
PUBLIC COMMENT

2003 AMENDMENT CYCLE

(March 17, 2003 Submissions)



United States Sentencing Commission

March 2003



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

March 18, 2002

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

Dear Judge Murphy:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 17, 2003. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

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CAMPAIGN FINANCE

Under emergency amendment authority, the Commission promulgated a temporary guideline amendment, effective January 25, 2003, to implement the Bipartisan Campaign Reform Act of 2002. The Department of Justice supports the temporary amendment and now favors the Commission's proposal to make the amendment permanent.

BODY ARMOR

The Department supports the Commission's proposed amendment to provide a new adjustment at §3A1.5 for the use of body armor in an offense involving a crime of violence or drug trafficking crime. In response to the issue for comment, we believe the adjustment should be based on all conduct within the scope of relevant conduct but should be triggered only if the defendant (1) used body armor himself or (2) otherwise knew that the offense involved the use of body armor. This formulation would ensure that the adjustment apply only to those who knowingly participate in conduct involving body armor – conduct that significantly increases the risk of harm to law enforcement and the public at large – and thus limit the applicability of the adjustment to those culpable for such increased risk.

OXYCODONE

Noting the marked increase in abuse and diversion of OxyContin and other forms of oxycodone, the Commission published a proposed amendment to adjust penalties for offenses involving oxycodone. The proposal would base sentences for such offenses on the actual weight of oxycodone involved in the offense and would set the marijuana equivalency at 1 gram oxycodone (actual) = 6,700 grams of marijuana. On February 20, 2003, Drug Enforcement Administration officials briefed Commission staff on the abuse and trafficking of products containing oxycodone.

After careful review, the Department of Justice supports the Commission proposal. The proposed equivalency would significantly increase sentences for OxyContin pills that are more potent than 10 mg strength. For example, under the current total pill weight-based sentencing scheme, approximately 1,500 OxyContin pills (10, 20 or 40 mg strength) correspond to a base offense level of 26 (63-78 months' imprisonment). Under the Commission's actual controlled substance weight-based proposal, far fewer 20 mg pills (746) and 40 mg pills (372) would correspond to level 26. The sentences would not change for 10 mg strength OxyContin pills.

Although we support the proposal, we do so with significant reservations. We note that the proposal will result in significantly lower sentences for combination (non-controlled release) formulations of oxycodone (*e.g.*, Percocet, Percodan, and Tylox). These pills, although weighing much more than the OxyContin formulations, each contain only approximately 5 mg of actual oxycodone. Thus, while approximately 460 Percocet pills presently corresponds to offense level 26, it would take almost 3,000 pills to achieve level 26 under the Commission's proposal. These sentence reductions are of significant concern to us.

The Commission has identified 39 cases sentenced in FY2000 and 2001 that involved OxyContin products. The Commission was able to recalculate the sentences using its proposal for 24 of those cases and determined that the present median sentence of 10 months would increase to 14 months under its proposal. Given the significantly upward trends in OxyContin diversion and abuse, there is a significant federal interest in prosecuting those who illicitly distribute this frequently deadly drug. The higher sentences for the higher concentration OxyContin products that will result from the Commission's proposal will, we believe, more accurately reflect the harm attendant to offenses involving this drug and encourage appropriate federal prosecution.

We are concerned over the sentence reductions that would result with respect to the non-controlled release oxycodone products for several reasons. We are particularly concerned about losing the ability to effectively prosecute individuals who are registered to prescribe and dispense controlled substances (physicians, pharmacists, etc.) and who abuse this privilege by illicitly prescribing or distributing products such as Percocet and Tylox. In our view, the ability to prosecute such defendants is key to maintaining the integrity of the registration system. Moreover, data from the Drug Abuse Warning Network (DAWN) indicate that, although

emergency room mentions of "single-entity oxycodone" (OxyContin)¹ have skyrocketed over the last several years, neither this nor any other data indicate that OxyContin abuse has supplanted the abuse of the combination oxycodone products.

As part of its data analysis, the Commission identified 25 cases sentenced in FY2000 and 2001 that involved oxycodone combination drugs. Upon recalculating the sentences for 22 of these cases under its proposal (assuming a 5 mg potency), the Commission determined that the average sentence would drop from 45 months to 17 months. The Commission further determined that at least six of the 25 cases sentenced involved DEA registrants (4 doctors and 2 pharmacists) although one of these cases was prosecuted for simple possession. Sentences in the remaining five registrant cases ranged from 24 months' probation to 72 months' imprisonment. There is an obvious concern that the enforcement program related to these drugs will be significantly impacted if the guidelines sentences are grossly reduced. Nevertheless, even assuming that fewer prosecutions of cases involving combination (non-controlled release) oxycodone products would occur under the new guidelines, we cannot at this time fully estimate how harmful the impact of such a loss would be.

In sum, we think the Commission's proposal appropriately corrects the disproportionately low sentences that offenses involving single-entity/controlled release oxycodone formulations such as the OxyContin formulations now incur. Due to the inherent complexities of alternative approaches that we and the Commission have considered, and the fact that we believe lowering the sentences for offenses involving combination/non-controlled release oxycodone formulations will affect relatively few cases, we support the Commission's proposal. We expect that the Commission will join the Department in carefully monitoring the sentences under the new guideline and, if appropriate, will revisit the issue in the future.

THREATS AND ASSAULTS ON FEDERAL OFFICIALS

While we recognize the factors that have led the Commission to defer action on this issue, we strongly urge the Commission to make a comprehensive review of the assault and homicide guidelines a top priority in the next amendment year. As we have stated on a number of occasions, we believe the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. While the number of homicides prosecuted in federal court is relatively few because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes involved. Similarly, offense involving threats or assaults on federal judges and other federal officials, while very rare, are nonetheless of the utmost seriousness and should be appropriately addressed by the sentencing guidelines.

¹There is one other line of relatively high-concentration oxycodone products that do not contain aspirin or acetaminophen. These products, however, are prescribed less often compared with, for example, the over 7 million prescriptions for OxyContin products in calendar year 2001 and the approximately 26.5 million prescriptions for all oxycodone products. Furthermore, there is no evidence of any significant diversion of these products.

We note that the Commission's Native American Working Group is specifically examining federal homicide and assault crimes. We think the Commission should ask the Native American Working Group to complete its work on these issue by this summer so that the Commission can promptly revisit all of the homicide and assault guidelines in the next amendment year and make adjustments to the guidelines as warranted and as required by recent legislation.

CYBERCRIME

I. Introduction

In the fall of 2002, Congress passed and the President signed into law the Cyber Security Enhancement Act of 2002, part of the Homeland Security Act of 2002, Pub. L. 107-296 (2002). In passing the Cyber Security Enhancement Act, Congress again increased some of the statutory maximum penalties for unauthorized access to or interference with computers, networked communications, and electronic information.²

Also as part of the Act, Congress expressed its intent with regard to the sentencing guidelines for these offenses unequivocally – that the Commission should “ensure that the sentencing guidelines and policy statements reflect the serious nature of [computer crimes], the growing incidence of such offenses, and the need for an effective deterrent and effective punishment to prevent such offenses.”³ To that end, Congress directed the Sentencing Commission to review and, if appropriate, amend the sentencing guidelines applicable to offenses against or involving computers and computer networks. Congress provided a list of eight discrete factors the Commission should consider in conducting its review. We comment here on the factors set forth by Congress and, more generally, on the guidelines applicable to computer crimes.

We believe several of the factors identified for review by Congress – specifically, level of sophistication, number of victims, and restitution – are adequately addressed by the current guidelines. The current guidelines do not reflect, however, the dramatic increase in reported

²In the USA-PATRIOT Act, Pub. L. No. 107-56 (2001), Congress increased the statutory maximum sentence for intentionally damaging a protected computer from five years to 10 years for first time offenders and from 10 years to 20 years for repeat offenders. *See* 18 U.S.C. § 1030(c)(4).

³*See also* 148 Cong. Rec. H4583 (daily ed. July 15, 2002) (statement of Rep. Smith) (“We must improve our Nation’s cybersecurity and strengthen our criminal laws to prevent, deter and respond to [cyber] attacks.”); 148 Cong. Rec. S8902 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch) (stating Congress’s intent to “give judges greater latitude to increase a defendant’s sentence to better account for the seriousness of [a] cyber attack.”).

computer crimes,⁴ Congress's express intent to "increase[] penalties to better reflect the seriousness of cyber crime,"⁵ and the fact that such crimes often cause egregious non-monetary harms. We believe that several specific amendments to the guidelines are appropriate to address these issues.

Congress amended 18 U.S.C. § 1030 expressly to account for some non-monetary harm (for instance, damage to a computer used in furtherance of the administration of justice, national defense, or national security, added by the USA PATRIOT Act as 18 U.S.C. § 1030(a)(5)(B)(v)) and directed the Commission to consider other specific factors that reflect the non-monetary harm that may be caused by computer crimes (such as harms to privacy, critical infrastructures, and public safety). Unlike most economic crimes, computer intrusions sometimes cause relatively little monetary loss, in part because computer offenders may act out of a variety of non-financial motives, including the challenge of penetrating a network, the ability to access private or confidential information, and the desire for "bragging rights" within the online community. Nevertheless, the consequences of computer crimes may be dire – egregious violations of privacy; damage to the computer systems that support national defense, national security, and the administration of justice; impairment of critical infrastructures; and even serious bodily injury or death. These crimes must be effectively deterred and severely punished.

Based on the substantial experience of the Criminal Division in preventing, investigating, and prosecuting computer crimes, we feel these amendments constitute an effective, measured implementation of Congress's intent to "ensure that the sentencing guidelines and policy statements reflect the serious nature of [computer crimes], the growing incidence of such offenses, and the need for an effective deterrent and effective punishment to prevent such offenses."

⁴The annual CSI/FBI Computer Crime Security surveys indicate that in 2000, 70 percent of the companies surveyed indicated that they had been the target of computer crime within the past 12 months; by 2002, that figure had risen to 90 percent. Both the 2000 and the 2002 surveys indicate that only about 40 percent of such victims feel that the harm resulting from the attacks may readily be expressed as "financial loss." In 2000, the total financial loss of the 273 responding companies that felt that they could quantify their loss was more than \$265 million; in 2002, the total financial loss of the 223 companies that quantified their loss was more than \$455 million. See "2000 CSI/FBI Computer Crime and Security Survey," in *Computer Security Issues & Trends*, Vol. VI, No. 1 (Richard Power ed. 2000); "2002 CSI/FBI Computer Crime and Security Survey," in *Computer Security Issues & Trends*, Vol. VIII, No. 1 (Richard Power ed. 2002).

⁵Statement of the Hon. Lamar Smith (R-TX), Chairman, Crime Subcommittee, House Judiciary Committee, hearing on H.R. 3482, the "Cyber Security Act of 2001," February 12, 2002.

II. The Statutory Scheme and Recent Amendments

Three portions of the criminal code proscribe unauthorized access to or interference with computers, networked communications, and electronic information. Section 1030 generally prohibits intentionally accessing a protected computer without, or in excess of, authorization, *see* 18 U.S.C. § 1030(a)(1)-(4); knowingly transmitting a computer command, code or program with intent to cause damage to a protected computer, *see* 18 U.S.C. § 1030(a)(5); knowingly trafficking in devices that facilitate unauthorized access to computers, *see* 18 U.S.C. § 1030(a)(6); and threatening to damage a protected computer, *see* 18 U.S.C. § 1030(a)(7). Section 2511(1) prohibits intentionally intercepting any wire, oral or electronic communication. And section 2701(a) proscribes obtaining, altering, or preventing access to undelivered e-mail by intentionally accessing without, or in excess of, authorization a facility through which an electronic communication service is provided.

The USA-PATRIOT Act, Pub. L. No. 107-56 (2001), included several important amendments of Section 1030. Three of those amendments may have implications for the sentencing guidelines. First, Congress increased the statutory maximum sentence for intentionally damaging a protected computer from five years to 10 years for first time offenders and from 10 years to 20 years for repeat offenders. *See* 18 U.S.C. § 1030(c)(4). Second, Congress prohibited damaging a computer system used by the government in furtherance of the administration of justice, national defense, or national security even if the aggregate damage falls short of \$5,000. *See* 18 U.S.C. § 1030(a)(5)(B)(i). Third, Congress included a new, broad definition of "loss:"

the term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

18 U.S.C. § 1030(e)(11). In sum, the USA-PATRIOT Act strengthened some of the statutory penalties for computer crimes, brought new destructive conduct within the purview of the federal criminal code, and expanded the definition of loss suffered by a computer crime victim.

Roughly a year after the USA-PATRIOT Act became law, Congress passed the Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), again strengthening the penalties for many computer crimes. Congress increased the statutory maximum to 20 years for attacks on computer systems in which the defendant knowingly or recklessly causes or attempts to cause serious bodily injury. *See* 18 U.S.C. § 1030(c)(5)(A). Congress increased the statutory maximum sentence to life in prison if the defendant knowingly or recklessly causes or attempts to cause death. *See* 18 U.S.C. § 1030(c)(5)(B).

Congress also increased the statutory maximum penalty for obtaining, altering or preventing authorized access to a wire or electronic communication in electronic storage by accessing an electronic communication service without, or in excess of, authorization. *See* 18 U.S.C. § 2701(a). An offender convicted of such conduct for the first time now faces a one-year maximum sentence, and an offender with a prior conviction faces a five-year maximum sentence as opposed to the six-month sentence provided for before the Homeland Security Act. *See* 18 U.S.C. § 2701(b)(2). Moreover, if such an offender is motivated by commercial advantage, malice, or private gain, Congress increased the maximum sentence from one year to five years for a first-time offender and from two years to ten years for a repeat offender. *See* 18 U.S.C. 2701(b)(1).

III. The Guidelines' Current Treatment of Sections 1030 and 2701

With a few notable exceptions, the guidelines currently treat 18 U.S.C. § 1030 violations as basic economic offenses for which §2B1.1 determines a defendant's sentence.⁶ Section 2M3.2 determines the sentence for obtaining national defense information by accessing a protected computer in violation of 18 U.S.C. § 1030(a)(1). Section 2B2.3, the trespass section, determines the sentence for accessing without, or in excess of, authorization a computer of a department or agency of the United States. Section 2B3.2, the extortion guideline, determines the sentence for transmitting with intent to extort a threat to damage a protected computer in violation of 18 U.S.C. § 1030(a)(7). The guidelines currently provide no specific instruction as to how to sentence violations of 18 U.S.C. § 2701.

IV. Comments & Recommendations

Consistent with Congress's instruction to strengthen the penalties for computer crimes and to take into account non-monetary harm caused by such crimes, we recommend several specific Guidelines amendments. We address each of the enumerated factors set forth in the directive to the Commission in the Homeland Security Act and each of the questions posed by the Commission's solicitation for public comment.

A. Loss

The USA-PATRIOT Act amended 18 U.S.C. § 1030 to include a new definition of loss (see above). Application Note 2(A)(v)(III) of §2B1.1 currently instructs courts to include in a loss calculation "reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." To avoid confusion and promote consistency, we believe the guideline loss definition should be amended to mirror the definition now contained in 18 U.S.C. § 1030.

⁶Guideline §2X1.1 determines the sentence for an attempt to violate any subsection of 18 U.S.C. § 1030(a). It generally instructs courts to apply the appropriate guideline for the substantive offense and then decrease the offense level by 3. *See* U.S.S.G. § 2X1.1(a), (b)(1).

As amended, the definition of loss will be sufficiently broad to capture the monetary harm caused by computer crimes (it does *not*, however, adequately address non-monetary harms such as invasion of privacy, damage to critical infrastructures, and bodily injury or death, which are addressed specifically later in these comments). We thus recommend that §2B1.1, note 2(A)(v)(III) be amended as follows:

Protected Computer Cases.—In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a “protected computer” as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: **reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service; any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.**

B. Level of Sophistication

The guidelines currently account for the level of sophistication of an offense in §2B1.1(b)(8). We believe this offense level increase is adequate and that no further amendment is needed.

C. Commercial Advantage or Private Financial Benefit

Congress directed the Commission to consider whether the guidelines should treat differently a violation of § 1030 that was motivated by commercial advantage or private financial benefit. Congress has expressly treated more severely computer crimes committed with these purposes. An offender who violates 18 U.S.C. § 1030(a)(2) by intruding into a protected computer and obtaining information generally faces a statutory maximum sentence of one year, *see* 18 U.S.C. § 1030(c)(2)(A); if, however, that same offender is motivated by the prospect of commercial advantage or private financial gain he faces a statutory maximum sentence of five years, *see* 18 U.S.C. § 1030(c)(2)(B)(i). In the Homeland Security Act, Congress established a similar increase in the statutory maximum penalty faced by an offender who violates 18 U.S.C. § 2701 with such motives. *See* 18 U.S.C. § 2701(b)(1) (establishing a statutory maximum sentence for offenses committed “for purposes of commercial advantage . . . or private commercial gain” of one year for first offenders and two years for repeat offenders); *cf.* 18 U.S.C. § 2701(b)(2) (establishing a statutory maximum sentence of six months where such motives are absent).

As a general matter, §2B1.1’s loss table addresses monetary motives and harms by punishing an offense in proportion to the loss it causes or is intended to cause. However, in light of Congress’s clearly expressed intent that crimes committed for such purposes be sentenced

more severely, we believe a minimum offense level floor of 12 for such offenses is appropriate (with no provision for any generally applicable penalty enhancement). Such a minimum would place an offender in Zone C of the sentencing table, absent the effect of other mitigating or extenuating specific offense characteristics. A short prison term is the appropriate penalty for these offenses, and, we believe, should be an effective deterrent for an offender who accesses without or in excess of authorization the computer of another in order to obtain commercial advantage or personal financial benefit.

We thus propose adding the following specific offense characteristic to §2B1.1(b):

() If the offense involves violation of 18 U.S.C. §§ 1030 or 2701 and was committed for purposes of commercial advantage or private financial gain and the offense level is less than 12, increase to 12.

D. Intent to Cause Harm

Section 1030 violations committed with intent to cause harm are relatively commonplace; the disgruntled former employee who exacts revenge by attacking his former employer's network, for example, is a figure familiar to prosecutors. Punishing more severely offenders who intend to cause harm than offenders who cause harm unintentionally serves three of the four penological purposes recognized by federal law. Congress provided in the USA-PATRIOT Act for higher statutory maximum sentences for violations of 18 U.S.C. § 1030(a)(5)(A)(i), which applies to computer criminals who act with intent to cause damage. For a first offense, Congress raised the maximum sentence to 10 years, *see* 18 U.S.C. 1030(c)(4)(A); for any subsequent offense, Congress raised the maximum sentence to 20 years, *see* 18 U.S.C. 1030(c)(4)(C).

We believe the Commission should amend §2B1.1 to include a significant offense level increase and an offense level floor that reflects both the purposes of sentencing and Congress's unequivocal intent that the sentences for such crimes be increased. Individuals who violate the law with the intent to harm the life and livelihood of others are a threat to public safety and economic security. We recommend that the guidelines increase the offense level of such offenders by 4, to not less than 14, placing them in Zone D and assuring that, absent a departure, their sentence will include a term of imprisonment.

We suggest that the following specific offense characteristic to § 2B1.1:

() If the offense involved intentionally causing or attempting to cause damage to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A)(i), increase by 4 levels; if the resulting offense level is less than 14, increase to 14.

E. Violations of Privacy

Personal information such as medical and financial records, diaries and personal correspondence, and other confidential information is increasingly stored on network-accessible digital media, either on networked personal computers or in the custody of third parties such as Internet service providers, credit reporting services, or data storage services. One objective of many computer intruders is to obtain such information. Given computer networks' roles as repositories for private and confidential information, computer intrusions have unprecedented potential to expose the personal information of hundreds or thousands of users at once. A computer intrusion in which the offender obtains personal information causes non-monetary harm that is difficult to capture in the loss table or elsewhere in the current guideline.

For instance, accessing without authorization a hospital's medical records in violation of 18 U.S.C. § 1030 and posting on the web a list of HIV-positive patients may be extremely harmful to both the hospital and the patients even though it may cause little or no measurable economic loss. In fact, at least one hospital has suffered such an intrusion. Several years ago, a hacker accessed a Pittsburgh hospital to obtain the medical records of a popular country western singer. Similarly, accessing a Hotmail web server in violation of 18 U.S.C. § 2701⁷ and reading the personal correspondence of several of Hotmail's subscribers harms each subscriber, although that harm is difficult to quantify. We believe the guidelines should reflect the serious harm that such offenses cause.

Currently, §2B1.1 accounts for violations of privacy by including among a "non-exhaustive list of factors the court may consider" in making an upward departure from a defendant's sentencing range whether "[t]he offense . . . resulted in a substantial invasion of a privacy interest." §2B1.1, note 15(A)(ii). In practice, however, courts seldom depart upward from the guidelines. As a result privacy violations are left unpunished and under-deterred. In cases such as the intrusion into the hospital computer described above, the invasion of privacy is not a footnote to the monetary loss, it is the most significant harm caused by the intrusion. Moreover, even where an intrusion does involve a monetary loss (*e.g.*, where it results in the theft of financial records), the invasion of privacy is a separate and significant harm. In fact, it may be the harm regarded as most egregious by the individual victim.

We recommend increasing by two the offense level of offenders who obtain important private information. In addition, because a violation of the privacy of 50 people causes more harm than a violation of the privacy of a single person, we recommend amending the application note for section 2B1.1(b)(2) to clarify that every individual about whom such information is obtained as a result of a computer intrusion is a "victim" for the purposes of the guidelines.

⁷The guidelines do not currently reference violations of 18 U.S.C. § 2701 to a specific guideline. Section 2701, like section 1030, prohibits unauthorized access to certain computer systems. We believe Appendix A should be amended to reference violations of 18 U.S.C. § 2701 to §2B1.1.

Thus, if a hacker accesses a medical records database and steals 100 people's records, the number of victims would include these 100, not just the computer owner.

We propose (1) adding the following specific offense characteristic:

() (A) If the offense involved knowingly accessing a computer without authorization or exceeding authorized access in violation of 18 U.S.C. §§ 1030 or 2701 and obtaining personal information as a result, increase by 2 levels.

(2) adding the following Application Note to the Commentary:

1. Definitions.—For the purposes of this guideline:

* * *

“Personal information” means sensitive or private information, including but not limited to medical records, financial records, social security numbers, wills, diaries, private correspondence including email, photographs of a sensitive or private nature, or similar information, including such information in the possession of a third party.

(3) amending application note 3(A)(ii) as follows:

(ii) *“Victim” means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701. “Person” includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

F. Computers Used by the Government in Furtherance of National Defense, National Security, or the Administration of Justice & Disruptions of Critical Infrastructures⁸

Computer networks are used in furtherance of the administration of justice – by state, local, and federal law enforcement agencies, by jail and prison agencies, by probation and parole offices, and by local, state and federal courts. Such networks play a critical role in ensuring that the justice system performs effectively and efficiently and that dangerous criminals are kept off the streets. In one notable case, a convicted felon hacked into the computer network of a United States District Court in an effort to modify his sentence. Intrusion into networks used in

⁸Although Congress listed these as two separate factors, we believe they are so closely related that they are best addressed by a single amendment to the guidelines.

furtherance of the administration of justice should be appropriately accounted for in the guidelines. Accordingly, we believe a four level increase should be provided for intruding into such networks.

Computer networks are also used to maintain and operate the critical infrastructures upon which our society and economy rely. Such critical infrastructures, whether publicly or privately held,⁹ include the provision of health care, the production and distribution of energy, public transportation, emergency response, national defense and national security, and the administration of justice. The prospect of attacks on, or intrusions into, these networks raises harrowing possibilities. For instance, in March 1997, a computer intrusion into a telephone company serving Worcester, Massachusetts disabled the night landing lights and communications with airport emergency services at Worcester's airport for six hours. Luckily, no one was injured.

In 1998, a young hacker broke into the computer system that runs Arizona's Roosevelt Dam, attaining complete command of the system controlling its massive floodgates. If the 1.5 million acre-feet of water restrained by the dam had been released, experts indicate that the consequences could have been disastrous for Mesa and Tempe Arizona, two communities with a population totaling nearly one million people that rest on the flood plain below the dam. Again, in 2000, in Australia, a computer hacker obtained complete control over the waste- and fresh-water system that served a large community, leaking hundreds of thousands of gallons of sludge that killed marine life, destroyed a riparian area, and subjected residents to an insufferable stench. The chief executive of the water station indicated that the consequences could have been much worse, stating, "He could have done anything he liked to the fresh water." Only two months ago, in January 2003, a computer virus disrupted operations for the Seattle-area 911 operations center that serves two suburban police departments and at least 14 fire departments.

