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STATEMENT

OF

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UNITED STATES SENTENCING COMMISSION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

MARCH 22, 1993

Mr. Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. In my statement today, I would like to highlight a few of the most important areas of concern raised by the proposed amendments. The Department has also provided a more comprehensive set of written comments on the amendments.

DEPARTMENT OF JUSTICE PROPOSALS -- COLLATERAL ATTACKS ON PRIOR CONVICTIONS

As the Commission is aware, the Department of Justice proposed amendments addressing several important areas of concern to law enforcement. These areas include increasing the penalties for anabolic steroids and certain other controlled substances, establishing a guideline for computer fraud and abuse, and addressing concerns about firearms sentences. We strongly urge the Commission to consider these, as well as our other, proposals.

One amendment of great importance to the Department and to the justice system involves the problem of collateral attacks on prior convictions as they relate to a defendant's criminal history under the sentencing guidelines, Amendment 57. Adoption of this amendment is extremely important because collateral attacks on prior convictions threaten to undermine the entire sentencing process. For example, one United States Attorney's Office reports that most career offenders in that district attack

prior convictions at sentencing and thereby delay the sentencing process. In some cases poorly documented prior State convictions that may have occurred years before must be considered by the federal sentencing court. Delving into the validity of facially valid prior convictions is overly burdensome to the sentencing process, which ought not be used as a substitute for appeals or habeas corpus. Except to the extent the Constitution or a statute requires otherwise, a defendant should be precluded from raising the alleged invalidity of prior convictions at sentencing.

The problem arises because the current commentary to guideline §4A1.2 states: "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." United States Sentencing Commission, Guidelines Manual (Nov. 1992). This language has been interpreted in some circuits as providing sentencing courts with discretion to inquire into the validity of prior convictions. United States v. Canales, 960 F.2d 1311 (5th Cir. 1992); United States v. Jakobetz, 955 F.2d 786, 805 (2d Cir. 1992) (dicta); United States v. Cornoq, 945 F.2d 1504, 1511 (11th Cir. 1991); but see United States v. Roman, 960 F.2d 130 (11th Cir. 1992), opinion vacated and petition for rehearing en banc granted, 968 F.2d 11 (11th Cir. 1992). These courts have reached this result despite the contrary inference arguably arising from the Commission's commentary that sentences resulting from convictions that a defendant shows to have been previously

ruled constitutionally invalid are not to be counted.

Application Note 6, §4A1.2.

The proposed amendment would delete the problematic language in the commentary to guideline §4A1.2 and clarify that the Commission does not intend to confer any right to attack collaterally at sentencing a prior conviction or sentence. The amendment recognizes, however, that other law may grant defendants the right to the collateral attack of prior convictions, e.g., 21 U.S.C. §851. This recognition obviously also includes any constitutional protection defendants may enjoy. See United States v. Veaz-Gonzales, No. 91-30469 (9th Cir. February 22, 1993).

We urge the Commission to adopt Amendment 57 with one modification. We believe that the amendment (developed by the Commission staff) would be improved if it did not include the first sentence: "Whether a defendant at sentencing may collaterally attack a prior conviction or sentence is a procedural matter for court determination." This sentence, which is similar to the one that has led to the problematic court holdings, is likely to cause confusion and may be construed as inconsistent in part with the second sentence.

ACQUITTED CONDUCT (Amendments 1, 34, and 35)

The Department strenuously opposes the various published proposals to change the definition of relevant conduct in guideline §1B1.3 so that acquitted conduct may no longer be

considered in determining the guideline range. This change would constitute a dramatic departure from the constitutional standards courts have historically applied in both pre-guideline and guidelines cases and would reverse a long line of well-settled appellate decisions which permit judges to rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. It is also at odds with the Commission's fundamental commitment to a modified real offense system by preventing the court from sentencing the defendant on the basis of conduct which the court finds by a preponderance of evidence to have actually occurred.

Most courts of appeals have held that the Constitution does not preclude the use of acquitted conduct for sentencing purposes. United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United States v. Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); United States v. Averi, 922 F.2d 765 (11th Cir., 1991). These rulings are consistent with Supreme Court decisions allowing acquitted conduct to be introduced in evidence at a defendant's

subsequent trial, Dowling v. United States, 493 U.S. 342 (1990), and allowing civil forfeiture notwithstanding acquittal on the same charges underlying the forfeiture. United States v. 89 Firearms, 465 U.S. 354 (1984). The broader rules of evidence admissible at sentencing, as compared to trial, also militate against a bar to using acquitted conduct for sentencing purposes. There is surely no unfairness in sentencing a defendant based on additional evidence, e.g., obtained from a search whose fruits could not be admitted at trial, that clearly shows that the defendant engaged in the conduct at issue.

There are, moreover, additional reasons why changing the present rules with respect to acquitted conduct would be unwise. First, the change would lead to an undue increase in litigation. Frequently, the effect of an acquittal is unclear because the basis of the jury's verdict cannot be definitively established. For example, suppose a defendant and a confederate are charged with selling drugs and the defendant with using a firearm during and in relation to that crime (18 U.S.C. §924(c)). The defendant is convicted of the drug charge but acquitted of the firearms offense. Should that mean that the defendant can assert the acquittal to successfully resist the government's attempt to apply the enhancement in guideline §2D1.1 for possessing the firearm? Not necessarily. The proof at trial may have been weak as to whether the firearm belonged to the defendant or to the confederate, also present in the room. The doubt may have been sufficient to cause the acquittal, but, if that was the basis

therefor, not to preclude an enhancement under the guidelines. In other cases, the verdicts may simply be inconsistent, for example, a case in which the defendant is convicted of aggravated bank robbery (18 U.S.C. §2113(d)) for placing life in jeopardy by using a firearm, but acquitted under 18 U.S.C. §924(c) for using the firearm to commit the robbery. Based on anecdotal information from the United States Attorneys, it is our belief that the number of inconsistent verdicts, particularly in drug and fraud prosecutions, is growing. In each of these situations, if the Commission were to bar the use of acquitted conduct in determining the guideline range, difficult litigation would arise over the effect of the acquittal -- an increased burden on the already highly complex sentencing process that we think is unjustified and that many courts, we suspect, would not welcome.

Second, a limitation on the use of acquitted conduct would likely lead to unwarranted charging and sentencing disparity, contrary to the goal of the Sentencing Reform Act, and would encourage more trials and sentencing hearings. Under the proposal, the court would remain obligated to consider conduct not charged in the indictment but within the ambit of relevant conduct, but could not consider that same conduct if it had been charged and resulted in acquittal. Often, the decision whether to bring a charge that later results in acquittal will be a close one, on which reasonable prosecutors would reach conflicting judgments. If the rule on acquitted conduct were changed as proposed, these reasonable but opposing charging decisions by

prosecutors would produce markedly different sentences. Moreover, the change would create a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring supporting facts to the court's attention at sentencing. Likewise, defendants, who are encouraged under the current definition of relevant conduct to enter pleas when charged with several counts with similar offenses will, if the proposed amendment is adopted, have a strong incentive to go to trial to try to defeat one or more of the multiple counts, thereby increasing the number of trials in the hard-pressed justice system.

For all of these reasons, we strongly urge the Commission to reject the superficially appealing but unsound proposals to limit the use of acquitted conduct.

LIMITATIONS ON THE IMPACT OF CONTROLLED SUBSTANCE QUANTITY ON
OFFENSE LEVEL DETERMINATIONS (Amendments 8, 9, 39, 48, and 60)

The Commission has proposed several amendments aimed at limiting the impact of drug quantity on the determination of offense levels. While drug quantity may not be a perfect measure of harm, it reflects both the scope of the activity in which a defendant is involved and the resulting harm to society and, therefore, should be retained as an important measure of the appropriate sentence. Moreover, the Commission has decreased the impact of drug quantity on sentencing in large part with its 1992 amendment of the relevant conduct guideline. The effect of this

amendment in many cases is a narrower range of conduct for which a defendant is liable for sentencing guideline purposes -- that is, a smaller quantity of drugs -- than the scope of the conspiracy in which the defendant is involved.

While we believe that drug quantity is an important factor in sentencing and urge the Commission to make no amendments in this regard until it can determine the effect of the recent relevant conduct amendments, we recognize that the Commission may wish to address the view of critics that drug quantity as it now affects the determination of sentence still plays too great a role. Should the Commission determine that an amendment addressing drug quantity is needed, we would not oppose the adoption of a narrower version of Amendment 8.

Amendment 8 amends the drug trafficking guideline, §2D1.1, to provide that if a defendant qualifies for a mitigating role adjustment, the base offense level shall not be greater than level 32. It also amends the mitigating role guideline, §3B1.2, to describe more specifically the characteristics of a defendant subject to a mitigating role adjustment in sentence. Amendment 8, which places the cap at a level sufficient to accommodate a 10-year mandatory minimum sentence, would be acceptable to the Department if the following conditions are met.

(1) The proposed cap on the sentence should apply only to minimal, but not minor, participants. Providing an extra benefit to offenders at the highest offense levels should be limited to the least culpable among this group.

(2) If the Commission adopts the level 32 cap for minimal participants, it is essential that it also approve Amendment 60. This amendment, proposed by the Department, precludes a role reduction for drug defendants whose relevant conduct subject to the drug-trafficking guideline consists only of drug quantities in their actual possession. For example, a person who transports two kilograms of crack cocaine for a large drug enterprise trafficking in much greater quantities should not receive the benefit of a role reduction if his relevant conduct is limited to the two kilograms. Such a defendant's participation is not minor or minimal when viewed in light of his relevant conduct, which itself reflects a reduction for the defendant's role in the joint activity.

By barring a role reduction for such offenders, Amendment 60 would also prevent application of the level 32 cap. Thus, offenders who possess controlled substances in such large quantities that their offense level is above level 32 on the basis of the amounts they actually possess would neither receive a mitigating role reduction nor benefit from the proposed cap. This result is appropriate for offenders entrusted by drug organizations with large quantities of controlled substances. We recommend adoption of proposed amendment 60 rather than proposed Application Notes 6 and 7 in Amendment 8 to deal with this issue since

amendment 60 is clearer and more comprehensive in its approach.

Even if the Commission does not adopt the proposed cap for minor or minimal participants, it should adopt Amendment 60 since the principle that a defendant does not play a minor or minimal role when his relevant conduct is limited to the drugs in his possession is an important one under the current drug guideline scheme. One technical correction needed is that, as printed, amendment 60 incorrectly amends guideline §2B1.2, rather than §3B1.2.

(3) Another condition for our acquiescing to the adoption of Amendment 8 is that the Commission bar a defendant from receiving a mitigating role adjustment if he possessed or had ready access to a firearm or other dangerous weapon or if he engaged in assaultive or violent behavior. In addition, the mitigating role adjustment should be precluded for an offender who directed or induced another participant in this regard. Amendment 8 establishes this preclusion in a more limited form -- only for those who possess or have ready access to a firearm or who direct or induce another participant to possess a firearm.

(4) The final condition is that the Commission retain current Application Notes 2 and 4, which Amendment 8 proposes to delete from the commentary to guideline §3B1.2. Note 2 states the Commission's intent that the downward adjustment for a minimal participant be used infrequently.

Deletion of this language will be taken as a signal that the Commission intends a broadened application of the role reduction guideline, despite the more direct description of mitigating role that is proposed. Likewise, the Commission should preserve existing Application Note 4, which ordinarily bars a role reduction for a defendant who has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct.

Amendment 8, as modified, would address the concern that drug quantity drives sentencing to too great an extent while avoiding unnecessary and radical changes in the guidelines. We oppose Amendments 9, 39, and 48, which contain a number of objectionable features. The most notable is that Amendments 9 and 39 create a cap of level 36 for drug quantity applicable to all offenders, regardless of their role in the offense. Drug traffickers would have no disincentive to deal in huge quantities of drugs since they could do so with impunity for the excess above level 36 amounts. Amendment 39 also makes further adjustments to the drug quantity table that are problematic in their relationship with mandatory minimum provisions. Under the amendment, aimed at reducing sentences, amounts that would require imposition of a mandatory minimum would fall in a range that barely accommodates the mandatory minimum. By placing the guideline maximum at a level very close to the mandatory minimum, this scheme provides the courts with little discretion to set the

sentence within a reasonable range in recognition of factors not specified in the guidelines or to take into account the range of drug quantities subject to the same offense level. It also precludes reduction for mitigating role in the offense or acceptance of responsibility for those defendants whose drug quantities are at or just above the mandatory minimum amounts.

We are also particularly troubled by the proposed role-in-the-offense adjustments in Amendments 9, 39, and 48. For example, Amendment 9 proposes a 4-level reduction for a defendant who did not own or sell drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills. The effect of this proposal would be an automatic reduction for drug couriers, regardless of the measure of their relevant conduct. Drug couriers are essential to the operation of a drug-trafficking organization and play a central, rather than a minimal, role in the offense. The amendment is also contrary to Amendment 60, discussed earlier, which denies a mitigating role adjustment to defendants whose relevant conduct consists of the drugs in their actual possession. In addition, Amendment 39's proposed 6-level decrease for "significantly minimal" participants would lead to endless litigation over the differences between "significantly minimal" and "minimal" participants and would invite disparity. Creating another level of role in the offense is a complication the guidelines do not need. Finally, the proposed caps below level 32 in Amendment 48 for minor and minimal participants trafficking in substances

subject to mandatory minimum sentences are unacceptable. Our willingness to accept any cap is limited to its being set no lower than level 32 -- which is consistent with the 10-year mandatory minimum.

