March 17, 2003

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

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

Dear Judge Murphy:

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

I. Comprehensive Loss Table Increases Are Not Justified

A. The Sarbanes-Oxley Act

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

The Justice Department has now reasserted its attempts to institute across-the-board sentencing increases. For example, the Justice Department is working on draft legislation that

[1] *See, e.g.*, Sue Reisinger, *Government Seeks Tougher Sentences*, The National Law Journal, March 10, 2003, at A20.

would require those who commit white collar crimes involving at least $10,000 to face some jail time mixed with other punishment, and those with crimes involving at least $50,000 to serve a mandatory prison term. With regard to its proposed comprehensive increases in the base offense level and the loss tables, Justice Department official Drew Hruska argued that prosecutors need the leverage of jail terms against smaller defendants in order to persuade them to testify against their bosses. "Sometimes we build our cases from the bottom up, and we need to be able to make clear to people at the low end of the range how serious the consequences are," Hruska said. "If we want to get the big fish, we have to start with the minnows." *Id.* Of course, the purpose of the Sentencing Guidelines is to promote fair and equitable sentences across the board. Increasing the leverage of the Justice Department against the "minnows" is not a valid reason to increase sentences. In fact, the Sentencing Guidelines are designed to reduce inequities based on the charging decisions of prosecutors.

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

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

B. The 2002 Economic Crime Package

The Justice Department's suggestion that the loss table should be completely revised to ratchet up offense levels across the board in economic crime cases is a transparent effort to re-visit the Economic Crime Package ("ECP") passed two years ago. The ECP, which included a

revised loss table, was the result of years of careful study and discussion, including a two-day symposium in October of 2000. Given that there has been no opportunity to study the effects or impact of the new loss table, there is absolutely no basis to revise it at the present time. It will take at least three to four years before adequate response and information can be gleaned from the legal community as to the impact of the ECP.

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

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

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

C. Summary

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

In sum, federal economic crime penalties have increased in the last fifteen years. The rate of imprisonment of economic crime defendants, the severity of sentences called for by the

Guidelines, and the length of sentences of imprisonment actually imposed are now at all-time highs. Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence. Nonetheless, the Justice Department insists that economic crime penalties are not high enough and that it needs the higher penalties for "leverage." Such reasoning creates dangerous precedent.

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

II. The Proposed Permanent Amendments

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

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

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

Respectfully,

The National Association of Criminal Defense Lawyers

30150270.1