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VIA HAND DELIVERY

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

Re: 2004 Proposed Amendments and Issues for Comment

Dear Commissioners:

We write on behalf of the Practitioners Advisory Group to address the notice of proposed amendments and issues for comment published in the Federal Register notices of January 14, 2004. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to respond to the issues for comment and specific amendments proposed by the Commission.

I. Proposed Amendments to Chapter 8 (Amendment #2)¹

Initially, the PAG applauds the Commission for the formation of this Ad Hoc Advisory Group. From our perspective, this is sentencing policy-making at its best, and it stands in unfortunate contrast to the process that has led to many of the recent amendments that have resulted from Congressional directive. We also wish to compliment the Ad Hoc Advisory Group on its excellent work product. It is refreshing to see sentencing policy formulated through a process that brings together experienced individuals from different backgrounds and ideological perspectives. Although we do not necessarily agree with all of the Group's recommendations, we hope that the Group's success can serve as a model for future policy-making in this arena. We do wish to provide input on the four issues for comment:

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¹ The PAG expresses its appreciation to Eugene Illovsky and Greg Smith for their assistance in preparing this portion of our submission.

A. Eliminate the Automatic Preclusion for Unreasonable Delay.

Under U.S.S.G. § 8C2.5(f), an organization cannot receive the three point culpability score reduction if it "unreasonably delayed reporting the offense to appropriate governmental authorities." The proposed amendment retains that prohibition in subsection (f)(2), even though the clear thrust of amended § 8C2.5(f) is the adequacy of the organization's compliance program.

The prohibition should be removed. An organization's delay in reporting is sufficiently considered in the guideline's subsection explicitly addressed to such self-reporting, U.S.S.G. § 8C2.5(g). Under that section, an organization cannot get the five point culpability score reduction for self-reporting and acceptance of responsibility if it does not "report[] the offense to appropriate government authorities" within a "reasonably prompt time."

An organization with an excellent compliance program may, for some reason, delay its self-reporting of the violation. That decision, if later deemed unreasonable, may not necessarily reflect on inefficacy of the organization's program to "prevent and detect violations of law." It is proper to have reporting delay be the subject of subsection (g) and remove it from subsection (f).

B. High-Level Personnel Involvement Should Create a Rebuttable Presumption.

If certain high-level personnel participated in, condoned, or were willfully blind to the offense, § 8C2.5(f) automatically precludes the three-point culpability score reduction for an effective compliance program. The proposed amendment changes the automatic preclusion to a rebuttable presumption that the organization's compliance program was not effective.

The PAG believes the proposed amendment, reflected in subsection(f)(3), correctly treats the issue of high-level employee involvement. The PAG believes the Commission should not try to distinguish further between 'large' and 'small' organizations for the purpose of leaving some version of the automatic preclusion in place. An "automatic" rule will invariably lead to unjust results in some cases.

An automatic preclusion also unnecessarily restricts judicial discretion. Removing it gives judges the discretion to consider each organization's circumstances, and the particulars of the higher-level employee involvement, on a case-by-case basis. The organization should have the opportunity to present its case to the judge as to how it can rebut the presumption in those particular circumstances. Judges will no doubt exercise that discretion in light of precisely those factors recognized to be important, such as the organization's size and the number and type of high-level employees involved in the offense.

C. Increase The Culpability Score Point Reduction.

The PAG supports increasing the culpability score reduction from three to four points. Awarding more points for an effective compliance program would not only appropriately reflect the heightened requirements of U.S.S.G. § 8B2.1, but would also create an incentive for organizations to examine the adequacy of their current programs.

D. Factors Relating to Small and Mid Size Organizations.

Chapter Eight's impact on small and mid-size companies requires further study. Historically, the great majority of sentenced companies are small, closely-held entities. And, as the Advisory Group's Report notes, since 1991 an overwhelming number of convicted organizations failed to receive effective compliance program sentencing credit for reasons related to their smaller size. The PAG seconds the Advisory Group's recommendation that the Commission devote resources to reaching and training small and mid-size companies about corporate compliance.