We favor Amendment 39's proposed increases in guideline §2D1.1 for the use of a firearm or other weapon and the defendant's leadership role in a large organization and believe that these increases would have validity under the current structure of guideline §2D1.1.

DRUG MIXTURES (Amendments 10 and 49)

Amendments 10 and 49 would amend the commentary to guideline §2D1.1 to address uningestible portions of drug mixtures. Amendment 10 would exclude for sentencing purposes "uningestible, unmarketable portions," while Amendment 49 would exclude "portions of a mixture that are uningestible or unmarketable." Both proposals would exclude materials that have to be separated from the controlled substance before the controlled substance can be used.

We do not object to the concept of excluding uningestible, unmarketable portions of a drug mixture but believe there is a need for clarification and further amendment. First, the opening statement of Application Note 1 provides that a mixture or substance for purposes of guideline §2D1.1 "has the same meaning as in 21 U.S.C. §841." The Commission is not in a position to make this assertion and then to provide a guideline definition

that the courts may or may not accept for purposes of application to the statute. The courts, for purposes of applying statutory penalties, may not agree with the Commission's determination of what portions of a mixture should be included or excluded. The Commission is in a position only to dictate the application of the sentencing guidelines, not the statutory penalties. This sentence should be deleted.

Next, the use of a suitcase to which cocaine is bonded, for example, reflects a sophisticated means to avoid detection. The Commission should provide a guideline enhancement to reflect this added culpability. An increase would provide uniformity in recognizing the added culpability of sophisticated means but would not make the sentence dependent upon the weight of the substance used in this endeavor.

In addition, the amendment should clearly provide that the exclusion applies only to drug mixtures which are both uningestible and unmarketable. If a mixture containing uningestible portions is, nevertheless, marketable under the expectation that the purchaser will perform a simple function to extract the controlled substance for use, the entire weight should be included. In this regard, the direction to exclude portions that have be separated from the controlled substance before use is inconsistent with the "uningestible, unmarketable" language and should be deleted. Similarly, portions that are not marketable, for example, because of their need for refrigeration,

should be included if they can be ingested. We recommend the following commentary to address these concerns:

This exclusion applies only to mixtures which are both uningestible and unmarketable. Therefore, if a mixture is marketable but is not ingestible because, for example, of adulterants or other components of the mixture, the entire mixture will, nevertheless, be included for sentencing purposes.

We also recommend the addition of commentary to recognize that the weight of the controlled substance may be determined by extrapolating from the weight of a sample of the mixture from which the controlled substance has been extracted. Without this language, the courts may incorrectly infer a requirement that the entire quantity of the controlled substance be extracted -- an approach that would be overly burdensome to the Drug Enforcement Administration, which has to perform some extractions with the use of harmful solvents. Moreover, the commentary should state that once the controlled substance is extracted, it need not be in "pure" form. We suggest the addition of the following commentary:

In calculating the sentencing weight of the controlled substance, the court may extrapolate the total quantity of the controlled substance based on the quantity extracted from a sample of the mixture. After exclusion of the uningestible, unmarketable portions, the substance included in the sentencing weight need not be the "pure" controlled

substance. Rather, any substances that are normally included with marketed mixtures of the controlled substance, and that were, therefore, likely to have been with the controlled substance before it was combined with the portions to be excluded, are included in the "mixture" for sentencing purposes.

Finally, we recommend specifying that LSD on blotter paper, sugar cubes, or other similar "carriers" are examples of mixtures not subject to the exclusion of uningestible and unmarketable portions. This amendment would prevent defense arguments that the amendment in question encompasses such LSD cases.

MONEY LAUNDERING (Amendment 20)

The Commission has proposed a sweeping amendment of the money laundering guidelines, §§2S1.1 through 2S1.4. The amendments would substantially lower the penalties for many money laundering offenses, even very pernicious ones, and send a dangerous signal that money laundering is merely an inconsequential extension of the unlawful activity that produces the dirty funds. This message is at odds with actions by Congress, which has treated money laundering as a serious offense that is wholly distinct from the underlying unlawful activity. Moreover, money laundering, subject to a 10- or 20-year penalty depending upon the offender's intent, is an offense that threatens our nation's financial institutions and, therefore, our economic well-being, by involving these institutions in

transactions rooted in unlawful conduct. The Department vigorously opposes the proposed amendments.

The amendment of guideline §2S1.1 would reduce the offense level for many money laundering offenses to a level equivalent to, or slightly above, the level applicable to a fraud offense involving the amount of money laundered. That is, money laundering would be treated in a manner generally consistent with fraud. This decrease would apply to both money laundering related to white collar offenses and money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire, and other violent crimes. In many cases the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at level 23 or 26, under guideline §2S1.1, and 22, under guideline §2S1.2, and increases depending on the amount of funds laundered. The only cases generally spared from reduction are those in which the money launderer committed the underlying unlawful activity and the offense level for that activity is equal to or greater than the currently applicable money laundering offense level.

In our view, the motivation for the suggested change in large part relates to "receipt and deposit" cases -- that is, cases in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We believe that these cases are but a small

segment of the universe of money laundering and that recent caselaw developments, as well as internal Department of Justice prosecution guidelines, have cured many of the problems of the past. The overall approach of the money laundering sentencing guidelines should not be revised because of these cases, nor do we believe that other cases that have been cited as non-serious money laundering dictate sweeping amendments. However, we acknowledge that "receipt and deposit" cases, when correctly identified, may more appropriately be sentenced at a different level.

To this end, we have recently submitted a proposal that would carve out "receipt and deposit" cases from current treatment under guidelines §2S1.1 and 2S1.2 (copy attached). Under our proposal money laundering offenses for which the underlying activity did not involve controlled substances, a crime of violence, firearms, or certain other offenses would be sentenced at 8 levels above the level established by the fraud table in guideline §2F1.1 corresponding to the value of the funds. The proposal specifies further conditions: the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account that is clearly identifiable as belonging to the person who committed the specified unlawful activity. The principal reason for the limitation to "non-currency" proceeds is that currency is the most dangerous form of proceeds from the standpoint of enforcement of the money laundering laws since, once deposited

into an account with other funds, there is no ability to trace it back to the specified unlawful activity which generated it. Our proposed treatment of this class of cases is identical to the Commission's proposal relating to the class of cases subject to the most lenient treatment. However, our proposal preserves current offense levels for cases which do not fall within the exception, such as cases that involve further money laundering conduct. Thus, our proposal reduces the "shock" to the system that a wholesale, and unnecessary, revision of the money laundering guidelines would bring. We urge you to consider our proposed amendment, as well as the appendix to this statement, which sets forth more fully the reasons for our opposition to the proposed money laundering amendments.

The appendix also highlights our concerns regarding the proposed amendment of guidelines §§2S1.3 and 2S1.4, addressing transaction reporting and currency and monetary instrument reporting. The Department had submitted a proposal to harmonize disparate treatment of the various offenses that fall within these guidelines. The Commission's proposal, while it brings about harmony, produces substantial and inappropriate reductions in offense levels. Reporting requirements relating to financial transactions and the movement of currency and monetary instruments are critical to curbing money laundering and enabling investigators to trace unlawful proceeds. Proposals to reduce sentences in this area should be rejected as inconsistent with

the goal of deterrence of both reporting offenses and money laundering in general.

SUBSTANTIAL ASSISTANCE MOTIONS (Amendments 24, 31, and 47)

The Commission has proposed several amendments to policy statement §5K1.1 to eliminate the prerequisite of a government motion for departure below the applicable guideline range to reflect a defendant's substantial assistance in the investigation or prosecution of others. In addition, the Commission has invited comment whether to eliminate the requirement of a government motion in the case of a first offender, where no violence was associated with the offense.

We strongly oppose these amendments. Even if one agreed with the concept of allowing a defense motion over the objection of the prosecutor, amending the existing policy statement would be a mistake. As the Commission knows, Congress has provided by statute that a government motion to reduce a sentence based on cooperation is required for situations in which the cooperation occurs after sentence is imposed (Rule 35, F. R. Crim. P.) and where reduction would mean lowering the sentence below a mandatory minimum (18 U.S.C. §3553). It is difficult to imagine that Congress could have intended a system in which a government motion is required in these circumstances but not in the situation currently addressed by policy statement §5K1.1. Thus, in our view, the appropriate forum to consider this issue is Congress, not this Commission, since the Commission's policy

statement requiring a government motion is consistent with the Congressional scheme.

Moreover, on the merits the published proposals are unsound. For one thing, they will result in increased numbers of (if not indeed routine) requests by defendants for reduction in sentence and can, therefore, be expected unduly to burden the courts. Defense attorneys will feel pressured by future claims of ineffective assistance of counsel to file such motions and will accordingly argue for reduction in many unwarranted cases. In addition, no one disputes that the prosecutor is in the best position to determine whether a defendant has provided substantial assistance in investigating or prosecuting others. This is reflected by the fact that, under the terms of the proposed amendments, the court would still have to give substantial weight to the government's evaluation of the defendant's conduct from the standpoint of substantial assistance. In addition, we point out that the government has an incentive to seek substantial assistance reductions where warranted in order to encourage defendants to cooperate. It is not in prosecutors' long range interests to fail to file such motions where justified by the facts.

Although the current policy statement properly limits reduction of sentence based on a defendant's substantial assistance to cases in which the government has filed a substantial assistance motion, the prosecutor's discretion in filing such motions is not unlimited. The Supreme Court held in

Wade v. United States, 112 S.Ct. 1840 (1992), that federal district courts "have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive ... say, because of the defendant's race or religion." Id. at 1843-1844.

For all these reasons, we strongly urge the Commission to reject the proposed amendments to policy statement §5K1.1.

FRAUD AND THEFT (Amendments 5, 6, 7, 37, 38, 45, and 65)

The Commission has requested comments on whether adjustments should be made to the loss tables in the fraud and theft guidelines, and whether the loss tables provide appropriate and adequate punishment for the loss categories included. Several alternative approaches are provided for consideration.

A major change proposed in Amendment 5 would delete the "more than minimal planning" adjustment from the fraud and theft guidelines and the use of "sophisticated means" from the tax guidelines and replace them with a two-level increase in the loss tables. As we have stated in the past, the Department opposes elimination of "more than minimal planning" from the fraud and theft guidelines. In our experience, the extent of planning is an important indication of the seriousness of a crime. Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss from the fraud, but eminently

feasible to show the extent of "planning". Losses are also extremely difficult to document in complex schemes to defraud and are thus unaccounted for in many cases because of defendants' successful efforts to hide the scope of illegal activity.

If the Commission decides to eliminate the enhancement for "more than minimal planning," the Department strongly favors the proposal to increase by two levels the base offense level of the fraud and theft guidelines. We would not oppose a related two-level decrease if the defendant proved the offense constituted a single, opportunistic act that did not involve "more than minimal planning".

We have substantial concerns about the proposed gradual increase in offense levels in the loss tables to replace "more than minimal planning". Since the proposed two-level adjustment for "more than minimal planning" does not actually occur until the losses are greater than \$40,000, the proposal effectively lowers by two levels (in the \$2,000 to \$5,000 range) and one level (in the \$5,000 to \$40,000 range) the offense levels for many crimes in which the "more than minimal planning" adjustment had been previously applied, such as crimes which may have been discovered early and did not have a large dollar amount assigned to them, and those many "smaller" crimes that did involve "more than minimal planning".

In addition, we fail to see the logic of eliminating from the tax guidelines the use of "sophisticated means" to avoid discovery of the nature or extent of the fraud. We view the use

of offshore bank accounts, shell corporations, etc., as factors which can be easily identified and which greatly increase the seriousness of the crime and defendants' culpability warranting increased punishment. Rather than being eliminated, the use of "sophisticated means" should be retained in the tax guidelines and added to the fraud and theft guidelines.

The Department supports the proposal to increase the loss tables for the offense levels with "extremely high loss amounts". As we have testified before, this change is absolutely necessary to reflect Congressional intent in raising the maximum sentences for a number of fraud and theft offenses. We also favor making the increases in offense levels steeper as the amount of loss increases.

We also recommend that the offense level for fraud be calculated on the basis of the *higher* of the amount of gain or loss resulting from the offense. In many of the Department's fraud cases, there is no dollar loss associated with the crime, but there is a gain to the defendant, which should be considered in the calculation of the offense level.

In our experience, the use of dollar loss as a primary indicator of the seriousness of the offense often underestimates the extent of the crime and the damage to individuals and society. Defendants can do great harm without creating large dollar losses, and the same monetary loss to a bank or an elderly pensioner has a vastly different impact. There are numerous cases in which there is no dollar loss associated with the crime,

such as those involving false identification documents and fraud cases charging mislabeling, loan fraud, and other types of misrepresentations.