Other dire scenarios are not hard to imagine:¹⁰ attacks on, for instance, the computer systems that regulate and operate nuclear power plants, that control the orbit of telecommunications satellites, or that route calls to 911 operators could have truly disastrous

⁹Since many critical infrastructures in the United States are owned and operated by private companies, it is essential that the definition of critical infrastructures include such private concerns and not merely public or governmental entities.

¹⁰Computer attacks striking at the heart of the United States' critical infrastructures have fortunately been few in number. However, we agree with the statement of Senator Hatch that "[t]errorists and others who wish to harm our country recognize that cyber attacks on our vital computer and related technological systems can have a devastating impact on our country, our economy and the lives of our people." 148 Cong. Rec. S8901 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch). In light of this threat, we believe it is essential for the guidelines to provide severe punishment for such cyber attacks to effectively deter and appropriately punish them.

consequences. For instance, a computer intrusion that compromised the integrity of databases reflecting troop and equipment locations could gravely harm national security. Computer intrusions that impede, or risk impeding, such critical infrastructures should be sentenced severely to deter effectively and punish appropriately conduct that risks such formidable consequences.

We do not believe these harms can be adequately quantified in monetary terms and therefore are not adequately accounted for by the section 2B1.1 loss table. Congress's concern with such attacks is evidence. The USA-PATRIOT Act added to the list of specific computer conduct prohibited by 18 U.S.C. § 1030 a computer intrusion or the transmission of a code or program that causes damage to "a computer system used by the government in furtherance of the administration of justice, national defense, or national security." 18 U.S.C. §§ 1030(a)(5)(A) & (a)(5)(B)(v). Such computer systems are integral to the proper functioning of government, and conduct that exposes them to damage should be strongly deterred and severely punished. We therefore propose a specific offense characteristics with a two-tiered offense level increase and a minimum offense level floor for the second tier. This structure provides for increased punishment for computer intrusions that risk harm to the computers that maintain and operate critical infrastructures, reflecting the notion that hacking into such computers is serious, risky conduct even if no harm results. The second tier punishes extremely severely computer intrusions that substantially disrupts critical infrastructures themselves.

The proposed amendment would apply cumulatively where appropriate with the specific offense characteristic for creating a risk of death or serious bodily injury and the specific offense characteristic for causing injury or death. The Commission may also want to consider including as a ground for upward departure violations disrupting so severely a critical infrastructure as to incapacitate the economy, public health, or national defense or security.

We propose adding the following specific offense characteristic:

() (A) If the offense violated 18 U.S.C. § 1030 and involved a computer system used to maintain or operate a critical infrastructure or a computer system used by or for a government entity in furtherance of the administration justice, national defense, or national security, increase by 4 levels.

(B) If the offense violated 18 U.S.C. § 1030(a)(5)(A)(i) caused a substantial disruption of a critical infrastructure, increase by 6 levels. If the resulting offense level is less than level 28, increase to level 28.

We also suggest adding the following Application Notes to the Commentary:

1. Definitions.—For the purposes of this guideline:

* * *

“Critical infrastructure” means systems and assets vital to the national defense, national security, economic security, public health or safety, or any combination of those matters.

... Critical Infrastructures under Subsection (b)(16). – *Examples of critical infrastructures to which subsection (b)(16) applies are systems and facilities, whether publicly or privately held, that provide essential services in support of the economy and national defense and national security. Such infrastructures include, but are not limited to, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services, medical care, and transportation links such as interstate highways, airlines, and rail systems. Substantial disruptions in the services provided by such infrastructures jeopardizes the health, safety, security, or economic welfare of a substantial number of people. The enhancement provided for in subsection (b)(16) reflects the seriousness of substantially disrupting a critical infrastructure such as by impairing 9-1-1 phone service to a town or city for several hours or by eliminating electrical power to a county for a similar period of time. Subsection (b)(16) should be applied cumulatively with subsections (b)(11) and (b)(17).*

H. Threat to Public Health & Safety; Risk of Bodily Injury, and Death

Both 18 U.S.C. § 1030 and the guidelines should take into account the potential that a computer intrusion may cause serious bodily injury or death.¹¹ Congress has recognized this potential by significantly increasing the maximum penalties for conduct that involves the risk of such consequences. The USA-PATRIOT Act doubled the maximum sentences for intentionally damaging a computer and, as a result, causing physical injury to any person or a threat to public health or safety. See 18 U.S.C. § 1030(c)(3)-(4). Congress further strengthened these penalties in the Homeland Security Act of 2002, increasing the statutory maximum to 20 years for an offender who knowingly or recklessly causes serious bodily injury and to life in prison for an offender who knowingly or recklessly causes death. Thus, Congress has unequivocally expressed its intent to punish and deter computer intrusions that cause death or serious bodily injury.

Section 2B1.1(b)(11) currently addresses conduct that *creates a risk* of death or serious bodily injury. It provides: “If the offense involved (A) the conscious or reckless risk of death or serious bodily injury . . . increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.” For a first time offender, an offense level of 14 results in a sentencing range of 15 to 21 months; even an offender with the highest possible criminal history points faces only a 46-month sentence, absent discretionary departure from the guidelines by the sentencing

¹¹See 148 Cong. Rec. S8901 (daily ed. Sept. 19, 2002) (statement of Sen. Hatch) (“[I]t is not difficult to imagine an assault on a computer system which might cause death or serious bodily injury.”).

court. Section 2B1.1 does not, however, provide guidance to a court confronted by a computer intrusion or the transmission of a computer virus that *actually causes* serious bodily injury or death. For example, a computer intrusion that disabled even for a moment the 911 emergency response system could easily deprive a medical patient of emergency treatment or a crime victim of timely protection.

We believe §2B1.1 should be amended to reflect both the wider scope of section 1030 violations that Congress intended to punish more severely, and the stronger penalties Congress intended for offenders whose conduct has such dire consequences. We recommend including a specific offense characteristic in section 2B1.1 that reflects the physical harm caused by the offense.

We suggest adding the following specific offense characteristic:

() If the offense resulted in: (A) bodily injury, add 2 levels; (B) serious bodily injury, add 4 levels; (C) permanent or life-threatening bodily injury, add 6 levels; and (D) death, add 8 levels.¹²

And adding the following cross reference:

() If the offense involved a violation of 18 U.S.C. § 1030 and any person was killed under circumstances that would constitute homicide, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the application of that section results in a higher offense level than application of this section.

1. Number of Victims

The current guidelines treat the same a computer attack that damages one computer and a computer attack that damages 100 computers, so long as there is only one victim of the statutory violation. It is undeniable, however, that even if a computer intrusion victimizes only one government agency (e.g., the armed forces), the intrusion is more egregious if it damages 100 of that agencies computers than if it damages only one of them. We believe the definition of "victim" should be amended to reflect that each computer damaged by a computer intrusion constitutes a victim for the purposes of subsection (b)(2).

¹²The offense level increases in this recommended amendment are drawn from §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and other similar provisions.

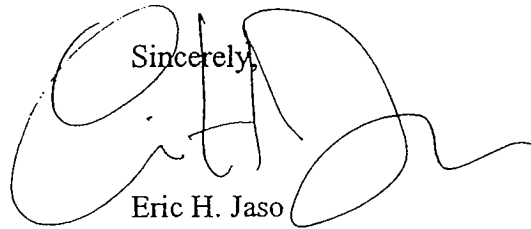
We suggest amending Application Note 3.(A)(ii) as follows:

- (ii) *"Victim" means (I) any person or computer that who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*¹³

* * * * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric H. Jaso', written over the word 'Sincerely,'.

Eric H. Jaso
Counselor to the
Assistant Attorney General

¹³This amended application note incorporates the amendment recommended in Part IV.E., *supra*.

**PRACTITIONERS' ADVISORY GROUP
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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.

The Honorable Diana E. Murphy
March 17, 2003
Page 2 of 5

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.

The Honorable Diana E. Murphy
March 17, 2003
Page 3 of 5

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

The Honorable Diana E. Murphy
March 17, 2003
Page 4 of 5

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.

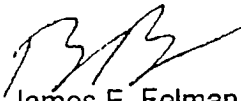
It seems to us that the Sentencing Commission's duty is to resist "political" approaches to criminal justice in general, and sentencing policy in particular. The Commission should ensure that the sentencing ranges available to district judges are fair and appropriate in light of the particular offender 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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The Honorable Diana E. Murphy
March 17, 2003
Page 5 of 5

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.

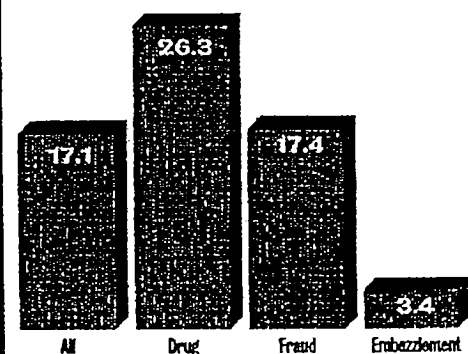
Declining figures

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).

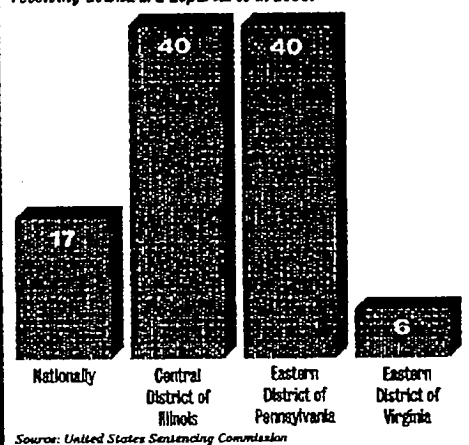
Perhaps due to the lack of defined procedures governing the request for such a departure, inconsistencies exist in the way prosecutors exercise their departure power. Nationally, substantial assistance departures are granted in approximately 17% of all cases. In the central district of Illinois and the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

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FACSIMILE COVER PAGE

TO: The Honorable Diana E. Murphy
The Honorable Ruben Castillo
The Honorable William K. Sessions, III
John R. Steer, Vice Chair
Michael E. O'Neill, Commissioner
Timothy McGrath, Esq.
Charles Tetzlaff, Esq.
Ken Cohen, Esq.

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

DATE: March 17, 2003

PAGES: 9 (including cover)

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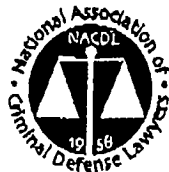
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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 10, 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

Dear Judge Murphy:

I am writing to request that NACDL's President, Lawrence Goldman of New York, be permitted to testify at the Sentencing Commission's March 25 public hearing. As the leading organization devoted exclusively to the interests of the defense bar, we would greatly appreciate the opportunity to share our member's perspective with the Commission.

As you are aware, NACDL regularly submits comments regarding proposed amendments to the Sentencing Guidelines and has testified at past hearings. Mr. Goldman has an active white collar practice and, if permitted to testify, would address his comments to amendments proposed pursuant to the Sarbanes-Oxley Act.

Thank you for considering this request.

Sincerely,

Kyle O'Dowd
Legislative Director

"LIBERTY'S LAST CHAMPION"

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March 17, 2003

The Honorable Diana E. Murphy
Chairwoman
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Re: NACDL Response to Request for Comment on Proposed Permanent Amendments

Dear Judge Murphy:

The National Association of Criminal Defense Lawyers ("NACDL") submits this response to the Commission's request for comment on the proposed permanent amendments to the Sentencing Guidelines. More specifically, the NACDL would like to take this opportunity to comment on published reports that the Justice Department is seeking marked across-the-board sentence increases for economic crime offenders at virtually all loss levels via an increase in the base offense level and/or the loss table of U.S.S.G. § 2B1.1. We also do not believe that any of the three options for a modified loss table set forth in paragraph 1(a) in the Issues for Comment should be adopted. In our view, such increases are not warranted and fly in the face of the specific targeted increases set forth in the Sarbanes-Oxley Act.

I. Comprehensive Loss Table Increases Are Not Justified

A. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in 2002 in response to numerous corporate scandals, questionable accounting practices, and a variety of allegedly criminal behavior by senior officers of large corporations. Prior to the passage of the January 2003 amendments, the Justice Department argued that Sarbanes-Oxley contained an express or implied directive that sentences should be increased for virtually all economic crimes, regardless of loss amount or other indicia of seriousness. The Commission reviewed the language and legislative history of the Act and wisely rejected the view that it mandated across-the-board sentence increases. Instead, the Commission enacted a number of amendments targeting sentence increases at those serious corporate offenders whose misdeeds were the focus of the language and legislative history of the Act.

The Justice Department has now reasserted its attempts to institute across-the-board sentencing increases. For example, the Justice Department is working on draft legislation that would require those who commit white collar crimes involving at least \$10,000 to face some jail time mixed with other punishment, and those with crimes involving at least \$50,000 to serve a mandatory prison term. With regard to its proposed comprehensive increases in the base offense level and the loss tables, Justice Department official Drew Hruska argued that prosecutors need the leverage of jail terms against smaller defendants in order to persuade them to testify against

their bosses. "Sometimes we build our cases from the bottom up, and we need to be able to make clear to people at the low end of the range how serious the consequences are," Hruska said. "If we want to get the big fish, we have to start with the minnows." *Id.* Of course, the purpose of the Sentencing Guidelines is to promote fair and equitable sentences across the board. Increasing the leverage of the Justice Department against the "minnows" is not a valid reason to increase sentences. In fact, the Sentencing Guidelines are designed to reduce inequities based on the charging decisions of prosecutors.

Given that the statutory maximum constraints on the offense levels have been substantially revised by the Congress via Sarbanes-Oxley, the current loss table, supplemented by carefully-tailored specific offense characteristic enhancements (including those in the proposed permanent amendments), will more than adequately punish those offenders who operate at the highest levels of economic crime. Many of the offenses potentially affected by a wholesale revision of the loss table involve criminal statutes and scenarios untouched by the Sarbanes-Oxley amendments. Most of the cases affected by the economic guidelines and loss table involve individual defendants who are low-to-mid-level employees who engage in some unremarkable fraud scheme or involve defendants who are not corporate employees at all. There is no suggestion in either the legislative history or the statutory directive that Sarbanes-Oxley was designed to increase sentences for garden-variety fraud or economic offenses, much less those offenses subject to the application of the loss table that do not involve corporate crime. Nor is there any basis or proof to suggest that the current guidelines are not acting as severe enough penalty for, or deterrent to, criminal conduct. A generalized request to "get tough" on crime, arising in the middle of any wave of media stories about corporate or other types of wrongdoing should not be the grounds for changing sentences or guidelines. Indeed, it is precisely in times of passion and emotion that statutes and rules, including those addressing penalties and sentences, should remain constant so that balances that have been carefully struck over time are not tipped for the excitement of the moment.

The offenses and offenders targeted by the Act are those who engineer sophisticated and massive fraud by virtue of the positions they occupy in large, publicly-traded and regulated corporations. The intent of the Congress can best be carried out by the specific targeted enhancements set forth in the amendments that focus on the individual offenders who are at the top of an organization's corporate leadership or who possess substantial fiduciary positions. Neither the Justice Department's proposals nor the three proposed loss tables in paragraph 1(A) of the Issues for Comment follow the intent of the Congress.

B. The 2002 Economic Crime Package

The Justice Department's suggestion that the loss table should be completely revised to ratchet up offense levels across the board in economic crime cases is a transparent effort to revisit the Economic Crime Package ("ECP") passed two years ago. The ECP, which included a revised loss table, was the result of years of careful study and discussion, including a two-day symposium in October of 2000. Given that there has been no opportunity to study the effects or impact of the new loss table, there is absolutely no basis to revise it at the present time. It will take at least three to four years before adequate response and information can be gleaned from

the legal community as to the impact of the ECP.

Furthermore, the fifteen-year history of the white collar guidelines, commencing in 1987 and culminating with the implementation of the ECP, reflects the relentless increases in the severity of these guidelines. While the average sentence imposed by federal judges in a number of major crime categories declined during the 1990s, Sentencing Commission statistics establish that the average sentence of white collar defendants actually increased from 19 months in 1994 to 20.8 months in 2001. As the Commission noted, the new loss tables implemented in 2001 were aimed at addressing the concerns articulated by the Justice Department for more severe sentences at the moderate and higher loss amounts. See 66 Fed. Reg. 30512 (June 6, 2001).

The incremental increases in offense levels at the higher end of the consolidated theft and fraud table instituted via the ECP significantly exceed those of their previous separate tables. For example, a \$1 million loss in year 2000, even with application of the more than minimal planning offense characteristic, would result in a 30-37 month sentencing range; in contrast, the same offender after the implementation of the ECP loss tables is subject to a 41-51 month range, an approximately 25% increase. Thus, the upward trend will accelerate over the next few years as the sentence increases built into the ECP begin to take effect.

Other provisions also demonstrate how the ECP changes promoted increased sentences. Though the more than minimal planning enhancement has been eliminated - or, more accurately, incorporated into the loss table - the sophisticated means enhancement remains. Also, though generally excluded by the revised Guidelines, the Commission has noted that interest and similar costs may be the subject of an upward departure where an offender will otherwise be "under-punished." *Id.* On the other hand, gain realized by a victim in a fraudulent investment scheme cannot be used to offset losses incurred by other victims in that scheme. *Id.* In sum, the ECP has continued the steady progression of increases in the severity of sentences for white collar offenders.

C. Summary

Loss amounts already often overstate the culpability of defendants. Calculating loss under the relevant conduct guideline sweeps in the conduct of others, based on a preponderance standard, without the opportunity to confront the witness, and based on uncharged and/or dismissed conduct. Loss also includes intended loss no matter how economically unrealistic the intended loss may be. Sometimes, a defendant commits the offense just to retain his or her job, or for misguided loyalty or not personal profit and for motives that may be tinged with financial need rather than pure greed. Increasing the base offense level or increasing offense levels will just exacerbate the overrepresentation of culpability in many cases.

In sum, federal economic crime penalties have increased in the last fifteen years. The rate of imprisonment of economic crime defendants, the severity of sentences called for by the Guidelines, and the length of sentences of imprisonment actually imposed are now at all-time highs. Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence. Nonetheless, the

Justice Department insists that economic crime penalties are not high enough and that it needs the higher penalties for "leverage." Such reasoning creates dangerous precedent.

When there has been or is now under current guidelines a need to seek a more severe sentence, prosecutors have found numerous ways to do so whether by seeking the inclusion of more conduct oriented factors (planning, role in the offense, etc.) or even in seeking an upward departure where needed. There has been no demonstration that a change is needed now.

II. The Proposed Permanent Amendments

While the NACDL's greater concern involves the Justice Department's proposals addressed above, we would also like to take this opportunity to briefly comment on the proposed permanent amendments. For the most part, the Commission has adequately addressed the Sarbanes-Oxley directives through the targeted specific offense characteristics and upward departures it has enacted in the amendments. We do, however, believe the Commission has gone too far in one area.

With regard to the two level increase for offenses under 2B1.1(b)(2) involving 250 or more victims, we do not believe that such an amendment is necessary. We are particularly concerned that this amendment, when employed in a cumulative fashion together with the new proposed amendment providing for an additional four-level increase if the offense substantially endangers the solvency or financial security of a publicly traded company, is unduly harsh. It is likely that offenses which endanger the solvency of a publicly held company will, by definition, involve 250 or more victims. It is also likely that such offenses will involve sophisticated means, an abuse of trust, as well as a four-level upward adjustment for role in the offense. Thus, the proposed amendments would have the likely effect of providing an eighteen-level upward adjustment to the base offense levels provided in the loss tables for fraud involving a publicly held company. We do not believe that such rapid escalation of punishment is warranted. The current guidelines are more than adequate in this regard, and as stated above there are numerous means by which higher penalties can be achieved under current rules without making changing that could have consequences beyond those that are presently intended.

We appreciate the opportunity to provide these comments to the Commission.

Respectfully,

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March 17, 2003

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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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Chair, White Collar Defense Committee



Richard K. Gilbert
Chair, Legislative Committee

**COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED JANUARY 17, 2003 AMENDMENTS TO
THE SENTENCING GUIDELINES**

**Respectfully submitted,
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**Edward Shaw, President
Brian E. Maas, Chairman, Sentencing Guidelines Committee**

March 14, 2003

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED JANUARY 2003 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address those of the proposed amendments and Requests for Comment published in the Federal Registry on January 17, 2003 which are of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Brian Maas, Chairman and Jacqueline Wolff, Nick DeFeis, Steven Kimelman and Michael Miller.

OVERVIEW

The NYCDL applauds the Commission in its promulgation of emergency amendments to the Guidelines that respond to the Congressional directive in the Sarbanes-Oxley Act of 2002 (the "Act") to address the Enron debacle and other recent large-scale corporate frauds. However, we have substantial concerns that certain of the emergency amendments upon which the Commission seeks comment as well as some of the additional amendments requested by the Department of Justice in its December 18, 2002 letter to the Commission and are the subjects of Requests for Comment go far beyond Congress's directives under the Act. Specifically, the NYCDL objects to those emergency and proposed amendments that would (i) modify the fraud loss table to increase offense levels for lower loss amounts, (ii) increase the fraud base offense level, (iii) provide a four level enhancement, simply because the defendant is an officer or director of a public company, rather than the two level enhancement for "abuse of trust", without any consideration of the size of the company or number of victims, and (iv) require an enhancement based on endangering the financial security of an organization if such endangerment can be established by events common to most small and medium sized companies in the current economic climate, whether defrauded or not, such as, for example, a substantial reduction in a company's workforce or a substantial reduction in the value of the company's stock. In short, as discussed below in our specific responses to the Issues for Comment set out in both the December 18 and January 17 public notices, the NYCDL objects to any amendments to the guidelines or to the commentaries to any

specific guideline that do not target the sort of large scale massive fraud cases with multiple victims that was the primary focus of Sarbanes-Oxley..

Congress' directive to the Commission was made very clear when enacting Sarbanes-Oxley: that is, that the Commission is to "review and *consider* enhancing as *appropriate* criminal penalties in cases involving obstruction of justice and *serious* fraud cases." 148 Cong. Rec. § 7418 (emphasis supplied). Therefore, as a preliminary matter, enhancements are required only if "appropriate". This comports with the Commission's own view of one of its functions to amend the guidelines "as necessary". An Overview of the United States Sentencing Commission, at p. 4, available at <http://www.ussc.gov/general.htm>.

Amendments affecting smaller or "garden-variety" fraud cases can hardly be deemed "appropriate" or "necessary" given the Commission's recent amendments issued pursuant to the Economic Crime Package and effective only since November 1, 2001. The Commission, as is its responsibility, spent years gathering statistics, inviting comment and drafting enhancement provisions prior to promulgating those amendments. Now, we respectfully submit, the Commission must give the courts time to apply these amendments in order for the Commission to conduct further research to determine how the new amendments affect the various goals of sentencing including just punishment, deterrence, incapacitation, rehabilitation and certainty and fairness in sentencing. Only after such a review can the Commission determine whether enacting additional

enhancements or further modifying the loss table for smaller fraud cases is necessary to meet those goals.¹

Furthermore, even if the lack of time to review the effect of the recent amendments would not stand as a bar to additional enhancements, the Commission has not had enough time to consider the need for and potential impact of any enhancements other than those specifically targeted by the Act's sponsors. Commissioner O'Neill himself stated when indicating his concern as to the lack of time Congress has given the Commission to study the issues, "we're not exactly sure what the proper course is." "Panel Clears Harsher Terms in Corporate Crime Cases," New York Times, p. C1, col. 5, at p. C4, col. 6 (January 9, 2003). Having recently enacted a comprehensive revision to the fraud guidelines, including an upward revision of the fraud table, the Commission, an independent agency in the judicial branch of the government, should not now allow current political concerns to prompt an increase in the punishment of financial crimes which will necessarily impact both victims and defendants alike for a lifetime.