The PAG believes that many factors or considerations could be incorporated into Chapter Eight to encourage small and mid size organizations to develop and maintain compliance programs. There is likely, however, to be some spirited disagreement among business interests, the defense bar, and the Department of Justice as to which factors or considerations will likely be most effective or important. And, to say the issue is a difficult one may understate things. The Advisory Group Report noted the difficulties it had in getting feedback on the matter.

The PAG therefore proposes that the Commission convene a working group dedicated solely to the study of the specific issue of the guidelines' application to small and mid size companies. This working group will no doubt have the first, difficult task of even defining the best methodology for studying this issue. The PAG envisions that the working group would reflect the usual affected constituencies (e.g., business, defense bar, prosecutors), but also that it might fruitfully be broadened to include an economist and/or other academics who have studied these issues from a broader perspective. The interdisciplinary approach may be the most effective way to give the Commission the help it needs to tackle this complex yet exceedingly important guidelines matter.

II. Proposed Amendments relating to Public Corruption (Amendment #4)

The PAG is unaware of any data or even anecdotal examples suggesting a need for increased penalties under these guidelines. No such basis or justification is included in the materials accompanying the proposed amendments. Although the Synopsis of the proposed amendment states that it "aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense," it does not appear that the proposed amendment in fact does so (assuming there are policy reasons for such a change, which are not explained in the published materials). The new guidelines incorporate the §2B1.1 loss table in precisely the same fashion as the existing guidelines. Accordingly, the PAG does not believe any

increase to the base offense levels for bribery and gratuity cases has been demonstrated to be warranted. Indeed, these base offense levels could instead be *reduced* to achieve proportionality with 2B1.1, the guideline governing other similar economic crimes.

The PAG agrees that Guidelines 2C1.1 and 2C1.7 may readily be consolidated, but the 2-level enhancement for multiple incidents should be limited to those cases currently sentenced under 2C1.1 to avoid even further unwarranted disparity between cases involving intangible rather than tangible harm. Similarly, if guidelines 2C1.2 and 2C1.6 are consolidated, the 2-level enhancement for multiple incidents should be limited to cases currently sentenced under 2C1.2 to avoid unwarranted disparity between cases involving mere gratuities rather than actual theft.

Briberies and gratuities are purely economic crimes. While the acceptance of a bribe or gratuity by a public or bank official is a serious offense because it serves to undermine the public's confidence in government and banks, there is little reason to believe it does so to any greater degree than outright theft or embezzlement by such officials, particularly where the official's position does not involve high-level decision-making or other sensitive matters, and is not an elected office. Because the base offense level for economic crimes is either 6 or 7, depending on the statutory maximum sentence, the current base offense level of 10 for bribery offenses results in unwarranted disparity. Increasing the base offense level from 10 to 12 would exacerbate this unwarranted disparity rather than cure it, and result in sentences that are unjust.

Consider, for example, a typical bribery case in which a low-level public official accepts two \$5,000 bribes to award a \$100,000 contract on which the contractor makes a \$20,000 profit.² Under the current version of 2C1.1, the base offense level would be 10, increased by 2 levels for multiple incidents, plus 4 levels under the 2B1.1 table reflecting the \$20,000 "benefit received," resulting in an adjusted offense level of 16. If the base offense level is increased by two levels as proposed in the amendment, the adjusted offense level would be 18.

Contrast this \$10,000 bribery scenario with a case in which a public official simply steals \$10,000 outright from the public fisc. Assuming some use of the mails or wires, the base offense level would be 7, plus 4 levels for the loss, plus 2 levels for abuse of trust, resulting in an adjusted offense level of 13. Why should a low-level public official be sentenced 3 levels higher for accepting a \$10,000 bribe from a third party than stealing the \$10,000 directly from the public fisc? And if the proposed amendment were adopted, the disparity would be 5 levels. This means that the minor official who accepts the \$10,000 bribe would be sentenced 1 level *higher* (18) than an official who outright steals up to \$120,000 – *more than the entire value of the contract* (7+8+2=17).