In many other cases it is difficult to quantify the losses. In food, drug, and medical fraud cases, monetary losses often do not reflect the potentially significant negative health risks caused by defendants such as pharmacists who distribute outdated, unapproved or ineffective drugs, or veterinarians who distribute drugs that leave harmful residue in food. In other cases losses may be impossible to prove, such as fraudulent schemes which involve poor records or an obscure paper trail but may affect many victims. Therefore, we strongly support the addition of specific offense characteristics to reflect harm other than dollar losses. The types of harm identified by the Commission in proposed Amendment 7 are appropriate and should be further refined and adopted. A general statement as in proposed Amendment 6 that an upward departure may be warranted if the sentence understates the actual harm, by itself, is not sufficient.

The guidelines do not adequately reflect the seriousness of fraud affecting multiple victims, such as telemarketing fraud. Rather than eliminating the enhancement in the fraud and theft guidelines proposed in Amendment 5 for cases involving more than one victim, we recommend adding specific offense characteristics that would increase the offense levels as the number of victims increases. This change recognizes the increased societal harm

that occurs when numerous people are victimized, and the significantly heavier burden on the criminal justice system in investigating and prosecuting the crime and establishing restitution for victims, as well as on business and commerce, such as in telemarketing cases, when large numbers of people resolve never to trust a telemarketer, legitimate or otherwise.

The Commission has asked for comments in Amendments 37 and 65 on whether the fraud guidelines should be amended to include the risk of loss as a factor in determining the guideline range when the amount of risk is greater than the amount of the actual or intended loss. The Department believes this proposal is a good idea to cover fraudulent loan application cases and other cases such as, for example, defendants who, in their role as individual sureties on government contracts, use fraudulent assets as security for payment and performance bonds, and thus present a substantial risk of loss if the government is forced to collect against the bonds for a contractor's default. Increasing the emphasis on risk of loss is also of crucial importance in environmental cases. The risk of loss should also encompass risks to the public health caused by schemes to market drugs, medical devices and foods which are capable of causing serious harm.

The Department strongly opposes lower sentences for defendants who did not personally profit from the crime as proposed in Amendment 38. Fraud is frequently made possible and prolonged by people participating in it if only to keep their

jobs. Downward departures for them are unwarranted. If a person decides to engage in criminal activity, he or she should not benefit at sentencing merely because the government is unable to identify the monetary incentive that led the defendant to commit the crime. The proposed amendment would lead to litigation over the wages and benefits of employees to learn if they profited financially from the offense, hardly a fit subject for a sentencing hearing.

TAX OFFENSES (Amendments 21 and 41)

We have not addressed in our testimony today the proposed changes to the tax guidelines, on which a representative of the Internal Revenue Service will be testifying. The Department supports the IRS's approach, and we have submitted a fairly extensive analysis of the proposed tax amendments in our written comments. However, if the Commission has any questions for the Department about the proposed tax guideline amendments, we are prepared to respond in writing to the Commission's inquiries.

DEPARTURES FOR A COMBINATION OF OFFENDER CHARACTERISTICS
(Amendment 29)

Amendment 29 addresses offender characteristics that the Sentencing Commission has identified as not ordinarily relevant to determining whether a sentence should be outside the guidelines. Such factors include age, education, employment record, family ties, and military record. See United States

Sentencing Commission, Guidelines Manual, Chapter Five, Part H (Nov. 1992). The amendment proposes that such factors, although not ordinarily relevant to departure, may, nevertheless, be considered if they, "alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case." Since the factors enumerated may currently be considered as grounds for departure in extraordinary cases, the real impact of the proposal relates to cases in which the factors in question are present in combination with other factors. That is, the amendment proposes that factors the Commission has already identified as ordinarily irrelevant to departure become the basis for departure because of their cumulative effect.

We strongly oppose this amendment because it could seriously erode the goal of the Sentencing Reform Act of 1984 of reducing unwarranted sentencing disparity. The Commission has wisely identified a group of factors that likely would bring about a great deal of disparity if ordinarily relied on as bases for departure. For example, one sentencing judge may determine that a defendant's recent graduation from a university is a basis for a downward departure to a probationary sentence while another judge may find that a similar defendant's university degree and future opportunities render his unlawful conduct more blameworthy and, therefore, inconsistent with downward departure. Under the current policy statement education is not ordinarily a ground for departure, and both defendants would be subject to the same

guideline range. More importantly, both defendants would be subject to the same guideline range as an offender not fortunate enough to have received a higher education. However, the proposed amendment would allow the judge intent on departure to take into account such factors as the defendant's young age, his strong family ties, and some other factor, such as prior public service work -- in combination with his recent university graduation -- to order a downward departure even though no single factor would have provided a basis for it.

In short, the amendment invites disparity of exactly the sort the Sentencing Reform Act instructs the Commission to avoid: favorable treatment for offenders with higher socio-economic status. See 28 U.S.C. §994(d). The proposed "combination of factors" basis for departure is but a thinly veiled disguise for this favorable treatment. If the Commission addresses the effect of a combination of factors at all, it should adopt a contrary amendment to dispel the notion that a combination of irrelevant factors can somehow become relevant.

APPENDIX

Money Laundering is an international crime which has reached epidemic proportions. In 1990, the G-7's Financial Action Task Force (FATF) estimated the United States' share of international drug proceeds to be \$100 billion; other estimates put this figure at closer to \$200 billion. The Federal Bureau of Investigation estimates that when drug money laundering is combined with other major types of money laundering, the figure for money laundered in the United States annually may be as high as \$300 billion. The money laundering statutes were drafted with the intention of reaching the flow of proceeds from this whole spectrum of illegal activity, from narcotics offenses to white collar crime, to terrorism, organized crime and environmental crime.

Because this is the first time that the Commission has reviewed the money laundering guidelines, we believe that a full explanation of the consequences of the pending proposal is appropriate, in light of the drastic effect the proposal would have on sentences in money laundering prosecutions. The Commission's proposal (Amendment 20) would markedly reduce the base offense levels for laundering of white collar crime proceeds, in even its most pernicious forms, as well as for professional drug money launderers.¹

¹While most of our discussion focuses on the non-narcotic area, it is important to note that the proposed amendment could significantly reduce sentences for some professional drug money launderers, who usually are not involved in the underlying drug offenses and therefore would not be sentenced under §2S1.1(a)(1) of the proposed amendment. This is the case in several of the recent Operation Polar Cap prosecutions. Such cases are the kind of offenses that § 1956 was aimed at, and are the cases which arguably should merit the strongest punishment under the guidelines.

The principal law enforcement agencies fighting money laundering -- the Federal Bureau of Investigation, the Drug Enforcement Administration, the Customs Service, the Internal Revenue Service, and the Postal Service, as well as the Financial Crimes Enforcement Network -- are in agreement that the United States has, proportionally, the worst money laundering problem in the world. The United States money laundering problem and response go beyond drugs to non-narcotic and white collar crime offenses.² Indeed, the United States leads the international law enforcement community in enforcement of all types of money laundering. Primarily through its participation in the FATF, the United States has emphasized to the domestic and international financial community the critical need for comprehensive money laundering enforcement, and has been in the forefront of an initiative to broaden the scope of anti-money laundering programs to include the proceeds of non-narcotic as well as narcotic offenses. Many other countries have anti-money laundering laws, but they often do not prohibit the laundering of proceeds of non-narcotic related crimes. Our initiative to broaden the scope of money laundering enforcement would be severely impacted by the message that our domestic enforcement aimed at white collar criminals is in retreat.

The Department of Justice strongly opposes Amendment 20. However, we acknowledge that a modification of the current

²There are presently 103 predicate crimes constituting "specified unlawful activity." Of these, only ten are narcotic related.

guidelines may be appropriate to address a small class of money laundering cases popularly known as "receipt and deposit" cases, which seem to be the area of greatest concern under the current guidelines. Accordingly, the Department, by letter of March 2, 1993, forwarded to the Commission a proposed alternative amendment (also set forth as an attachment hereto), which we believe addresses this class of cases. We urge the Commission to adopt our alternative approach, rather than to completely rewrite the current guidelines, as proposed in Amendment 20.

The Department of Justice opposes the published proposal, drafted by the Commission Staff's Working Group on Money Laundering ("Staff"), on fundamental philosophical grounds. Our fundamental difference lies in the interpretation of the Congressional intent giving rise to the money laundering statutes. In our view, Congress created the money laundering statutes, set the maximum penalty at 20 years, and created the avenue of forfeiture, not merely to deal with what the Staff casts as "facilitating" activity, but to remedy completely separate conduct requiring severe punishment:

The purposes of S. 2683, the Money Laundering Crimes Act of 1986, are: To create a Federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.

S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986). Congress said, in essence, that criminals are to be punished routinely for their

underlying criminal conduct, but if they further attempt to have use of their proceeds, they should expect to be punished even more severely, as a separate and distinct crime has been committed.

Moreover, contrary to the more lenient treatment for white collar criminals proposed in the Staff amendment, Congress did not create two money laundering statutes, one with harsh consequences for those who launder narcotic proceeds and one more lenient for white collar criminals. Congress created one statute, with penalties for the launderers of profit of specific white collar offenses as severe as those imposed on narcotic money launderers.³ Over time Congress has added to the list of non-narcotic specified unlawful activity, has never subtracted, and continues to reach out for ways to strengthen money laundering enforcement in the white collar arena.⁴ Indeed, this is in part a response to law enforcement reports which suggest that organized crime and drug trafficking organizations are inserting their narcotics proceeds into "legitimate" businesses

³The present Sentencing Guidelines set the base offense level for § 1956 money laundering with the intent to promote specified unlawful activity at 23, and at 20 for all other intents. By contrast, the proposed amendment would drop the base offense level for non-narcotics related money laundering to 8 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

⁴As recently as October 1992, Congress added food stamp fraud, violations of the Foreign Corrupt Practices Act, and theft from the mail to the list of specified unlawful activity, and also amended § 1956 (and by reference, § 1957) to include transactions which involve the proceeds of kidnapping, robbery, extortion and bank fraud offenses which occur outside the United States.

and layering their assets with proceeds of subsequent white collar offenses, rendering the nature of the funds virtually indistinguishable as narcotics or non-narcotics related proceeds.

The theoretical basis for the Commission's proposed amendments was set forth in an October 1992 Staff Report, which stated that the Commission's initial decision to set high base offense levels for money laundering "was presumably based on the general conclusion that 18 U.S.C. §1956 would apply only to relatively serious offenses." See Staff of the Sentencing Commission, Report on Information Gathering and Initial Findings, at 17 (October 14, 1992) (Money Laundering Working Group) (hereinafter referred to as "Staff Report I"). According to the Staff report, the Commission, at that time "did not have the benefit of settled judicial interpretations of key terms because the applicable statutes had only recently been enacted . . . these statutes are very broad, and it appears they may be being applied somewhat differently than the Commission anticipated." Staff Report I at 16. Although the first part of this statement may be true, the now-settled judicial interpretations of the key terms, however broad, do not justify the arbitrary distinctions in money laundering conduct set forth in the proposed amendment nor the wholesale dismantling of the money laundering penalties to address anomalous fact patterns.⁵

⁵Among the arbitrary distinctions drawn in the proposed amendment is the identification of "sophisticated" money laundering. The most pernicious forms of money laundering are accomplished by relatively unsophisticated means. For example, recent raids on the Cali Cartel, in Colombia, resulted in the

The Staff's philosophical view, evidenced by its use of language in Staff Report I, a subsequent report dated November 10, 1992, and in the Commentary to the proposed amendment, is that only §1956 concealment and promotion cast as reinvestment in future specified unlawful activity (SUA) are "actual" money laundering. All other statutory bases for prosecution are denigrated by the Staff proposal, which would provide little punishment beyond that imposed for the underlying offense.⁶

Indeed, in an ambitious attempt to merge the present §2S1.1 (which applies to §1956) and §2S1.2 (which applies to §1957), the proposal sets one level for money laundering and purports to provide enhancement for the §1956 intents. However, only two of the four §1956 intents are included -- promotion and concealment -- the rest of the 20-year offense is ignored.⁷ In addition,

discovery of bags full of postal money orders. Another seriously damaging method of money laundering is the use of electronic transfers. Neither of these methods can be said to be particularly "sophisticated." Moreover, we contend that the Commission Staff's attempt to define "sophisticated" will have to be modified in each amendment cycle.

⁶In addition, depending on the outcome of another proposed amendment -- to the fraud guideline (§2F1.1) -- which would delete the 2-point enhancement for "more than minimal planning" in favor of a new fraud table which factors in planning, the money laundering base offense levels may end up equal to an underlying fraud offense. If "more than minimal planning" is not incorporated into the table, "8 plus the number of offense levels from the table" is in many cases the same as the §2F1.1 fraud offense level, because as presently drafted, the 2-point enhancement is unavailable to the money laundering calculation.

