PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
(202) 234-9000 - BARRY BOSS
(813) 229-1118 - JIM FELMAN

March 17, 2003

VIA FACSIMILE

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

Re: January 17, 2003 request for comment (corporate fraud)

Dear Judge Murphy:

We write to add our views to others submitted in response to the Commission's January 17, 2003 request for comment. In addition, we ask that this letter serve as the Practitioners' Advisory Group's ("PAG") written testimony for the public hearing scheduled for March 25, 2003. [1]

The PAG has already commented extensively on the amendments proposed in response to Sarbanes-Oxley, including our correspondence dated December 12, 2002, November 15, 2002, and September 18, 2002. While we remain convinced that the Commission went too far in passing the emergency amendments on January 8, 2003, we have previously set forth those concerns at length and will not repeat them here. Instead, we will focus on the Issues for Comment set forth in the January 17, 2003 Federal Register notice. In that regard, we rely not only on our previous letters to the Commission but also on the thoughtful comments of Indiana University Law Professor Frank O. Bowman, III, contained in his February 10, 2003 letter to the Commission. The PAG strongly opposes the adoption of a new loss table (options 1A-1C) or a new base offense keyed to the statutory maximum of the offense of conviction.

[1] We wish to express our appreciation to PAG member David F. Axelrod for his assistance in drafting this letter.

REVISING THE LOSS TABLE

The Department of Justice's ("DOJ") arguments in support of the proposed increases in the loss table and/or the base offense level do not square with reality. For instance, it is at least implicit in DOJ's arguments in favor of increasing the loss table contained in U.S.S.G. §2B1.1 that sentences for white-collar offenders are not sufficiently severe. That is convincingly refuted by Profession Bowman, who points out, among other things, that there cannot be a general deterrent rationale for increasing the loss table, since DOJ's own statistics show that the rate of property crime has been dropping steadily since 1974 (Bowman letter at 2).

It is, of course, always possible to argue that more severe sentences would reduce the crime rate even more. However, common sense suggests that at least with respect to white-collar crimes, we are far beyond the point of diminishing returns in that regard. DOJ's limited resources would better be devoted to increased enforcement, rather than locking up a relatively small number of offenders and throwing away the key. Furthermore, the approach advocated by DOJ is counterproductive because it lulls policymakers, and the public, into thinking that meaningful action has been taken. To the contrary, where, as here, offenders are already facing extremely stiff sentences, increasing sentencing ranges does little to reduce criminal activity.

Nor is revision of the loss table justified by other commonplace arguments, such as that sentences for white-collar offenders are insufficiently severe to deter specific categories of potential offenders. As Professor Bowman points out, examination of the guidelines presently applicable to even moderately serious white-collar offenders – those at whom Sarbanes-Oxley is directed – reveals sentences that are substantial, even in comparison to those imposed for violent crimes and drug-related offenses (Bowman letter at 13). Professor Bowman illustrates the point with a series of hypothetical examples that we respectfully urge the Commission to examine carefully. They demonstrate, among other things, that when low-level offenders are excluded from the calculus, DOJ's statistics reveal that the present Guidelines are more than adequate to deal with white-collar crime. (*See* Bowman letter at 9, 12-13.)

Numerous other statistics are available to prove that the perception that white-collar offenders are treated leniently – vigorously promoted by DOJ – is just plain wrong. As you know, the guidelines for economic crimes have been increased repeatedly since 1987, causing very substantial increases in sentences, with the further result that the percentage of white-collar offenders who are sentenced to imprisonment increased dramatically throughout the 1990s. For instance, the Commission's own statistics demonstrate that the rate of imprisonment for fraud increased from 56.7% in 1992 to 69.2% in 2001.

The severity with which white-collar offenders are treated is also shown by the relatively low rate of departures for such offenders. For instance, while defendants who are convicted of drug trafficking receive downward departures 44% of the time, white-collar offenders who commit fraud, embezzlement and forgery/counterfeiting receive downward departures in just 28%, 18% and 19% of such cases, respectively. (Behre and Ifrah, *Courts not soft on fraud, theft crimes,* National Law Journal, March 10, 2003 attached as Exhibit A.) In other words, white-collar offenders are less likely than other classes of defendants to receive

departures and avoid the high sentences mandated by the Guidelines. The authors of that article point out:

> This flies in the face of today's frenzied conventional wisdom concerning corporate wrongdoers, and draws into question whether reform is truly needed.