Indeed, Congress did not suggest at the time it passed Sarbanes-Oxley that changes other than those specifically called for to address the "investor's crisis of confidence" caused by Enron and other grand scale frauds should be considered by the Commission at this time. As Congress stated, "[S]pecifically the Commission is

¹ The Commission's Report to Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002 repeatedly points out the lack of reliable data for recently enacted amendments that were used as the basis for the current emergency amendments. For example the amendment providing an enhancement for a fraud endangering the solvency or financial security of a public company or organization with over 1000 employees is based on the just recently enacted amendment providing an enhancement for jeopardizing the safety and soundness of a financial institution. The Report points out that it has no reliable data available on the latter as to its application by the Courts. p. 4. The same is true with respect to the significant changes made to the fraud loss tables in November 2001. The Commission is only receiving relevant data now. The NYCDL respectfully asks how can the commission determine whether an amendment is necessary if it has insufficient information as to the use and affect of the current guideline?

requested to review the fraud guidelines and consider enhancements for cases involving *significantly greater than 50 victims* and cases in which the solvency or *financial security of a substantial number of victims is endangered.*" Id. [emphasis supplied] The legislative history of the Act is packed with references to Enron and the hope that the new legislation and accompanying guidelines will prevent cases like Enron from occurring in the future. As Commissioner Sessions himself recognized, "The law says 'serious' fraud case. We have to do what Congress says." Id. at p. C4, col. 5.

While it is generally accepted that the punishment for "serious" fraud should be influenced in part by the amount of the loss and the number of victims, some of the enhancements included in the emergency amendments as well as some of those suggested in the Issues for Comment run the risk of unnecessarily enhancing guideline sentences for small frauds leading only to more downward departures and inconsistent sentences. Thus, our overriding concern in these comments is that several of the aforementioned proposed and emergency amendments go far beyond the clear directives set forth in the Act, and were promulgated or are being contemplated without the Commission's usual careful review and study. Moreover, we are concerned that were certain of the emergency amendments to become permanent, the result would be a series of unintended consequences, all of which are contrary to the goals of the Commission.

ISSUES FOR COMMENT

1. (A) Proposed Modification of Loss Table for Lower Loss Amounts

Two years ago, criminal defense organizations like ours objected to many elements of the economic crime package proposed by the Commission including the proposal to modify the loss table to increase the penalties across the board. While some of the proposed changes were not adopted, the changes to the loss table were approved based on data collected by the Commission over a substantial period of time that the Commission and others interpreted as demonstrating that white collar defendants were not receiving sufficiently harsh sentences for fraud offenses. Before the changes in the loss table were approved, the Commission had proposed several variations of changes to the table, some more and some less harsh than the table that was ultimately approved.

Although the NYCDL was disappointed that the loss tables were changed as they were, because we did not believe that the data warranted the change, there is no question that the modifications were not enacted until there had been substantial opportunity for the Commission to analyze available data⁸³ and for the public to comment on the proposals. Over multiple amendment cycles, the Commission clearly wrestled with the question of the fairness of the loss tables. The Commission published its data which it contended supported the change and the public had ample opportunity to respond and comment. Moreover, the changes were implemented as part of a comprehensive review of the guidelines governing economic crimes which created public confidence both in the process and in the result.

No such confidence can attend a change in the loss table at the present time. While Congress in the Sarbanes-Oxley Act directed that the loss table be amended

to add more severe offense levels for losses which exceed the current maximum loss amount of \$100,000,000, no such direction was given to the rest of the loss table. While Congress' direction was based on a belief that massive frauds at companies like Enron and Worldcom, which resulted in losses in excess of \$100,000,000, warranted greater penalties than currently available under the loss table, no belief was expressed that the current table, as amended in November 2001, was not adequately punishing offenders who participated in frauds where the losses were less than \$100,000,000. Thus, any change at this time to the overall loss table would constitute inappropriate reaction to the general anger at business misconduct without any evidence whatsoever that any further change in the tables is warranted. We believe that the Commission's credibility built up over the many amendment cycles in which the Economic Crime Package evolved, will be jeopardized by any precipitous action at this time.

Each of the three loss tables included by the Commission in this Request for Comment as possible options lowers the amount of loss that would trigger particular offense level enhancements at all levels of the loss tables except for frauds with losses less than \$10,000. These proposed changes would lower the loss triggers from those included in the new table that was enacted less than eighteen months ago in November 2001, which itself implemented a substantial lowering of the loss triggers from the loss table that had previously been in effect. Thus, as an example, the threshold for a ten point enhancement which required a loss of more than \$500,000 prior to November 2001, and now requires a loss of more than \$120,000, would be reduced to a loss of \$100,000 under all three of the proposed tables. Such a defendant, even if she pleads guilty, and is subject to no other enhancements (an unlikely possibility), would be sentenced at an

offense level of thirteen (13) and would be sentenced to at least one year in prison. This same defendant would currently be sentenced at a level eleven (12) in Zone C, and prior to November 2001, would have been sentenced at offense level ten (10) in Zone B.

That it would be a mistake to change the loss table at this time is highlighted by the fact that the second Request for Comment is seeking input into whether the Commission should decouple the theft guidelines from the fraud guidelines. Having merged the two tables as recently as November 2001, the only reason that the Commission could be considering decoupling of the tables at this time is the concern that the fraud table is becoming inappropriately draconian for "mere" property crimes. In fact, the merging of the tables made sense in November 2001 as the loss factors supporting the sentencing for a property crime should not be affected by whether the loss resulted from fraud or from theft. Thus, the mere fact that the Commission is concerned that it may need to separate the Guidelines should be instructive as whether there is any basis for amending the table for fraud at this time.

The loss tables represent the central element in the guidelines for the sentencing of financial crimes. The legitimacy of the guidelines depends in no small degree on a belief among the participants in the system, including the judges, that the gradations in the loss table are based on empirical evidence and have resulted from a deliberative process in which all of the participants in the system have had ample input into the proposed changes. As there is no evidence to support any change to the loss table at this time, and since there has not been time for the sort of input from the public that such changes should warrant, any new change in the loss tables would substantially undermine the legitimacy of the process. Thus, we strongly urge the Commission to limit

its amendment to the loss table to the addition of two additional levels for losses in excess of \$100,000,000.

For the same reason, the NYCDL opposes any change in the base offense level for fraud offenses. To the extent that Congress increases the statutory maximum for certain fraud offenses, the Commission is proposing other enhancements that will insure that defendants convicted under these statutes will receive greater sentences than are now being imposed. To also increase the base offense level at the same time is to impose an improper form of double counting. The base offense level of six (6) for all financial crimes has been in effect for many years and there is no evidence that it is not an appropriate starting point for the sentencing of economic crimes.

1. (B) Proposed Amendment to Guideline § 2B1.1(b)(13)

The NYCDL strongly urges the Commission not to make permanent the four-level enhancement for defendants who are officers or directors of publicly traded companies and also urges the Commission not to extend this enhancement to other individuals with a fiduciary or statutory duty of trust to investors. The guidelines have always included a two (2) point enhancement for abuse of positions of trust under § 3B1.3 which has regularly been applied to persons such as investment advisors and registered representatives. To the extent that the Commission feels that the guidelines are unclear as to whether such persons in the securities or investment business are covered, an amendment to the Application Notes would clarify the applicability of this section.

As to officers and directors of public companies, the Commission made the judgment in the initial proposed emergency amendments to add a two-point enhancement for such persons. The NYCDL recognizes that Sarbanes-Oxley specifically instructed the Commission to consider such an enhancement for officers and directors of public companies and perceived the proposed two-level enhancement as essentially a clarification that these classes of person are subject to the Abuse of Position of Trust enhancement.

However, the four-level enhancement for any officer or director of public company which was included in the emergency amendment as enacted is unnecessarily harsh. First, by failing to distinguish between the size of the company or the size of the fraud, the four-level enhancement can result in a doubling of the sentence for a participant in a \$120,000 fraud while this enhancement will result in a much smaller proportionate increase in the sentence for a participant in a fraud on the scale of

Enron/Worldcom. Such a disparity is inconsistent with the goals of Sarbanes-Oxley to punish the perpetrators of the massive frauds that undermine the public's confidence in this economic system.

Second, as the Commission implicitly recognized by seeking comment on whether to expand the reach of the four-level enhancement to all fiduciaries in the investment community, a sentencing distinction between officers and directors of public companies and these other fiduciaries is difficult to justify. Just as the stockbroker participant in a \$100,000 fraud warrants a certain enhancement for the loss and a two point enhancement for abuse of the position of trust, so the officer of a small public company whose misconduct results in a \$100,000 loss should be subject to the same fraudulent enhancement.

Finally, although Sarbanes-Oxley was enacted in response to concerns about financial misconduct at publicly traded companies, the Sentencing Commission is charged with devising a sentencing system that minimizes disparity and creates parity within classes of defendants. Thus, in considering an enhancement based on the equivalent of an abuse of a position of trust, the Commission should create an enhancement that treats officers or directors who abuse their positions similarly to other fiduciaries such as attorneys or trustees who have abused their positions of trust. Given that the Commission has not developed evidence suggesting that the two-level enhancement at § 3B1.3 is inadequate for these people, the new enhancement for officers and directors should only be a two-level enhancement.

1. (B) Proposed Amendments to Guideline §2B1.1(b)(12)

The NYCDL generally opposes the amendments to Guideline § 2B1.1(b)(12), which, among other things, add 4 levels to the offense score for frauds that endanger the solvency or “financial security” (whatever this means) of (1) publicly traded companies or companies that have 1000 or more employees or (2) 100 or more victims. Additionally, such offenses are subject to a minimum offense level of 24, which level corresponds to imprisonment terms of 51 to 63 months. Prior to these amendments, only offenses that affected “financial institutions” qualified for such enhanced penalties under § 2B1.1 (or formerly, § 2F1.1). Now, offenses involving all publicly traded companies and large employers will be punished more harshly than offenses against other entities.

Although the application notes contain some helpful commentary regarding the amendments, they make no effort to mitigate the double-counting involved when the enhancements are applied to offense levels that have already been inflated by other emergency amendments that address the same harms. Moreover, they cover many more companies than the large publicly traded companies whose loose accounting and other problems prompted the emergency amendments in the first instance.

The amendments are not entirely objectionable. For instance, Application Note 10 (E) has been eliminated. This Note stated that the enhancement for “substantially jeopardizing the safety and soundness of a financial institution” should be applied whenever the institution was placed in “substantial jeopardy” of becoming insolvent (Note 10 (A)), or reducing benefits to pensioners or insureds (10 (B)), or being unable to refund deposits and the like (10 (C)), or merging with another institution because of asset depletion (10 (D)). Now the actual evils described in Notes 10 (A)

through 10 (D) must have occurred in order for the enhancements to apply. For example, actual insolvency (Note 10 (A)) rather than “substantial jeopardy” of insolvency (formerly permitted under Note 10 (E)) must be established. This change should reduce litigation over the meaning and application of the vague standard of “substantial jeopardy” and promote more accurate fact-finding. As such, it is one helpful feature of the amendments.

Unfortunately, this commendable change is overshadowed by several negative and possibly unintended consequences of the amendments. First, the enhancements and minimum offense levels (and consequent punishment) apply to far too many potential defendants. They apply to fraudulent conduct at *any* publicly traded company – whether the subject security is liquid or illiquid; whether it trades on a major exchange or only on the so-called “bulletin board” or “pink sheets.” To be sure, frauds involving marginal or thinly-traded companies must be (and are) punished. The NYCDL, however, reminds the Commission that these are not the frauds that compelled the emergency amendments.

On a second and related note, these amendments lack any type of asset test or similar proxy for their application to publicly traded companies. (Notably, companies that are not publicly traded must have 1000 or more employees for the amendments to apply. Employment at these levels would be a reasonable proxy for a certain level of assets or revenue). Among the factors that now weigh in favor of enhanced punishment is whether the organization suffered a “substantial reduction in the value of its assets” or whether it “substantially reduced” its workforce. (See new Application Notes 10 (B) (ii) (I) and (IV)). Publicly traded companies can be quite small. The NYCDL does not

believe that an offense that contributed to layoffs at a small publicly traded company warrants the punishment called for by the emergency amendments. These amendments, if made permanent, should require threshold levels of employment and/or assets for the enhanced penalties.

The NYCDL objects to the factors listed in the application notes to support an enhancement for endangering the solvency and financial security of a public company or organization of over 1000 employees on other grounds as well. It is fundamentally sound to hold a defendant accountable for factors over which he has control. The imposition of enhancements for factors just as likely due to the current economic climate than due to the defendant's actions runs contrary to current case law where losses resulting from acts over which the defendant had no control are routinely excluded. See e.g., United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) ("The reason for the distinction is no doubt to prevent the sentencing hearing from turning into a tort or contract suit."); United States v. Barker, 89 F.3d 851; 1996 WL 294141, at *2 (10th Cir.) (Mem.) ("This policy prevents a sentencing proceeding from becoming a tort or contract action, and promotes uniformity in sentencing."); United States v. Dadonna, 34 F.3d 163, 170-72 (3d Cir. 1994); United States v. Izydore, 167 F.3d 213, 223 (5th Cir. 1999).

The NYCDL is also concerned that the amendments do not take into account the possibility that there may be "double-counting" when a victim of an offense involving multiple victims under 2B1.1(b)(2) counts as an employee for the purposes of determining whether a company that had more than 1000 employees was "substantially endangered." The same person should not count as a victim for the purposes of 2B1.1(b)(2) and employee for the purposes of 2B1.1(b)(12).

Finally, the amendments also provide for enhanced punishment when an offense “substantially endangered the *solvency* or *financial security* of 100 or more victims.” (emphasis supplied). Once again, we have a potential double-counting issue when some of these victims are also victims for the purposes of 2B1.1(b)(2) – or even triple-counting if these are employees for the purposes of 2B1.1(b)(12). More significantly, the Application Notes contain absolutely no guidance on the meaning of this language. The definition of “solvency” might not engender major debate, but the same cannot be said about “financial security.” Is the test objective or subjective? Does it apply only when a victim’s standard of living has been reduced to subsistence levels or whenever it has changed dramatically? Does the forced sale of one out of two (or more) vacation homes evidence a loss of financial security? Additionally, do dependents of victims also count as victims for the purposes of this provision? Unless the Commission can provide guidance on these fundamental issues, the NYCDL believes this provision should be stricken as confusing and redundant when viewed in light of other amendments, and thus unnecessary to achieve the ends of the emergency amendments.

Amendments to Application Notes in the Commentary to § 2B1.1

The U.S.S.G. Commission proposes to amend the Application Notes in the Commentary to Section 2B1.1 to permit courts to estimate loss by reference to “the reduction that resulted from the offense in the value of equity securities or other corporate assets.” We believe that this method of valuation, particularly as it applies to equity securities, is neither workable nor appropriate.

First, an enormous number of factors effect the market valuation of a publicly-traded company. Without even attempting to offer an exhaustive list, we note that market value is often effected by general economic cycles, volatility in particular market sectors (e.g., semiconductor stocks are generally more volatile than consumer staple stocks), and the financial health and/or consolidation of peers, suppliers and customers. In addition, news unrelated to a specific company, like a threat of war or changes in interest rates, can have significant impact on its share price. Any effort to pin loss valuations on such a complex, multi-faceted analysis will require significant research, expert testimony, and complicated and lengthy sentencing hearings. Given this complexity, it seems likely that a vigorous defense will often demonstrate that the court lacks reliable proof linking a drop in market value to a specific criminal act. Not all defendants, of course, will be able to afford to mount such an effective defense at sentencing, which raises the prospect that defendants will receive vastly disproportionate sentences based on the economic status of the defendant.

Second, even if it were feasible to efficiently and reliably link criminal conduct with stock value, this analysis will often offer an inappropriate measure of “loss.” This is particularly true with the accounting disclosure cases which have

triggered this proposed amendment. In those cases, the share price of a company's stock falls to, and often past, its true value when the accounting irregularities are eventually revealed to the public. Many shareholders will not suffer any real loss, however, having purchased shares before the value of the company was inflated. It would clearly work an injustice to any defendant whose term of incarceration is pegged to a drop in equity value where the actual investor did not realize a true loss.

This proposed amendment should not be adopted.

Fraud Related Contempt

With respect to the Commission's Request for Comment concerning the guideline treatment of fraud related contempt, the NYCDL urges the Commission to resist the Department of Justice request to amend this guideline so that all "fraud contempt" violations are governed by the fraud guidelines instead of the obstruction guidelines. We believe that such an amendment would in effect punish a defendant for committing a crime, to wit, fraud, without the government having to prove its case beyond a "reasonable doubt" and would grossly distort the sentencing process so that a criminal contempt of a court order arising out of a civil fraud action would be sentenced more harshly than a criminal contempt arising out of a civil action unrelated to fraud.

While conceding that courts normally and appropriately sentence defendants convicted of fraud-related contempts using fraud guideline, the government's submission nevertheless suggests that the application notes to the Contempt Guideline, § 2J1.1, should state clearly that the guideline for fraud and deceit applies to fraud-related contempts. Presently, the guideline for contempt directs courts to rely on § 2X5.1, which provides that where no express guideline exists for a particular offense, courts should use the most analogous offense guideline. The direction in § 2X5.1 is clear and it is also clear, as the government concedes, that most courts apply the most analogous guideline offense to fraud-related contempts: the fraud guideline. The government's reliance on only one obviously exceptional case (United States v. Kenneth Sterling, No. 0:99 Cr 06105-001 (S.D. Fla. Nov. 5, 1999) to demonstrate the need for change, moreover, fails to show that there is a widespread problem in the application of § 2J1.1 to the application

notes for fraud-related contempts. In fact, the government concedes that most courts apply the fraud offense guideline.

The government's proposed change contravenes the spirit of the Contempt Application Notes, which seek to provide courts flexibility in determining the appropriate offense guideline for contempts given the nature of that offense. The government has failed to make the case that the Sentencing Commission should limit the discretion it provided courts when it crafted § 2J1.1 and drafted the application notes. If the government is concerned about those rare instances where courts do not prudently exercise the discretion the Sentencing Commission provided for contempts, the government's remedy is to appeal those sentences.

The government argues that confusion exists over whether the enhancement set forth in § 2B1.1(b)(7) applies if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines, such as a violation of a condition of release (§ 2J1.7) or a violation of probation (§ 4A1.1). The government, however, cites only two cases in support of its view that courts are confused over when to apply the enhancement in § 2B1.1(b)(7). It is worth noting that one of the cases on which the government relies, United States v. Lonny Remmers, No. CR-98-4-LHM (C.D. Cal., Nov. 23, 1998) was decided nearly five years ago. Thus, whatever confusion may exist over the application of the enhancement is obviously limited to a handful of cases, at best.

We believe that § 2B1.1(b)(7) is clear that where a fraud offense is related to the violation of a prior judicial order, a two-point enhancement is warranted. Otherwise, a violation of a court order arising from a civil fraud claim should be punished

in a similar manner to violations of other court orders. In those rare instances where courts fail to appreciate the clear language of the guideline and its commentary, the government's remedy is to appeal the sentence.

Amendment to § 2J1.2, Obstruction of Justice

Following its emergency amendment of § 2J1.2, Obstruction of Justice, on January 25, 2003, the U.S. Sentencing Guidelines Commission invited public comment on the two primary changes instituted: (1) an increase in the offense base level from a 12 to a 14; and (2) an additional two point adjustment to be applied “if the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation.” *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Notwithstanding Congress’ recent mandate for increased maximum penalties for defendants guilty of destroying or altering documents material to an on-going investigation (from ten to twenty years),² the combined effect of these guideline changes is both unnecessary and unwise.

Prior to the emergency amendment, the Sentencing Guidelines already provide the Courts ample resources to sentence defendants guilty of destroying or altering probative material or documents. Starting with U.S.S.G. § 2J1.2’s existing base level of 12, the guideline already provided a three-level enhancement for any “substantial interference with the administration of justice.” U.S.S.G. § 2J1.2(b)(2). Courts may apply this upward adjustment if the defendant’s conduct resulted in (a) “a premature or improper termination of a felony investigation”; (b) “an indictment, verdict or any judicial determination based upon perjury, false testimony, or other false evidence”; or

² *Cf.* 18 U.S.C. §1519 and 18 U.S.C. §1503.

(c) “the unnecessary expenditure of substantial governmental or court resources.” *Id.* at Application Note 1. In order to base this enhancement on an unnecessary expenditure of resources (U.S.S.G. § 2J1.2(b)(2), the government must merely “(1) identify a particular expenditure of governmental resources (time or money); (2) which but for the defendant’s conduct would not have been expended; and (3) was ‘substantial’ in amount, as that adjective is used in common parlance.” *United States v. Weissman*, 22 F. Supp. 2d 187, 196 (S.D.N.Y. 1998) (applying the collective holdings of various Circuit Court decisions, including the First, Second, Seventh and Tenth Courts of Appeal).

The emergency amendment added a two-level enhancement if (a) the defendant destroyed, altered or fabricated a substantial number of documents; (b) the defendant selected any “essential or especially probative” record to destroy or alter; or (c) the defendant’s obstruction was extensive in scope or planning. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Thus, the proposed amendment, if made permanent, would appear to subject a defendant to a potential five-level enhancement under subsections (b)(2) and (b)(3). In our view, the conduct set forth in proposed subsection (b)(3) is already taken into account by the “substantial interference” enhancement already set forth in subsection (b)(2). Adding the (b)(2) enhancement to the (b)(3) enhancement, therefore, would constitute impermissible double-counting.

We also believe subsection (b)(3)(B) of the emergency amendment should be removed entirely from the Obstruction Guideline. *See* § 2J1.2, Application Note 1; §3B1.1, Application Note 3; *Weissman*, 22 F. Supp. at 194-195. Its text, based on a defendant’s “selection of any *essential or especially probative* record...to destroy or alter,” introduces an unacceptable level of subjectivity and doubt into the sentencing

process without any guidance from the Sentencing Commission's Application Notes. Moreover, the conduct described would seem to be already covered as an "attempt" under the current Sentencing Guidelines. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3)(B).

It is respectfully suggested that the Sentencing Commission (i) return the base level of § 2J1.2 to "12" in line with similar offenses (i.e., perjury); (ii) remove subsection (b)(3)(B) entirely; and (iii) make emergency amendment subsections (b)(3)(A) and (C) additional means by which a Court may impose a three-level enhancement under § 2J1.2(b)(2). *See* Appendix A. These changes achieve several important goals. They recognize and fairly reflect Congress' will to strongly deter and punish criminal defendants guilty of "substantial" or "extensive" document destruction or alteration as in the Enron/Anderson prosecutions. Two of the three suggested courses of conduct that most troubled Congress, i.e., the destruction and alteration of a substantial number of documents relevant to a criminal investigation and an extensively planned and executed obstruction of justice, would now specifically be appropriate candidates for three-level enhancements. By moving them into subsection (b)(2), the Sentencing Commission provides additional clarity and definition to these specific acts and avoids a potential double counting issue. Finally, by removing emergency amendment (b)(3)(B) from consideration, the Sentencing Commission spares the government, the defense bar and the Courts the inevitable problems of dealing with unduly subjective and undefined language already covered as an attempt by the Sentencing Guidelines.

APPENDIX A

§ 2J1.2. Obstruction of Justice

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(2) If the offense (A) resulted in substantial interference with the administration of justice; (B) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; or (C) was otherwise extensive in scope, planning, or preparation, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to § 3D1.2(c) (Groups of Closely Related Counts).

4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).

5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence. The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401); January 25, 2003 (see Appendix C, amendment 647).

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To: "pubaffairs@ussc.gov" <pubaffairs@ussc.gov>, "pdesio@ussc.gov" <pdesio@ussc.gov>
Date: Tue, Mar 18, 2003 9:37 AM
Subject: Comment on proposed amendments to sentencing guidelines

<<Sentencing Commission Guidelines Comment.doc>>

We are sending you the comments of the Division of Enforcement of the Commodity Futures Trading Commission on the proposed amendments to the sentencing guidelines. We will also fax a copy. Thank you for your consideration.

Daniel Nathan
Chief, Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission

(202) 418-5314



Division of
Enforcement

U.S. COMMODITY FUTURES TRADING COMMISSION

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March 18, 2003

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-9002

The Division of Enforcement ("Division") of the Commodity Futures Trading Commission ("CFTC") appreciates the opportunity to comment on the proposal to repromulgate the temporary, emergency amendment implementing the Sarbanes-Oxley Act, Pub. L. 107-204 ("Sarbanes-Oxley"), as a permanent, non-emergency amendment to the sentencing guidelines. The Division also welcomes the chance to assist the Sentencing Commission by setting forth the CFTC's role in implementing, administering and enforcing the Commodity Exchange Act ("CEA"), 7 U.S.C. §1 *et seq.*

As the agency that enforces violations of the commodity laws and refers such violations to the Department of Justice for criminal prosecution, the Division is qualified to comment upon the appropriate sentencing levels for convictions based upon violations committed in the commodities arena. The Division is submitting this letter to recommend that fraudulent conduct committed in the commodity futures and options industry be treated comparably to similar types of securities and corporate fraud that are explicitly treated in Sarbanes-Oxley and under the guidelines.