⁷The four basic intents set forth in 18 U.S.C. § 1956 are:

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

the proposal enhances punishment for §1956(a)(2) (international transportation of illegal proceeds out of the country), but ignores the plain language or the statute which prohibits transportation in or out of the country.

The Department of Justice contends, therefore, that the proposal draws contours around §1956 -- with this and other distinctions that are merely arbitrary -- in a manner which Congress did not intend and which ignores the methodology of money laundering.

In our view, the basis for the Staff's conclusions is the flawed view that money laundering is "simply incidental" to the underlying offense which gives rise to the profit laundered. Staff Report I at 1. This view is based, we believe, on a misconstruction of the concept of "merger." By way of example, the classic merger problem is illustrated in United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), a case in which money laundering charges were brought relating to the wire transfer of money from fraud victims to the defendant. The same wire transfers which gave rise to the money laundering charges also

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal Law.

formed the basis for wire fraud offenses which were charged substantively and as specified unlawful conduct. The Tenth Circuit held that the wire transfer of the money from victim to defendant was merely the completion of the underlying offense, and could not form the basis for money laundering charges, since the funds do not take on the character of "proceeds" until they are received by the defendant.⁸

It is our position that at the time the Staff reports were drafted, much of the charged conduct⁹ which gave rise to its conclusion that money laundering is "incidental to" the underlying conduct consisted of "merged" transactions, which are now properly addressed in the case law and the Department of Justice prosecution guidelines. To the extent that we can agree that any financial transactions are "incidental to" the underlying offense, it is only in this category of "merged" transactions, which the case law makes clear do not constitute money laundering. To the extent that the Staff reports go further to suggest that all subsequent transactions in illegal proceeds are "incidental to" the underlying conduct, this conclusion is simply wrong.

⁸The Court in Johnson noted the distinction between the wire transfer scenario and the case where a defendant first obtained the funds and then deposited them himself. The court noted that the latter transaction would clearly have violated § 1957. This issue is discussed further, infra.

⁹The statistical, rather than analytical nature of the case analysis provided in the Staff reports does not reflect information necessary for proper analysis of the merger issue.

For example, Staff Report I cites three cases in support of its conclusion that the courts of appeals are interpreting the statutory requirement "intent to promote" in an overbroad manner. See Staff Report I at 9. One case cited, United States v. Johnson, is discussed above, and does not support the Staff's conclusion that judicial interpretation of "intent to promote" is overbroad. To the contrary, in finding that loan payments permitted the illegal enterprise to continue to maintain office space, the court also found, as discussed above, that only transactions subsequent to the crediting of wire transfers to the defendant's bank account could properly be charged as "reinvested" profit. 971 F.2d at 570.

Similarly, in United States v. Skinner, 946 F.2d 176 (2d Cir. 1991), another case cited in Staff Report I, the intent to promote was supported by defendant's transfer of drug proceeds to her supplier, in what amounted to payment on a line of credit. Although the facts of Skinner are somewhat anomalous, in that the defendant was paying for the very first in a series of contemplated shipments of drugs, it is clear that all later transfers of drug proceeds to her supplier for additional shipments would unquestionably qualify as reinvestment promotion in the manner contemplated by both Congress and the Commission.

The third and last case cited in Staff Report I, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a case which is intended to fall within the exception the Department of Justice herein proposes. In Montoya, a California state senator

was charged with promoting his acceptance of bribes based on his deposit of a check into his personal bank account. The Ninth Circuit held that this deposit promoted the carrying on of specified unlawful activity -- the bribe -- because "Montoya could not have made use of the funds without depositing the check." 945 F.2d at 1076. No other indicia of money laundering activity were found to be present. By virtue of the Court's interpretation of the conduct as promotion, in this case, the defendant was subject to the harshest of the sentencing guidelines. As set forth below, the Department of Justice's alternative amendment proposes to draw an exception for promotion cases such as Montoya, as well as other types of fact patterns more typically charged under 18 U.S.C. §1957, where there are no further indicia of money laundering activity beyond the deposit of the proceeds and where certain other elements are present. The excepted group of cases is treated in the Department of Justice alternative proposal at the base offense level proposed by the Staff.

In our view, a large portion of the fact patterns which are the focus of the Staff's proposed amendment have, since the time of its initial study, already been addressed and remedied. That is to say, a portion of the fact patterns examined fall into the "merger" category addressed by cases such as United States v. Johnson, and these cases can no longer be charged as a matter of law.

To provide uniform application in charging transactions chronologically close to the underlying conduct, the Department of Justice instituted internal prosecution guidelines, which took effect on October 1, 1992. The guidelines state, in pertinent part:

Cases Involving Financial Crimes: In any case where the conduct to be charged as "specified unlawful activity" under §§1956 and 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense, no indictment or complaint may be filed without prior consultation with the Money Laundering Section [of the Criminal Division].

U.S. Attorneys' Manual 9-105.000 (October 1, 1992).

We believe that the internal guidelines, and the developments in case law in the past year relating to white collar based money laundering, have already eliminated a large portion of the problems addressed by the Staff. However, the Staff reports also take issue with fact patterns commonly described as "receipt and deposit," as exemplified by the Montoya case.

In "receipt and deposit" cases, the funds received by the defendant arrive in the form of a check and once received are subsequently deposited into a bank account. This is a correct application of the money laundering statute. However, the Staff's analysis appears to take the view that such cases reflect transactions which are easier to trace and should not, therefore, be sentenced in the same category as other types of cases. This

conclusion is acceptable only in certain cases where no further indicia of money laundering are present, as explained below.

Most disturbing is the Staff's focus on the "receipt and deposit" fact patterns as justification for wholesale revision to the guidelines. We are willing to address "receipt and deposit" cases, by carving out an exception which leaves undisturbed the sentencing levels of "heartland" money laundering cases; we oppose most strongly the notion that all money laundering cases should be affected by what we believe to be a small subsection of fact patterns.

The Staff's position, briefly stated, is that "incidental" money laundering, including deposit of criminal profit into readily identifiable bank accounts, creates "little additional harm to society beyond that reflected in the underlying offense." Staff Report I at 1. The Department of Justice, joined by the Treasury Department, takes issue with this view, because the insertion of criminal profit into the banking stream, in and of itself, causes harm to society. Moreover, prosecution of offenses committed at what is in the law enforcement community referred to as "the placement stage" is critical, because the first placement of funds creates the most serious potential harm. Once money is inserted into the banking stream, it can be moved, concealed and/or reinvested with far less chance of detection.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN), in a July 1992 report entitled "An Assessment of Narcotics Related Money Laundering" (hereinafter referred to

as the "FincEN Report"), stated that the "placement stage" was the point at which the money laundering process is most vulnerable. Although the report focuses primarily on narcotics and currency, these observations have general application, including the emphasis placed on the danger of permitting launderers to move through the placement stage and into the "layering stage":

In the layering stage, the launderer attempts to separate the proceeds from their illicit origin as much as possible by moving them through a complex series of financial transactions. The launderer hopes thereby to make the connection more difficult, if not impossible, to trace. With the placement stage completed successfully, the proceeds have been converted to a non-cash form and can therefore be more easily and rapidly manipulated. There are obviously a large number of options available for the launderer; however, the amount of layering used will usually depend on how quickly the profits need to return to their owner and on the "visibility" of original placement activity.

FincEN Report at 23.

Among the options available to the launderer, once the illicit funds are placed into the banking stream, is use of the electronic communication network of banks to move the funds. This is the most serious danger in permitting the launderer -- whether his profit originates in narcotic-related or non-narcotic activity -- to insert his profit into the banking stream:

The use of wire transfers is probably the most important technique used for layering illicit funds in terms of both the volume of money that can be moved and the extent to which transfers occur. The technique is preferred because launderers can get funds to their destination rapidly. Size of the transfer is usually not a constraint. The United States does not restrict the amounts that may be transferred electronically into or out of the country, nor does it require reporting of transactions between accounts or financial

institutions. After the funds have been transferred several times, especially when done successively, tracing them back to the source is difficult. Transferring the funds through foreign countries electronically adds a further complication in that there are often no means for law enforcement to follow the trail quickly through the maze of foreign banking laws and regulations.

FinCEN Report at 24. None of this activity is possible until funds are inserted into the banking system. We contend, therefore, that dismissing the placement stage as "mere deposit" and concluding that deposit causes no harm to society is a serious mistake.

Even assuming, arguendo, that money laundering fact patterns demonstrate variant levels of conduct, we view it as illogical to set the level for all money laundering at the lowest possible level, as opposed to the approach in the present guideline, which focuses on high levels, in recognition of Congressional intent in the creation of a 20-year offense. The Staff justifies its recommendation to lower the levels on a statistical analysis of approximately 200 cases. Their analysis of this limited sample, even if accepted, reflects only 25 percent of the cases to be within the category it classifies as less serious cases. Lowering the base levels in all cases, based on 25 percent of the cases, is unjustified even on the assumption (which we dispute) that the Staff's statistical sampling is valid.

First, the statistical basis is questionable. The methodology for selection of cases is defendants actually sentenced under §2S1.1 and §2S1.2, in fiscal year 1991. However, in our view examination of reported cases or, for that matter,

indicted cases is insufficient. To be fair, the universe of cases under examination must include cases where plea negotiations resulted in pre-indictment resolution of these charging issues, as well as situations in which the early exercise of discretion (even at the investigative stage) reflects the recognition of the issues presented by the Staff.¹⁰

Second, the 200 or so cases presented (in a statistical rather than analytical format) are not capable of interpretation of relevant facts. Both analyses must be performed to conclude that limits on the exercise of prosecutorial discretion are warranted.

Enforcement in the white collar money laundering area is relatively new, with many of the cases only now reaching the level of appellate review. However, the Criminal Division of the Justice Department has consulted in cases whose facts reveal that money laundering in white collar cases is no less pernicious nor unsophisticated than in the narcotic area.

In a case recently indicted in New England, the defendant set up an elaborate pyramid of fraudulent bank loans, constantly reinvesting the proceeds of successive false loan applications

¹⁰We strongly take issue with the suggestion that any component of the Department of Justice has a policy of threatening money laundering prosecution in order to coerce pleas. Where the possibility of money laundering prosecution is discussed in the course of plea negotiations, all such discussions are grounded on the good faith belief that such prosecution has basis in fact and law. Department of Justice policy, under what is commonly called "The Thornburgh Memo," dictates charging decisions and plea bargaining practices consistent with the "most serious readily provable offense." See "Principles of Federal Prosecution," USAM 9-27.000. See also Bordenkircher v. Hayes, 434 U.S. 357 (1978).

into repayment on prior loans. The Government has charged money laundering under a promotion theory, alleging that the continuous reinvestment of proceeds permitted the defendant to build a larger and larger fund of illicit profit -- ultimately the defendant caused transfers totalling millions of dollars and seriously endangered the health of a savings bank -- and permitted him to keep increasing the fund with each successive loan, without detection, by satisfying the prior bad loans. Clearly this is a case requiring severe punishment, not merely based on the sum of all its pieces -- the fraudulent loans. Rather, the punishment should reflect the severity of the money laundering scheme which both nourished and obscured the operation.

Similarly, in a recently indicted case in the southwest, a real estate developer and his attorney are charged with defrauding the Federal Deposit Insurance Corporation (a judgment creditor by reason of the previous failure of a savings and loan) by transferring real estate belonging to the developer into his girlfriend's name, in anticipation of bankruptcy, and moving the funds through the use of various escrow accounts and cashier's checks to conceal its origin. Clearly, this activity, as well, goes well beyond the scope of activity "incidental to the underlying crime," and is activity Congress intended to reach with punishment beyond that of the underlying crime.

It is not true, therefore, that the money laundering statutes are "being applied somewhat differently than the

Commission anticipated" or to suggest that most white collar money laundering is merely a fragment of the underlying crime. Although the Staff may be able to cite anomalous fact patterns which reflect a variance of application, we believe that the recently promulgated money laundering guidelines evidence the Department's commitment to uniform application, particularly in the area of financial crimes.

In contrast to the pending proposal, the Department's alternative proposes to leave undisturbed the offense level for money laundering, except in certain cases defined by a strict set of parameters. The elements of the parameters are:

1) The specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, or a firearm or explosive: The lower guideline range is not available to defendants who launder the proceeds of these serious crimes. We do not view this limitation as controversial, in that it relates to a serious class of offenses.

2) The money laundering conduct was limited to deposit: We have drawn a bright line at the point of deposit, because we seek to address only that portion of the Staff's concerns which relates to fact patterns where the completion of the underlying offense and the commencement of money laundering are blurred -- no more, no less. That is to say, we do not agree with the Staff's suggestion that money laundering is a "facilitation"

crime or that it is merely a method for the final accomplishment of profit. Money laundering is a wholly separate crime.

This bright line approach also reflects our concern with a critical misunderstanding with respect to concealment. The defense bar has argued that any number of subsequent transfers should be given more lenient treatment, so long as they involve bank accounts which clearly relate to the defendant. This is more a tracing/ forfeiture concept, and ignores all but the "fictitious names" theory of concealment.

