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Introduction

Thank you for this opportunity to address a topic of great importance. I appear today to discuss the proposed "More than Minimal Planning" ("MMP")[1] and "Sophisticated Concealment" amendments that would apply to fraud and theft cases (which I will refer to simply as the "Proposed Amendments"). As a practicing attorney who deals with the Guidelines almost every working day, I hope to help you focus on the "real-world" effects those proposed amendments may have on individuals and trial courts.

I testify from the perspective of one who has wrestled for years with Guidelines issues, both as a prosecutor and defense attorney. My first exposure to fraud cases came as a young associate in a law firm that specialized in white collar defense. I subsequently served as a federal prosecutor for seven years, during which I focused on the prosecution of economic crimes. In the middle of my prosecutorial career, the implementation of the Guidelines immediately and dramatically changed the nature of my job. Several years later, I returned to private practice in Columbus, Ohio, where I focus on the defense of economic crimes.

[1] For consistency and convenience, this testimony adopts the MMP abbreviation as it is used by the Commission in the Proposed Amendments.

I. Operative Principles

There are several principles that should guide consideration of the Proposed Amendments. They are, in my opinion, principles which should be applied to all aspects of the Sentencing Guidelines. Some represent my own value judgments; others represent views previously expressed by the Commission. I identify those that I believe most important in this context:

1) Simplicity in the Guidelines is desirable. In the Commission's own words, "The larger the number of subcategories of offense and offender characteristics, the greater the complexity and the less workable the system.… The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." U.S.S.G. Ch. 1., Pt. A.3.

2) Special Offense Characteristics invite litigation.

3) Each relevant factor should be considered only once in the imposition of a criminal sentence. No factor should be double or triple-counted.

4) Judges should retain significant flexibility to deal with differing offenses and offenders. Again in the Commission's own words, "The appropriate relationships among … different factors are exceedingly difficult to establish, for they are often context specific." U.S.S.G. Ch. 1, Pt. A.3.

II. General Comments on the Proposed Amendments.

My preference is that the Proposed Amendments not be adopted. As noted above, I believe that the Guidelines should be kept as simple as possible, and that judges must

retain the flexibility to consider the context in which each factor exists and the relationships among them. More importantly, my experience in dealing with the Guidelines for almost ten years teaches that the addition of specific offense characteristics will magnify the complexity of the sentencing process without improving the quality of justice.

Additional Offense Characteristics add complexity by encouraging litigation over their existence in almost every case. On the other hand, the concerns that underlay the Proposed Amendments may be addressed without incorporating this undesirable side-effect. The sophistication of an offense may presently be considered in selecting the defendant's offense level within the guideline range. To the extent that greater flexibility is desired, the Commission may add commentary that explicitly recognizes judges' authority to depart upward in cases of unusual sophistication, and downward in cases involving only minimal planning.

However, if current proposals are adopted, it is essential that it not be done piecemeal. To the contrary, the Commission should consider the Proposed Amendments only in context of an overall plan for how culpability in fraud and theft cases should be determined. Therefore, if new Offense Characteristics are adopted, they should consist of a three-tiered structure that would provide judges with sufficient flexibility to deal with different gradations of complexity and concealment, including:

1) Incorporation of the MMP enhancement into the loss tables for fraud and theft;

2) Adoption of the Practitioners' Advisory Group's proposal for a two-level reduction in the fraud and theft guidelines for cases that involve only limited or insignificant planning; and

3) Adoption of a two-level enhancement for Sophisticated Concealment.

I strongly oppose other changes that would result in unjustified increases in the lengths of sentences under the fraud and theft guidelines. The most significant of those changes would increase the loss tables substantially more than necessary to incorporate the MMP enhancement, even at middle levels of the loss tables. The Proposed Amendments state that such additional increases are to achieve better proportionality with the penalties for comparable offenses. The Proposed Amendments neither identify such comparable offenses, nor offer empirical data to support the proposed changes.