The Division strongly supports the Sentencing Commission's proposed amendments that apply across the board to all forms of corporate and financial misconduct because, on their face, they provide for increased sentences against violators in the futures and options industry as well as against other perpetrators of white collar fraud. These amendments affect the sentences for, among other things: fraud offenses involving significantly greater than 50 victims; fraud offenses that endanger the solvency or financial security of a substantial number of victims; obstruction of justice offenses; and fraud offenses committed by officers and directors of publicly traded corporations.¹

¹ For example, the Division has extensively investigated violations of the CEA committed by public companies involved in producing and trading energy products, including crude oil and electricity. In addition to alleged market manipulation, the conduct under investigation includes potentially fraudulent conduct such as uncompetitive or "wash" trading, and false reporting of trading volume. Some of these acts have been the subject of criminal prosecutions. If it is proven that criminal liability for fraud runs to the officers and directors of these public

Honorable Diana E. Murphy
March 18, 2003
Page 2

In part I.(B) of the Notice's "Issues for Comment: Corporate Fraud," the Sentencing Commission raises two related questions relevant to Sarbanes-Oxley's request that the Sentencing Commission consider providing "an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses," Sarbanes-Oxley §1104: (1) whether the scope of the sentencing enhancement in §2B1.1(b)(13)² for violations of securities law should be expanded to include other individuals or entities besides officers and directors of public companies who also may have a fiduciary or similar statutory duty of trust and confidence to the investor; and (2) whether the enhancement should apply to entities or individuals that offer and manage securities or commodities futures or options but who are not regulated under securities law. The Division responds in the affirmative to both questions: the Sentencing Commission should extend the enhancements to bring these futures industry participant and futures-related acts within the guidelines, because the CFTC's regulatory scheme parallels the securities laws, and criminal prosecutions with respect to the futures and options industry often address the same types of fraud and abuse as those brought with respect to the securities industry.

I. The Enforcement Mission of the CFTC

The CFTC regulates the commodity futures and options markets. Its mission is to protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity futures and options and to foster open, competitive, and financially sound commodity futures and options markets. In pursuit of that mission, the Division investigates and prosecutes alleged violations of the CEA and CFTC regulations.

The importance of the integrity of the futures and options markets to the United States economy is reflected by the CFTC's membership in the President's Working Group on Financial Markets and participation in the President's Corporate Fraud Task Force and the Enron Task Force, among other initiatives. Fraudulent investment schemes committed in the futures and options markets can have a devastating impact on the savings of individual ("retail") investors, and violations of the anti-manipulation provisions of the CEA can adversely affect broad sectors of the economy. Willful violations of the CEA are felonies under §9 of the Act. 7 U.S.C. §13.

Fraudulent conduct is contrary to one of the CEA's core regulatory protections. See, e.g., In re Nikkah, [2000-2001 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,129 at 49,892 (CFTC May 12, 2000)(civil monetary penalty imposed where respondent fraudulently allocated trades). The fraudulent conduct pursued by the Division and by criminal authorities encompasses a broad range of practices and sectors of the industry regulated by the CFTC. Certain prevalent

companies, then the enhancements could affect the sentences for these people as a result of their violation of the commodity laws.

² Section 2B1.1(b)(13) provides for a sentencing enhancement "if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company"

Honorable Diana E. Murphy
March 18, 2003
Page 3

fraudulent practices, that might merit sentencing enhancements in criminal prosecutions, are described below.³

Sales solicitation fraud: The Division regularly investigates fraud committed by intermediaries in the futures and options industry (such as introducing brokers, commodity trading advisors and commodity pool operators) in soliciting, selling, and providing advisory services concerning, commodity futures and options. Enforcement actions have alleged that introducing brokers, commodity trading advisors and commodity pool operators have lied to their customers (who often are individuals of modest means) about the profitability and risk of transactions in futures and options, about the intermediaries' track records and expertise, and about the nature of the transactions. Related criminal actions have charged that such fraudulent misrepresentations also constitute wire fraud, mail fraud and commodities fraud. In addition, the CFTC and the courts have found that a broker breaches a fiduciary duty to a customer by trading ahead of a customer's order.

The "Issue for Comment" inquires whether the Sentencing Commission should include in §2B1.1(b)(13) a registered broker or dealer, an investment adviser, or persons associated with either of those. Any affirmative response to that question with respect to participants in the securities industry should equally apply to registered intermediaries in the futures and options industry. These individuals and entities perform functions similar to those performed by brokers, dealers and investment advisers; some or all of them make sales solicitations, handle customer orders, provide trading advice, accept customer funds, and report to customers the status of their investments. As with securities brokers, dealers and investment advisers, they owe a duty of trust and confidence to their customers.

Commodity pool fraud: A commodity pool operator is a business similar to an investment trust or syndicate that raises funds for the purpose of trading commodity futures or options. Commodity pool operators have a fiduciary obligation to investors in the pools and are obligated to comply with statutes and regulations designed to ensure the safety and soundness of funds placed in the pools. The Division has civilly prosecuted commodity pool operators for running commodity pools as Ponzi schemes, in which much of the money raised from retail investors is misappropriated by the promoters of the scheme, and funds are used to pay purported profits to the earlier investors in order to create the appearance of profitability. The Department of Justice has brought related criminal actions alleging violations of the general fraud statutes as well as, in some cases, commodities fraud, against such pool operators.

Fraud involving sales of off-exchange instruments: The CFTC investigates, prosecutes and makes criminal referrals based upon fraudulent solicitations and sales of foreign currency (also known as "forex") and precious metals futures and options that are not traded on designated exchanges. While these investments might masquerade as "physical" or

³ The CFTC's enforcement complaints from the past several years are available on the CFTC website at www.cftc.gov. The website also includes several CFTC Consumer Advisories alerting the public to warning signs of possible fraudulent commodity activity and offering precautions that individuals should take before committing funds, www.cftc.gov/cftc/cftccustomer.htm.

Honorable Diana E. Murphy

March 18, 2003

Page 4

"spot" commodities, they often are futures or options as a legal matter, and thus are covered by

the CEA. The CFTC's actions prosecuting such fraud, and related criminal actions, often charge the promoters of these frauds with misappropriation as well as false and misleading representations.

II. Enhancements should apply to individuals and entities in the commodity futures and options industry

The Division recommends that the guidelines extend any enhancements for violations that involve breaches of a fiduciary or other statutory duty of trust and confidence to encompass violations by individuals and entities in the commodity industry that have similar duties. As demonstrated above, many of the acts of misconduct by individuals and entities regulated under the securities laws have their parallel in acts of misconduct by individuals and entities in the futures industry. As in the securities industry, futures and options professionals abuse their duties of trust and confidence to their customers through misrepresentation and misappropriation, among other things. The degree of criminal sentence should not vary depending on the particular investments that were the subject of the fraud, when the customers were similarly situated and the abuse involved similar duties and similar breaches of these duties. Indeed, many financial professionals stand with one foot in each of the securities industry and the futures and options industry under a system of dual regulation. It would be an odd result if a dual registrant's acts of defrauding a customer with respect to securities and futures transactions subjected the registrant to different sentences depending upon the financial instrument involved in the fraud.

For the same reasons, the scope of any enhancement should apply to entities and individuals that offer and manage commodity futures and options and are not regulated under the securities laws, but rather under the CEA. Significant to this conclusion is the provision in the "Application Notes" to §2B1.1(b)(13) which provides that "A conviction under a securities law is not required in order for subsection (b) to apply;" that is, even if the individual is convicted under a general fraud statute, if the defendant's conduct violated a securities law, it is appropriate for a sentencing enhancement. The fact that many futures and options violations also are prosecuted under general fraud statutes should warrant equivalent application of an enhancement when a criminal violation of the CEA is committed (but not necessarily charged), given the similar purposes and applications of the two statutory regimes.

Thank you for the opportunity to comment on the proposed amendments. Please call me at (202) 418-5314 if you have any questions about these comments.

Yours truly,

Daniel A. Nathan
Chief
Office of Cooperative Enforcement

Honorable Diana E. Murphy
March 18, 2003
Page 5



March 12, 2003

US Sentencing Commission
C/O Office of Public Affairs
Suite 2-500 South Lobby
One Columbus Circle, NE
Washington, DC 20002
Attn: Michael Courlander

Dear Mr. Courlander:

LRN, The Legal Knowledge Company, is pleased to have the opportunity to respond to the U.S. Sentencing Commission's January 17, 2003 request for public comment. LRN commends the Commission for addressing the important issues raised in the proposed amendments to the sentencing guidelines, particularly given the short time-frame in which the Commission was required to act.

As a leading provider of Web-based legal, ethics, and compliance training, LRN has worked with many of the largest companies in the world to develop effective systems for communicating the organization's values and standards, as well as their compliance training. In addition, LRN's network of over 1,000 legal experts research legal and compliance issues across a broad range of topics for the law departments of many of these same companies. Based on LRN's experience and research, we provide the following comments with regard to Issue 1 of the Commission's Issues for Comment for consideration.

Issue 1(A): Corporate Fraud—The Loss Tables

As part of the emergency amendment, the Commission expanded the loss table in

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§2B1.1(b)(1), providing for two additional levels to the table: and increase of 28 levels for offenses in which the loss exceeded \$200,000,000 and an increase of 30 levels for offenses in which the loss exceeded \$400,000,000. The Commission asks whether, when it repromulgates the emergency amendment as a permanent amendment, the loss table should be modified more extensively to provide increased levels for offenses involving lower loss amounts and provides three alternatives for public comment. Additionally, the Commission requests comment regarding whether it should amend §2B1.1(a) to provide an alternative base offense level, either in conjunction with, or in lieu of, an amendment to the loss table, that would apply based on the statutory maximum term of imprisonment applicable to the offense of conviction—for example, five, ten, fifteen, or twenty years.

LRN believes that modifying the lower loss amounts in the loss table will likely have little or no impact in addressing the conduct that was the focus of the Sarbanes-Oxley Act (the Act). The corporate scandals that largely led to the Act's creation involved substantial losses to investors and employees, and the 28- and 30-level increases the Commission has promulgated for those substantial losses address, for the most part, the intent of the Act. Indeed, it is likely that any fraud committed by an officer or director of a public company, once revealed, will result in substantial loss of shareholder value and the lower loss amounts in the loss table will be largely irrelevant.

For example, public disclosure of securities fraud at a publicly traded company often leads to a material decrease in the company's share price. And as the guidelines now contemplate such a reduction as a "loss" for purposes of the loss tables, it is highly likely that the loss will quickly exceed the \$1 million mark. Thus, a 10% drop in market value of a corporation with a \$1 billion market capitalization, will result in a loss of \$100 million. We therefore suggest that, if the Commission's purpose is to address the types of misconduct witnessed in the corporate scandals of 2002, the lower loss amounts are irrelevant. This is particularly true when the additional enhancements the Commission has promulgated for officers and directors of public companies who commit fraud offenses are applied.

However, the Commission's proposal to increase the base offense level in §2B1.1(a) from six to seven for offenses that the Congress deemed most egregious seems appropriate. We therefore suggest that §2B1.1(a) be amended to read as follows:

(a) Base Offense Level:

(1) 7, if the defendant was convicted of an offense referenced to this

guideline for which the maximum term of imprisonment prescribed by law is 20 years or more; or
 (2) 6, otherwise.

Again, our focus is on the intent of Congress in passing the Act. Our basis for the twenty-year maximum term provision is derived from what we perceive as Congress's intent to address the most egregious cases. For example, in the Act, Congress

- increased the maximum penalty for mail and wire fraud from five to twenty years,
- increased the criminal penalties for securities fraud from ten to twenty years,
- created new criminal laws for destroying documents or otherwise obstructing federal investigations with a maximum twenty years imprisonment
- created ten and, in the case of willful violations, twenty year prison terms for failure of corporate officers to certify financial reports
- created a ten-year maximum prison term for retaliating against a whistleblower, and
- created a new securities fraud statute with a twenty-five year maximum prison term.

The increase in the base offense level, coupled with the addition of the 28-and 30-level increases for very high losses, appears to satisfy Congress's intent that the sentencing guidelines adequately address those fraud offenses that are particularly extensive and serious. And it does so without a wholesale revision of the loss table, thereby avoiding a lengthy analysis of the appropriateness of the relatively incremental changes among the lower loss amounts.

Issue 1(B): Corporate Fraud—Enhancement at §2B1.1(b)(13)

As part of the emergency amendment, the Commission promulgated a new enhancement at §2B1.1(b)(13) that provides a four level enhancement if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission asks whether, when it repromulgates the emergency amendment as a permanent amendment, it should expand the scope of at §2B1.1(b)(13) to include other individuals or entities that may have a fiduciary or similar statutory duty of trust and confidence to the investor. Possible examples included brokers, dealers, and investment advisers, as well as their associated persons, and other market professionals who may not be a regulated entity under the securities laws.

We have found that the successful implementation of an effective system to communicate the organization's standards and procedures largely depends on the commitment to the program by senior management. Thus, the "tone at the top" set by the

most senior leaders of an organization plays a crucial role in how compliance and ethics are viewed by the rest of the organization. In this regard, and based on LRN's experience and research, we agree that a four-level enhancement for fraud offenses committed by officers and directors of publicly traded companies is appropriate.

However, before addressing the proposed expansion of the emergency amendment to other persons, LRN first suggests that the Commission clarify certain elements of the emergency amendment. As currently drafted, the subsection applies in the case of a defendant convicted under a general fraud statute if the defendant's conduct also "violated" a securities law. We assume that such a "violation" must be proved by a preponderance of the evidence by the prosecution at sentencing, but this is not clear. Moreover, many securities prosecutions are brought parallel to civil actions brought by the Securities and Exchange Commission. In fact, many such cases may be settled with the SEC without admitting or denying the allegations. But the SEC still often makes findings in such settlements. Such a finding by the SEC could be tantamount to the *de facto* establishment of a securities law violation, without any additional evidence being presented. LRN therefore suggests that the Commission provide guidance in the application notes as to its intent with regard to how a securities law "violation" is to be established.

In addition, by including all "violations" of the securities laws, the amendment could have the effect of criminalizing conduct that would otherwise purely be a technical violation. For example, under §13 of the Securities Exchange Act of 1934, a company must keep accurate books and records of its financial transactions. The SEC may bring an action against individuals--typically an administrative proceeding--seeking an order that they cease and desist from "causing" the company to fail to keep accurate records. And while the materiality of a particular record is often examined by the SEC to determine whether to charge an individual or organization with a §13 violation, the statute does not require it. Thus, even a single inaccurate--and possibly immaterial--record caused to be created by an individual could lead to the enhanced sentence. Furthermore, under new disclosure and reporting requirements, a number of disclosures are required to be filed within short time periods. Even a one-day delay in making an appropriate filing--and thus a technical violation of the securities laws--could lead to the enhanced sentence. We do not believe this is the Commission's intent and we suggest the Commission provide further guidance as to its intent with regard to the application of this provision.

Furthermore, LRN notes that proposed expansion of the amendment to market professionals may have the unintended effect of bringing within it many persons who were not the focus of Congress when passing the Act. The expansion may thus have the effect of diluting the Act's emphasis on corporate governance. In passing the Act, Congress identified a particular problem--namely, that those at the very top of an organization set the tone for the entire organization. The potential for serious losses arising from the example they set is therefore much greater. These factors--the leadership role they play in the organization and the potential for great losses--caused Congress to

substantially increase regulations and sanctions to address these leadership shortcomings.

By expanding the amendment to others who are not officers or directors of their companies, that is, not the leasers of their organizations, the amendment casts a much wider net. For example, the amendment would likely cover a registered representative employed at a broker-dealer who churns a single customer's account. While the employee certainly deserves to be punished, is the application of the enhancement consistent with congressional intent? Furthermore, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) seems to already address just this scenario, causing a 2 level increase to the employee's sentence, without having to go through the exercise of establishing a securities law violation at sentencing. LRN therefore suggests that the Commission narrowly apply the amendment to those market professionals who, because of their positions of trust, have the potential to cause the greatest amount of harm. In that regard, perhaps the amendment is appropriate for the leadership of market participants, such as the officers and directors of a brokerage firm or other regulated entity (which may or may not be a publicly traded company) because their illegal conduct could cause great losses and even threaten the integrity of the capital markets. But for the low-level employees who happen to work for such an entity, LRN suggests the Commission utilize already existing sentencing guidelines, as their status in the marketplace and their duties vis-à-vis the investing public do not rise to the same level as the officer or director of a public company.

If this argument is rejected by the commission and it is the intent to extend the amendments to lower-level employees, LRN notes that certain professionals, such as investment advisers, have statutorily-defined fiduciary duties under specified circumstances, and clearly are closer to the status of an officer or director of a public company because of their similar position of trust and confidence. However, other market professionals do not have statutory fiduciary duties, but may, under certain circumstances, accept such a duty by offering certain products or services.

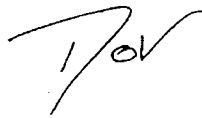
For example, case law suggests that no fiduciary duty arises between a securities broker and his customer simply by virtue of the broker-customer relationship. Of course, because of their position in the marketplace, market professionals are held to high standards of business conduct and fair dealing. To avoid confusion, we therefore suggest the Commission simply identify those market professionals to which the enhanced standard will apply, based on the Commission's policy determination that such professionals are similar enough to the public company officer or director, and then offer the courts guidance for determining which additional individuals, not otherwise identified in the amendment, may be covered by it. We also suggest that the Commission insert language into the guidelines explaining the intent for including these marketplace professionals and the types of duties or responsibilities the Commission expects would bring an individual into the provision as a "similar" person.

* * * *

LRN appreciates the opportunity to respond to the Commission's request for

public comment. We hope the Commission finds our response helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Dov", with a stylized flourish extending from the end.

Dov Seidman
Chairman and Chief Executive Officer

MERCATUS CENTER

GEORGE MASON UNIVERSITY

March 17, 2003

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Sentencing Guidelines for United States Courts

Dear Mr. Courlander:

Please find enclosed comments on the United States Sentencing Commission's Guidelines for United States Courts

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of regulations and their impact on society. As part of its mission, RSP produces careful and independent analyses of agency rulemaking proposals from the perspective of the public interest. The enclosed comments on the United States Sentencing Commission's Guidelines for United States Courts, do not represent the views of any particular affected party or special interest group, but are designed to evaluate the effect of the proposed guidelines on the public interest generally.

The Regulatory Studies Program appreciates the opportunity to comment. We hope that consideration of these comments will enhance the quality and development of regulations and policy regarding sentencing guidelines.

Wendy L. Gramm, Director
Regulatory Studies Program

Susan E. Dudley
Senior Research Fellow

MERCATUS CENTER

GEORGE MASON UNIVERSITY

REGULATORY STUDIES PROGRAM

Public Interest Comment on Sentencing Guidelines for United States Courts¹

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the United States Sentencing Commission's Guidelines for United States Courts does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Agency's proposed guidelines on overall consumer welfare.

I. Introduction

The Sarbanes-Oxley Act of 2002 contains directives to the United States Sentencing Commission regarding fraud and obstruction of justice offenses committed by corporate executives that endanger the financial condition of a firm and adversely affect a large number of individuals. The Act contained language expressing particular concern for especially large corporate frauds. To address this concern, the Commission has proposed an amended table relating the dollar size of a fraud to the offense level to be consulted in the sentencing guidelines.²

The proposed options for the amended loss table, unfortunately, are likely to do little to discourage relatively large frauds and might encourage larger frauds, on the margin. This comment illustrates this perverse effect of the proposal and suggests that the Commission consider developing a structure that takes these incentive effects into account.

¹ Prepared by Jonathan Klick, Ph.D., Dorothy Donnelley Moller Research Fellow, The Mercatus Center. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University.

² The sentencing guidelines contain baseline "offense levels" for different crime categories, as well as adjustments for various aggravating factors. Judges then use the adjusted offense level to consult the sentencing table which indicates appropriate sentencing ranges, in months, by offense level.

II. Statutory Basis for Regulation

The corporate fraud amendment to the sentencing guidelines implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the "Act"), Pub. L. 107-204. The directives pertain to fraud and obstruction of justice offenses and require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. Under emergency amendment authority, the Commission promulgated guideline amendments, effective January 25, 2003, to implement these directives. The current proposal is meant to provide a permanent amendment concerning these issues.

III. Declining Cost of Fraud

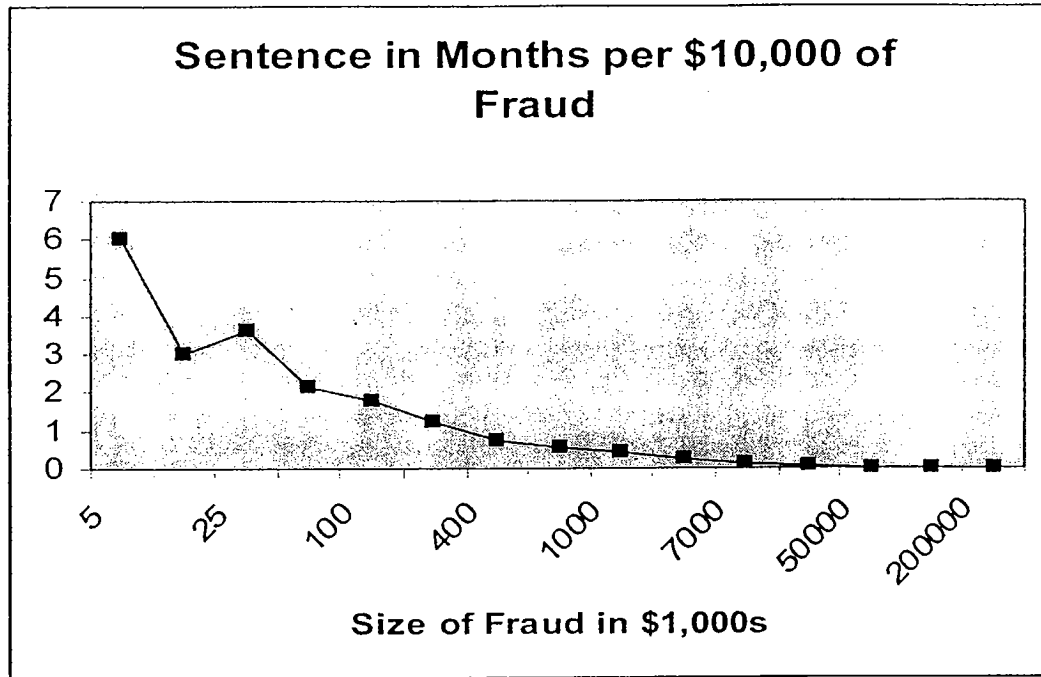
The Commission offers three options to amend the loss table in §2B1.1(b)(1), which provides guidance for determining the offense level to be used on the sentencing table in the case of a corporate fraud conviction. The options each offer varying degrees of gradation relating the dollar valuation of the loss resulting from the fraud to a corresponding offense level.

In its request for comments, the Commission notes that it added loss categories at \$200,000,000 and \$400,000,000 to address concerns articulated in the Sarbanes-Oxley Act of 2002 about "particularly extensive and serious fraud offenses." This implies that the Commission sees value in and, in fact, imputes a mandate to discourage larger frauds even more than relatively smaller frauds. While this certainly makes sense, none of the proposed alternative loss tables is likely to achieve this goal.