3) Deposit into an account which is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity: The Staff reports acknowledge that concealment, particularly through the use of fictitious names or nominee accounts, is the most egregious form of money laundering. There is insufficient recognition, however, of other pernicious forms of concealment employed by some defendants who use their own bank accounts. All forms of concealment must be ineligible for the exception. This issue is best explained by illustration:

In a recent case in the Northern District of Florida, the lead defendant pleaded guilty to concealing the movement of illegal proceeds through the fraudulent use of "consulting fees" to mask the transfer of the illegitimate profit. Co-defendants pleaded guilty to fraudulently obtaining public contracts (despite an earlier debarment of the lead defendant) through the use of nominee companies. The lead defendant received his profits from these contracts by creating a sham consulting

company in his wife's name and the fiction of "consulting fees." Although each transfer in the series could be traced to the defendant, the creation of the fictitious services was designed to conceal his ownership of the funds from the time they were received by companies covertly under his control and to provide a false "legitimate" cover for his illegal activities.

Similarly, in a case recently indicted in a midwestern district, the concealment charged relates to the creation of false "legitimate" business transactions to mask an illegal drug operation. In that case, the defendant had been enjoined from selling certain chemicals because the volume and manner in which he sold them indicated that they were being used for illicit purposes. He evaded the injunction and continued to sell the chemicals by fraudulently representing that his company had been sold to a family member. The fictitious "sale" of the business, and monthly payments made pursuant to the sham sale agreement, were designed to give an aura of legitimacy to payments of profit for illegally distributed precursor chemicals. The transactions were designed to conceal the defendant's ownership of the funds from the time they were received by the company covertly under his control.

In both cases, the defendants argue that there was no money laundering because the funds involved in the transactions in which the defendants engaged could be traced to their possession. This argument overlooks the case law which holds that concealment is not limited to the use of fictitious names and nominee

accounts. See, e.g., United States v. Lovett, 964 F.2d 1029 (10th Cir. 1992) (defendant's purchase of an automobile for the purpose of inducing his brother's silence was sufficient to establish concealment); United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), cert. denied, 1992 U.S. LEXIS 4643 (1992) (son passes proceeds to father, who uses the funds to purchase land in his own name, then borrows against the property and passes loan proceeds back to son).

Thus, transferring money in the defendant's own name is not necessarily benign nor non-concealing, and the use of his own name should not open the door to an unlimited number of transfers. The exception we propose only extends to fact patterns where the first transfer after receipt (i.e., deposit) converts the funds to a more liquid form, completely available for use. The exception should only be available to defendants who: (1) deposit checks into the account of the person who committed the underlying offense, and (2) engage in no further transactions which constitute money laundering offenses.

4) Non-currency: We expect that some will take issue with our limitation of the exception to non-currency. It will be argued that the "mere deposit" of currency is the same as "mere deposit" of a check. Currency cases are different for the following reasons:

a) currency is the genesis of all money laundering enforcement, equivalent to the paramount concern with narcotics-related cases;

b) the problems relating to currency have induced the development of an entire body of statutes and regulations

which address the problem, prosecuted and administered with great vigor by the Departments of Justice and Treasury;

c) numerous studies on the public record (most notably the FinCEN Report, referenced above) discuss the critical nature of the "placement stage" of currency. The goal of laundering currency is to get it into the banking stream and financial community, both to make it appear legitimate and because once it is placed in the financial system, it is normally "gone" -- wire transferred to places unknown and untraceable as proceeds;

d) although the Department of Justice does not encourage charging concealment based solely on the use of currency, we do acknowledge the "self-concealing" nature of currency and the problems attendant thereto. Although bank records might otherwise permit tracing of the defendant's ownership of the funds (the Staff's purported concern), there is no ability to trace currency back to the specified unlawful activity; and

e) there can be no question of merger where currency has been received. Unlike checks, which must ultimately be negotiated at a financial institution before the underlying funds can be accessed, currency is already in a useable form, and any subsequent use of the currency is a completely separate transaction after it is received.

5) The use of a domestic financial institution: We believe, consistent with the Staff reports, that the use of foreign banks and foreign bank accounts is an offense characteristic undeserving of lenient treatment.

6) First-party money launderer: The exception is limited to offenders who deposit their own proceeds; it is not intended to extend to the "professional money launderer" (a third party).¹¹ Again, this is to ensure that the exception only

¹¹The Commentary to our proposed alternative discusses the third-party depositor, such as a spouse, who, knowing that the funds were derived from unlawful activity, willfully deposits the funds into the banking stream, but does so using an account identifiable as belonging to the person(s) who committed the specified unlawful activity. If the individual engages in no further money laundering conduct (i.e., all subsequent transactions

applies to the small-time offender who commits a crime (which, if all other elements of the exception are established, will likely be the gravamen of the offense) and puts the money in the bank. If the defendant induces a third party to deposit the money into an account not belonging to the defendant, a layer of concealment (a nominee account) has been added and the defendant should not be entitled to the exception. Moreover, the defendant has involved another individual in his scheme. However innocent the third party might be, this does not entitle the original offender to more lenient treatment. Similarly, the third party with knowledge sufficient to establish money laundering is not entitled to lenient treatment if that person knowingly agreed to lend his or her identity to unlawfully derived funds.

Put in terms of the Staff's expressed concerns, the exception is only available to those who deposit the funds "incidental to" the underlying offense. This, by definition, does not include the third party who, with knowledge sufficient to establish money laundering, joins in after the underlying offense is complete, for the purpose of giving his or her name to the proceeds.

do not indicate an intent which would violate § 1956; are "for legitimate purposes" in amounts under \$10,000, and therefore do not violate § 1957; and do not violate Title 31 currency reporting requirement) and all the other elements of the exception are present, such an individual is eligible for the lower offense level.

Similarly, in the corporate setting, an employee who, for the benefit of a corporate defendant, causes the corporation to deposit ill-gotten gains into an account clearly identifiable as belonging to the corporation, will be eligible for the exception.

In conclusion, therefore, if the Commission believes that there has been a sufficient showing to warrant a change in the guidelines to address the small category of cases identified as problematic, we believe that the Department's proposed amendment is far preferable to the pending proposal. Rather than a wholesale restructuring of the guidelines to address a limited number of cases, the Department's proposal addresses the problem directly by adding a special instruction to be followed in these cases. Further, our proposal retains the present guideline levels which properly reflect the serious nature of money laundering offenses, while allowing for a lower guideline level in the limited category of less egregious cases.

The Proposed Amendments to §§2S1.3, 2S1.4

Finally, we wish to address the proposed amendments to §2S1.3 and §2S1.4, relating to currency reporting requirements. Published along with the Commission's proposal is an alternative amendment previously submitted by the Department of Justice. The structures of the two proposals are similar with respect to harmonizing the guidelines treatment of violations involving various currency transaction reports required by law (i.e., the Currency Transaction Report (CTR), the Currency and Monetary Instrument Report (CMIR), and IRS Form 8300), because the three types of reports are similar in purpose, and comparable violations involving currency reporting should be treated similarly. The proposals disagree, however, on the issue of appropriate base offense levels.

Under the current guidelines, the base offense level is 13 for CTR (reports by financial institutions of currency transactions in excess of \$10,000) and Form 8300 (reports filed by trades and businesses) violations, when either is coupled with structuring and/or misrepresentation (5 where there is no such additional act). The base offense level is 9 for CMIR offenses (reports of transportation of currency in excess of \$10,000 in or out of the United States).¹² Section 2S1.4 was created in 1991 in order to treat CMIR offenses differently:

[T]his amendment creates an additional offense guideline (§2S1.4) for offenses involving Currency and Monetary Instrument Reports (CMIR). Currently, such offenses are covered by §2S1.3, which deals with all currency transaction reporting requirements. CMIR violations are committed by individuals who, when entering or leaving the country, knowingly conceal \$10,000 or more in cash or bearer instruments on their persons or in their personal effects and knowingly fail to file the report required by the U.S. Customs Service. Such criminal conduct is sufficiently different from the other offenses covered by §2S1.3 to merit treatment in a separate guideline.

However, the separate treatment was aimed at the following circumstance, which was deemed to be peculiar to border crossing offenses. At the time of the 1991 amendment, there was a split in the Circuits over how to apply §2S1.3 in the CMIR context, because the usual fact pattern involved a failure to file a CMIR and a negative response to the routine inquiry of the Customs official as to whether there was something to declare. Some of the Circuits held that the negative response was part and parcel

¹²Both sections call for an enhancement of 4 levels where the defendant "knew or believed the funds were criminally derived."

of the non-filing (therefore, a base offense level of 5); other Circuits held that the negative response was a misrepresentation (therefore, a base offense level of 13). The amendment was intended to resolve the dispute by creating a separate guideline (§2S1.4) setting the base level at 9.

We have proposed that the CTR, Form 8300, and CMIR offenses be brought back under one heading in the Sentencing Guidelines (a proposed new guideline is attached hereto), setting the base offense level at 9 for willful failure to file, and preserving the base offense level of 13 for structuring or filing a form containing a material misrepresentation or false statement. An application note is proposed to resolve the CMIR issue, which sets the base level at 9 for the mere denial of reportable assets, in response to routine questioning at a border crossing. The level 5 would remain to cover all other willful violations of regulations (no change).

We believe that the Staff's proposal to lower the penalties overall signals a serious retreat in the area of currency enforcement -- an area too closely linked with narcotics trafficking to merit more lenient treatment at this time. Currency has traditionally been, and continues to be, the medium of narcotics profit. For all the reasons set forth above with respect to currency enforcement, we find the arguments put forth

by the Staff to be unpersuasive. Therefore, we respectfully oppose the Commission's proposed amendments.

Attachments

DEPARTMENT OF JUSTICE PROPOSAL

Section 2S1.1 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money

Laundrying

- (1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if--
 - (A) the defendant was convicted under 18 U.S.C. §1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A);
 - (B) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive; and
 - (C) the money laundrying conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.1 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the count of conviction for money laundering must have been for a violation of 18 U.S.C.

§1956(a)(1)(A)(i), (a)(2)(A), or (a)(3)(A), relating to an intent to promote specified unlawful activity. If the defendant was also convicted under one of the other provisions of section 1956 for the same conduct, the reduced offense level provided by subsection (c) does not apply. Next, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical,

firearm, or an explosive. Finally, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(C) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently

establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over \$10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Section 2S1.2 is amended by redesignating subsection (c) as subsection (d) and inserting the following after subsection (b):

"(c) Special Instruction for Certain Forms of Money
Laundering

- (1) Notwithstanding subsections (a) and (b), the offense level shall be 8 plus the number of offense levels from the table in §2F1.1 corresponding to the value of the funds if--
 - (A) the specified unlawful activity did not involve a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a

controlled substance or precursor chemical, a firearm, or an explosive; and

- (B) the money laundering conduct was limited to the deposit of non-currency proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity."

The Commentary to §2S1.2 is amended by inserting the following at the end thereof:

"The lower offense level provided by the special instruction in subsection (c) is reserved for offenses which meet the specified criteria. First, the underlying unlawful activity must not have involved a matter of national security or munitions control, a risk of serious bodily injury or death, a crime of violence, a controlled substance or precursor chemical, a firearm, or an explosive. Next, the money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account, and the account must be clearly identifiable as belonging to the person(s) who committed the specified unlawful activity. For example, a defendant who deposits a check constituting the proceeds of his or her spouse's specified unlawful activity into the spouse's

account would qualify for the reduced offense level of subsection (c) if all the other limitations are present.

The term "money laundering conduct" as used in subsection (c)(1)(B) is not limited to the conduct comprising the offense of conviction but includes transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction and which themselves independently establish any money laundering offense. The withdrawal of proceeds does not constitute money laundering conduct unless carried out in a manner that would violate a money laundering statute (see, e.g., 18 U.S.C. §1957 regarding withdrawals and other transactions in an amount over \$10,000). Therefore, the withdrawal of the proceeds for legitimate purposes, such as the payment of living expenses, in a manner that does not constitute money laundering conduct is consistent with application of the reduced offense level of subsection (c). However, if there are indicia of further money laundering activity by the defendant involving the proceeds deposited into the account, the higher offense levels provided in subsections (a) and (b) apply."

Proposed Guideline (Changes appear in bold.):

\$2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(a) Base Offense Level:

- (1) 13, if the defendant:**
 - (A) structured transactions to evade reporting requirements; or**
 - (B) knowingly filed, or caused another to file, a report containing materially false statements; or**
- (2) 9, for a willful failure to file; or**
- (3) 5, otherwise.**

(b) Specific Offense Characteristics

- (1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.**
- (2) If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.**
- (3) If the base offense level is from (a)(1) or (a)(2) above and the value of the funds exceeded \$100,000, increase the offense level as specified in \$2S1.1(b)(2).**

(c) Special Instruction for Fines -- Organizations

* * * * *

Commentary

Statutory Provisions: 26 U.S.C. §§ 7203 and 7206 (if a willful violation of 26 U.S.C. § 6050I or in connection with a return required under 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316,

5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

* * * * *

Background:

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A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A base offense level of 9 is provided for willful failure to file the required reports, and for the mere denial of reportable assets in response to routine questioning at a border crossing. A lower alternative of 5 is provided in all other cases.