Finally, to revise the loss table would be a vastly overbroad response to the problems at which Sarbanes-Oxley was directed. The loss table obviously applies to many categories of offenses that have nothing to do with the sort of corporate fraud that motivated Congress. Furthermore, approximately 20 or so guidelines, many having nothing to do with corporate fraud, incorporate the 2B1.1 loss table by cross-reference. It does not appear that any consideration has been given to the significant increase in severity of this myriad of offenses, or its effect on sentencing policy.

INCREASING THE BASE OFFENSE LEVEL

The arguments for increasing the base offense levels for certain targeted economic crimes (those carrying statutory maximum sentences of ten or twenty years) are equally unpersuasive for the reasons cited above and for the additional reason that this proposed amendment invites charging abuse. For instance, the two violations that will most often be affected by this proposed amendment are mail and wire fraud (18 U.S.C. §§ 1341 and 1343, respectively), each of which now carries a maximum sentence of twenty years imprisonment. The malleability of those statutes is beyond dispute. This proposed amendment increases the prosecutor's ability to decide the sentence at the time of indictment through the simple expedient of charging mail or wire fraud to increase the sentence, or another offense carrying a lesser maximum, to lower it.

Additionally, the statistics cited in support of this proposed amendment are unreliable. Indeed, it is impossible to forecast the effect of this sort of proposal because of the change it would make in the prosecutor's incentives in filing charges and negotiating plea agreements. In that light, it cannot reliably be predicted whom this proposal would affect, or how.

Most importantly, the Commission should refrain from amending the Guidelines because there has been no meaningful opportunity to evaluate the effect of the most recent amendments, contained in the Economic Crime Package of 2001. Those amendments will cause very significant sentencing increases for almost all white-collar offenders who have committed even moderately serious crimes. However, since those amendments apply only to offenses committed after November 1, 2001, there is not yet any meaningful data on their effect. (Bowman letter at 8.)

We implore the Commission not to succumb to pressure to amend the loss table merely to satisfy a public perception created by a few, high profile cases. The burden should be on DOJ to demonstrate through statistics or other reliable evidence a concrete need for amendment. It has failed to do so, choosing instead to rely on the overly simplistic – and incorrect – assumption that Sarbanes-Oxley requires such amendment.

The sort of constant tinkering advocated by DOJ threatens to undermine the Guidelines' fundamental purpose "to achieve reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." (U.S.S.G. Chapter 1, Part A, 2. *The Statutory Mission*.) Surely, Congress did not intend for two similarly situated defendants to receive significantly different sentences solely because their offenses occurred on different dates. Such temporal disparity, however, will inevitably result, especially if the Commission revises guidelines, such as those contained in the Economic Crimes Package, that have barely become effective.

The PAG is troubled by what we see as a "politicalization" of sentencing policy. There is a disturbing and counterproductive trend to respond to high profile criminal episodes with higher sentencing ranges for that "type" of offender. This enables politicians and DOJ officials to chant the mantra of "tough on crime," because he or she supported increasing sentencing ranges. As noted above, increased sentences do little to reduce criminal activity where, as here, sentencing ranges are already high. Even worse, this approach enables policymakers to avoid the difficult task of figuring out how to craft policies that might really work.

It seems to us that the Sentencing Commission's duty is to resist "political" approaches to criminal justice in general, and sentencing policy in particular. The Commission should ensure that the sentencing ranges available to district judges are fair and appropriate in light of the particular offender and offense. Unfortunately, we appear headed on a course reminiscent of the "war against drugs," where politics drove sentencing policy and it is now generally acknowledged that Congress and the Commission went too far.

In closing, we urge the Commission not to discard the five years of work that achieved the Economic Crimes Package of 2001. The guidelines applicable to economic crimes should not be amended unless and until the Commission has a concrete reason for doing so.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners regarding the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

Enclosure

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Kenneth Cohen, Esq.