I place in the same category the proposed "floor" offense level of 12 for crimes involving Sophisticated Concealment. It is reasonable to infer that, even without this feature, most crimes that may be categorized as involving Sophisticated Concealment will score at level 12 or more because they will involve significant sums or will constitute money laundering. Nevertheless, experience teaches that zealous prosecutors will advocate this enhancement for even low level crimes. Where such offenses involve only a small amount of money, a two level increase is sufficient to penalize the additional culpability involved in efforts at concealment.

My overall concern as a defense lawyer, and as one who is forced to view the results of such proposals in human terms, is that offense levels not creep upward without sufficient evidence that increases are necessary or appropriate, especially at the lower and middle levels of the loss tables. Across-the-board increases should not be approved without a much better foundation than presently exists. Therefore, I strongly urge that any increases at the lower and middle levels be confined to the two levels necessary to compensate for the elimination of MMP as a specific offense characteristic, and that the

Sophisticated Concealment enhancement also be limited to two levels.

The comments which follow are applicable only if the Commission decides to amend the fraud and theft guidelines, and should not be understood as detracting from my overall opposition to the Proposed Amendments.

III. MMP Is Inherent in Most Thefts and Frauds.

The present MMP specific offense characteristic may be unsatisfactory in that it defines the covered conduct so broadly that it literally applies to any fraud or theft that was not "purely opportune." U.S.S.G. § 1B1.1, Application Note 1(f). "More than 80% of all defendants sentenced under the fraud guideline and nearly 60% of those sentenced under the theft guideline are assessed the two additional levels for more than minimal planning."[2]

In the present Guidelines structure, the MMP enhancement may also be too inflexible in providing judges with only two options (to enhance or not). Consequently, it may not sufficiently assist sentencing judges in distinguishing among simple, moderately complex and highly sophisticated criminal schemes.[3] As noted above, I believe these deficiencies can be addressed by recognizing the sophistication of an offense, or its lack of sophistication, as possible reasons for departure.

My personal experience supports the view that most frauds involve MMP. Indeed, I have rarely seen a court decline to apply this adjustment in a fraud case, as is apparent in the reported cases. For instance, in United States v. Pooler, 961 F.2d 1354 (8th Cir. 1992), the enhancement was applied where a bank official made a single false entry in the bank's books. In United States v. Sanchez, 914 F.2d 206 (10th Cir. 1990), the

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[2] Bowman, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines, ___ Vand. L. Rev. ___, Manuscript at 50 (1998) ("Coping With Loss") (citing U.S. Sentencing Commission, 1995 Datafile MONFY 95).

[3] Coping With Loss, Manuscript at 50-51.

enhancement was applied in a simple case of fraud by unauthorized use of a credit card, even though the defendant did nothing but use the card, since "[e]ach purchase involved several calculated falsehoods including a forged signature." Id. at 207. In United States v. Fox, 889 F.2d 357 (1st Cir. 1989), the Court stated that "[w]e cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning." In United States v. Garcia, No. 96-2453, 1996 U.S. App. LEXIS 31074 (7th Cir. Nov. 26, 1996), the MMP enhancement was predicated on the repetitive nature of the defendant's conduct, despite the Court's conclusion that the scheme was not complex.

The enhancement is also applied in the majority of theft cases, often on remarkably simple facts. For example, in United States v. Harrison, 42 F.3d 427 (7th Cir. 1994) the Court applied the enhancement where a contract custodian had removed envelops containing food stamps from a cart in the post office. The defendant's efforts at observing Post Office operations to ascertain the location of the envelops containing food stamps warranted the sentencing enhancement. Id. at 432-33.

I concede that an enhancement that applies in the majority of cases may lose meaning as a specific offense characteristic. Nevertheless, it should be incorporated in the loss tables *only* as part of a larger picture that includes a two level *reduction* for defendants whose crimes involved *less* planning than is typical for commission of the offenses in a simple form.

