

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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PUBLIC CORRUPTION

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

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Members of the Commission–

I appreciate the opportunity to appear before you to discuss the proposed amendments to the public corruption sentencing guidelines. Let me first say that we have enjoyed the opportunity over the past several months to meet with the Sentencing Commission staff and share our views on these important amendments. As a prosecutor who has spent considerable time working with the public corruption sentencing guidelines, I understand that the issues presented are complex, and we appreciate the staff's willingness to hear our concerns.

The Department of Justice strongly supports the central components of the proposed amendments to the public corruption sentencing guidelines. I would like to address those central components briefly, and then provide the Commission with our views regarding those limited matters on which we continue to have concerns.

First, the proposed amendments will increase the base offense level for corruption offenses, and we strongly support that change. We all know that public corruption betrays the public trust and

erodes public confidence in our government institutions. These are serious crimes, and it is important that potential offenders and the public at large understand that these crimes will be met with stiff penalties. The proposed amendments will help convey that message. For example, given the increased base offense level of 12 for bribery under the proposed amendments, all defendants who proceed to trial on a bribery charge will face imprisonment, regardless of the application of any other enhancement.

We also note that the increase in the base offense level for bribery will help to maintain proportionality in sentencing for similar offenses. Recent amendments have raised the base offense levels for two offenses that we consider to be analogous, obstruction of justice (§2J1.2) and perjury (§2J1.3). The base offense level for those offenses is now a level 14. The proposed increase in the base offense level for bribery, along with the other proposed amendments, will help to insure that sentences for bribery will remain proportional with sentences for those two analogous offenses.

The second major change under the proposed amendments is that the enhancement for the dollar amount involved in a corruption offense will be made cumulative with the enhancement that applies in cases involving elected officials and officials holding high-level or sensitive positions. Under the current guidelines, these enhancements are stated in the alternative, which, unfortunately, leads to two anomalous results. Let me describe them. First, under the current structure, a high-level official will have the same offense level whether his crime involves five dollars or \$100,000. And second, if a corruption crime involves more than \$70,000, under the current guidelines a high-level official will have the exactly the same offense level as a very low-level official. We believe that the dollar value

enhancement and the high-level position enhancement have distinct purposes and address distinct elements of the relevant conduct, and that they should both be addressed in every case. We therefore support the Commission's proposal to make these two specific offense characteristics cumulative, rather than alternative.

Third, the proposed amendments provide offense levels that are higher for public officials who are corrupted than for the individuals who corrupt them. This is an important acknowledgment that it is the public officials themselves who hold the public trust, and their betrayal of that trust should be reflected in the sentences that they receive in a corruption case. We certainly support this change.

Finally, the proposed amendments provide a new enhancement for corruption offenses that involve permitting persons or cargo to enter the United States unlawfully, and for offenses that involve providing government identification documents. These particular forms of corruption may threaten the security of the United States, and we believe that the sentence imposed in these cases should reflect that serious risk. The Department strongly supports the addition of a new specific offense characteristic to address this conduct. We note that the Commission is considering two different formulations of this enhancement, and we support the broader version of this enhancement. Under the broader formulation, this enhancement will apply whenever the offense involved providing unlawful entry into the United States or providing government identification documents; it will not be limited to defendants who personally provided unlawful entry or government identification documents. We believe that the broader language should be used in order to capture all participants in a joint criminal enterprise that creates these serious risks.

Let me take a moment now to discuss some of the concerns that we have raised in our discussions with the Sentencing Commission staff. As you will see, our concerns are focused on the particular guideline and commentary language that will be used to accomplish the central goals of the amendments, which we fully support.

The first concern stems from the proposed consolidation of the bribery guideline (§2C1.1) with the guideline for honest services fraud cases (§2C1.7). This is an aspect of the proposed amendments that we do not see as critical or necessary. It is our understanding that the consolidation is strictly a formal change (primarily a matter of housekeeping) and that the Commission does not intend to cause any substantive change through this consolidation. In order to insure that the consolidation does not cause any substantive change, it is important that the new, consolidated guideline contain language that will fully capture both groups of cases.