The unwarranted disparity noted above would be further exacerbated by the consolidation of 2C1.7 with 2C1.1 if the 2-level increase for multiple incidents is applied across the board.

² Obviously the numbers used in hypotheticals such as this are important. We believe the numbers above are quite reasonable, and further believe our overall point would be amplified by having the Commission Staff apply and contrast the fraud and bribery guidelines to randomly selected actual bribery cases.

Section 2C1.7 deals with acts of dishonesty by public officials that cause purely *intangible* harm. Section 2B1.1, coupled with a 2-level increase for abuse of trust, would presumably apply in non-bribery cases to acts of public officials which actually cause tangible harm, such as thefts or embezzlements. If the amendment were enacted as proposed, cases of *intangible* harm with multiple incidents would have an offense level of 14, while cases of *tangible* harm would be 5 levels lower ($7+2=9$).

Similar disparities result from raising the base offense levels for mere gratuities – cases which by definition do not involve any *quid pro quo* and are largely misdemeanors. These disparities will be furthered amplified by consolidating the bank gratuity cases with 2C1.2 and applying the 2-level multiple incident adjustment across the board. A bank employee who accepts two \$3,000 gratuities not causing loss to the bank will be sentenced at the same level (13) as a bank employee who embezzles up to \$30,000 directly from the bank. ($9+2+2=13$ (proposed 2C1.2); $7+2+4=13$ (existing 2B1.1)).

To be sure, there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But this characteristic is more than fully accounted for by the 8-level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic. For example, if the amendment were enacted as proposed, an official in a high position of public trust involved in more than one incident who accepted \$10,000 for the purpose of influencing an official act will be sentenced at the same level ($12+2+2+(2 \text{ or } 4)+(2 \text{ or } 4)=20$ to 24) as if the official had embezzled from \$400,000 to \$2,500,000, depending on which options are selected from the proposed increases.

The existing bribery and gratuity guidelines are already out of proportion with the guidelines for economic offenses, and should be reduced by at least 2 levels to eliminated incongruous results. Raising the bribery and gratuity offense levels, particularly in conjunction with applying the 2-level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

III. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

The PAG will provide a supplemental submission addressing this issue.

IV. Proposed Amendment to Multiple Victim Rule in USSG §2B1.1, (comment.) n. 4(B)(ii) (Amendment #8b)³

The proposed amendment to U.S.S.G. §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal

³ The PAG thanks Richard Crane for his assistance with this portion of our submission.

customers, such as those found in apartment complexes, would presumptively involve 50 or more victims.

Presently, the special rule provides that when United States mail is taken from a Postal Service relay box, collection box, delivery vehicle, satchel or cart, the offense is considered to have involved at least 50 victims. This rule was added to the guidelines in 2001 because of "(i) the unique proof problems often attendant with such offenses, (ii) the frequent significant, but difficult to quantify, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States Mail." U.S.S.G. Amend. 617 (Reason for Amendment). These reasons provide no support for the changes contemplated in Proposed Amendment 8(b).

A. Amendment Does Not Address Unique Proof Problems

Unique proof problems exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft. Without knowing the number of pieces of mail, the scope of the theft and number of victims is impossible to ascertain.

These proof problems do not exist when dealing with banks of mailboxes. In fact, it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes. For example, if the offender stole mail by entering an apartment unit box from the front,⁴ the door to the mailbox will almost always show signs of tampering to overcome the box's locking mechanism. On the other hand, mail taken from individual home mailboxes would not show such tampering because these boxes are rarely locked. If the apartment mail was stolen via the back way, it would be more difficult to determine the number of victims, but no more so than determining the number of victims when mail is stolen from individual home mailboxes.

B. Quantifying Non-Monetary Losses Is No More Difficult Than In Other Cases

As noted above, we do not believe it is more difficult to quantify non-monetary losses resulting from theft of mail from apartment cluster mailboxes than single residence mailboxes.