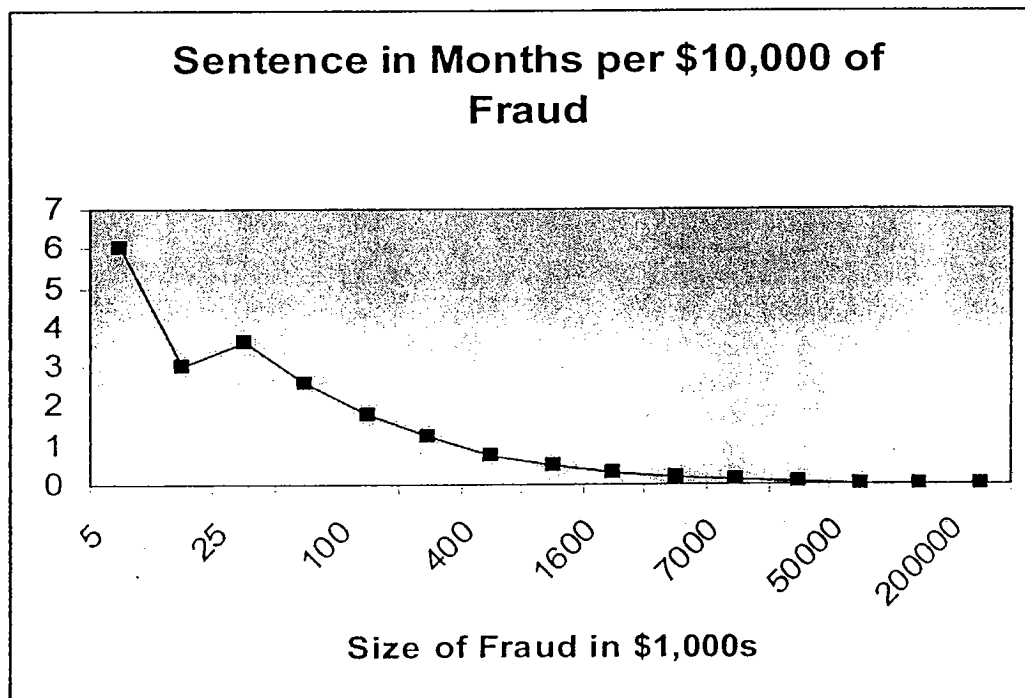
If the criminal sentences are to serve a deterrent value for corporate executives and there is a desire to deter especially egregious frauds at an even greater rate, one would expect that the incremental increase in the sentence increases as the size of the fraud grows. However, in the options offered by the Commission, we see the exact opposite. The average sentence per dollar of fraud loss is actually decreasing as the fraud grows. This is illustrated in the following graphs:³

³ The data in these graphs come from the sentencing guidelines and the proposed amendment. The y axis measures the sentence in months given by the guidelines (taking the midpoint of the suggested sentence and assuming 0 or 1 criminal history points) divided by the upper limit of the loss category given in the proposed tables. This figure is multiplied by 10,000 to scale the numbers. The x axis is the upper limit of the loss category in the proposed tables (in thousands of dollars).

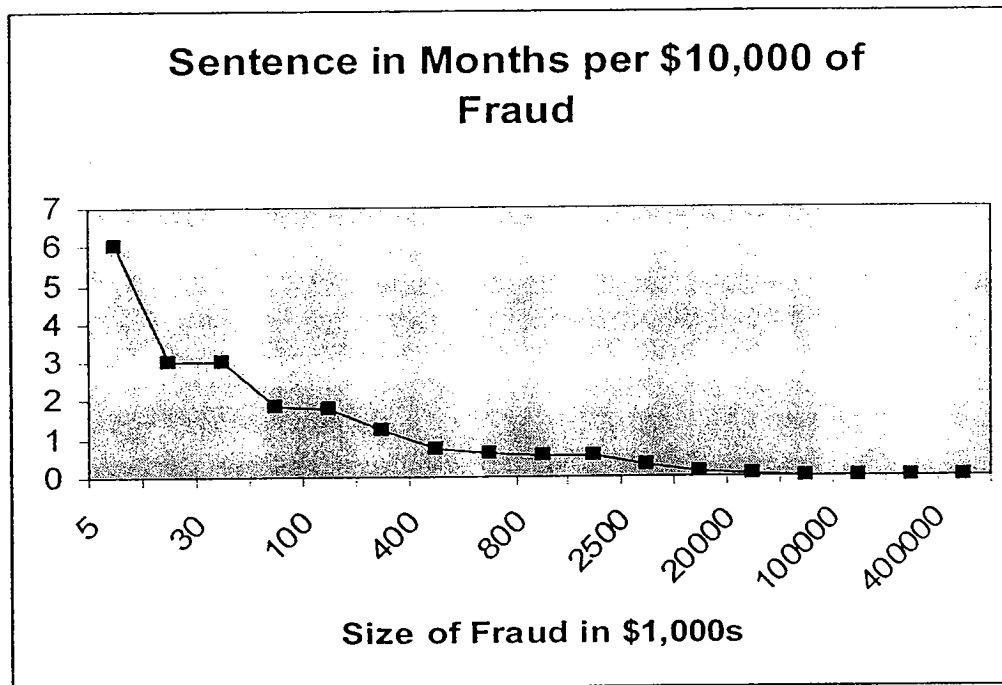
Option A



Option B



Option C



Assuming that the gain to corporate executives engaged in a fraud is proportional to the resulting loss from the fraud and that the probability of law enforcement officials detecting the fraud is constant, the proposed loss tables provide decreasing marginal deterrence. That is, once a fraud is committed, it is actually rational for the executives to engage in more fraud because the punishment effectively becomes cheaper on average as the fraud grows.

Perhaps the stated assumptions are unrealistic. Specifically, it might be the case that larger frauds are more likely to be detected. This would dampen or even reverse the declining average cost of fraud implied in the graphs above. This is an unanswered question. If the Commission holds the assumption that larger frauds are more likely to be detected, it should present some empirical evidence in its support. However, proving such a proposition would be difficult as the data are effectively censored. That is, we do not know the size of undetected frauds.

The foregoing analysis also implicitly assumes that the marginal cost of additional months on a sentence is linear to the executives. If, in fact, the marginal cost is increasing, then the declining average cost of fraud effect would again be dampened or reversed. However, if the marginal cost is decreasing, the effect is heightened. This too is an empirical question that is difficult to answer.

Noting those two caveats, it seems clear that none of the Commission's proposals does an adequate job of providing relatively high deterrence for "particularly serious or extensive fraud offenses."

IV. Conclusion and Recommendation

The Sentencing Commission attempted to answer congressional concerns regarding corporate frauds of an especially large magnitude. In its proposed changes to the loss table in §2B1.1(b)(1) the Commission sets up an incentive structure that achieves the exact opposite. The proposed sentencing structure actually induces a situation of declining marginal deterrence which has the potential to produce larger frauds on the margin.

A superior loss table would provide increasing marginal deterrence whereby the average cost imposed on the perpetrators of a fraud increases with the scale of the fraud. Such a system would go a long way to discouraging especially egregious offenses.



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March 17, 2003

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: Sarbanes-Oxley Act

Dear Chair Murphy and Commissioners:

I am writing to provide the following public comment on the Commission's proposed amendment to implement the Sarbanes-Oxley Act of 2002 ("the Act"). Numerous commentators have submitted comprehensive comments. I am writing to address a particular issue of substantial concern that is raised by one particular aspect of the Act.¹

Section 802 of the Act amended Chapter 73 of title 18, United States Code, by adding a new Section 1519, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Unlike other aspects of the Act, this amendment is not limited to corporate accounting misconduct and its effects on capital markets that served as the instigation for the Act. Instead, it creates a broad new law addressing Obstruction of Justice and does so in the broadest terms of any such statute to date.

As others have noted, Section 1519 makes clear that the government can now seek to prosecute an individual for document destruction prior to the existence of any official proceeding or investigation.² Specifically, Section 1519 provides:

¹ I am a partner in the law firm of Hunton & Williams, and I present these comments as an individual attorney. The views expressed herein are my own and should not be construed to represent those of my firm, or of our clients, or of the Commission's Practitioners' Advisory Group (PAG) of which I am a member. However, these comments have been briefly reviewed by Barry Boss, co-chair of the PAG who believes that the invited downward departure proposed in this letter should be given serious consideration by the Commission.

² See, e.g., *Life After Sarbanes-Oxley: New Criminal Penalties for Fraud and Obstruction Affect All Companies*, Hamel, Kelly, Dolan, Legal Times, October 7, 2002. Vol. XXV, No. 39

Honorable Diana E. Murphy, Chair

March 17, 2003

Page 2

Whoever knowingly alters, destroys . . . or makes a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . *or in relation to or contemplation of any such matter or case*, shall be . . . imprisoned not more than 20 years. (emphasis added).

Significantly for the purposes of these comments, Section 1519 makes it a crime to destroy documents "in relation to or contemplation of any such matter or case." This new language appears to expand the crime of obstruction to a new territory by creating potential criminal liability for the destruction of a document, even if done pursuant to an otherwise appropriate document retention policy and even if there was no federal proceeding or investigation under way at the time the document was destroyed.

Businesses routinely and legitimately destroy documents and other materials pursuant to document retention policies when such materials are no longer required to be maintained by law or business need. It would impose a totally unreasonable burden if huge numbers of such records were thought to be required to be retained, perhaps indefinitely, because some future reviewer may conclude that it was "contemplated" at the time of destruction that such records might be of some interest to a then non-existent future government inquiry.

Such concerns about the impacts of expanding document retention requirements are far from speculative. For example, the sheer impact of a vastly expanded record-keeping obligation has lead to reconsideration of the Environmental Protection Agency's (EPA) so-called CROMERRR rule, which was designed "primarily to ensure that . . . documents and records are preserved . . . so that they continue to provide strong evidence of what was intended by the individuals who created and/or signed and certified them."³ The EPA is reconsidering the rule in light of, among other things, estimates that the overall cost to the affected organizations of initially implementing the rule could be as high as \$68 billion dollars.⁴

³ 66 Fed. Reg. at 46164.

⁴ See, <http://www.epa.gov/website1/cromerrr/propose/index.html>, for the text of public comments filed with EPA regarding the proposed rule. Similarly, the Food and Drug Administration is considering curtailing enforcement of a rule regulating electronic filing of records and data by pharmaceutical manufacturers due to concerns about the costs involved in implementing and in the annual compliance with the rule; 21 CFR Part 11.

Honorable Diana E. Murphy, Chair
March 17, 2003
Page 3

The Commission is well aware that provisions such as Section 1519, and the direction provided to U.S. courts under the Guidelines, have a powerful effect on corporate management practices. Since the Commission issued the Organizational Guidelines in 1991, there have been massive increases in the development and implementation of internal programs to prevent, detect and report violations by organizations. Moreover, the structure of these compliance programs have unquestionably been shaped by the language of the Organizational Guidelines.

The Organizational Guidelines have also profoundly influenced bargaining between prosecutors and defendant corporations. They have become central to the resolution of the vast majority of investigations involving alleged corporate crime and play a central (if not widely recognized) role in the fact and charge bargains struck between prosecutors and defendants.

These impacts far outweigh the role of the Organizational Guidelines in setting criminal sentences,⁵ and that this broader role was in fact the Commission's goal. The Commission sought to use the Organizational Guidelines to enroll organizations in the effort to prevent crime, by rewarding such efforts with meaningful reductions in liability when violations occur despite good faith efforts to comply.

A similar effort by the Commission is warranted regarding the Guidelines implementation of Section 1519. Without further guidance from the Commission regarding the application of Section 1519 it will be extraordinarily difficult for companies to develop and implement appropriate document retention policies without fear that almost any failure to maintain a document could, in hindsight, be viewed as an act of obstruction. Moreover, without limiting language, Section 1519 may impose potentially impracticable if not impossible costs of keeping a seemingly limitless class of records for future review akin to those imposed by the EPA and FDA rules referenced above.

It is helpful, in this regard, to refer to the language found in the Senate Report on the Act⁶. Recognizing the broad reach of Section 1519, the Report notes:

⁵ As recognized by one close observer who noted that the Guidelines "biggest influence may be behind the scenes, in plea negotiations . . .", *Sentencing Reformers*, NYLJ, March 18, 2002, p.A15.

⁶ S. Rep. No. 107-146 (2002).

Honorable Diana E. Murphy, Chair
March 17, 2003
Page 4

In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the *specific intent* to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. *It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.*

S. Rep. 107-146, at 27. (emphasis added). Without similar clarification in the Guidelines the Act in its naked form could punish exactly the conduct described in the Senate Report as not intended to be covered by Section 1519 and would fail to provide consideration for good faith efforts to implement a proper document retention policy.

As it did in the Organizational Guidelines⁷, the Commission could directly address these concerns either in the form of Commentary or downward Adjustments to the Offense Level for violations of Section 1519. At the very least, the Committee should include an invited downward departure where the defendant has made efforts to implement a sound document retention policy. In considering whether to grant such a departure, the Commission should propose that a court consider the following non-exclusive factors as indicators of a sound document retention policy: providing a written document policy to employees involved in or responsible for records management activities; clear direction to employees who are uncertain as to what to do with a particular document or record to seek advice from the company's counsel; and, a policy that directs that time periods set for destruction of records do not apply when there is a clear direction that certain records or categories of records should be retained.

Moreover, courts should be encouraged to give recognition to the varying document retention policies that may be employed given the size of the organization involved; to the likelihood that a specific category of documents would be of interest; to the sensitivity of the document with respect to their impact on individual privacy concerns; and, to the prior history of the organization in consistently carrying out the requirements of its document policy as opposed to last-minute efforts aimed at destroying records. This general guidance would be consistent with the recognition in the context of the Organizational Guidelines by Chair Murphy, who noted that:

⁷ United States Sentencing Commission, Guidelines Manual § 8A1.2, Commentary, Application Note 3(k); §8C2.5 (f) (November 2002).

HUNTON & WILLIAMS

Honorable Diana E. Murphy, Chair
March 17, 2003
Page 5

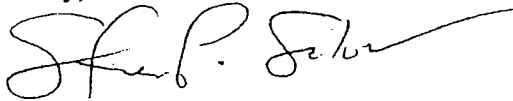
the guidelines must be general enough to be used by all types of organizations engaged in a wide variety of activities. The standards and procedures for effective compliance programs in one industry may not be the same in another.⁸

Such an invited downward departure for Section 1519 would accommodate concerns about destruction of inculpatory records while providing recognition and encouragement in the Guidelines for efforts to implement a sound document retention policy; meaning a policy that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing or detecting document destruction undertaken with the specific intent to obstruct justice.

In so doing, the Commission can provide guidance to those covered by Section 1519, and those given the discretion to use its seemingly overbroad language, so as to support the goals of the law while preventing abuse in the context of 20-20 hindsight that seeks to make otherwise innocent conduct appear criminal. Such liability without moderation could impose unreasonable expectations on efforts to manage the ever-expanding list of required record keeping covered by Section 1519.

I appreciate the opportunity to present these views on this important issue.

Sincerely,



Steven P. Solow

cc: Charles Tetzlaff, Esq.
Paula Desio, Esq.
Barry Boss, Esq.
Jim Felman, Esq.

⁸ Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 715-16 (2002).

6 March 2003

Lou Reedt, ScD
Acting Director, Office of Policy Analysis
United States Sentencing Commission
Thurgood Marshall Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Facsimile: 202.502.4699

Dear Dr. Reedt:

Thank you for the opportunity to express our opinion on the "Revised Proposed Amendment: Oxycodone" (hereafter, Proposal, Appendix I) to amend the United States Sentencing Guidelines (USSG) for crimes involving oxycodone. Purdue Pharma L.P., the distributor of OxyContin[®] (oxycodone hydrochloride controlled-release) Tablets, is very concerned that persons with legitimate medical need have access to OxyContin and other controlled opioids, when indicated, and that persons engaged in criminal activities involving OxyContin, or any other prescription medication, be punished in a manner that is equitable within the federal sentencing schema.

The Proposal would change the USSG that currently equate one gram of oxycodone to 500 grams of marijuana (Drug Equivalency Tables). Under the current USSG, "oxycodone" is construed to mean a mixture containing oxycodone and other ingredients. The Proposal would have sentences involving oxycodone formulations calculated on the basis of the nominal weight of the oxycodone salts, as opposed to the weight of the oxycodone mixture, similar to the manner of calculation under the existing USSG for phencyclidine, amphetamine and methamphetamine.

To achieve the stated Congressional goals of honesty, uniformity and proportionality in sentencing, we agree with the intent and rationale of the Proposal. Our rationale for this decision is explained in Appendix II.

We fully understand the utility of using nominal weights of oxycodone in licit pharmaceutical formulations, as opposed to the precise weight of the oxycodone itself, since a 10 MG OxyContin tablet contains slightly less than 10 MG of oxycodone and a 5 MG tablet of Percocet contains slightly less than 5 MG of oxycodone. Acceptance of this convention will save time for the courts and will not, if applied uniformly, create any disparity in sentencing.

We would, however, like to raise an issue for consideration by the Commission. The language in the Proposal does not consider any licit formulation of oxycodone other than tablets or capsules. Oxycodone is available as an oral solution in the US and is available in an injectable formulation in other countries. These, and other as yet unmarketed novel formulations, could conceivably be involved in sentencing decisions. Likewise, if a crime involved trafficking in or possession of powdered oxycodone salts, the language of the Proposal might be unclear. There also exists the possibility of illegal manufacture of oxycodone for trafficking, as has occurred with fentanyl. We would suggest, therefore, that the language in the Proposal might be unnecessarily limiting. Contemplating these issues, and borrowing language from 21CFR 1300.01(b)(5)(i), we propose you consider modifying the Proposal by replacing the paragraph that reads:

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill or capsule.

with:

The term "Oxycodone (actual)" refers to the total nominal weight of the controlled substance, its salts, esters, ethers, isomers and salts of isomers, esters and ethers contained in a licitly manufactured pharmaceutical formulation (including, but not limited to, solutions, tablets or capsules). In the case of oxycodone in any form that is not licitly manufactured for legitimate medical or scientific purposes, the term "Oxycodone (actual)" shall refer to the total actual weight of the oxycodone salts, esters, ethers, isomers and salts of isomers, esters, ethers contained in the mixture.

In reviewing the USSG, there are several other areas involving licitly manufactured opioids that also should be revised to adhere to the intent of Congress. If the Commission is to consider parity amendments for other forms of marketed opioids in the future, we would like to participate in those discussions.

I understand from our telephone call yesterday that there will be no opportunity for oral testimony on this issue at the hearings later this month. If testimony on these issues will occur at future hearings, I am willing to appear on behalf of Purdue.

Again, you have our thanks for being consulted on this important and timely issue.

Sincerely,



J. David Haddox, DDS, MD
Vice President, Health Policy

Appendix I

REVISED PROPOSED AMENDMENT: OXYCODONE

Synopsis of Proposed Amendment: This proposed amendment responds to proportionality issues in the sentencing of oxycodone trafficking. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and Oxycontin. This prescription drug is generally sold in pill form and the sentencing guidelines currently establish penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines and (2) because different amounts of oxycodone are found in pills of identical weight.

As an example of the first issue, the drug Percocet contains, in addition to the oxycodone, the non-prescription pain reliever acetaminophen. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. This is in contrast to Oxycontin in which the weight of the oxycodone accounts for a substantially greater proportion of the weight of the pill. For example, a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg (oxycodone accounting for 0.9 percent of the total weight of the pill) while the weight of an Oxycontin pill containing 10 mg of oxycodone is approximately 135 mg (oxycodone accounting for 7.4 percent of the total weight). Consequently at sentencing, the same five year sentence results from the trafficking of 364 Percocet pills or 1,481 Oxycontin pills. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.6 grams of actual oxycodone while the 1,481 Oxycontin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of Oxycontin. Three different amounts of oxycodone (10, 20, and 40 mg) are contained in pills of identical weight (135 mg). As a result, an individual trafficking in a particular number of Oxycontin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues it is proposed that sentences for oxycodone offenses be calculated using the weight of the actual oxycodone instead of the current mechanism of calculating the weight of the entire pill. Currently the Drug Equivalency Tables in '2D1.1 equates 1 gram of oxycodone ~~mixture~~ to 500 grams of marijuana. The proposal would equate 1 gram of **actual** oxycodone to 6,700 grams of marijuana. This equivalency would keep penalties for offenses involving 10 mg Oxycontin identical to current levels but would increase penalties for all other doses of Oxycontin. At the same time, penalties for Percocet would be substantially reduced.

Proposed Amendment:

' 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill or capsule.

* * *

Commentary

Application Notes:

* * *

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, ~~or~~ methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*

10.

* * *

DRUG EQUIVALENCY TABLES

* * *

Schedule I or II Opiates*

1 gm of Morphine =

500 gm of marihuana

~~1 gm of Oxycodone =~~ ~~500 gm of marihuana~~

1 gm of Oxycodone (actual) = 6700 gm of marihuana

Appendix II

Our reasoning for endorsing the "Revised Proposed Amendment: Oxycodone" to the USSG is as follows:

The USSG currently states that offenses involving at least 100 KG, but not more than 400 KG of marihuana, deserve a five-year sentence (sentencing level 26), assuming no other factors are in evidence to warrant adjusting the sentence. The amount of "oxycodone" (mixture) currently needed to equal 100 KG of marihuana is 200 G, so applying the factor of 200 to the "oxycodone" (mixture) equivalent yields 200 G, or 200,000 milligrams.) Thus, under current sentencing USSG, it requires only about 364 Percocet® tablets (containing nominally 5 MG of oxycodone and weighing 550 MG per tablet), but it takes 1481 OxyContin® (oxycodone hydrochloride controlled-release) Tablets 10 MG (weighing 135 MG per tablet) to yield 200,000 MG of total mixture weight, an amount that warrants a five-year sentence, without applying any adjustments.

This schema under-penalizes the illegal possession of oxycodone in the form of OxyContin and over-penalizes the illegal possession of oxycodone in the form of Percocet or similar formulations, since in the latter cases, a large part of the sentencing is due to the weight of non-opioid tablet constituents, the bulk of which is often acetaminophen, a medicine not controlled under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USC 801, et seq.).

The current scheme does not take into account the fact that tablets of OxyContin containing 10, 20 and 40 MG all weigh 135 MG, so sentencing under the current USSG would be equivalent for the same number of tablets, despite the potential of a four-fold difference in the amount of oxycodone illegally possessed.

To establish proportionality in sentencing, if one begins with the amount of OxyContin 10 MG tablets as a constant, that is, 1481 tablets ($1481 \times 135 \text{ MG per tablet} = 199,935 \text{ MG}$ or about 200 G), then the amount of "oxycodone (actual)", or oxycodone salt, required for a 5-year sentence is 14.8 grams.

If one then divides the amount of marihuana required for a 5-year sentence (100,000 G or 100 KG) by the amount of oxycodone required for a 5-year sentence (14.8 G), this yields 6756 G (rounded to 6700 G) of marihuana equivalent to one G of "oxycodone (actual)".

CAMPBELL

1905 Taft Street #2 • Houston, Texas 77006 • (713) 447-3351

March 8, 2003

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington D.C. 20002-8002
Attention: Public Affairs

Re: Proposed amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) that provide increased penalties for offenses involving oxycodone.

Gentlemen:

I would like to address three issues concerning your proposed amendments to the sentencing guidelines referenced above to provide increased penalties for offenses involving oxycodone: first, the addition of the new paragraph defining "Oxycodone (actual);" second, the addition of the term "oxycodone" to Application Note 9; third, the amendment to the Drug Equivalency Tables; and fourth, the retroactive application of the proposed amendments.

First, however, before addressing these substantive issues, I would like to note that the proposed amendments appear to fall within the legislative mandate to the Sentencing Commission as granted in 28 U.S.C. §994(a)(1), and thus are appropriately within the authority of the Sentencing Commission.

The insertion of the new paragraph defining "Oxycodone (actual)" as the "weight of the controlled substance itself, contained in the pill or capsule" such that the sentences for offenses involving oxycodone will be calculated based on the weight of the actual narcotic rather than the weight of the entire pill, including non-narcotic substances, is clearly a step toward fairness in sentencing for oxycodone offenses. Due to the significant differences in the amount, by weight,

of narcotic contained in the various branded prescription painkillers containing oxycodone, persons convicted of offenses involving this narcotic and sentenced under the existing guidelines have been subject to inequities in sentencing, as such sentences were based on total weight of the pills or capsules instead of the weight of the actual narcotic. Accordingly, an individual convicted of trafficking in Oxycontin could receive a five-year sentence for an offense involving more than nine times the amount of oxycodone as an individual receiving the same sentence for trafficking in Percocet. Such guidelines as exist currently clearly discriminate in favor of traffickers in Oxycontin. The insertion into the sentencing guidelines of the definition of "Oxycodone (actual)" will cure these inequities and more fairly base oxycodone-related sentences on the amount of actual narcotic involved in the offense.