§2S1.4 IS DELETED

§2T1.3. Fraud and False Statements Under Penalty of Perjury

* * * * *

Statutory Provision: 26 U.S.C. § 7206(1), (3), (4), and (5) (except in connection with a return required under 26 U.S.C. § 6050I). For additional statutory provision(s), see Appendix A (Statutory Index).

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

* * * * *

Statutory Provision: 26 U.S.C. § 7206(2) (except in connection with a return required under 26 U.S.C. § 6050I).

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U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
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MAD 15 1993

Dear Judge Wilkins:

The following sets forth additional comments of the Department of Justice, beyond those included in our written testimony for presentation before the Sentencing Commission at the hearing on March 22, regarding published proposed amendments to the sentencing guidelines.

TAX OFFENSES (Amendments 5, 21, 41, 42 and 43)

The Department has two main objectives with regard to the tax guidelines during the 1993 guideline amendment cycle: (1) an increase in the offense levels for tax offenses to alleviate the detrimental impact on criminal tax cases of the 1992 amendments to the Sentencing Table (Chapter 5, Part A); and (2) simplification of the Chapter 2, Part T guidelines, including a single definition of "tax loss". The 1993 amendment package contains three proposals which impact on these objectives -- proposed Amendments 5 and 21 (Commission proposals) and proposed Amendment 41 (developed by the Internal Revenue Service (IRS)). We favor the proposal of the IRS. However, with some modifications, our objectives could be met by the Commission's proposals.

The recent changes in the Sentencing Table drastically affect the Federal Tax Enforcement Program. Unlike other statutory requirements, the provisions of the Internal Revenue Code touch virtually every individual and business in the country. In order to encourage compliance with the internal revenue laws by all taxpayers, criminal tax prosecutions must be directed at all income, occupations, businesses, and geographic locations. However, because of limited resources, only a small number of tax violations can be prosecuted. The great majority of these prosecutions must result in sentences of some form of incarceration, even if only for short periods of time, in order to deter those in all categories of tax offenders from violating the internal revenue laws. The recent changes to the Sentencing

Table could result in a significant number of tax violators not being sentenced to terms of imprisonment and, thus, greatly reduce or entirely eliminate the deterrent value of tax prosecutions.

In addition to problems posed by the changes to the Sentencing Table, we continue to experience problems in the courts in determining the "tax loss" for sentencing purposes. Since the advent of the guidelines, the core of sentencing in criminal tax cases has been the concept of "tax loss." However, rather than a single definition, "tax loss" is defined differently in various provisions of Chapter 2, Part T of the guidelines. These variations in the definition of "tax loss", as well as cross-references between the definitions within the guidelines, have caused confusion and difficulties in application of the tax guidelines.¹

¹ Difficulty in applying the concept of "tax loss" has arisen in a number of different contexts. Areas of confusion involving "tax loss" include: (1) whether the determination of base offense level under §2T1.3 requires proof of an "actual tax loss" (compare United States v. Schmidt, 935 F.2d 1440, 1450-1451 (4th Cir. 1991) with United States v. Hirschfeld, 964 F.2d 318, 324-325 (4th Cir. 1992); see also, United States v. Telemague, 934 F.2d 169 (8th Cir. 1991); United States v. Krause, 786 F.Supp. 1151, 1152-1158 (E.D.N.Y. 1992)); (2) language in §2T1.3, which, on its face, requires that "the offense was committed in order to facilitate evasion of a tax" in order to use the tax loss table (see United States v. Krause, 786 F.Supp. at 1156-1157); (3) in Spies-evasion prosecutions under 26 U.S.C. §7201, refusing to use the tax loss as defined in §2T1.3 (i.e., 28% of greater of understatement of gross income and taxable income) on the ground that there is no "understatement" where no return is filed (United States v. Warren L. Pickett, (W.D. Pa. 1991) (unreported district court decision)); (4) in Klein-conspiracy prosecutions, construing the "as applicable" language contained in §2T1.9(a)(1) to mean that the Government must show that either §2T1.1 or §2T1.3 is applicable to the offense in order to use "tax loss" in calculating base offense level, rather than utilizing the alternative base offense level of 10 pursuant to §2T1.9(a)(2) (United States v. Schmidt, 935 F.2d at 1450-1451); and, (5) in cases involving previously assessed, but unpaid, taxes, whether "tax loss" means the assessed tax or only the "hidden assets" which form the basis for the false statement involved (compare United States v. Brimberry, 961 F.2d 1286, 1292 (7th Cir. 1992) (unambiguous, explicit definition of "tax loss" under §2T1.3 and §2T1.1 as the amount of tax owed to the Government) with United States v. David W. Maestas, (D. N.M. 1991) (unreported district court determination finding tax loss to be only what Government could not execute against because of defendant's concealment rather than greater amount defendant either evaded or attempted to evade).

We endorse the IRS proposal as the best available option to obtain our objectives. The IRS-proposed amendments to the tax offense guidelines comprehensively address both of these problems.²

The IRS proposal shifts the focus of the sentencing scheme from one primarily designed to punish according to the magnitude of the loss caused by the violator to one designed both to punish and to draw tax violators back into the system. The proposal attempts to accomplish this by setting minimum offense levels for virtually all significant criminal tax offenses. The offense level is then increased by specific amounts for tax losses over \$10,000. The minimum offense levels are not arbitrary, but were selected because they would insure some form of incarceration under the current Sentencing Table for the great majority of tax violators and, at the same time, make it possible for most violators to qualify for a probationary sentence by accepting responsibility. The intent is to use the guidelines to encourage convicted tax violators to accept responsibility for their violations and to do so by filing required tax returns and paying all due taxes and penalties. In this way, the guidelines will not only punish those who violate the internal revenue laws but will also encourage their return to the self-reporting tax system. At the same time, the guidelines should go far toward eliminating any possibility that an unrepentant taxpayer will be able to make a mockery of the system by receiving a sentence of probation without being required to file tax returns and pay all taxes due.

Concededly, this is a novel approach and one which differs from the approach used in sentencing under the Fraud and Theft Tables, as well as from the approach currently used in sentencing tax offenses. Tax fraud, however, is different from other forms of fraud and theft directed against the government. Virtually everyone in the country comes in contact with the internal revenue laws in one form or another. Consequently, almost anyone has the opportunity to cheat the government out of tax revenue. Deterrence, therefore, takes on added importance in the tax area. Moreover, a defendant who has engaged in some form of fraud against or theft from the government generally does not owe any continuing duty to the government. A tax violator, on the other hand, will normally owe a continuing duty of filing returns and paying taxes. Getting that violator back into the system by encouraging the filing of returns and the payment of taxes significantly increases the chances that the defendant will comply with those duties in the future. To the extent the tax

² The proposal also provides a new guideline to cover violations of the omnibus clause of 26 U.S.C. §7212(a).

sentencing scheme can be utilized to achieve that objective, differences in the sentencing schemes are clearly justified.

The IRS proposal also provides for both a comprehensive definition of tax loss and a significant consolidation of the tax guidelines. This aspect of the proposal should not only reduce definitional confusion, but also facilitate practical use of the tax guidelines by consolidating redundant language and reducing the requisite "flipping around" within the tax guidelines depending on the statute involved.

Tax loss computations should be simpler and more uniform under this approach. Defining "tax loss" to be the loss that was the object of the evasion or fraud, and explaining that the amount of loss that would have resulted had the scheme or fraud succeeded is properly considered the amount of loss that was the object of the scheme or fraud, should eliminate those cases where defendants attempt to downplay the seriousness of their violations by arguing that they did not really intend to cause a tax loss or a tax loss of the magnitude that could have resulted from the successful completion of the scheme. In addition, explicitly stating, as does the IRS proposal, that the success or failure of a tax evasion or fraud scheme is irrelevant to the calculation of "tax loss" will eliminate windfalls to those defendants whose schemes are discovered prior to the time the government has suffered any actual loss. Moreover, the proposal anticipates and eliminates the need for future amendment of the definition by providing in its examples for use of the "applicable tax rate," rather a specified rate (i.e., 28% (or 34% for corporations) as is now the case, in calculating the "tax loss".

We do believe, however, that two changes in the IRS proposal are advisable. First, we recommend that the tax loss definition contained in the first three sentences of Application Note 1 be moved to guideline language. This should insure that there are no questions as to the meaning of the "tax loss" term used in the guidelines. Second, we recommend that the top range of the "tax loss" specific offense characteristic increase in the IRS proposed §2T1.1(b)(1) be enlarged to include several additional specific ranges of tax loss beyond \$800,000. The inclusion of additional ranges at the upper end of the "tax loss" scale is consistent not only with the existing guideline framework, which includes, at §2T4.1, seven additional specific tax loss ranges beyond \$800,000 but also with proposals to enhance the top-level ranges in other loss-based areas of the guidelines as well. We are increasingly seeing massive tax fraud schemes, particularly in the motor fuel excise tax priority enforcement area, involving multi-million dollar tax losses. We believe that the IRS's top range of \$800,000 does not extend far enough.

The Commission's proposed Amendments 5 and 21 are not acceptable in their present form. However, with appropriate modification, they could provide the basis for an acceptable solution. For example, the Commission's proposed Amendment 5 provides loss table modifications and elimination of the "more than minimal planning" specific offense characteristic for the robbery and fraud guidelines. Correspondingly, the Commission proposes a conforming modification to the tax loss table in §2T4.1 which produces higher offense levels for lower tax losses. Standing alone, the conforming modification of the tax loss table is acceptable to the Department. The change serves to alleviate the detrimental impact of the 1992 amendments on criminal tax cases.

The unacceptable aspect of the Commission's proposal is the elimination of the "sophisticated means" specific offense adjustment in the tax guidelines. The proposal states that the elimination of this specific offense characteristic is consistent with the proposed elimination of "more than minimal planning" in the robbery and theft guidelines. Quite simply, we believe that "sophisticated means" is something more than "more than minimal planning" and is an appropriate specific offense characteristic to differentiate more sophisticated schemes from garden-variety tax cases. By eliminating it, we lose some ability to distinguish between less serious and more serious offenses in a manner inconsistent with other existing and proposed guidelines. For example, the proposed elimination, for consistency sake, of the "sophisticated means" adjustment in tax cases is utterly inconsistent with the Commission's proposal for a "sophisticated efforts" adjustment in its proposed money laundering changes. Moreover, the elimination of the "sophisticated means" enhancement in tax cases will mean that the use of foreign bank accounts will no longer enhance sentences in tax cases, although it may well enhance sentences in fraud cases pursuant to §2F1.1(b)(5) (minimum offense level of 12 if fraud "offense involved use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct"). The impact of this proposal will be felt especially in our non-tax loss driven cases, which often are quite sophisticated and difficult to unravel. These cases will be sentenced at the alternative offense level (currently ranging between level 5 and level 10 for the most frequently prosecuted tax violations), rather than the level determined by the amount of the "tax loss", without the possibility of an enhancement for sophisticated means or something similar.

The Commission's proposed Amendment 21 is its attempt to address the issues of simplification and consolidation within the tax guidelines, including a unified tax loss definition. However, the proposal is a diluted version of a proposal it made last year, which the Department supported with suggested modifications. Not only is this year's proposal substantially

weaker than last year's effort, but it also reflects few of the suggestions which the Department made during the last amendment cycle. The Commission's consolidated "tax loss" definition does contain the welcome change (also found in the IRS's proposal) that tax loss is the amount that would have resulted had the offense been successfully completed. However, we prefer that the formulation contain, as does the IRS's proposal, a further statement that success or failure of a scheme is irrelevant to tax loss determinations. We also do not understand why the Commission, in that part of its amendment directed to calculation of the tax loss, changed from the "applicable tax rate" language of last year's proposal to the specific percentage amounts (i.e., 28% and 34%) in this year's proposal. As we have earlier noted, use of "applicable tax rate" should give a closer approximation of "tax loss" if tax rates change and should be less difficult to administer.

With respect to the determination of tax loss, we are concerned that the rebuttable presumptions set forth in the Commission's proposal are not sufficient to cover the range of tax cases (e.g., improper refund claim where income is over-reported) and would suggest, in lieu thereof, that the six examples contained in the IRS's proposed Amendment 41 for loss calculations be substituted. These six examples better cover the universe of criminal tax situations than does the Commission's proposal. Substitution of the examples from the IRS proposal also alleviates the problem in the Commission's proposal whereby a defendant, in a failure-to-file return situation, can control the amount of loss through the payment of the taxes prior to sentencing. This blatantly favors more well-off taxpayers and undermines the guidelines' purpose of sentencing uniformity.

As a related change, we would suggest that the Commission consider renumbering the tax guidelines to eliminate the gaps that will ensue from the deletion of §2T1.2, §2T1.3, and §2T1.5.