IV. The Multiple Victim Enhancement Should Not Be Retained.

If MMP is incorporated in the loss tables, I oppose retention of the two-level enhancement for "a scheme to defraud more than one victim" that is presently contained in U.S.S.G. § 2F1.1(b)(2)(B). This enhancement currently exists as an alternative to the

MMP enhancement. Thus, under the current system, a defendant's sentence may *not* be enhanced for *both* MMP and the involvement of multiple victims. This limitation makes sense since it is reasonable to infer that MMP exists in virtually every multiple victim case, and it therefore would be redundant to increase a defendant's sentence for both reasons.

Retention of the multiple victim enhancement in addition to incorporating MMP into the loss tables will *double* the potential sentencing increase. The proposal notes that empirical evidence is not well developed, and the Guidelines should not be changed unless and until strong empirical evidence demonstrates that such a change makes sense.

V. "Sophisticated Concealment" is a Legitimate Consideration in Sentencing.

The addition of a Sophisticated Concealment specific offense characteristic would complete the proposed three-tier measure of culpability. For the reasons stated above, I prefer identifying Sophisticated Concealment as a potential ground for departure, but acknowledge the validity of increasing a defendant's sentence for this reason.

Conduct that readily warrants an enhancement for more than minimal planning does not necessarily rise to the level of sophisticated concealment. See United States v. Madoch, 108 F.3d 761, 766 (7th Cir. 1997) (conduct that "does not necessarily demonstrate 'sophisticated means' . . . may show 'more than minimal planning'"). The distinction is workable. For instance, United States v. Rice, 52 F.3d 843 (10th Cir. 1995) involved a false tax refund scheme. Because the defendant was convicted of offenses under both Titles 26 and 18, the Court had the option of applying both the MMP enhancement, and the enhancement for sophisticated means to impede discovery under § 2T1.1(b)(2). The Court found that the scheme was unsophisticated but persisted over three years, and therefore increased the sentence for MMP but not for sophisticated

means to conceal. Id. at 849-50. Similarly, In United States v. Bhagavan, 911 F. Supp. 351 (N.D. Ind. 1995), the court refused to enhance the sentence in a tax evasion case for sophisticated means, although it noted that the defendant's conduct would have warranted an enhancement for more than minimal planning.

VI. The Sophisticated Means Enhancement Should Apply to Overall Offense Conduct Only if Reasonable Foreseeability Requirements are Strictly Applied.

The proposed enhancement specifically raises the question whether it should be limited to the personal conduct of the defendant, or reach the overall offense conduct for the which the defendant is accountable. The latter approach was used in drafting the Proposed Amendment.

Consideration of this issue must occur in the overall context of the Sentencing Guidelines. U.S.S.G. §1B1.3 ("Relevant Conduct") establishes the framework under which all Guidelines, including specific offense characteristics, are applied. Referring to § 1B1.3(a)(1)(B), Application Note 2 to that section states that:

> a defendant is accountable for conduct (acts and omissions) of others that was both:
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> (i) in furtherance of the jointly undertaken criminal activity; and
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> (ii) reasonably foreseeable in connection with that criminal activity.

This reasonable foreseeability requirement should limit the reach of the proposed enhancement. In other words, no defendant's sentence should be increased for acts of concealment by others that were not reasonably foreseeable to him or her.

Reasonable foreseeability is employed as a measure of culpability in both the criminal law in general, and the Sentencing Guidelines in particular, to avoid punishing defendants for harm that was neither intended nor could reasonably have been

anticipated. On the other hand, defendants may appropriately be punished based on harms that they intend or that obviously will follow from their conduct.

Reasonable foreseeability, however, means different things in different contexts. Because the sentencing process focuses on culpability, it is appropriate for the requirement to be strictly construed in this context. Before increasing a sentence based on acts by third parties, the sentencing court should require that a reasonable person in the defendant's position would have foreseen the harm in question as a probable result.[4] This is considerably more specific than the definition presently contained in the Guidelines. Therefore, I urge the Commission to include additional commentary to more clearly define what is deemed reasonably foreseeable for purposes of the Sophisticated Concealment enhancement in particular, and sentencing in general.

