines usually have a devastating effect on the ability to provide for one's family and self, we suspect few economic offenders would take the risk of committing their crimes, if they only thought there was a good chance they would be caught.² And while we believe that in most of these cases, the need for, and usefulness of, any incarceration is debatable, we believe it is certainly true that the increased penalties provided by the Amendments are not required.

Nor can any perceived "penalty gap" between "white collar" and "blue collar" defendants justify wholesale increases in Guideline sentences. This is so because, perceptions to the contrary notwithstanding, no such gap exists. Although nearly 95% of defendants convicted of crimes like drug trafficking are imprisoned, while only about 50% of those who commit fraud or embezzlement serve jail time, "whatever disparities exist are principally the product of the actions of Congress." Rosenzweig, supra. When research controls for the mandatory nature of certain statutes, and measures the percentage of defendants *who were eligible under law for non-prison sentences* and received jail time, "the data are much more equivocal," and suggest that courts are as likely to send a "white collar" defendant to prison as a "blue collar" defendant. Id. For example, when this adjustment is made, white collar defendants are incarcerated at rates greater than those who possess drugs or firearms. Id. Moreover, "the rates of departure from the [G]uidelines are roughly consistent for all offenses and there is even some suggestion that serious offenses such as robbery and firearms are more likely to have judges depart from the [G]uidelines than white-collar crimes."³ Id.

² While there are, of course, economic offense recidivists, the Sentencing Guidelines by their very structure are intended to punish repeat offenders more severely, and District Courts retain the power to depart upward if the raw Criminal History score inadequately reflects the severity of an offender's criminal history.

³ At least one commentator has suggested that the perception of a "penalty gap" stems from the draconian punishments mandated by certain drug statutes, and that the solution to the problem may lie in adjusting those drug sentences. Bowman, supra.

IV. The Commission Should Not Abandon the Accepted Paradigm for Determining a Just Sentence

Perhaps what is most disturbing to DCACDL is the, not so subtle, motive of the Department of Justice in seeking even higher sentences - to compel the cooperation of less culpable offenders in prosecuting those "higher up." What appears to trouble the Department is not that a first time non-violent economic offender will escape prison time, but that he or she might do so *without* formally cooperating with the government - in other words, that the key to jail cell might reside in the hands of the District Court and not the United States Attorney. In the view of DCACDL, these proposals, and this reason for them, represent a major paradigm shift in sentencing philosophy. We have understood the purpose and the structure of the Sentencing Guidelines to embrace the concept that application of the Sentencing Guidelines will result in an appropriate sentence for the offense, a sentence from which "substantial assistance" to the government may result in additional leniency. The Department appears to prefer a paradigm in which an appropriate, just sentence is achieved only *after* full cooperation with the government. Such a change in philosophy may well impair the basic truth-finding function of criminal trials.

This concern is particularly acute in the case of first time, non-violent offenders, for whom the real fear of prison is not simply the resulting loss of freedom and dignity, but the fear of assault - physical and even sexual - by more violent inmates. This threat, often highlighted by the media, is frequently and graphically conveyed to potentially vulnerable offenders by law enforcement agents during incommunicado interrogation, when the microphone is turned off and the prosecutor has stepped out of the room. What happens then is the transformation of a possibly genuinely remorseful offender, who would be an excellent potential witness, into a desperate man or woman who will say *anything* to stay out of jail.⁴

⁴ As Judge Stephen Trott of the Ninth Circuit has observed:

The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and thus of which we can take judicial notice. Fed. R. Evid. 201(b)(2); cf. Hudson v. Palmer, 468 U.S. 517, 526-27 (1984) (illegal activities of prisoners subject to judicial notice). By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. As Justice Jackson said forty years ago, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." On Lee v. United States, 343 U.S. 747, 757 (1952). A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. See United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) (convictions reversed because government should have known witness was committing perjury).

United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993):

While this dilemma affects all aspect of the federal criminal justice system, the danger in particularly acute in white collar cases. Investigations of white collar crime frequently, and understandably, begin with a document trail, and what the government often seeks to complete its case is the undocumented, unwitnessed admission by the major figures under investigation that will essentially establish any required criminal intent. However, due to the hierarchical nature of most economic institutions and the known existence of the documents, the lower level suspect, who is likely intelligent him or herself, will know precisely whom the government is seeking information about, even without any improper prodding by the government agents. It is then simple enough to provide a description of the damning private conversation, evidence otherwise incapable of proof, or disproof. Such credibility determinations are the very stuff of criminal trials, but there is, or should be, some realistic limit on the power of coercion. Existing appropriate sentences help provide those limits, while excessive sentences undermine them.

CONCLUSION

In sum, there is no doubt that large-scale criminal corporate and financial fraud that results in catastrophic losses to many victims should be punished. But reflexively hiking penalties for such acts is unlikely to be effective in combating such crime, while, at the same time, it is likely to create unfairness and confusion, while also discouraging lawful and beneficial conduct. DCACDL believes that the Amendments proposed by the Commission are not required by Congress, and are not warranted by the concerns that motivated Congress to issue those directives. More time is needed to assess the impact of the recent corporate fraud prosecutions, as well as the impact of the Commission's November 2001 amendments to the Guidelines. Those prosecutions, and those amendments, are likely to result in increased deterrence of corporate and financial fraud, without creating the difficulties identified in these comments.

Respectfully submitted,



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