The proposed change to §2T1.4, involving the creation of one two-level specific offense characteristic by combining the specific offense characteristics now found at §2T1.4(b)(1) and §2T1.4(b)(2) will adversely affect some of our cases, but the number of cases affected will be small and we can accept the proposed amendment. While combining two of the current specific offense characteristics, the Commission's proposal is careful to continue to limit the inapplicability of the §3B1.3 (Abuse of Position of Trust or Use of Special Skill) adjustment to only the second prong of the proposed specific offense characteristic (two-level adjustment if the defendant was in the business of preparing or assisting in the preparation of tax returns). In this way, the §3B1.3 adjustment will continue to be available when the defendant committed the offense as part of a pattern or scheme from which the defendant derived a substantial portion of his income.

The Commission's proposal also seeks to clarify the circumstances under which the specific offense characteristics of §2T1.9 apply and the relationship between the loss calculation under §2T1.4 and §2T1.9. We have no objections to these proposals, but believe that some other changes are necessary.

First, we would recommend that the Commission delete the phrase "as applicable" from §2T1.9(a)(1). That phrase has caused confusion as sentencing courts have struggled to determine whether §2T1.1 (Tax Evasion) or §2T1.3 (Fraud and False Statements Under Penalty of Perjury) applies. In some situations, the view has been expressed that neither guideline applies and use of a base offense level of 10 is appropriate.

In fact, use of the phrase "as applicable" is inappropriate as neither of the offenses covered by §2T1.1 (26 U.S.C. §7201) and §2T1.3 (26 U.S.C. §7203) (or §2T1.4 (26 U.S.C. §7206(2)) as proposed in the Commission's proposed amendment) is applicable to the type of conspiracy covered by §2T1.9. That guideline covers conspiracies to defraud the United States by impeding and impairing the Internal Revenue Service. The object of such a conspiracy is not the violation of a particular statutory provision, such as 26 U.S.C. §7201, 26 U.S.C. §7203, or 26 U.S.C. §7206(2). (Indeed, if the object of a conspiracy is to violate a particular provision of the Internal Revenue Code, sentence is properly imposed under §2X1.1.) Consequently, to direct a court to determine whether §2T1.1, §2T1.3, or §2T1.4 applies is to require it to engage in a hopeless exercise. The most a sentencing court should be directed to do is to select a guideline which covers conduct most nearly approximating the harm which would have resulted had the conspirators succeeded in impeding and impairing the Internal Revenue Service. Language should be added to the commentary to §2T1.9 to guide the sentencing court in this regard. The deletion of the "as applicable" language and the insertion of additional commentary language will make clear that a court is not required to find that any particular guideline applies in order to refer to a guideline for calculation of the base offense level under §2T1.9.

We also suggest that the phrase "fraudulent tax schemes" be added to proposed Commentary Application Note 4 after "the marketing of fraudulent tax shelters." Not all fraudulent tax schemes are tax shelters and "schemes", in our view, is a broader and more appropriate term.

NEGOTIATED AMOUNTS OF CONTROLLED SUBSTANCES (Amendment 12)

We oppose Amendment 12, which would amend the commentary to guideline §2D1.1 to provide that where the defendant "was not reasonably capable of producing, or otherwise did not intend to produce" (emphasis added) the negotiated amount, the court should exclude the amount that falls within this description from the

guideline calculation. The current language excludes amounts the defendant "did not intent to produce and was not reasonable capable of producing." (Emphasis added.) If a defendant was reasonably capable of producing a quantity under negotiation, this quantity should be included. His claim of lack of intent should not prevail over evidence of the amount negotiated and the defendant's capability of producing that amount. Likewise, a defendant's lack of ability to produce an amount at the moment of negotiation should not block inclusion of that negotiated amount if there is sufficient evidence of intent to produce it.

POSSESSION OF FIREARMS IN A SCHOOL ZONE OR FEDERAL FACILITY
(Amendment 19)

The Commission has requested comment on the adequacy of the offense levels under guideline §2K2.5 for the possession or discharge of firearms in a school zone or a federal facility. By letter of November 30, 1992, the Department specifically sought increases in this guideline.

Under guideline §2K2.5 the base offense level is 6, with a 2-level enhancement for the unlawful possession of a firearm in a school zone or a federal court facility. This offense level may result in a sentence that is not commensurate with the offender's activities since offense level 8 allows for a sentence of "straight" probation. There simply is no legitimate reason for a person convicted under the school zone statute, 18 U.S.C. §922(q), to have a firearm on school property since the statute provides numerous exceptions from application of the prohibition. Moreover, possession of a firearm in a federal facility, particularly a court facility, is a dangerous offense, given the threat to our system of justice such possession poses.

We recommend that the Commission include additional specific offense characteristics, such as an increase if the firearm (or other weapon in the case of possession in a federal facility) is brandished, discharged, or otherwise used. An enhancement should be included if the firearm is loaded or the offender is also in possession of ammunition in a school zone or federal facility. Under these circumstances the unlawful weapon possession presents increased danger. These enhancements are more effective than grounds for departure (as recognized in Application Note 4) and would assure stiffer sentences for offenders who present an increased danger to children and government personnel.

The Commission has also requested comment on the manner in which guideline §2K2.5 addresses the statutory requirement that the violation of the school-zone statute result in a consecutive sentence. We believe that Application Note 3 does not reflect the statutory mandate of consecutive sentencing. See 18 U.S.C. §924(a)(4). A defendant convicted of both the school-zone provision and the offense of being a felon in possession of a

firearm would face the same sentencing guideline range as a defendant convicted only of the second offense. Under the application note the judge would simply determine which portion of the sentence to allocate to the school-zone provision as a "consecutive sentence." This approach is a contrived one that meets neither the letter nor spirit of the statutory mandate.

STANDARDS FOR ACCEPTANCE OF PLEA AGREEMENTS (Amendments 25 and 36)

The Department strongly opposes these amendments which would add commentary to guideline §6B1.2 recommending that the government disclose to the defendant during plea discussions (option 1) or prior to a rule 11 colloquy (option 2) information known to the government that is relevant to the application of the guidelines. This proposal seems to be little more than a poorly disguised attempt to use plea negotiations to discover the details of the government's case.

This proposal would place a great burden on the system to make sure the defendant can correctly determine what his sentence will be. It would likely engender a plethora of litigation of claims by defendants that the government did not "fully" disclose relevant information in its possession. The amendments also raise the additional issue of the nature and scope of information the government should disclose; for example, whether information pertaining to an ongoing investigation would need to be disclosed that might subsequently result in the defendant's loss calculation being increased. Moreover, the defendant will already have access to the pertinent information through normal discovery.

Requiring that defendants be able to calculate a probable sentence invites additional litigation as to whether the sentence was correctly predicted and additional collateral attacks on plea voluntariness.

CARJACKING (Amendment 26)

Amendment 26 invites comments on the appropriate guideline for the recently enacted federal carjacking statute. We believe that guideline §2B3.1 should be made applicable to carjacking. This guideline, aimed at robbery in general, incorporates factors relevant to carjacking, such as bodily injury, abduction, and the nature of the use of a firearm. (The defendant must possess a firearm for the statute to apply). In addition, a cross-reference to the murder guideline, §2A1.1, should be added for cases in which death results. We also support increases in the theft guidelines for offenses involving stolen vehicles to reflect the increase in the maximum imposable sentence from five to ten years' imprisonment.

CRIMINAL ENTERPRISE AND RACKETEERINGBRIBERY AND GRATUITIES (Amendment 27(G))

We recommend against this proposal to merge the two guidelines for bribery and gratuities affecting employee benefit plans and labor unions, respectively. The proposal carries the risk that persons applying the merged guideline will confuse the different specific offense characteristics for the two existing guidelines (§§ 2E5.1 and 2E5.6). The gratuity offenses for the two predicate crimes in the merged guideline section also differ substantially as to the elements of proof.

Section 2E5.1 increases the base offense level by two levels with respect to defendants who are fiduciaries of benefit plans. Section 2E5.6 has no similar increase for fiduciaries of labor organizations. The two types of organizations are frequently confused when the benefit plan is sponsored by a labor organization. The confusion would be compounded by the cross-application of the proposed guideline to reporting crimes which facilitate or conceal a bribe or gratuity involving a benefit plan (§2E5.3(a)(2)) or a labor organization (§2E5.5(a)(2)).

The gratuity portions of the union-related crime at §2E5.6 are offenses which proscribe the payment and receipt of things of value by persons holding particular positions described in the statute and do not require that the payment or receipt be tied to the recipient's actions, duties or decisions as an officer or employee of a labor organization or as a labor representative of employees. 29 U.S.C. §186(a)(1), (a)(2) and (b)(1). On the other hand, the benefit plan-related gratuity requires that the thing of value be received "because of" the recipient's actions, decisions or duties in relation to a benefit plan matter. 18 U.S.C. §1954.

In the event that the proposal is adopted over our objection, the discussion of "graft," which applies only to the section 1954 gratuities, should be omitted from the Commentary. That is, the paragraph in §2E5.1 captioned "Background" would be further amended by deleting the following clause:

. . . as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.

THEFT (Amendment 27(H))

This amendment consolidates guideline §§2E5.2 and 2E5.4 for theft from benefit plans and labor unions, respectively, into the larceny guideline at §2B1.1. However, it fails to carry the "Application Note" in the consolidated sections to the larceny

guideline's Commentary. Instead, the proposed amendment transfers the Application Note's instruction to apply the adjustment for abuse of position of trust (§3B1.3) in the case of benefit plan fiduciaries and union officials to the Commentary in §3B1.3 as an "illustration." No other crimes are "illustrated" in such manner in §3B1.3. However, §2B1.1 already includes an enhancement based on harm to a "financial institution" which is defined in Application Note 9 as including unions and organizations providing "pension, disability, or other benefits . . . to large numbers of persons." The application notes for abuse of benefit plan and labor union positions of trust are more likely to be found and heeded in §2B1.1.

Therefore, we recommend that each "Application Note" in the Commentary to §§2E5.2 and 2E5.4 be transferred to the Commentary of §2B1.1 as new "Application Note 14."

We further recommend that the statutory citation for these frequently used statutes, whose guidelines are being deleted from Part 2E, be listed in the Commentary to §2B1.1 following the term "Statutory Provisions:" by inserting "664," after the term "659," and by inserting "29 U.S.C. §501(c)" after the term "2317."

REPORTING CRIMES (Amendment 27(I))

This proposed amendment consolidates the two guidelines for reporting crimes involving employee benefit plans and labor organizations into a single guideline. However, the proposals fail to amend the cross-references in §2E5.3(a)(2) and to preserve the cross-reference in §2E5.5(a)(2) for reporting crimes which facilitate or conceal a theft or embezzlement or an offense involving a bribe or gratuity. The proposals also fail to amend Appendix A (Statutory Index).

Therefore, we recommend that §2E5.3(a)(2) be amended to read as follows:

If the offense was committed to facilitate or conceal a theft or embezzlement, apply §2B1.1. If the offense was committed to facilitate or conceal an offense involving a bribe or gratuity pertaining to an employee benefit plan or labor organization, apply §2E5.1 and §2E5.6 as applicable.

The Commentary to §2E5.3 captioned "Statutory Provision: 18 U.S.C. § 1027" should be deleted and the following Commentary inserted: "Statutory Provisions: 18 U.S.C. § 1027, 29 U.S.C. §§ 439, 461, 1131."

Appendix A (Statutory Index) should be amended at the line beginning "18 U.S.C. § 1027," "29 U.S.C. § 439," and "29 U.S.C. § 461" by deleting "2E5.5" and inserting "2E5.3" at the end of each line.

Appendix A (Statutory Index) should be amended by deleting the lines beginning "29 U.S.C. § 431," "29 U.S.C. § 432," and "29 U.S.C. § 433" in their entirety. The penalty for these statutes is 29 U.S.C. § 439.

ADDITIONAL PROPOSALS (Amendments 27(I))

Appendix A (Statutory Index) does not currently list crimes which are analogous to the labor racketeering offenses described above.

The misdemeanor for the willful failure to maintain records and file reports required by the Employee Retirement Income Security Act (ERISA) which is codified at 29 U.S.C. §1131 is not listed in Appendix A. We believe that the offense should be consolidated within the proposed record keeping and reporting guideline at §2E5.3, as amended.

Moreover, the misdemeanor for the willful deprivation of a union member's right to democratic participation in the affairs of a labor organization by means of actual or threatened violence (29 U.S.C. §530) is not included in Appendix A. However, the analogous misdemeanor for the willful deprivation of employee benefit plan participants' rights by means of actual or threatened violence (29 U.S.C. §1141) is assigned by Appendix A to guideline §2B3.2 (extortion by force or threat of injury).

Therefore, we recommend that Appendix A (Statutory Index) be amended before the line beginning "29 U.S.C. § 1141" by inserting the following two new lines: "29 U.S.C. § 530" followed by "2B3.2" and "29 U.S.C. § 1131" followed by "2E5.3."