However, I feel it important to point out that by basing some equivalencies on actual narcotic weight (Oxycodone, Amphetamine, Methamphetamine, and PCP) and others on weight of the narcotic mixture, the Commission may run afoul of the prohibition in the Administrative Procedure Act on arbitrary and capricious actions. Under §706(2)(A) of the Administrative Procedure Act, a court reviewing an agency action shall hold unlawful and set aside any arbitrary and capricious agency action, findings, or conclusions. While, as indicated above, I believe it is certainly appropriate to determine sentencing levels based on the actual amount of oxycodone involved, it does seem arbitrary to treat certain narcotic offenses in this manner while offenses involving other narcotics, including those such as morphine which has an almost identical medical equivalency gram for gram compared to oxycodone (See Exhibit A), are evaluated using the weight of the narcotic mixture. I would suggest further amendments to the Drug Equivalency tables such that all narcotic equivalencies are based on actual narcotic weight rather than mixture weight.

In addition to the insertion of the term "oxycodone" into Application Note 9, for purposes of consistency, the term "oxycodone (actual)" should also be added to Note B of the Drug Quantity Table after "Methamphetamine (actual)". The term oxycodone should not, however, be added after "metamphetamine" in the second sentence. This portion of the note currently indicates that for those narcotics which have guidelines based upon both narcotic mixture and actual narcotic weight, in the case of an offense involving a mixture containing the narcotic, the greater of the offense levels determined by the weight of the mixture and the weight of the actual narcotic should be used. This inclusion would negate the intended impact of the proposed amendments for offenses involving Percocet branded oxycodone, but for the striking of the phrase "1 gm of Oxycodone = 500 gm of marihuana" in the Drug Equivalency Tables.

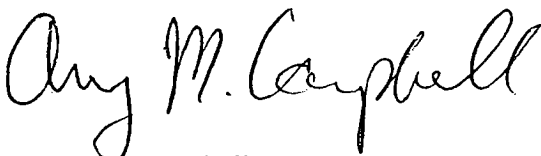
The third issue I would like to address concerns the striking of "1 gram Oxycodone=500 grams marihuana" and the insertion in its place of "1 gram Oxycodone (actual)=6700 grams marihuana." As discussed above, I readily agree that the appropriate measure of the narcotic oxycodone (and indeed, all narcotics) for sentencing purposes should be the actual weight of the narcotic itself, and not the weight of the pill or capsule containing the narcotic; and further, that leaving in the original equivalency would subject oxycodone offenses to the "greater of" standard in Note B discussed above, which in turn would negate the intended effect on Percocet offenses. However, the proposed equivalency of one gram Oxycodone (actual) to 6700 grams (6.7 kilograms) marihuana seems rather arbitrary. The proposed new equivalency appears to be based on the translation of the current equivalency using the actual oxycodon percentage by weight in 10-milligram dosages of Oxycontin branded oxycodone tablets. While this new equivalency clearly serves the stated purpose of substantially reducing penalties for trafficking in Percocet, the notice of proposed amendments provides no indication of the criteria considered in

establishing this proposed equivalency. A review of such criteria would be helpful in assessing the appropriateness of the proposed equivalency, particularly since other opiate equivalencies are based upon mixture weights rather than actual weights.

The fourth issue I would like to address is the retroactive application of the proposed amended guidelines. Previously, any offense involving less than 10 grams of oxycodone (mixture) was subject to the level 12 sentencing floor, and under the proposed amendments would continue to be subject to such floor for offenses involving less than 10 grams Oxycodone (actual). Thus, individuals receiving sentences for such offenses would not be able to avail themselves of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). However, any offense previously involving more than 10 grams of Oxycodone (mixture) would result in a lower sentence under the proposed amendments, and thus the proposed amendments should be made retroactive to previously sentenced defendants.

I appreciate your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Amy M. Campbell". The signature is written in black ink and is positioned above the printed name.

Amy M. Campbell

Hunter Area Palliative Care Service
 Newcastle Mater Misericordiae Hospital
 Locked Bag 7
 Hunter Region Mail Service
 Warabrook 2310

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Palliative Care Fact Sheet

No. 2 November 2002

A Monthly Service to General Practitioners in the Hunter Region

Information in this Fact Sheet does not necessarily represent the views of the editor or the editor's advisers. The editor and the editor's advisers are not liable for any damages or claims by third parties arising from this material.

Palliative Care is the care and study of Patients with active, progressive, far advanced disease, where the prognosis is limited and where quality of life issues are the central concern. The care also involves families / carers. The patient's GP is a key member of the Palliative Care team.

Pain & Symptom Management - Opioid Conversion Table

This conversion chart has been compiled from a number of sources but the most heavily relied on source is the Therapeutic Guidelines series on Analgesics and Palliative Care editions. Other important resources for opioid conversions are the Australian Medicines Handbook 2001 Edition, and the excellent website called Palliative Drugs <http://www.palliativedrugs.com.au>

CONVERSION EXAMPLES:

1. CONVERT from Oral MORPHINE to S/C MORPHINE	RATIO
Oral Morphine 30mg 4 th hrly = S/C Morphine 10mg 4 th hrly	3 : 1

2. CONVERT from Oral MORPHINE to ORAL OXYCODONE (ENDONE)	RATIO
Oral Morphine 30mg 4 th hrly = Oral Oxycodone (Endone) 30mg 4 th hrly	1 : 1

3. CONVERT from Oral MORPHINE to ORAL HYDROMORPHONE	RATIO
Oral Morphine 30mg 4 th hrly = Oral Hydromorphone 4mg 4 th hrly	7.5 : 1

4. CONVERT from Oral MORPHINE to S/C HYDROMORPHONE	RATIO
Oral Morphine 30mg 4 th hrly = S/C Hydromorphone 1.5mg 4 th hrly	20 : 1

5. CONVERT from Oral MORPHINE to Oral METHADONE (SEEK ADVICE)

1 <u>If the morphine dose is less than 300mg/day:</u> Oral Morphine 30mg 4 th hrly (180 mg/day) = Oral Methadone 10mg bd (20 mg/day)
2 <u>If the morphine is greater than 300mg/day:</u> Start at 30mg/d and titrate according to response, it may take over a week to get to steady-state concentrations. It is strongly recommended to liaise with Pain or Palliative Care staff. Due to incomplete cross tolerance and its long half-life ~10 : 1 inpatient admission is recommended for this conversion to ensure close observation of the patient.

6. CONVERT from Oral CR MORPHINE to Oral CR OXYCODONE	RATIO
CR Morphine 30mg bd (MS Contin 30mg bd or Kapanol or MSMono (60mg ONCE daily)) = CR Oxycodone (Oxycontin) 20mg bd	1.5 : 1

Exhibit A
 1987

Opioid Conversion Table (contd)

7. CONVERT from ORAL CR MORPHINE to CR OXYCODONE		RATIO
Oral CR Morphine 60mg/d (MS Contin 30 mg bd or Kapanol or MSMono (60 mg ONCE daily)	= CR Oxycodone (Oxycontin) 20mg bd	1.5 : 1
8. CONVERT from CR MORPHINE to S/C MORPHINE		RATIO
Oral Morphine 30mg bd (60 mg/d)	= Morphine 20mg CSCI / 24hrs	3 : 1
9. CONVERT from S/C MORPHINE to S/C FENTANYL		RATIO
Morphine 10mg	= Fentanyl 150i grms	70 : 1
10. CONVERT from S/C MORPHINE to S/C SUFENTANIL		RATIO
Morphine 300mg/24hrs CSCI	= Sufentanil 450i grms CSCI / 24hrs	700 : 1
11. CONVERT from CSCI MORPHINE to INTRATHECAL MORPHINE		RATIO
Morphine 100mg CSCI / 24hrs	= Morphine 1mg IT daily	100 : 1
12. CONVERT from S/C MORPHINE to EPIDURAL MORPHINE		RATIO
Morphine 100mg CSCI / 24hrs	= Morphine 10mg E / 24 hrs	10:1
13. CONVERT from S/C MORPHINE to Intraventricular MORPHINE		RATIO
Morphine 100mg CSCI / 24hrs	= Morphine Intraventricular 0.1mg / d	1000 : 1
14. CONVERT from S/C FENTANYL to Transdermal FENTANYL		RATIO
Fentanyl 600i grms / 24 hrs via a continuous s/c infusion	= Transdermal Fentanyl 25i gm/hr	1 : 1
15. CONVERT from S/C FENTANYL to Sublingual FENTANYL		RATIO
Fentanyl 50i grms	= Fentanyl 50i grms	1 : 1
16. CONVERT from S/C FENTANYL to S/C SUFENTANIL		RATIO
Fentanyl 100µgrm	= Sufentanil 10µgrm	10:1

ABBREVIATIONS

CR = Controlled Release
 S/C = Subcutaneous
 IT = Intrathecal
 CSCI = Continuous subcutaneous Infusion
 S/L = Sublingual
 E = Epidural

• The conversions contained in this Fact Sheet are average equivalents because of pharmacokinetic variation from patient to patient. If in any doubt contact Palliative Care. Editor



March 17, 2003

Via Overnight Mail

Office of Public Affairs
United States Sentencing Commission
Attn: Karen Hickey
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Comments re Section 1030 Guidelines

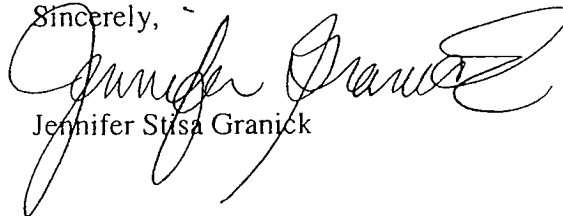
Dear Ms. Hickey:

On behalf of Commentators **National Association of Criminal Defense Lawyers**, the **Electronic Frontier Foundation**, and **The Sentencing Project**, I present to you their most recent response to the Commission's request for public comments as to how the Commission should respond to Section 225(b) of the Homeland Security Act of 2002, in particular, sentencing guidelines pursuant to 18 U.S.C. § 1030.

We would be happy to make available to you an electronic "pdf" version of this document, if you would like. Please advise us whether you would like us to email you this document as well.

We kindly thank the Commission for the opportunity to hear our comments in this matter.

Sincerely,



Jennifer Stisa Granick

JG:jsn
Enclosures

cc: Carmen D. Hernandez, Esq.
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The National Association of Criminal Defense Lawyers, The Electronic Frontier Foundation and The Sentencing Project write in response to the Commission's request for public comment about how the Commission should respond to Section 225(b) of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107-296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under 18 U.S.C. § 1030. We thank the United States Sentencing Commission for this opportunity.

Interests of the Commentators

The **National Association of Criminal Defense Lawyers (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 more than 10,400 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The National Association of Criminal Defense Lawyers (NACDL) encourages, at all levels of federal, state and local government, a rational and humane criminal justice policy for America -- one that promotes fairness for all; due process for even the least among us who may be accused of wrongdoing; compassion for witnesses and victims of crime; and just punishment for the guilty.

Equally important, a rational and humane crime policy must focus on the social and economic benefits of crime prevention -- through education, economic opportunity, and rehabilitation of former offenders. As a society, we need to eschew such simplistic, expensive, and ineffective "solutions" as inflexible mandatory sentencing, undue restriction of meritorious appeals, punishment of children as adults, and the erosion of the constitutional rights of all Americans because of the transgressions of a few.

NACDL's values reflect the Association's abiding mission to ensure justice and due process for all.

The **Electronic Frontier Foundation ("EFF")** is a non-profit, civil liberties organization founded in 1990 that works to protect rights in the digital world. EFF is based in San Francisco, California, but has members all over the United States.

EFF has been deeply concerned about the criminalization of online behavior since its inception. The founders intended EFF to bring balance and reason to law enforcement in cyberspace. One incident that brought this need home was a 1990 federal prosecution of a student for publishing a stolen document. At trial, the document was valued at \$79,000. An expert witness, whom EFF helped locate, was prepared to testify that the document was not proprietary, and was available to the public from another company for \$13.50. When the

government became aware of this information through defense's cross-examination of government witnesses, it moved to dismiss the charges on the fourth day of the trial.

Accordingly, EFF is very concerned that the Sentencing Commission act very carefully with regard to computer crime sentencing. We believe that those convicted of computer crimes are already punished more harshly compared to other crimes for the reasons stated in these Comments.

The Sentencing Project is a Washington, D. C. -based 501(c)(3) non-profit organization, which promotes greater use of alternatives to incarceration and the adoption of sentencing policies, and practices which are fair and effective in reducing crime. Founded in 1986 to encourage improved sentencing advocacy by the defense, The Sentencing Project has become well known as a source of widely reported research and analysis on sentencing and other criminal justice issues. The range of these issues includes: the number of non-violent, low-level drug offenders in state prisons; crack-powder cocaine sentencing discrepancy in federal law; unwarranted racial disparity in the criminal justice system; the impact of the federally mandated ban on receipt of welfare benefits for women convicted of drug offenses; "Three Strikes" mandatory minimum sentencing laws; denial to nearly four million Americans of the right to vote following felony convictions; and, the significance of prosecuting children as adults.

The Sentencing Project's interests in the matter before the United States Sentencing Commission are to insure that federal penalties are not increased absent objective indications that an increase in penalties will reduce criminal computer fraud or "hacking," when other steps may provide a higher degree of public safety and corporate security, and when the rationale for increasing penalties may be based on a misperception of the nature and character of most crimes prosecuted through application of 18 U.S. C. Sec. 1030.

COMMENTS

Congress has directed the Commission to review the guidelines applicable to persons convicted of offenses under 18 U.S.C. section 1030 to ensure that the guidelines reflect the serious nature of such offenses, the growing incidence of such offenses and the need for an effective deterrent and appropriate punishment to prevent such offenses. Our comments submitted on February 17, 2003 express our position that current guidelines not only adequately reflect, but also in many cases overstate, the seriousness of the heartland 18 U.S.C. 1030 offenses. Further, current guidelines are rife with problems, especially surrounding the special definition of loss in computer crime cases.

In this set of comments, we respond to the Commission's questions regarding the special definition of loss for offenses involving unlawful access to a protected computer under Application Note 2(A)(v)(III) of §2B1.1. We also discuss the question of whether Congress's eight concerns are adequately addressed by the Guidelines. We believe that Congress's concerns are adequately addressed by the Guidelines, and that there are already provisions that enhance sentences for computer intrusion cases that involve intent to cause physical harm, interfere with government processes etc. These enhancements should only apply in cases where the

government has plead and proved beyond a reasonable doubt that the case involved particularly culpable intent.

We also recommend that the definition of loss be amended to more closely mirror the definition that applies to other economic crime cases. By defining loss as pecuniary harm reasonably foreseeable to the defendant at the time of the offense, the Commission can optimize the deterrent effect of sentencing while providing just punishment in accord with the defendant's culpability, rather than the victim's business choices about remediation efforts.

I. CURRENT SENTENCING LAW ADEQUATELY ADDRESSES THE EIGHT FACTORS IDENTIFIED BY CONGRESS

The Commissions' challenge is to establish a sentencing scheme for a single statute that penalizes computer intrusions ranging from website vandalism to cyberterrorism, and setting a wide range of statutory maximums, from one year to life. However, heartland computer crime case is analogous to economic fraud and most offenses are properly sentenced under guideline 2B1.1. We believe that guideline 2B1.1 should continue to address the heartland case of a computer intrusion that causes economic harm. Extraordinary cases where the government proves that the defendant intended cause physical harm or compromised national security may be enhanced pursuant to §3A4.1 (Terrorism), or be sentenced under a different guideline referred to in Appendix A, or receive an upward departure under existing guidelines such as § 5K2.2 (physical injury), § 5K2.3 (extreme psychological injury), or § 5K2.7 (disruption of government function).

We stress that the enhancements or guidelines specified below should only apply to computer crime offenses if the government pleads and proves special non-pecuniary harm as defined by the statute, or if the defendant admits such harm as part of a plea to the applicable subsection of section 1030. The applicable guidelines should be referenced by the statutory subsections in the Appendix, not cross-referenced in section 2B1.1. Cross references encourage courts to sentence computer criminals based on information about the crime that was not proven beyond a reasonable doubt at trial. This practice undermines certainty and predictability in calculating loss. Both promote deterrent effect and fairness in sentencing. Also, permitting enhancements only if warranted by the offense of conviction saves sentencing courts time, because they don't have to litigate at sentencing whether multiple special enhancements apply.

A. Whether The Offense Was Committed For Purposes Of Commercial Advantage Or Private Financial Benefit

The guidelines should not provide for a special enhancement for a computer criminal acting with a commercial purpose. Such an enhancement would result in double counting, as well as disproportionate sentencing as compared to other felony violations of section 1030.

Sections 1030(a)(2) and (c)(2)(A) provide that whoever intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information is subject to up to a year imprisonment. However, if the access was for purposes of commercial advantage or

private financial gain, then the maximum penalty is 5 years. 18 U.S.C. § 1030(c)(2)(B)(i). The guidelines do not provide an additional enhancement if this factor is present. Yet, the defendant's sentence will in fact be enhanced, because the one-year cap is removed. In most cases, based solely on the operation of other sentencing factors, the defendant will in fact receive increased punishment (i.e. more than one year) for acting with a commercial purpose. A special enhancement will amount to double punishment because the defendant would not only receive more than a year in prison but also an enhancement.

A special enhancement would also provide a disproportionate punishment for commercial motivation as compared to other felonious purposes. The section 1030(a)(2) misdemeanor offense also becomes a five-year felony if the access was in furtherance of any criminal or tortious act, or if the value of the information obtained exceeds \$5000. 18 U.S.C. §§ 1030(c)(2)(B)(ii)-(iii). The guidelines should not single out subsection (c)(2)(B)(i) for enhanced punishment over subsections (c)(2)(B)(ii)-(iii) especially because that motivation is not particularly depraved. Common business practices for the purpose of financial gain may be "unauthorized access" including sending unsolicited bulk email (America Online v. National Health Care Discount, 121 F.Supp.2d 1255, 1273 (N.D. Iowa 2000)), using automated search programs to collect even publicly available data (Register.com v. Verio, Inc., 126 F.Supp.2d 238, 251 (S.D.N.Y. 2000) [domain name information]; eBay v. Bidder's Edge, 100 F.Supp.2d 1058 (N.D. Cal. 2000) [internet auction information], EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir.2001) [travel agent prices]) and placing "cookies" the computers of website visitors for purpose of monitoring their web activity (In re Intuit Privacy Litig., 138 F.Supp.2d 1272 (C.D. Cal. 2001); Chance v. Ave. A, Inc., 165 F.Supp.2d 1153 (W.D. Wash. 2001)). All have a commercial motivation, but none are particularly depraved as compared to other computer intrusions. We do not believe that a defendant acting with commercial motivation is more culpable than one acting in furtherance of another criminal or tortious act such that a special enhancement should apply.

B. Computer Used By The Government In Furtherance Of National Defense, National Security Or The Administration Of Justice

Section 1030(a)(1) prohibits obtaining classified information that would harm the United States or help a foreign power through unauthorized computer access and communicating that information to any person not entitled to receive it. There is a penalty of up to 10 years in prison for a first offense. 18 U.S.C. § 1030(c)(1)(A). Per the statutory appendix violations of this section are punished under guideline § 2M3.2. This guideline adequately addresses the seriousness of a § 1030(a)(1) offense.

For less serious cases that nonetheless harm a critical government computer, section 1030(a)(5)(A) prohibits transmission of code or unauthorized access that causes unauthorized damage. The definition of damage includes that which affects a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security. 18 U.S.C. § 1030(a)(5)(B)(v). This section prohibits actions that are less serious than those proscribed by section (a)(1), but possibly more serious than one which merely causes loss in an amount exceeding \$5000. However, not every violation of this section will be more serious.

The statute does not require proof that the defendant intended to damage government computer systems, only that the damage occurred. [If the damage was intentional, the defendant faces up to 10 years in prison. 18 U.S.C. § 1030 (c)(4)(A). If the damage was reckless, the defendant faces up to 5 years in prison. 18 U.S.C. § 1030 (c)(4)(B). If damage occurred without a specified intent, the defendant faces up to 1 year in custody. 18 U.S.C. § 1030 (c)(2)(A).] Nor does it require that the defendant's actions actually interfere with the administration of justice, national defense or national security. In rare cases when the defendant intends to and/or succeeds in interfering with these critical government functions, an upward departure may be appropriate under § 5K2.7 (Disruption of Governmental Function) or the § 3A1.4 (Terrorism). The § 3A1.4 enhancement is one of the most severe enhancements in the guidelines in that it enhances both the offense level and the criminal history under § 8C4.3 (Threat to National Security (Policy Statement)) may be warranted. We believe that this is sufficient.

However, if the Commission believes that §§ 5K2.7 or 3A1.4 are insufficient, then a targeted enhancement modeled on Guideline 3C1.1 may be appropriate. That guideline reads, "If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels."

Similarly, the Commission may wish to increase the offense level by 2 levels if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice or harming national defense or national security. However, this enhancement should only apply to convictions under section (a)(5)(A)(i) (intentional damage) that caused proven damage under (a)(5)(B)(v). It would overstate the defendant's culpability to apply this enhancement in cases where the damage to the government computers was not intentional and the defendant did not have the willful purpose of obstructing justice.

C. Malicious Intent To Cause Harm

The guidelines should not provide for a special enhancement for sentencing a computer criminal that acted with the malicious intent to cause harm. Such an enhancement would result in double counting.

Malice means that the defendant acted intentionally for the purpose of doing harm. Section 1030(a)(5)(A)(i), which provides that whoever knowingly causes the transmission of a program, information, code, or command and as a result of such conduct, intentionally causes damage without authorization may be punished up to 10 years in prison. 18 U.S.C. § 1030(c)(4)(A). Conviction of this subsection requires proof of malice. The guidelines do not provide an additional enhancement for conviction under this subsection. Yet, the defendant's sentence will in fact be enhanced, because the one-year or five year cap is removed when he is sentenced under section (a)(5)(A)(i). In most cases, based solely on the operation of other sentencing factors, the defendant will in fact receive increased punishment (i.e. more than one year) for maliciously causing harm. A special enhancement will amount to double punishment

because the defendant would not only receive both more than a year in prison but also an enhancement.

The Commission should not allow a sentencing enhancement based on this factor for conviction of any other subsection that does not require proof of malice at trial for the reasons stated above.

D. Violation Of Privacy Rights

The guidelines already take violations of privacy rights into account by providing for an upward departure if the offense caused or risked substantial non-monetary harm. For example, if a computer crime offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records) an upward departure may be warranted. Section 2B1.1, note 15 (A)(ii).

E. Intent Or Effect Of Significant Interference With Critical Infrastructure and Intent To Or Effect Of Threat To Public Health Or Safety Or Injury

There are multiple guidelines that take threat to public health or safety or injury into consideration. Section 1030(a)(5)(A) prohibits transmission of code or unauthorized access that causes unauthorized damage. The definition of damage includes that which causes a threat to public health or safety. 18 U.S.C. § 1030(a)(5)(B)(iv). This section prohibits actions that are possibly more serious than one that merely causes loss in an amount exceeding \$5000. However, not every violation of this section will be more serious. The statute does not require proof that the defendant intended to threaten public health or safety. [If the damage was intentional, the defendant faces up to 10 years in prison. 18 U.S.C. § 1030 (c)(4)(A). If the damage was reckless, the defendant faces up to 5 years in prison. 18 U.S.C. § 1030 (c)(4)(B). If damage occurred without a specified intent, the defendant faces up to 1 year in custody. 18 U.S.C. § 1030 (c)(2)(A).] Currently, the guidelines provide that an offense involving a conscious or reckless risk of death or serious bodily injury receives a two level enhancement and a minimum offense level of 14 under § 2B1.1(b)(11). It would overstate the defendant's culpability to apply a greater enhancement in cases where the threat of harm was not intentional.

In rare cases when the defendant intends to and/or succeeds in causing harm to public health or safety through unauthorized access to computers, other guidelines may apply. First, an upward departure under § 5K2.14 (Public Welfare) may apply. "If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense." Also, guideline § 3A1.4 may apply. That section provides that "If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32." Also, "in each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI." This guideline is adequate to punish a violator of Section 1030 who intends to

harm the public safety or welfare. Furthermore, if the unauthorized access was a tool to commit murder, then the appropriate homicide guideline may apply if the indictment alleges and the proof at trial conforms with the elements of homicide ... See U.S.S.G. § 1B1.2 (instructions for selecting applicable guideline). It would overstate the defendant's culpability to apply this enhancement in cases where the threat to public safety was not intentional. Nor should the Commission cross-reference the homicide guidelines in section 2B1.1. This allows courts to impose greater sentences on defendants without proving the elements and mental state of those more serious crimes.