There is certainly considerable overlap between bribery cases and honest services fraud cases, and the two separate guidelines, §§2C1.1 and 2C1.7, are very similar. However, honest services fraud cases are different, and not all honest services fraud cases involve actual bribes.

Let me give you an example. Let's assume that a city council member has a financial interest in a company, and that the company is a bidder on a contract that the city intends to award. If the council member conceals his or her financial interest in the company and votes to award the contract to the company, the council member could be charged with honest services fraud. There would, however, be no actual bribe or corrupt payment to the council member.

In order to address these unique cases, the current honest services guideline includes very broad language that captures the value of any financial benefit that is acquired through biased decision-making, such as the value of the contract in our example involving the city council member. That broad language, however, is not included in the current bribery guideline. Instead, the bribery guideline uses the term “payment,” and the dollar value enhancement turns on the value of the payment or the benefit given in return for the payment. Unfortunately, that language is not broad enough to cover honest services cases in which there is no actual payment, like the one I just described.

In the new, consolidated guideline, we urge the Commission to include the broader language that is contained in the current honest services fraud guideline. Including that language will preserve the status quo, and insure that the dollar value involved in the case will be fully considered, regardless of whether the case involves bribery or honest services fraud.

The second set of concerns involve the enhancements for cases involving elected officials and officials holding high-level decision-making or sensitive positions. The current corruption guidelines include a bright line rule for elected officials, and any offense involving an elected official qualifies for a substantial enhancement. We believe that any official who is elected to an official position by the voters holds a unique position of public trust, and we urge the Commission to maintain this bright line rule and avoid any reduction in the offense level for elected officials.

In addition, we recommend that the Commission retain the current guideline language and commentary regarding high-level decision-making or sensitive positions. As you know, that language is

well-established in the corruption guidelines, and it has been used and interpreted by prosecutors, probation officers, and courts for many years. We are concerned that even minor adjustments to that language could unsettle matters considerably, diminishing the value of the existing case law and causing attorneys and judges to struggle with the question of whether the new bar is higher or lower than the previous bar. The current commentary provides several examples of positions that qualify for this enhancement, and we support the continued use of this simple method to provide guidance in the application of this enhancement. It is our understanding that the examples will be expanded to include jurors, election officials, and all law enforcement officers, rather than only supervisory law enforcement officers as under the existing commentary. We fully support these additions.

Third, the proposed commentary for the amended guidelines includes a new definition of the term “Public Official.” We are not aware of any case in which the status of a defendant as a public official or non-public official was unclear to the court or the parties, and we recommend against adding a definition of this term to the commentary.

Corruption takes many forms, and we are concerned that a definition, no matter how carefully formulated, will fail to include within its specific terms a defendant who holds a unique position of trust that we are unable to foresee today. An example comes to mind. In United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), the defendant was a party chairman in Nassau County, New York, and in that position he had direct and substantial influence over government decisions, although he held no official position. Based upon his de facto authority, he was convicted of honest services fraud. The party chairman’s position might not fall within the parameters of a particular definition of the term

“public official,” but there was no question that Margiotta was a corruption case and no question that the party chairman was the person who was corrupted. We believe that such a defendant should receive the 2 level enhancement applicable to public officials under the proposed amendments.

Given the number and variety of state and local government systems in our country, there may be other unique positions like this that elude definition, but that would warrant application of the public official enhancement. For this reason, we oppose including a specific definition of the term “public official.”

Finally, I would like to emphasize the importance of simplicity and clarity in the public corruption guidelines. The Commission has identified several important purposes to be served by the proposed amendments, and a corruption guideline that is confusing or awkward will, we believe, detract from achieving the Commission’s goals. For that reason, we urge the Commission to use the simplest structure and most straightforward methodology possible in the amended guidelines.

In conclusion, let me reiterate that we strongly support the proposed increases to the offense levels under the public corruption guidelines, and we appreciate the opportunity to work with the Commission Staff and appear before the Commission on these important changes. I will be happy to answer any questions that you may have.