CONFORMING AMENDMENTS - FRAUD AND THEFT (Amendment 28(G))

This amendment attempts to make the definition of loss in the theft guideline consistent with the language currently in the fraud guidelines. The Department has found that issues related to recovery under §2F1.1, particularly in the area of consumer fraud, which were made relevant by the 1991 changes to the commentary, are more difficult to resolve than the basic question of how much was spent for the fraudulent item. That is, when consumers purchase fraudulent products (juice with sugar and undeclared chemicals in it, cars with turned-back odometers, drugs not made in conformity with regulatory requirements), it is easy to determine what the cost of the item was. However, determining the "loss" now that credit for value received is granted raises difficult issues regarding the value of something that is not what it is supposed to be, and is generally something for which there is no market (these products exist only due to fraud). Thus, in deciding whether to conform guideline 2B to 2F, the Commission should not assume that 2F is easy to apply in its current form. It is not. Therefore, we do not support the

proposed consolidation and urge the Commission to further evaluate the appropriateness of the current approach for determining loss.

ANTITRUST OFFENSES (Amendment 28(I))

The Commission has requested comments on several conforming changes pertaining to the interaction of Chapter Two (offense conduct) and Chapter Eight (organizations). It proposes to amend guideline §2R1.1 so that both individual and organizational complementary bidders would be assigned a volume of commerce equal to the greater of the affected volume of commerce done by the individual or organization or the largest contract on which a complementary bid was submitted. While the Department has no objection to the general thrust of this amendment -- imputing a volume of commerce to individual complementary bidders in the same manner that a volume of commerce is assigned to organizational complementary bidders -- we do believe that the proposal can and should be improved.

The language adopted by the Commission in 1991 to impute a volume of commerce to complementary organizational bidders has a possible hole in its coverage. While the usual form of a bid-rigging conspiracy is for one company to submit a winning bid while others submit complementary bids, there are also conspiracies in which one or more companies agree with the selected winning bidder not to submit bids at all. An agreement not to submit a bid has the same anti-competitive effect and is every bit as unlawful as an agreement to submit an artificially high or low bid. The Commission discusses both types of bid-rigging agreements in identical terms in Application Note 6 to §2R1.1. The language in the guideline, however, only explicitly addresses cases in which an organization "submitted" one or more complementary bids. While there is every reason to apply the same rule concerning imputed volumes of commerce to agreements not to submit bids -- and while the Department is prepared to argue based on Application Note 6 that the Commission intended that both complementary bidders and defendants that agreed not to bid be treated in the same manner -- the current language, which would be used again in the proposed amendment to §2R1.1(b)(2), should be clarified on this point. The proposed amendment should also be revised to conform to the language used in the first sentence of the paragraph to which it is being added and which provides that the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him "or his principal" in the goods or services affected by the violation.

Therefore, we recommend that the language of the proposed amendment to §2R1.1 be amended to read:

"In a bid-rigging case in which an individual participant or his principal, or an organization, submitted one or more complementary bids or agreed not to submit one or more bids, use as the individual's or the organization's volume of commerce the greater of (A) the volume of commerce done by the individual or his principal, or by the organization, in the goods or services that were affected by the violation, or (B) the largest contract on which the individual or his principal, or the organization, submitted a complementary bid or agreed not to bid in connection with the bid-rigging conspiracy.".

This issue should also be addressed in Application Note 6. The note will need to be amended in some manner -- even if the Commission does no more than adopt the language that it has proposed -- inasmuch as it currently states that complementary bidders have a zero volume of commerce with no mention of the attribution rules that the Commission has already promulgated for organizations and proposes to expand to individuals. For example, a new third sentence could be added to Application Note 6--whether or not the new guideline language we suggest above is adopted by the Commission--as follows: "For this reason, the Commission has adopted rules that impute to individuals and organizations a volume of commerce equal to the largest contract on which an individual or his principal, or an organization, submitted a complementary bid or agreed not to submit a bid.".

Finally, should the Commission agree to address this issue either through new guideline language or new commentary (or, preferably, both), and assuming that the Commission agrees that it intended its 1991 change regarding organizational complementary bidders to apply to agreements not to bid as well, the Commission should state explicitly that any 1993 changes in this area as they relate to organizations are clarifying rather than substantive in nature. Otherwise, we will face a two-year period during which organizational defendants that agreed not to submit bids will argue that they have a zero volume of commerce and no \$100,000 minimum fine.

FIRST OFFENDERS (Amendment 32)

Amendment 32 invites comment on whether the Commission should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense, either by creating a new ground for departure or by increasing the number of offense levels in Zone A of Criminal History Category I.

We strenuously object to this amendment. First, the Commission just last year considered alternatives to incarceration at great length and made adjustments to the

guidelines. Further change at this time is unwarranted since the effect of last year's amendments, which became effective only a few months ago, cannot be assessed.

On the merits, the proposal is extremely troublesome. It would lead to a great deal of disparity in sentencing if handled by way of departure. If implemented through additional offense levels added to Zone A, the maximum terms of imprisonment would have to decline in order to avoid excessive ranges. See 28 U.S.C. §994((b)(2), which establishes ranges in which the maximum may not exceed the minimum by more than the greater of 25 percent or six months. Offenses the Commission had previously identified as more serious than Zone A offenses would have reduced ranges for all offenders in order to address concerns regarding first offenders. The Commission just lowered the terms of imprisonment for offense levels 7 and 8.

Finally, the effect of this amendment, like amendment 52 discussed below, would be to provide favorable treatment to white-collar offenders. Its impact on antitrust violators would be significant since it would undercut the increased offense levels for antitrust offenses established in 1991. The amendment would also have a negative impact on tax law enforcement since the vast majority of tax cases involve first offenders. The effect on federal tax enforcement, which depends to a great extent on the deterrent effect of imprisonment for tax violators in order to insure compliance with the internal revenue laws, would be devastating.

COCAINE BASE/POWDERED COCAINE QUANTITIES (Amendment 40)

The notion that offenses involving equal quantities of cocaine base and powdered cocaine should be subject to the same penalties, as suggested in Amendment 40, ignores the original basis for the distinction in the law currently. Congress established different quantities for a number of particularly dangerous controlled substances, including cocaine base and powdered cocaine, on the understanding that quantities of some substances posed greater risks than equal amounts of other substances, whether based on dosage unit, addictive qualities, or other factors. Whether Congress arrived at the best possible ratio in all cases is subject to debate and study. However, we see no greater basis, without significantly further study, to equate cocaine base and powdered cocaine than to equate other distinct substances.

The suggestion that racial disparity resulting from the current scheme should be a basis for equating cocaine base and powdered cocaine quantities under the guidelines is inconsistent with the statutory mandate that the Commission assure the neutrality of the guidelines on racial grounds. 28 U.S.C. §994(d). Under the current scheme racial neutrality is achieved

because offenders of all racial groups who unlawfully traffick in cocaine base face the same guideline range, all else being equal. The view that guidelines for different offenses should be compared on the basis of racial impact would mean that any time one racial group engaged in a particular type of offense in disproportionate numbers, as compared to a related offense, the guidelines should be adjusted to address this so-called racial disparity, regardless of the relative seriousness of the two offenses. Thus, if whites had a propensity to commit burglary of a residence (base offense level 17) and blacks to commit burglary of other structures (base offense level 12) in disproportionate numbers, the offense levels for the two offenses would have to be harmonized to rid the system of this form of perceived disparity, despite the added danger one offense poses over the other. The guidelines would cease to become neutral as to the race of the offender.

Finally, a guideline change to equate cocaine base and powdered cocaine, without a corresponding statutory change, would cause the guidelines to be superseded by relevant mandatory minima in many cases. If these changes were made only for offense levels above or below the relevant mandatory minima, as suggested in the request for comment, the guidelines would produce great cliffs.

GROUPING RULES (Amendments 42 and 43)

These amendments to the grouping rules were proposed by the Internal Revenue Service and are designed to alleviate the problem of so-called "free" crimes in the sentencing calculus. In the tax area, this situation most often arises when tax crimes are grouped with drug violations. If the income giving rise to the tax violation is generated by drug activity and exceeds \$10,000 in any one year (which it usually does), there is a two-level specific offense characteristic increase in the offense level for the tax violation and the offenses are grouped under §3D1.2(c). If the offense level for the drug offense exceeds that for the tax violation, the offense level for the tax violation has no effect on the ultimate sentence. The IRS proposed Amendment 42 has two alternative ways of dealing with this problem. We support the proposed amendment and prefer the first option, which would increase the offense level of the group two levels in all cases such as the one outlined above. The second option would affect only money laundering and drug violations.

Proposed Amendment 43 would insure that any offense, including, of course, tax offenses, would always have a definite effect on the final offense level calculation. It would do this by amending §3D1.4 to provide that groups which are nine or more levels less serious than the most serious group would be assigned one-half unit, rather than be totally disregarded, as is

currently the case under §3D1.4. We also favor this proposed amendment.

LSD CARRIERS (Amendment 50)

This amendment would exclude from mixtures or substances containing LSD the carrier substance, such as blotter paper. We oppose this amendment as inconsistent with the statutory scheme. If the Commission adopted this amendment, many offenders would face mandatory minimum sentences that far exceeded the sentence that would otherwise apply under the guidelines, since the mandatory minimum would be based on the weight of both the LSD and the carrier. See Chapman v. United States, 111 S. Ct. 1919 (1991). The current approach of including the carrier substance is appropriate since the carrier medium is a necessity of retail distribution.

COCAINE BASE DEFINITION (Amendment 51)

Amendment 51 excludes from the term "cocaine base" any form of the substance other than what is commonly referred to as "crack." Most courts have agreed that chemical composition, rather than physical form, determines the identity of cocaine base for statutory purposes. There is no basis for a different definition under the guidelines. Establishing one would only bring about inconsistency with mandatory minimum provisions of law.

REQUIRED PROBATION (Amendment 52)

This amendment would require a sentence of probation without confinement conditions if the applicable guideline range were in Zone A, unless the court made a finding that a sentence of imprisonment were required to achieve the purposes of sentencing set forth in the Sentencing Reform Act. If the defendant were in Zone B, the amendment would require the court to impose the minimum confinement condition permitted unless the court made a finding that a greater confinement condition were required to achieve these purposes.

We vehemently object to this amendment. First, as explained with regard to amendment 32, the Commission just last year considered alternatives to incarceration at great length and made adjustments to the guidelines. Moreover, the proposal is unwise on the merits. The sentencing Reform Act did not aim to eliminate all judicial discretion, but rather provided for sentencing ranges within which judges could exercise their discretion. Discretion within these ranges allows judges to take into account a variety of factors of importance to the sentencing process but, since limited to a given range, the discretion necessarily is exercised in a manner that serves the purposes of reasonable uniformity in sentencing. An amendment which

eliminates this last measure of discretion is not consistent with the goals of sentencing reform.

The amendment would have the effect of keeping white-collar defendants out of prison since many white-collar offenses are subject to low offense levels. Tax and some antitrust offenders would particularly benefit from this proposal. In fact, the proposal would substantially increase the likelihood that the majority of tax violators would not serve any time in confinement. The threat of imprisonment can be a powerful deterrent for white-collar offenders. The Commission should not thwart this important goal.

CAREER OFFENDERS (Amendment 55)

Amendment 55 would eliminate the current table in the career offender guideline, §4B1.1, that places the guideline sentence at or near the statutory maximum, and would provide instead that a career offender be sentenced at the top of the applicable guideline range for Criminal History Category VI for the offense level that otherwise applies. The effect of this amendment would be to substitute the highest guideline sentence applicable to a particular offense level for a sentence close to the statutory maximum for the offense.

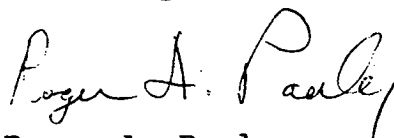
We strenuously object to this amendment because it violates the statutory directive that a career offender be sentenced "at or near the maximum term authorized." 28 U.S.C. §994(h). As the Commission recognizes in the commentary to the career offender guideline, the relevant legislative history reflects that "the maximum term authorized" means the statutory maximum. S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983). The Commission should reject this amendment as inconsistent with the Sentencing Reform Act.

RETROACTIVITY (Amendment 56)

Amendment 56 would include last year's amendment to the guideline on acceptance of responsibility, §3E1.1, which provides a third level of reduction in certain circumstances, in the retroactivity policy statement, §1B1.10. Providing for the retroactive application of this amendment can be expected to result in a flood of defense motions for reduced sentence. The courts would then have to consider the nature of the defendant's acceptance of responsibility to determine whether the added requirements of guideline §3E1.1 for the third level of reduction had been met. The factual information necessary for this determination may be old or unavailable. Providing for the retroactivity of the third level of acceptance of responsibility could be truly disastrous for the courts.

We also oppose the proposed amendment of the retroactivity policy statement to authorize the courts to sentence retroactively for reduction in ranges even when an amendment is not specifically listed in the policy statement. This proposal would also cause a flood of unfounded motions for reduced sentence. It would have the effect of making it very difficult for the Commission ever to reduce a guideline range because of the opportunity such a reduction would provide to defendants to seek reduced sentences.

Sincerely,

A handwritten signature in cursive script, reading "Roger A. Pauley". The signature is written in dark ink and is positioned above the printed name and title.

Roger A. Pauley
Member (ex officio)
United States Sentencing Commission