C. Amendment Will Not Further the Purposes of the Guidelines

It may be important to protect the soundness of the United States Postal Service by providing greater penalties for those who would steal from a Postal Service vehicle or container. But we do not believe it is necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences.

⁴From the front" means that the mail was taken out of the box in the same manner as the recipient would have taken it. In some cases, mail can be accessed from the back by unlocking the entire bank of boxes or by approaching the boxes from the rear (as is done with the individual boxes located in a Post Office. [2-198]

On the other hand, the purposes of the guidelines will be frustrated if the proposed amendment is adopted. The basic objective of the guidelines is to provide reasonably uniform sentences for similar offenses committed by similar offenders. USSG Ch 1, Pt. A(3). Mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The proposed amendment will also create confusion as to the meaning of the term 'victim.' For purposes of mail theft, 'victim' is defined as "any person who sustained any part of the actual loss" or "any person who was the intended recipient or addressee" USSG §2B1.1 App. Note 4(B)(i). In either case, the definition requires an identifiable victim. The definition has been weakened, perhaps necessarily, by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance. It should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

D. Placing Burden On Defendant to Prove Number of Victims is Unfair⁵

Requiring a defendant to prove that his mail theft offense involved less than fifty victims puts the burden on the party in the worst position to do so. The government is in a far superior position to prove the number of victims because it can obtain this information immediately upon discovery of the offense. It is one thing to ascertain how many apartments were vacant and how many people had already retrieved their mail when the question is asked the same day as the offense and another to get answers when the questions are asked months later. Additionally, government agents have the perceived authority to ask people if they have already retrieved their mail and, if not, whether they were expecting anything valuable or time-sensitive. An attorney or investigator representing the alleged thief would have a far more difficult time getting answers to these questions.

Additionally, the present rule reasonably assumes that a person who steals from a Postal Service box or conveyance intends to steal all the mail, while breaking into a single apartment mailbox does not evidence such an intent.

E. There Is No Demonstrated Need for the Amendment

Finally, we question the seriousness of the problem addressed by the proposed amendment. We can find only one case where a similar situation arose. In *U.S. v. Gray*, 71

⁵As published, the amendment provides that any theft from a cluster of mailboxes would be considered to have involved 50 or more victims. This would result in a four level enhancement even if the apartment complex had less than 50 apartments. At the very least, this should be changed to read that where there are multiple boxes, there is a presumption that the number of victims corresponds to the number of boxes. But, even this refinement would not alter our opposition to the amendment for the reasons stated above.

Fed.Appx. 300 (5th Cir 2003), a two-level enhancement was imposed on the defendant for having more than ten and fewer than 50 victims because he pried off the mailbox panels in an apartment building, exposing 42 individual boxes. On appeal the enhancement was vacated because there was no proof that there were at least ten people who had mail in their boxes at the time of the offense. There was, however, no indication that it would have been difficult to obtain sufficient evidence proving the number of victims, especially considering the reduced degree of proof required at a sentencing hearing.

V. Issue for Comment regarding Aberrant Behavior (Amendment #10)

With regard to aberrant behavior, Issue for Comment 10, the PAG opposes as premature the elimination of the aberrant behavior downward departure provision, U.S.S.G. § 5K2.20. While we agree in principle that the mandate of 28 U.S.C. § 994(j) should be implemented and true first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense to eliminate the aberrant behavior downward departure before proposing an amendment to U.S.S.G. § 4A1.1 designed to accomplish this objective. The Commission has been engaged in a two-year study of criminal history. The PAG suggests that the Commission formulate an appropriate amendment to U.S.S.G. § 4A1.1 based on the results of that study. At that point, but not before, it makes sense to consider whether or not the aberrant behavior downward departure remains necessary.

VI. Proposed Amendment to Immigration Guidelines (Proposed Amendment #12)

The PAG intends to comment on this proposed amendment but has not yet finalized its submission on this issue. A supplemental comment addressing this proposed amendment will be forthcoming in the next few days.

As always, we appreciate the opportunity to present our perspective on these important issues. We are available to provide further information or meet with the Commission if it would be useful.

Sincerely,

James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

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