[4] Coping With Loss, Manuscript at 144-45.

VII. "Committing the Offense From Outside the United States" Should be Included as One Form of Sophisticated Concealment Rather Than as an Alternative Enhancement.

Two options are proposed for the Sophisticated Concealment enhancement. Under Option 1, the commission of any part of the offense from outside the United States would be an alternative ground for enhancement. Option 2 would have an application note state that the commission of an offense from outside the United States is ordinarily indicative of sophisticated concealment.

Option 1 is overbroad. It is easy to imagine offenses in which trivial activity outside the United States would be urged by the government to trigger the enhancement. For example, the existence of a single mail fraud victim across the Canadian border from Detroit arguably would trigger the enhancement under Option 1, even though the offense might otherwise be crude and unsophisticated.

Furthermore, such an overly-specific offense characteristic is entirely unnecessary. Option 2 would provide judges with sufficient flexibility to punish the use of foreign bank accounts, etc., wherever common sense dictates.

VIII. The Loss Tables Should be Not be Amended More Than Necessary to Incorporate MMP.

Elimination of MMP as a specific offense characteristic would result in a two level across-the-board reduction unless a compensating adjustment is made elsewhere. However, the current proposals to amend the loss tables would increase sentences, even at lower levels, much more than necessary to compensate for the elimination of the MMP offense characteristic, and therefore should be rejected.

Both proposals recognize the obvious correlation between the amount of money

involved in a fraud or theft, and its planning and sophistication. Smaller, simpler offenses are indicative of a less culpable mental state. Therefore, the Proposed Amendments would appropriately refrain from increasing sentences at the lower end of the loss tables. Where larger losses are involved, the revised tables would increase the sentences to punish the greater sophistication and planning that is ordinarily involved.

However, the line of loss demarcation is drawn too low. Under Option 1, MMP would be presumed for all offenses involving more than $5000. Under Option 2, the increase would start at offenses involving as little as $2000. The level at which such increases should begin is partly a value judgment. However, even $5000 cannot be considered a large sum in our present economy. Therefore, I suggest that MMP not be presumed in offenses involving less than a significantly larger amount.

I find even more disturbing proposals that would increase sentences at the middle levels of the guidelines far more than necessary to account for the incorporation of MMP. For instance, Option 2 would result in a three level increase over the present loss table for offenses involving more than $40,000 and a five level increase for offenses involving more than $150,000. Throughout the middle levels, Option 2 would increase sentences by approximately 40% to 50%. No justification is offered other than the vague suggestion that this would make fraud sentences more proportionate to sentences for unspecified other offenses.

Recognition that loss is a proxy for other sentencing factors, including mental state, becomes explicit with the incorporation of MMP in the loss tables. However, even if one concedes that sentences should be increased for truly high-level offenses, increases beyond that are unjustified. Additional increments of sophistication and planning may be

punished through upward departures or the two-level enhancement for Sophisticated Concealment. In most cases, to include the Sophisticated Concealment enhancement *on top of* already increased offense levels would be to punish the same conduct twice.

IX. Justice Requires That a Downward Adjustment be Permitted for Cases of Limited or Insignificant Planning.

The Commission's Practitioners' Advisory Group suggests a two-level reduction for cases of limited or insignificant planning if the MMP enhancement is incorporated into the tables. I strongly support such a recommendation. If MMP is incorporated into the Guidelines, the Commission should preserve a mechanism to deal with "purely opportune" conduct. The best way to do so would be to permit a reduction for insignificant or limited planning.

Conclusion

I am concerned that the overall result of the Proposed Amendments may be unjustified increases in a broad category of sentences, and penalizing the same conduct several times. I urge the Commission to exercise care not to include specific offense characteristics that are overbroad, or would punish the same conduct that is used to justify increases in the loss tables.

I thank the Commission and its able staff for permitting me the opportunity to share these views with you. I will be happy to answer any questions you may have.