F. Level Of Sophistication Or Planning

The defendant's level of sophistication or planning is more than adequately accounted for in § 2B1.1(b)(8)(C), which provides for a two level increase and a minimum offense level of 12.

We believe that this adjustment often overstates the defendant's culpability. Computer crime offenders disproportionately receive a sentencing enhancement for special skill under § 3B1.3. Almost every computer offense inherently requires abuse of trust or special skill. Though the public uses computers, it is generally uninformed about computer security matters. A computer intruder must either use a password that permits access, leading to an abuse of trust adjustment, or know how to circumvent the password requirement, leading to a special skill adjustment. In its 1996 Report to Congress on the adequacy of federal sentencing guideline penalties for computer fraud and vandalism offenses, the Commission reported that 32.5% of all computer crime cases received an upward adjustment for abuse of position/special skill, as compared to 8.8% of white collar cases and 3% of all cases. Table 2.

Almost certainly, that percentage, and that discrepancy is higher today, if only because case law has supported a liberal application of the special skill adjustment in computer crime cases. In United States v. Petersen, 98 F.3d 502 (9th Cir. 1996), the Ninth Circuit held that the special skill adjustment only requires that the offender have skills not possessed by members of the general public. Special education or certification is not a prerequisite. While the Petersen court did not hold that a special skill adjustment would apply in every computer crime case, it greatly liberalized any limits on when the adjustment would apply. Anecdotal evidence suggests that a special skill adjustment is applied in almost every computer crime case today.

The additional special adjustment in § 2B1.1 for "sophisticated means" under § 2B1.1(b)(8)(B) further increases computer crime sentences. "'Sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." § 2B1.1 Application Note 6(B). If this adjustment is also liberally applied to computer crimes, then the most basic computer crime offenses will be sentenced at a

minimum level 12. This results in a minimum sentence more than two times as high as the minimum sentence for the most basic economic crime.

The Commission should not provide for a special enhancement when the offense was committed for the purposes of commercial advantage or private financial benefit, or for malicious intent to cause harm. Enhancement for these factors would result in double counting and/or penalties disproportionate to the offense. The Commission should not provide for a special enhancement for offenses that affect a computer system used by a government entity in furtherance of the administration of justice, national defense, or national security. Current guidelines 2M3.2 and 8C4.3 are adequate. If the Commission believes otherwise, a targeted enhancement modeled on 3C1.1 should apply only to defendants that intentionally damage these government computers for the purposes of obstructing or impeding the administration of justice, or harming national defense or national security. There are already guidelines that take into consideration whether an offense involved a violation of privacy rights (Guideline 2B1.1, note 15(A)(ii), involved sophistication or planning (§ 2B1.1(b)(8)(C)), or intended to threaten public health or safety or cause injury (§§ 2B1.1(b)(11), 5K2.14, 3A1.4 and the homicide guidelines).

II. THE COMMISSION SHOULD ABANDON THE SPECIAL CALCULATION OF LOSS IN COMPUTER CRIME CASES AND ADOPT A DEFINITION LIKE THAT USED IN OTHER ECONOMIC CRIME CASES

Under the current sentencing law, the estimation of loss is the primary factor driving both economic and computer crime sentencing. Along with other relevant factors under the guidelines, loss should reflect the seriousness of the offense and the defendant's relative culpability. In economic crimes, the calculation of loss is generally limited to "reasonably foreseeable pecuniary harm." However, in computer crime sentencing, "actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." USSG § 2B1.1 Application Note 2(A)(v)(III). The inclusion of unforeseeable pecuniary harms in the definition of loss, including "any lost revenue due to interruption of service" results in computer crimes being treated more harshly than other crimes. Additionally, the categories of harm described as loss are not easily assigned objective monetary value. As a result, the loss estimation for identical offenses can differ widely, resulting in grossly disparate sentences for identical conduct. For example, the cost of conducting a damage assessment depends more on the victim's actions than it does on the actions of the perpetrator or his intent to cause damage. A similar problem occurs with including any lost revenue due to interruption of service. Additionally, this definition of loss is susceptible to manipulation by victims, investigators and prosecutors.

We have identified two separate problems with the assessment of loss in computer crime cases. First, the definition of loss results in computer crimes being treated more harshly than other crimes by including unforeseeable losses. This problem can be alleviated by having the definition of loss for sentencing of computer crimes conform to the standard definition of loss for white-collar offenses. That definition includes only pecuniary losses that were reasonably

foreseeable to the defendant at the time of the offense and which were proximately caused by the defendant's actions. Second, the elements of loss are too difficult to accurately quantify. This problem is alleviated by adhering to an objective definition of loss that doesn't single out and encourage impractical measures of harm, but uses "reasonable foreseeability" as a guide to the sentencing court.

A. Definition Of Loss

First, the definition of loss for sentencing purposes should not mirror the statutory definition of loss. The statutory definition serves a different purpose from the definition used in sentencing. The statutory definition is a jurisdictional element that defines the point at which the federal government has a sufficient interest in prosecuting the matter. At trial, the prosecution must prove the requisite harm "beyond a reasonable doubt" since it is an element of the offense. The goals of sentencing, however, are "(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2). At least where the loss enhancement would not result in a "tail which wags the dog of the substantive offense," loss need only be proved by a preponderance of the evidence, U.S. v. Watts 519 U.S. 148, ___, 117 S.Ct. 633, 637, n.2 (1997), so long as the sentencing factor does not increase the maximum term allowed by law, Apprendi v. New Jersey, 530 U.S. 466 (2000).

The statute includes unforeseeable losses, a definition that fails to promote, and even denigrates, other goals of sentencing. Congress has identified unforeseeable losses as relevant to the seriousness of the offense, specifically the question of whether the offense caused sufficient harm that the federal authorities could prosecute it. However, sentencing based on unforeseeable losses does not promote respect for the law, provide just punishment for the offense, or properly deter criminal conduct. Citizens have less respect for the law when it produces unpredictable and inharmonious results, as the current definition does. Nor does the statutory loss definition result in just punishment. Sentences are disproportionate to the defendant's culpability because loss doesn't depend on either the defendant's actions or intent. Nor do sentences based on unforeseeable loss provide an optimum deterrent effect. Such sentences are "unforeseeable", not tied to the defendant's expectations. In fact, the sentencing scheme deters too much conduct, including common business practices. See February 19th comments, pp. 6-7, [Sending unsolicited bulk email (America Online v. National Health Care Discount, 121 F.Supp.2d 1255, 1273 (N.D. Iowa 2000)), using automated search programs to collect even publicly available data (Register.com v. Verio, Inc., 126 F.Supp.2d 238, 251 (S.D.N.Y. 2000) [domain name information]; eBay v. Bidder's Edge, 100 F.Supp.2d 1058 (N.D. Cal. 2000) [internet auction information], EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001) [travel agent prices]), placing "cookies" the computers of website visitors for purpose of monitoring their web activity (In re Intuit Privacy Litig., 138 F Supp 2d 1272 (C.D. Cal. 2001); Chance v. Ave. A, Inc., 165 F.Supp.2d 1153 (W.D. Wash. 2001), shipping faulty software. See, e.g. Shaw v. Toshiba Am. Info. Sys., 91 F.Supp.2d 926 (E.D. Tex. 1999) [mailing floppy diskettes containing faulty microcode]; In re AOL, Inc. Version 5.0 Software Litig., 168 F.Supp.2d 1359 (S.D. Fla. 2001); Christian v Sony Corp. of Am., 152 F.Supp.2d 1184, 1187

(D.C. Minn. 2001).]

Therefore, for sentencing purposes, we believe that the definition of "loss" should include "only pecuniary losses that were reasonably foreseeable to the defendant at the time of the offense and which were proximately caused by the defendant's actions." This definition mirrors the one in use for economic crimes that the Commission recently adopted after much study and has several benefits over the current one. First, by including only pecuniary loss, it assists sentencing courts, which don't have to value intangibles. Non-economic harms should be punished under a different section or be the basis for other adjustments as discussed above.

Second, "reasonably foreseeable" loss promotes uniformity in sentencing because similar offense conduct is likely to cause similar harm. Currently, the loss calculation is entirely in the hands of the victim. The assessment of damages depends more on the victim's actions than it does on the perpetrator. The proposed definition resolves this problem by requiring that harm be reasonably foreseeable. By referencing the defendant's point of view, and requiring that the defendant's actions were the proximate cause of the loss, the definition ties the factor more closely to the defendant's conduct and intent, better reflecting his culpability. The proposed definition also optimizes the deterrent effect without over-punishing.

Finally, loss should explicitly exclude costs of law enforcement investigation and prosecution.

B. Calculation of Loss

We believe that this new definition of loss will resolve a lot of the problems inherent in the current definition. The only reason why the current sentencing scheme hasn't caused more of a stir is because courts haven't been required to assess loss with any accuracy at all. The burden of proof in sentencing is by a preponderance of the evidence. Additionally, current guidelines advise that the sentencing court "need only make a reasonable estimate of the loss." Guideline 2B1.1, Application Note 2(c). Proving something is a reasonable estimate by a preponderance of the evidence isn't hard. As a result, judges aren't worried about being reversed, and prosecutors are having an easy time arguing for high sentences. The goals of sentencing, however, are not served by the current definition.

The calculation of loss will still entail some evaluation of costs associated with damage assessment, costs of remediation, and lost revenue due to interruption of service. However, by requiring that these types of harms be "reasonably foreseeable", the definition avoids the uncertainty and the manipulability of the loss figure that characterizes the current sentencing scheme.

The current definition of loss includes any reasonable damage assessment conducted by the victim. Our proposed definition limits this discretion on the part of the victim by counting only "reasonably foreseeable" harm. It also distinguishes between doing an assessment for repair purposes and doing one that is forensically sound to preserve evidence for later prosecution. The proposed definition makes clear that costs associated with prosecution are not included in the definition of loss.

The current definition includes the cost of returning the system to the condition it was in prior to the incident. This definition is nonsensical, because the prior condition of the machine was insecure. No one wants to return their systems to that condition. Everyone wants to upgrade or repair the hole that allowed the defendant unauthorized access. The proposed definition makes clear that the defendant is responsible for assessment and remediation as a result of the hacking event, but not responsible for costs associated with upgrading systems and software that were insecure prior to the offense conduct.

The current definition includes "lost revenue due to interruption of service." Lost revenue is difficult to measure. In the 2000 denial of service attacks on Yahoo! Inc., the company went off-line for about three hours. Yahoo! initially refused to estimate how much the attack cost it in lost revenue. Yahoo! makes money from sale of goods and from showing advertisements. Some analysts estimated that Yahoo!'s loss would add up to millions of dollars. ZDNet News, February 7, 2000 <http://zdnet.com.com/2100-11-518359.html?legacy=zdn>. Sources quoted by the Industry Standard estimated that losses for Yahoo! and eBay would amount to 1.2 Billion dollars. February 11, 2000, <http://www.thestandard.com/article/display/0,1151,9703,00.html>. However, Yahoo! appears to have suffered no real loss of sales or advertising contracts as a result of the attack. For example, the company did not report these huge losses to the SEC.

Moreover, companies overestimate losses. For example, in U.S. v. Mitnick, the defendant accessed computers and viewed source code owned by the victim companies. The victims reported their estimate of the entire cost of research and development as their actual loss in the case. Sun Microsystems alone reported loss of 80 million dollars because the defendant saw the company's source code. However, the companies were not deprived of the use of that information, nor was it redistributed to competitors. Subsequently, Sun licensed the source code for \$100. See Wired News, How Much Damage Did Mitnick Do? May 5, 1999, <http://www.wired.com/news/politics/0,1283,19488,00.html>, See also, How Much Does Cybercrime Cost, ABC News, <http://abcnews.go.com/sections/tech/DailyNews/cybercrime990813.html>.

The proposed definition of loss will not depend on the victim's reasonable estimates, but on what was reasonably foreseeable to the defendant. Also, any calculation of loss should differentiate between temporary losses that are recoverable by the continued operation of the computer system of business, and permanent losses which can not be recouped. Defendants should not be held responsible for temporary losses that a company recovers simply by going back on line. This "limitation" should also remove the incentive for companies to overestimate losses.

C. Cap on Damages

We believe that the Commission should consider putting a cap on damages in cases where the defendant did not intend to cause harm under section 1030(a)(5)(A)(iii). Enhancing the sentences for the full amount of loss when the defendant did not intend to cause damage overstates culpability. The commentators suggest that the cap should be at no more than a four

level enhancement for loss. Starting with a base offense level of six, the sentencing court would most likely add two levels for sophisticated means, and four levels for loss. The heartland of section 1030 (a)(5)(A)(iii) cases for a first offender would then be sentenced between 10-16 months. We believe that this range accurately reflects the level of seriousness for this offense.

III. SENTENCING FOR VIOLATIONS OF 18 U.S.C. 2701

Violations of 18 U.S.C. section 2701 that are not committed for the purpose of commercial gain or in furtherance of any criminal or tortious act are misdemeanors, with a one-year maximum for a first-offense. We would recommend a simple guideline with a base offense level of six. For the offender with a prior, the criminal history category is likely to increase the sentencing range. Also, the court may depart upward if circumstances warrant. However, every violation of section 2701 will involve an invasion of privacy, so the Commission should make clear that that harm is taken into account in setting the base offense level.

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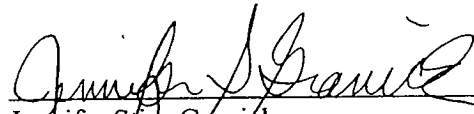
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IV. CONCLUSION

We encourage the Sentencing Commission to bring sentencing law for computer crime offenses in line with sentencing for other, similar economic crimes. We should eschew a strategy of creating a complicated sentencing scheme that applies many of the factors already considered in the guidelines in novel ways to the complicated area of computer crimes. This strategy interferes with the goals of sentences and creates a framework in which sentences are disproportionate to the defendant's culpability and chill legitimate computer security research, reporting and adoption of new, beneficial technologies.

Dated: March 17, 2003

Respectfully submitted:



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**Comments of the United States Internet Service Provider Association
On Section 225 of the Homeland Security Act of 2002
Sentencing Guidelines
March 17, 2003**

The United States Internet Service Providers Association (US ISPA) is an organization comprised of major Internet Service Providers (AOL Inc., Cable & Wireless, eBay, EarthLink, Microsoft, SBC Communications, Teleglobe, Verizon Online, WorldCom, and Yahoo) throughout the United States. US ISPA welcomes this opportunity to submit written comments to the U.S. Sentencing Commission regarding Section 225 of the Homeland Security Act of 2002, sentencing guidelines applicable to defendants convicted of violations under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. §1030.

Computer crime, including virus creation and distribution, computer intrusions, denial of service attacks, and theft of personal information, has continued to steadily increase over the last decade. Recent congressional testimony given by Assistant Attorney General Michael Chertoff, head of the Criminal Division at the Department of Justice, indicated that "there is no doubt that the number of crimes involving computers and the Internet is rising dramatically." For example, the CERT Coordination Center, which was created to warn network operators about computer attacks and viruses, received over 21,000 network crime incident reports last year. This is more than double the number of reports it received the previous year. Similarly, a survey conducted by the FBI and the Computer Security Institute recently revealed substantial increases in computer crime. Over 85 percent of the companies and government agencies surveyed reported computer security breaches within the preceding twelve months, up from 70 percent last year. Moreover, researchers at the University of California at San Diego recently reported a methodology that enabled them to count the numbers of denial of service attacks on the Internet; their research revealed that "4,000 attacks occur every week."

Some estimates of economic loss as a result of recent virus attacks add up to billions of dollars. Aside from the economic loss, our society's increasing dependence on computers means that the disruption of networks could seriously impair public safety, national security, and economic prosperity.

Today, however, sentences for violations of the CFAA are treated primarily as "white collar" fraud cases. Sentences are determined by calculating *actual or intended pecuniary harm*, something that is often difficult to quantify in the typical computer crime case. Under Guideline 2B1.1, significant economic loss is required before a defendant would even be eligible for imprisonment. In the case of the "Melissa" virus, a simple program that caused worldwide damage to millions of computers and computer systems, the perpetrator faced less than four years in prison even after proven damages of in excess of \$80 million. This lack of a significant criminal penalty eliminates the deterrent effect of a conviction, and makes the crime less likely to be prosecuted in the future. That is one reason that despite the enormous increase in the commission of computer crime, there is not a similarly large increase in prosecution of computer crime.

Newly emerging threats to the Internet, such as unsolicited bulk email, or spam, go largely unprosecuted because the type of harm spam causes is not currently addressed in the guidelines. Spammers send millions of unsolicited email messages that degrade and cripple entire email systems. However, the significant interference to the critical infrastructure caused by the abuse of spammers is not currently considered as a factor in the sentencing guidelines. Similarly, a common method for spammers to send bulk email, in an effort to by-pass spam blocking technology, is to steal personal email accounts and use their identities. The spammer's unauthorized access into the subscriber's account is a significant violation of the account holder's privacy rights. However, neither the violation of the individual's privacy rights by the spammer nor the spammers' financial gain from this illegal activity is taken into account in the sentencing guidelines, making prosecution for this type of offense extremely unattractive.

Moreover, the sentencing guidelines do not take into account the potential or actual harm caused by other types of crimes that may not cause economic loss, but have profound societal consequences: crimes that involve interference with important governmental functions, such as national security, national defense, and the administration of justice. For instance, viruses have attacked and taken down 911 operation centers in the past, knocking out the 911 emergency services for police stations and fire departments. This type of substantial harm to the public cannot be quantified in economic terms; and, if the perpetrators who created these viruses are finally caught, the disruptions they caused to these emergency services will probably not be used during their sentencing.

Cyber crimes should be viewed in the context of the overall incidence of the offenses and the extent to which they constitute a threat to civil peace and economic prosperity. The guidelines should not look just at the monetary damage a violation may cause, but at the important intangible loss of personal privacy and critical services that often results from cyber crime. Currently, the sentencing guidelines applicable to computer crime generally do not take into account these considerations.

We urge the Commission to amend the guidelines applicable to offenses under 18 U.S.C. §1030 to take full account of the eight factors listed in Section 225(b) of the Homeland Security Defense Act of 2002, particularly those factors that are not accounted for anywhere else in the applicable guidelines, such as whether the offense was committed for purposes of commercial advantage or private financial benefit; whether the defendant acted with malicious intent to cause harm in committing the offense; the extent to which the offense violated the privacy rights of individuals harmed; whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice; whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person. Economic loss alone does not adequately represent the threat to societal interests caused by computer crimes.

February 01, 2003

Re: U.S. Sentencing Commission
Proposal for Amending the
U.S. Sentencing Guidelines

Issues Addressed

- * 21 USC 851
- * Criminal History Points

Sentencing Commission,

The issues to be addressed is of great importance and must be addressed soon. If these issues are continued to be over looked the Federal Bureau Of Prison System will continue to become over crowded with non-violent offenders; yes convicted felons although contrary to belief given a chance these people can become productive citizens while lifting the burden of housing these inmates off the tax payers budget in many many ways.

§851

Under the current law §851 as with many Federal Laws the United States Attorney has the discretion on which statute or code is applied and why it is applied in certain cases. Under §851 the defendant is subjected to increase punishment by reason of prior conviction (only one being required) the court shall proceed to impose sentence upon him as provided by this statute; 21 USC 851(d)(1). This section reads as though the judge has some if any discretion when in fact the hands of the judge are tied as with many of the Federal Statutes now in effect. The issue of the §851 should be considered for amendment to add a more stringent check system. The statute has no mitigating factors i.e. murder, guns, or victims ect.. The U.S. Attorney

has no checks and balance system when applying the §851 to enhance a sentence, which in many cases are more than excessive to begin with. In 96% of the cases the §851 is applied their involves a minimum mandatory set by the sentencing guidelines that the Judge must apply (again hands are tied). The §851 enhancement is used without any mitigating factors to turn the minimum mandatory sentence of TEN years into 20 yrs. and the minimum mandatory of TWENTY years into a MANDATORY LIFE sentence with on chance of parole. These are the affects of the §851 this is done all without any mitigating factors, no checks and balances for the U.S. Attorney while the hands of the judge are tied.

In 99% of cases the §851 is applied the U.S. Attorney offered a plea deal; 100% of the cases the deal was for sentences of 50% below the minimum mandatory. Because the defendant choice was to exercise his/her right to a trial in hopes of proving their innocents the 851 was applied for an enhanced sentence upon conviction. In 100% of these cases the §851 was applied only days most times less than 24 hours before the jury was to be selected, so this issue boarders the line of prosecutorial vindictiveness; take the plea or get excessive time innocent or not!

The bottom line here is the use of the §851. This statute serves the purpose of enhancing already excessive sentencing, causing double punishment for past state charges that may or maynot have been found to be convictions in the state courts, is used along with other enhancing statutes (criminal history points), and is a tool for prosecutors to punish people for exercising their rights by using the Justice System. This Statute is flawed as are many.

The Judge has no dicretion on the application of the §851 or the Minimum Mandatory sentences to be applied by the U.S. Attorney. In two out of 4 cases the Felony used to enhance the sentence

adjudication was withheld; no guilt was established. So contrary to the U.S.S.G. the U.S. attorney say's it's legal to apply the §851 to non-convictions in the eyes of State Court (an issue for the appeals court).

* Criminal History

Under §4A1.2 Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

- (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense. U.S.S.G. 2002 p.315

Under this text according to the U.S.S.G. prior sentence is stated to be a conviction "imposed upon adjudication of guilt" by any rout. Even as the sentencing guidlines states this in plain english it is being used as though any sentence is used without established guilt.

While under §4A1.2(c) Sentences Counted and Excluded

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

- (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (b) the prior was similar to an instant offense: See U.S.S.G. 2002 p. 316

4A1.2(c) context is stating that sentencing must have been a term of at least one year or 30 days imprisonment. I am finding that under §4A1.1(c) points are being added for misdemeanors where no guilt was established nor was the requierments met to warrent points under this section. In 100% of the case researched the Probation officer in preparing the PSR added points for misdemeanor cases that did not met thecritirrior under any section of the U.S.S.G.. Due to the mis-interpetation of the U.S.S.G. points are being added and more time is being added and more defendants are spending more time being housed on the tax payers dollar.

Prison alternatives would save tax payer millions of dollars. While States such as Kentucky, Michigan, Connecticut, Louisiana, Mississippi and North Dakota, Texas, Oregon, Idaho, California and Arkansas are using alternatives like early release for non-violent inmates to ease the budget; while addressing the legitimate safety concerns of citizens and the need to help offenders take control of their lives to become productive citizens of society.

While Michigan signed into law a bill repealing the States mandatory minimum sentencing laws for drug crimes (non-violent), thus giving the judge the discretion to sentence offenders to probation or jail time as see fit. These steps reduces the number of first time offenders going to prison, therefore saving the tax payers millions of dollars.

The Federal system is currently home to over 170,000 men/women, 73% of these offenders are non-violent offenders. The average sentence is 120 months for non-violent crimes, the most popular charge is currently conspiracy this charge carries a minimum mandatory of TEN, 20, LIFE and due to this the system is over crowded with non-violent offenders at the cost of housing each offender for one year at 22K. With the population of the BOP the budget from year to year is almost 3.74BILLION you do the math if it don't help it does not make sense.

This is a citizens reply to the proposal for amending the U.S. Sentencing Guidelines. Give those that are non-violent offenders a chance to re-enter society and give back to their community and provide for the children and families that are innocent victims of their crimes. Any changes to the U.S.S.G should assist in releasing those that have been in the prison system for far to long because of the minimum mandatroy sentencing that are way to excessive.

Thank you for taking time out to review the issues . Being a citizen of the United States gave me this chance to address these issues with you. The Education System, Health System and the Welfare System is suffering so why are tax dollars going to the BOP when they can used for the well being of the citizens whom are paying the taxes.

Citizen of the U.S.A.

