

TESTIMONY ON PROPOSED AMENDMENTS TO
§§ 281.1 THROUGH 281.4 OF THE
SENTENCING GUIDELINES

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Before the United States Sentencing Commission

March 22, 1993

The proposed amendments to the guidelines for money laundering offenses announce the critical principle of "tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds." 57 Fed. Reg. 62832, 62839 (Dec. 31, 1992). This principle would correct a major distortion in sentencing under current guidelines for money laundering, which can readily be manipulated by prosecutors to achieve sharply different sentences for similarly-situated defendants. The manipulation involves adding money laundering charges under 18 U.S.C. §§ 1956 and 1957 to cases that do not fit any reasonable definition of money laundering. This is reflected in money laundering convictions based on (i) garden-variety fraud allegations, United States v. Lovett, 964 F.2d 1029 (10th Cir.), cert. denied, 113 S.Ct. 169 (1992), United States v. Johnson, 971 F.2d 562 (10th Cir. 1992), (ii) bankruptcy fraud, United States v. Levine, 970 F.2d 681 (10th Cir. 1992), (iii) bank fraud, United States v. Kelley, 929 F.2d 582 (10th Cir.), cert. denied, 112 S.Ct. 341 (1991); United States v. Hollis, 971 F.2d 1441 (10th Cir. 1992), petition for cert. filed (Dec. 30, 1992), (iv) pension fraud, United States v. Cusumano, 943 F.2d 305 (3rd

Cir. 1991), cert. denied, 112 S.Ct. 881 (1992), (v) political corruption, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), and (vi) fraud on federal programs, United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), cert. denied, 112 S.Ct. 3037 (1992); United States v. Henry, No. 3:91-00095 (M.D. Tenn).

As prosecutors candidly admit, money laundering charges are added to such cases solely because the current guidelines establish dramatically higher sentences for money laundering counts than for related fraud charges. The Money Laundering Working Group of this Commission confirmed this pattern in a recent study. In a sample of 24 non-drug cases with additional money laundering charges, 23 defendants faced sharply higher sentences because money laundering counts were included:

<u>Increased Guideline Levels Due to Money Laundering Count</u>	<u>No. of Cases</u>
+ 21 levels	1
+ 16 levels	2
+ 15 levels	1
+ 14 levels	1
+ 11 levels	4
+ 9 levels	5
+ 8 levels	1
+ 6 levels	2
+ 5 levels	5
+ 1-4 levels	2

In this sample, the money laundering charges created an average increase of 9 offense levels for sentencing. In most cases, that means that at least two additional years in prison. Whether the defendant faces that additional prison time now turns largely on the prosecutor's discretion to add money laundering counts to other, substantive charges.

The proposed amendment to § 2S1.1 recognizes this inappropriate distortion of the guidelines and begins to address it. This is an important step to reduce unjustified disparity in punishment and unintended prosecutorial power over investigative targets. Although the proposed amendment correctly diagnoses the problem, however, its solution needs more work. In particular, the Commission should reconsider the use of the fraud tables of § 2F1.1 to set money laundering sentences.

Under the proposed amendment to § 2S1.1, most money laundering sentences would be calculated based on the offense levels specified in the fraud table in § 2F1.1, plus 12 offense levels for a drug-related offense and 8 offense levels for non-drug-related offenses. The base offense level from the fraud table is based on the "value of the funds" involved in the offense.

As a practical matter, this amendment will preserve the current distortion in sentencing and prosecution in non-drug

cases. (Because guideline levels are so high in drug cases, there is no significant disparity for drug cases under proposed § 2S1.1.) The Money Laundering Working Group found that in non-drug cases, a money laundering count would increase offense levels by an average of 9 offense levels; the proposed amendment would institutionalize a differential of at least 8 offense levels between fraud and money laundering sentences. Indeed, that differential can be 10 or 12 offense levels if sentence enhancements apply for "special offense characteristics" under the proposed § 2S1.1(b). The differential often will be even larger, though, because of the distinction between "loss" under the fraud guidelines and "value of funds" under the money laundering guidelines.

For example, a scheme to overcharge the federal Medicare program may involve receipt of payments totalling \$750,000, of which only \$100,000 represents actual overcharges. Under the fraud guideline, the "loss" to the victim (the Medicare program) is \$100,000, or offense level 6 before enhancement. But under § 2S1.1 the "value of funds" involved in the money laundering offense will be \$750,000, or a level 10 when measured by the fraud table, plus the 8-level increase under § 2S1.1(a)(3), plus "specific-offense characteristic enhancements" of up to four offense levels. The gulf between the offense level for the underlying fraud (6 plus enhancements) and that for the money laundering charge (from 18 to 22) is both huge and contrary to

the Commission's professed goal of "tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds."

Under the proposed amendments, the continuing disparity between money laundering sentences and those for non-drug underlying offenses flows from the ill-advised reliance on the fraud table for determining money laundering sentences. The courts have stressed the error of equating money laundering with theft or fraud for sentencing purposes. In United States v. Johnson, supra, the Tenth Circuit declined to group money laundering and fraud offenses because the former concern "the value of funds" while the latter concern "loss." (971 F.2d at 576).

Although both offense levels are determined from a calculation involving an amount of money, the harm being measured by each is significantly different in character. "Loss" is used throughout the guidelines as a measure of the net harm resulting from theft and property crimes. . . . In any given case, the "loss" may or may not be the same as the total amount of funds involved in the fraudulent scheme. See U.S.S.G. § 2F1.1 comment (n. 7-10). A determination of loss requires an assessment of the impact of the fraud on the individual victims. Section 2S1.1, on the other hand, is not based on the amount of the loss. It is based on the value of the funds involved in the laundering transaction. The harm from such a transaction does not generally fall upon an individual but falls upon society in general. Thus, the measure of harm under § 2S1.1 is the total amount of funds involved.

For the reasons identified by the Johnson court, the fraud table is not appropriate for determining money laundering sentences. To the extent the fraud table is based on the concept of loss, it simply does not fit the value-of-funds measure for money laundering. Cf. United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991) ("loss" under theft guidelines differs from fraud "loss" under § 2F1.1).

The Commission also should address specifically the disparity problem in government "sting" cases, in which government agents represent that funds are the product of specific illegal activity. For defendants in sting cases, the money laundering guidelines should tie the sentence to the underlying offense described by the government agents.

In order to achieve its stated goal of tying money laundering sentences more closely to the sentences for the underlying offenses, § 2S1.1 should be revised in three respects. First, the sentence for non-drug offenses should not exceed the sentence for the underlying offense; that change will eliminate the current powerful incentive for prosecutors to add, or threaten to add, money laundering charges to non-drug, white-collar cases. Second, the previous table for § 2S1.1 should be reviewed or revised to avoid the further disparity caused by using the fraud tables under §§ 2S1.1(a) and 2S1.1(a). Third, the guidelines should provide that the money laundering sentence

in sting cases shall not exceed the sentence for the crimes that supposedly generated the funds at issue.