

**PROPOSED TESTIMONY OF
BRIAN E. MAAS**

I am appearing here as a representative of the New York Council of Defense Lawyers, an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in Federal Court. Our organization was formed in 1986 and has over the past 15 years actively sought a voice in the development of policies and practices that affect our clients. Operating through its various committees, the NYCDL interacts regularly and constructively with the judges and prosecutors in the Districts in which our practice is concentrated on a wide range of criminal justice issues.

One of the areas of primary concern to our organization, and to all defense lawyers who practice in the Federal Courts, is the evolution of the Sentencing Guidelines. To that end, the NYCDL has for the past ten years or so maintained a Sentencing Guidelines committee comprising approximately ten members, of which I am currently the chairperson. This committee has, among other things, generally submitted written comments on proposed amendments to the Guidelines and appeared before the Commission to testify about issues of particular importance to our members and their clients.

The Economic Crime Package and the related amendments which are currently before the Commission present issues of such importance. Although the package of proposed amendments also include significant amendments relating to the sentencing of defendants convicted of non-economic crimes, and our written submission includes comments about some of these, our written submission focused on the Economic Crime Package as the bulk of the work of our members involves representing defendants accused of economic crimes. My testimony this morning shall maintain that focus. As to the remainder of the proposed amendments, our committee has reviewed

the positions taken by the Federal Defenders organization and we join in their comments.

As to the Economic Crime Package, the NYCDL believes that several of the specific proposals are beneficial both in terms of providing clarification of ambiguous concepts and in terms of promoting uniformity in the application of the Guidelines. Thus, we support the consolidation of the theft and fraud guidelines with a base offense level of six. The distinction between the crimes covered by the separate guidelines is frequently artificial and the true distinctions between theft crimes and fraud crimes can be addressed through enhancements and reductions. Therefore, we urge the commission to adopt Part A of the Package.

We also believe that regardless of whether the theft and fraud guidelines are consolidated, it is desirable to provide a single definition of loss for all economic crimes. In doing so, we urge the Commission both to avoid a "one size fits all" rigidity and to avoid definitions that include sufficiently vague terms as to invite undesirable subjectivity. With respect to the former concern, the proposal to measure loss either at the time of sentencing or at the time when the offense was detected seems to ignore the differences between a theft offense and a fraud offense and the different variations of fraud offenses. Although we support the time of sentencing as the fairer of the two proposals for fraud cases, we recognize that this approach may not be appropriate for theft cases where the stolen object appreciates over time (artwork) so that the time of the offense would be the more appropriate time for measurement. Given the subjectivity of fixing the time of detection, as evidenced by the complexity of Option 2, it is probably the least desirable or relevant of the three options.

As to our concern over unnecessarily vague terminology, we are quite concerned about both options for the definition of "actual loss." The notions of "reasonable foreseeability" in

Option 1 and harm that "will result" in Option 2 create opportunities for subjective judgments of consequential damages that should be avoided. We believe that so long as the sentencing of economic crimes is dependant primarily on the fraud table, the loss being measured should be the direct loss actually suffered by the victim and other factors should be addressed through the use of upward or downward departures. As soon as the system becomes involved in determining the level of reasonable foreseeability or intent for a particular defendant, or ascertaining future harm, an unacceptable level of speculation has been added to the sentencing process.

As to the other nuances of the definitions included in Part C of the Economic Crime Package, we have addressed the significant ones in our written submission and will not address them here. Instead, I would like to address the remainder of my comments on the Economic Crime Package to explaining our opposition to all three options to revise the fraud tables. On one level, our opposition is probably predictable: each of the proposed tables increases the offense level for all economic crimes with losses greater than \$40,000 (options 1 and 3) or \$120,000 (option 2) and would have a corresponding negative effect on our clients. However, our opposition also derives from our belief that the harsher tables are trying to address a problem that does not exist. Economic crime defendants are not receiving the sentences they are receiving because the tables are too lenient: if that were the case, judges would utilize the upper end of the sentencing range more often or would be availing themselves of the opportunity to depart upward if the loss understates culpability. Instead, defendants are receiving the sentences they are getting because defense lawyers and prosecutors are fashioning pleas that utilize the full scope of the Guidelines to create an offense level acceptable to the sentencing courts.

It is not for the Commission to decide that the sentences being imposed for economic

crimes are too lenient; that is the role of Congress. Rather, the Commission should be concerned with the clarity of the Guidelines and with the uniformity of their application to certain crimes. Given that the data presented concerning the sentencing of Economic Crime defendants does not raise concerns of uniformity, except that sentences are too uniformly at the bottom of the sentencing range, the Commission should resist the temptation merely to tinker with the tables in order to increase sentences. Although the creation of two level increases and, therefore, fewer categories, responds in some small part to criticism of the tables as micromanaging the sentencing process, the incremental changes set out in these three options seem only intended to increase sentences without allowing the sentencing judge to exercise the sort of discretion favored by those who support substantially reducing the number of categories in the tables.

The last two amendments that I wish to address are the money laundering amendment and the amendment to expand Zones B and C. The money laundering amendment is a long overdue change that will rationalize both the charging and sentencing process. Given that the money laundering statutes are worded sufficiently broadly to encompass a wide range of behavior, prosecutors have been able to use the threat of a money laundering charge to force pleas to other, less seriously sentenced offenses. In addition, defendants who have resisted the threat have found themselves facing guidelines mandated sentences greater than the sentence for the underlying crime. Thus, this proposed change will go a long way to changing an area of practice where the Guidelines tail is wagging the criminal law dog.

Finally, I would like to urge the Commission to expand the range of both Zones B and C. Many defendants whose offense levels fall at 11 and 12 are receiving prison terms of a few months because of the requirement for Zone C that at least one-half of the sentence be served in

prison. These terms are just long enough to cost defendants jobs and to deprive families of support without being long enough to satisfy any truly valid sentencing purpose. These defendants are often first offenders for whom house arrest and probation would be appropriate.