(5)

[120]

SITE OF RESEARCH:

Clerk of Court @
Federal Courthouse Square
301 North Miami Avenue, Rm. 105
Miami, FL 33128-7788

611 United States Courthouse
80 North Hughey Avenue
Orlando, FL 32801

2211 Richard B. Russell Federal Building
75 Spring Street, S.W.
Atlanta, G.A. 30303

210 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, N.C. 28202

Strom Thurmond Federal Building
1845 Assembly Street
Columbia, SC 29201

Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314

Federal Prison Journal 2002

United States Sentencing Guidelines 2002

JANUARY 30, 2003

U.S. SENTENCING COMMISSION
ONE COLUMBUS CIRCLE N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002

PUBLIC COMMENT:
CONCURRENT SENTENCES

COULD THE SENTENCING COMMISSION TAKE IN CONSIDERATION, AND HELP THE FELONS THAT MOST NEED A CONCURRENT SENTENCE. THE FELONS THAT GET PUNISHED DOUBLE FOR THE SAME STATE CHARGE! THE FELONS THAT GET THERE FEDERAL CHARGE ENHANCED UNDER 4B1.2 BECAUSE OF THERE STATE CHARGE, THEN RUN CONSECUTIVE TO THE SAME STATE CHARGE! THIS 4B1.2 SHOULD BE ONE OF THE MECHANISMS THAT TRIGGER A CONCURRENT SENTENCE. THE 4B1.2 IS COUNTED IN THE BASE OFFENSE LEVEL IN CHAPTER 4. THEY ARE THE MOST NEEDING THE CONCURRENT SENTENCE AND WOULD STOP THE DOUBLE COUNTING ON THEM FOR THE SAME STATE CHARGE. IT IS INCORPORATED IN THE BASE OFFENSE UNDER 4B1.2. SO THEREFORE IT SHOULD BE ADDED IN BESIDE RELEVANT CONDUCT 1B1.3 UNDER 5G1.3(B).

I ALSO READ RUGGIANO V. REISH 307 F3D 121. I AGREE WITH THAT COURTS. SHOULD HAVE AUTHORITY UNDER 5G1.3(C) IN CASES THAT UNDER 4B1.2. KEEP THE DEFENDANT FROM BEING PUNISHED DOUBLE.

THANK YOU,

Harold Gargen

JANUARY 30, 2003

U.S. SENTENCING COMMISSION
ONE COLUMBUS CIRCLE N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002

PUBLIC COMMENT:
CONCURRENT SENTENCES

COULD THE SENTENCING COMMISSION TAKE IN CONSIDERATION, AND HELP THE FELONS THAT MOST NEED A CONCURRENT SENTENCE. THE FELONS THAT GET PUNISHED DOUBLE FOR THE SAME STATE CHARGE! THE FELONS THAT GET THERE FEDERAL CHARGE ENHANCED UNDER 4B1.2 BECAUSE OF THERE STATE CHARGE, THEN RUN CONSECUTIVE TO THE SAME STATE CHARGE! THIS 4B1.2 SHOULD BE ONE OF THE MECHANISMS THAT TRIGGER A CONCURRENT SENTENCE. THE 4B1.2 IS COUNTED IN THE BASE OFFENSE LEVEL IN CHAPTER 4. THEY ARE THE MOST NEEDING THE CONCURRENT SENTENCE AND WOULD STOP THE DOUBLE COUNTING ON THEM FOR THE SAME STATE CHARGE. IT IS INCORPORATED IN THE BASE OFFENSE UNDER 4B1.2. SO THEREFORE IT SHOULD BE ADDED IN BESIDE RELEVANT CONDUCT 1B1.3 UNDER 5G1.3(B).

I ALSO READ RUGGIANO V. REISH 307 F3D 121. I AGREE WITH THAT COURTS SHOULD HAVE AUTHORITY UNDER 5G1.3(C) IN CASES THAT UNDER 4B1.2. KEEP THE DEFENDANT FROM BEING PUNISHED DOUBLE.

THANK YOU,

Sanya Sargent

JOHN J. SHORTER

Reg. No. 03970-027, P.O. Box 5000, Greenville, Illinois 62246

February 21, 2003

Michael Courlander,
Public Affairs Officer
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

RE: Public Comment On Proposed Amendment(s): §5G1.3(b)
And Its Retroactive Application

Dear Mr. Courlander:

I am writing as someone who will be directly affected by the proposed amendments to §5G1.3(b), assuming retroactivity. I have spoken to and written your office on several different occasions regarding the unjust "Crack-Law" and most recently the 2002 Application Note 7 (Downward Departure Provision) to the Commentary of §5G1.3(b). (See your attached response.)

My Brief Case History

I have been incarcerated since April 11, 1990, shortly after my 22nd birthdate. I am a first time non-violent "Crack-Law" offender serving a 30 year concurrent sentence. Prior to my federal arrest I was serving a 6 year state (Fort Wayne, Indiana) sentence for the same offense. A fact that has been repeatedly acknowledged by my federal judge, the government and the probation department. I was taken in to federal custody on May 6, 1993, prior to the discharge of my state sentence. Unfortunately, I was again convicted and later sentenced federally to 30 years without receiving an adjustment for the 6 years I completed on the related state case.

At the time of my federal sentencing the 6 year state sentence had been discharged and, as a direct result, the judge refused to apply §5G1.3(b) ('94 version), citing a lack of authority. However, he did instruct me to take the issue to the Bureau of Prisons ("BOP") which, I did. And the BOP has steadfastly denied my repeated requests for the proper adjustment of my sentence since 1994. Therefore, my ultimate sentence is: 6 years state plus 30 years federal with a 5 year Supervised Release Term (41 years); for a first time non-violent offense.

2002 Application Note 7

In the previous amendment cycle the Commission issued a

a clarifying amendment to §5G1.3(b). Therein, agreeing with United States v. Blackwell, 49 F.3d 1232, 1241-42 and n.20 (7th Cir. 1995). This case held and the Commission agreed, that "distinguishing between two defendants merely by virtue of their sentencing dates appears contrary to the Guidelines 'goal of eliminating unwarranted sentence disparities.'" In addition it was rightly noted that "it perhaps could be argued that applying the guidelines to undischarged sentences but not to discharged sentences lacks a rational basis and therefore violates the Constitution." The acceptance of these facts by the Commission clearly argues in favor of retroactive application. This is true simply because if it is unjust and unconstitutional now, then it was unjust and unconstitutional then and the U.S. Constitution remains unchanged.

2003 Proposed Amendment To §5G1.3(b)

I am very pleased and relieved that the Commission is again addressing this important issue to achieve the Guidelines stated goals. Upon reviewing the amendment options, I believe that "Option Two B" is more appropriate. This option gives judges more latitude to fashion fair sentences in particular cases. In addition I assert that the application of this option should be mandatorily applied [shall]. Therefore, judges will not be unnecessarily restricted and at the same time required to apply the fairness this amendment permits.

In my particular case either option would apply, however, the additional specific requirement that any increase be directly relevant is unnecessary. Any fact that increases the instant offense should be considered in tandem with the instant case. This would promote fairness and give judges the option to more fully exercise the authority it has been granted by the Constitution.

Retroactivity of 2003 Proposed Amendment

The importance of the recognition that §5G1.3(b) should be overhauled in the suggested manner is proof positive that it should be extended to every case it affects. In my limited research on the effect of this amendment, I have found that it will not open the flood gates and release thousands of underserving defendants. Using my specific case as an example the direct affect of retroactively applying this amendment would be as follows: 6 years state - 30 years federal = 24 years to serve with an additional 5 years of supervised release.

The judge in my case specifically instructed me to address my issue with the BOP in the first instance but the BOP refuses to adjust my sentence. Should I not have an opportunity to redress the unjust sentence I received? The judge in my case stated on numerous occasions, during my post conviction proceedings, that he believed the sentence was extremely severe but that his hands were tied by the Guidelines. Even with the reduction in my sentence I would still be required to serve over 20 years in prison. Twenty years or more of incarceration is very harsh for a first time non-violent offender.

Issue For Comment: §5G1.3(c)

I address this issue in light of the potential effect it could have on §5G1.3(b). I believe the Commission should address this issue and resolve it in favor of the holdings of Ruggiano v. Reish, 307 F.3d 121 (3d Cir. 2002). I believe the case itself articulates the specific reasons of why and how this issue should be resolved. Infact I submit that the courts should be able to grant "credit" for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the remaining portion of a defendant's preexisting sentence, as well as be able to grant this credit for discharged sentences.

Ruggiano exhausted his BOP remedies first and then filed a § 2241 petition with district court. I believe that this option should be available to §5gl.3(b) situations as well, especially if the Commission does not specifically make the amendments to §5G1.3(b) retroactive.

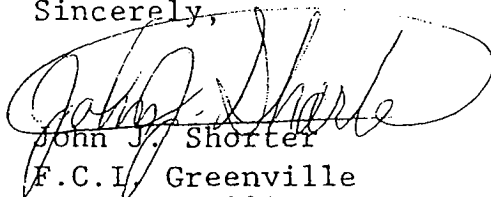
The current proposed amendments to §5G1.3 are substantial in comparison to last year's 2002 Application Note 7 (Downward Departure Provision), which was merely clarifying. The Commission's imposed authority should be used to address and apply the Guidelines in an even-handed manner. As a result, I urge the Commission to considers the comments offered by someone who's life and family's life will be tremendously affected by the actions taken on these proposed amendments.

Conclusion

In closing, I would like to thank you for the opportunity to voice my comments and sincere passions on the above issues. I pray that compassion would continue to overrule the political roadblocks which may be erected by some of those who do not face the affects of this concern directly.

Also, if this commission would like for me to submit any specific information that it deems helpful, please do not hesitate to contact me or even consider my signature below as permission for the Commission to use my specific sentencing information any way it seems appropriate.

Sincerely,



John J. Shorter
F.C.I. Greenville
P.O. Box 5000
Greenville, IL
62246

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
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October 10, 2002

John J. Shorter
Reg. No. 03970-027
P.O. Box 5300
Adelanto, CA 92301

Dear Mr. Shorter:

Your letter to the Commission has been referred to me for response. The recent amendment proposed to U.S.S.G. §5G1.3 has not been authorized by the Commission for retroactive application. I have no further information concerning the Commission's April 15, 2002 recommendations to Congress on crack cocaine sentences.

Very truly yours,

A handwritten signature in cursive script that reads "Michael Courlander".

Michael Courlander
Public Affairs Officer

Craig Patterson
Reg. No. 09385-045
USP Leavenworth
Post Office Box 1000
Leavenworth, Kansas 66048
Mrs. Diana Murphy - Chair

Re: "Crack" Cocaine Sentencing Policy

February 18, 2003

Dear Mrs. Murphy:

I am writing you after recently reading the report and recommendations that was filed to Congress (May 2002) dealing with the cocaine and "crack" cocaine sentencing policy.

Being a first time non-violent drug offender, I was very disturbed by your sentencing guideline results. I believe I speak on the behalf of all non-violent drug offenders, which reaches in the tens of thousands, when I address this concern.

What troubles me and many others, is the five(5) kilogram gap (between 2.5 and 7.5 kilos) that comes into play at level 38 and 36 with your new model guideline that will apply with changing the 100-1 ratio to 20-1 dealing with "crack" cocaine. Must I also imply that it is this street word - "crack" - that has influenced the minds of the Sentencing Commission and Congress to summons these heinous forms of punishment.

If the 100-1 ratio is unfair, then 20-1 ratio must also be unfair. I ask you a question, why is "crack" the only illegal drug with a spacious ratio? Since your report shows that it is unjust to Blacks and Latinos, it would be just to say that race is the reason why.

The concern is great because with changing the "crack" law to 20-1, there will still be tens of thousands of non-violent drug offenders that will not feel any effect of the change, due to the five(5) kilogram differential.

To my understanding, these laws were inacted mainly for "Drug Kingpins". Ask any Black or Latino who has been convicted either with conspiracy of, or possession of five(5) to ten(10) kilograms of "crack" or cocaine, is that person considered a "Kingpin". The answer is obviously **NO!** Inner City street dealers are being handed down sentences that should normally be awarded to suppliers that are shipping in hundreds upon hundreds, to thousands to tons of "powder cocaine".

It seems so easy for the Commission to present to Congress a law without any sufficient research of the outcome of the law or background of the problem, but after seventeen(17) years, cannot administer a cure. I question all of the Sentencing Commission to delve deeper into the fairness, reality, and rationality to obtain a result that aligns itself in truth. There is a short way to this destination, and that is the RIGHT WAY

Please find enclosed a copy of a motion that was prepared and filed in the Supreme Court by some 26 prisoners. This motion was denied review, i.e. the Supreme Court chose to not review the issues.(merits never addressed)

Thank you for earnest and sincere consideration of this matter.

*available
upon request
-on file with
Public Affairs*

Sincerely,

Craig Patterson
Craig Patterson
Reg. No. 09385-045
USP Leavenworth
Post Office Box 1000
Leavenworth, Kansas 66048

February 18, 2003

CC: Rueben Castillo - Vice Chair
William K. Session, III - Vice Chair
John R. Steer - Vice Chair
Sterling Johnson, Jr. Commissioner
Micheal E. O'Neill - Commissioner

PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

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James T. Searcy, Sr., 6th Circuit
Rex S. Morgan, 7th Circuit
Jim P. Mitzel, 8th Circuit
Felipe A. Ortiz, 9th Circuit
Ken Ramsdell, 9th Circuit
Debra J. Marshall, 10th Circuit
Raymond F. Owens, 11th Circuit
P. Douglas Mathis, Jr., 11th Circuit
Theresa Brown, DC Circuit
Cynthia Easley, FPPOA Ex-Officio
John Fitzgerald, OPPS Ex-Officio

March 22, 2003

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

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on March 6 and 7, 2003 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments for the amendment cycle ending May 1, 2003. We are submitting comments relating to the following proposed amendments.

Proposed Amendment – Corporate Fraud

POAG considered the issues that remain outstanding and were published for comment on January 17, 2003. To date, we have insufficient experience with the impact on the total offense level of the various specific offense characteristics which were added between November 1, 2001, and January 25, 2003. There is also a concern that charge bargaining will increasingly occur as a result of some of these changes. POAG discussed the sweeping changes to §2B1.1, effective November 1, 2001 and January 25, 2003. Given the recent amendments to §2B1.1, which have raised issues of *ex post facto* for offenses committed prior to enactment, POAG believes the field has not had sufficient opportunity to consistently apply this guideline. The group remains concerned about the impact to low level theft type cases which are now captured in this consolidated guideline. That being said, however, the group does not support this guideline being deconsolidated. The amendments effective November 1, 2001 and January 25, 2003 may provide adequate sanctions to the type of offender targeted under *Sarbanes-Oxley*. Notwithstanding these concerns, POAG's positions with respect to the proposed amendments are outlined below.

With the increased statutory penalties from ten to twenty years for fraud offenders, POAG recognizes the need to provide alternative base offense levels to reflect these penalties. If alternative base offense levels are implemented, POAG prefers applying the higher base offense level of 7 in cases involving offenses for which the maximum term of imprisonment prescribed by law is at least twenty years. This option would assign the higher base offense level to many cases involving fraud; the lower base offense level of 6 would almost always apply in theft cases. This might to some extent address the concern that theft and fraud cases warrant different punishment.

There are three options under consideration for amending the loss table in §2B1.1. POAG notes that none of the options raise sanctions for offenders whose frauds involve \$70,000 or less. If the table is altered, POAG noted ease of application exists for all three loss tables.

With respect to §2B1.1(b)(13), POAG supports expansion of this guideline as proposed. POAG members noted limited experience with cases where this enhancement would apply but surmise that this specific offense characteristic will specifically provide for the inclusion of non registered brokers and dealers and thus will close a potential loophole.

Likewise, POAG supports the creation of an application note under §2J1.1 (Contempt) regarding application of §2B1.1 as the most analogous guideline in cases involving a violation of a judicial order enjoining fraudulent behavior. Again, POAG members voiced limited experience concerning these types of cases.

POAG supports an increase to the base offense in §2J1.3 (Perjury) to conform to the increased base offense level in §2J1.2 (Obstruction of Justice), which became effective January 25, 2003. These types of offenses are similar and should have the same base offense level. POAG recommends that, under application note 4 at §2J1.2, which lists potential considerations for upward departure, examples of "extreme violence" would be helpful. This would assist officers in identifying the types of aggravated obstruction cases falling outside the heartland.

Proposed Amendment - Campaign Finance

POAG has had no experience with the new emergency Campaign Finance Fraud guideline and offers no suggestions for change. The group previously agreed with the establishment of a separate guideline, a base offense level of 8 and use of the loss table in §2B1.1 to address the value of the illegal transactions. POAG notes that the new guideline will eliminate possible disparity as previously, the instruction was to apply the most analogous guideline.

Proposed Amendment - Use of Body Armor in a Crime of Violence or Drug Trafficking Crime

POAG understands and appreciates the need to provide an enhancement/enhanced punishment for crimes of violence and/or drug trafficking offenses in which the defendant used body armor. Offenses involving both a weapon and body armor have an increased potential for violence and should not be treated in the same manner as the person who is simply wearing body armor, yet, has no means to commit an act of violence. Both situations indicate an awareness of a heightened potential for violence and therefore, it is our position that enhancements are appropriate for both scenarios. Under a new

guideline, §3B1.5, consideration should be given for an increased enhancement for the more egregious case of an offender possessing a dangerous weapon and wearing body armor.

In application note 1, it would be helpful to highlight that the definition under 18 U.S.C. § 16 for a crime of violence is different and broader than the definition found in Chapter 4.

Application note 2 currently indicates this enhancement is defendant based. We understand that the Congressional directive was worded in a defendant specific manner. It is our position that this enhancement should include relevant conduct of others. For example, four individuals planned and committed a bank robbery. Two wear body armor, two do not. Under current relevant conduct standards, all four would receive a weapon enhancement. It is our recommendation that this same principal should apply to offenses involving body armor if the defendants plan a crime together and decide that some participants will wear body armor and others will not.

Finally, in regard to application note 4, POAG found the language "actively used the body armor in a manner to protect the defendant's person" confusing. Perhaps some examples to illustrate this principal would assist officers in making this determination.

Proposed Amendments - Oxycodone and Red Phosphorous

POAG believes the proposed amendment to §2D1.1 would remedy proportionality issues resulting from inequitable counting of oxycodone. Based on the increasing levels of abuse and the addictive nature of oxycodone, POAG supports the amendment to resolve oxycodone calculation difficulties and increase its marijuana equivalency from 500 to 6,700 grams.

POAG supports the amendment which adds red phosphorous to the Chemical Quantity Table in §2D1.11. The conversion method suggested by staff appears to be sound and, like the precursor ephedrine, is based on the amount of methamphetamine which could be manufactured from the precursor.

Proposed Amendment - Cybercrime

POAG discussed the proposed promulgation of amendments pursuant to the Cyber Security Enhancement Act of 2002. The Group believes that an increase of four levels, rather than two, more accurately accounts for the increased risk of serious bodily injury or death which may occur as a result of conduct described in 18 U.S.C. § 1030(a)(5)(A)(i). The expanded language proposal in the loss definition for protected computer cases in application note 2 mirrors the loss language in the statute. This definition addresses consequential damages without using said terminology and POAG is concerned about the difficulty in ascertaining these loss amounts and the sentencing delays that may result. Although the U.S. Attorney's Offices are to produce this information, it is often not provided.

POAG discussed the proposed specific offense characteristic at §2B1.1(b)(14)(A), which provides for alternative offense level increases of two levels, or four levels. POAG believes these offense level increases accurately reflect the Congressional directive that the Guidelines account for (1) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the

administration of justice, and (2) whether the violation was intended or had the effect of significantly interfering with or disrupting a critical infrastructure.

POAG requests that the Commission examine the terminology used in the proposed upward departure at §2B1.1, comment. (n.16(B)), to the extent that an upward departure under this provision seems to require a higher degree of "disruption" than that required under §5K2.7. The proposed application note provides that "[a]n upward departure would be warranted in a case in which subsection (b)(14)(A)(ii) applies and the disruption of public or governmental functions or services is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters. See, e.g., §5K2.7 (Disruption of Governmental Function)." In contrast, §5K2.7 requires only that the "... conduct resulted in a significant disruption of a governmental function." (Emphasis added). POAG foresees a possible application problem given the apparent differences between the two provisions in the degree of governmental disruption required for an upward departure. To the extent that the Commission is concerned with maintaining consistency between guideline sections, POAG suggests the Commission consider amending the language in one or both provisions, eliminating the reference to §5K2.7, and adding examples to clarify use.

POAG foresees no application problems with the amendments proposed at §§2B1.1, comment. (n.2(A)(v)(III)), 2B2.3, or 2B3.2.

Proposed Amendment - Terrorism

In discussing the proposed change in the Money Laundering Guideline, POAG agreed the term "terrorism" should be deleted from §2S1.1(b)(1). This will prevent double-counting with the terrorism adjustment found in §3A1.4. POAG thought the proposed amendment to §2X3.1, Enhancement in Accessory After the Fact Guideline for Harboring Terrorists, was difficult to understand. We anticipate there may be some confusion in applying this guideline and recommend this guideline be revised for easier application. POAG discussed the proposed amendment to §2M6.1, Biological Agents and Toxins, and suggests a definition be added under the application notes to define or explain the phrase "intent to injure the United States" which is found in §2M6.1(a)(1). We recognize that this wording is statutory construction and an element of the offense, however, we believe the language will pose application difficulty for the field. POAG also discussed the proposed amendment pertaining to the Safe Drinking Water Provision which provides for the consolidation of guidelines found in §2N1 and §2Q1. While POAG could not foresee any application problems by consolidating the guidelines, we simply do not have enough application experience with these particular guidelines to make a recommendation.

Proposed Amendment - Immigration

The proposed amendment to §2L1.2 contains two options for a slight change to the specific offense characteristics regarding prior drug trafficking offenses, and also adds or amends several definitions. With regard to the options at §2L1.2(b)(1)(B), POAG recommends Option Two. We believe that this option will result in sufficient punishment, and with the definition added for "sentence of imprisonment," application of the guideline should be facilitated. The group also prefers the second option in the revised proposal of sixty days at §2L1.2(b)(1)(B). However, we believe a conflict may exist. The definition provided for "sentence of imprisonment" in the case of a totally suspended sentence would seem to be at odds with the definition in the statute at 8 U.S.C. § 1101(A)(48)(b). Additionally, we would recommend if Option Two

is adopted, that it not be retroactive as retroactivity would have an adverse effect on the caseloads in courts in the border districts.

POAG supports the definitions provided for "child pornography offense," "crime of violence," "drug trafficking offense," "firearms offense," "human trafficking offense," and "terrorism offense." We also support the revised definition of "alien smuggling offense," which eliminated the term "for profit." However, another conflict may exist between these definitions and the list of "aggravated felonies" provided at 8 U.S.C. § 1101(a)(43).

Regarding §2L1.2, (comment. n.3), POAG recommends Option 2 with the terminology "under such section" being replaced with 21 U.S.C. § 844. The group recognized sentencing disparity issues exist regarding the treatment of drug possession cases. A conviction for simple possession in one jurisdiction may be charged as distribution elsewhere, thus resulting in disparity. In addition, officers may encounter difficulties in obtaining documents outlining the criminal conduct.

Proposed Amendment - §5G1.3

POAG favors Option 1A of the proposed amendment since it is clearly stated in the case of a prior revocation, the sentence is to run consecutive to any prior undischarged term of imprisonment. It was the opinion of POAG that this option consistently uses the term "shall" in addressing cases falling under §5G1.3(a). POAG remains supportive of the Commission's past approach to revocation sentencing as a sanction for the breach of trust of supervision, and not punishment of new offense behavior.

POAG believes the use of the case examples in this guideline would be extremely helpful to the field. This guideline has traditionally caused great confusion to probation officers and examples demonstrating how this guideline is to be applied will assist the field in ease of application.

POAG feels the requirement in §5G1.3(b)(A) addressing credit received by the Bureau of Prisons may create problems for courts, since it is our experience that information obtained from the Bureau of Prisons is problematic to determine. Many times officers are unable to retrieve this information from the Bureau of Prisons in a timely fashion, or the Bureau is unable to assist the officer without receipt of the presentence report.

Regarding application note 3(D), POAG believes the language should clearly state that the sentence imposed is by way of a downward departure, and that the use of the word "adjustment" should be avoided. The term "adjustment" is inconsistent with its use in other areas of the guidelines.

As an aside, it might be helpful if the U.S. District Judges' Bench Book contained language for imposing sentences under §5G1.3(b) and (c) as these areas have proven problematic throughout the circuits. It is recommended that the amended language contain notice to the Bureau of Prisons as to when and how the "sentence alteration" has been rendered by courts.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Cathy A. Battistelli
Chair