

Report to the Congress:

**Sentencing Policy for Money Laundering
Offenses, including Comments on
Department of Justice Report**

(as directed by section 2(b) of Public Law 104-38)



United States Sentencing Commission
September 18, 1997

REPORT TO CONGRESS:

**SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING
COMMENTS ON DEPARTMENT OF JUSTICE REPORT**

Introduction

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A. The Statutory Directive

After several years of comprehensively studying money laundering sentencing practices, the United States Sentencing Commission unanimously approved (with one member abstaining) and submitted to Congress a proposed comprehensive rewrite of the principal sentencing guideline for money laundering offenses on May 1, 1995. The purpose of the Commission's amendment was to effect a major structural change in the money laundering sentencing guidelines, a change that would result in guideline penalties for money laundering offenses that were more proportionate to both the seriousness of the underlying criminal conduct from which the laundered funds were derived and to the nature and seriousness of the laundering conduct itself. The revised approach involved using the guideline measurement for the underlying crime as the starting point, with enhancements added that reflected the integral part which money laundering plays in certain very serious crimes.

This amendment, however, and another, concurrently-submitted amendment affecting cocaine offenses, were opposed by the Department of Justice ("DOJ"). Subsequently, Congress disapproved both amendments through section 1 of Public Law 104-38. In section 2 of the disapproved legislation, Congress directed DOJ to report on federal prosecutorial charging and plea practices affecting money laundering offenses, and to include a description of steps taken to ensure consistency and appropriateness in the use of the money laundering statutes. The Commission was directed, in turn, to submit comments on DOJ's study. This report is hereby submitted in accordance with that directive.

B. Organization of this Report

In Part II, the Commission identifies the nature and source of some of the continuing problems with current sentencing policy for money laundering offenses, and explains why a revised guideline structure continues to be needed. Part III outlines the Commission's objectives of deriving a more consistent, effective, and fair sentencing policy for money laundering offenses. In Part IV, the Commission comments, as directed by Congress, on salient aspects of DOJ's study,¹ in light of sentencing data and case law. The Report concludes with an expression of the

¹ Department of Justice, Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money

Commission’s intention to continue to study and work towards a guideline structure for money laundering offenses that will produce more proportionate and uniform sentences.

II. Continuing Need for a More Rational and Proportionate Guideline Structure for Money Laundering Offenses

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A. Derivation of the Current Money Laundering Sentencing Guidelines

The current sentencing structure for money laundering offenses resulted from the fact that the two primary money laundering statutes² had been in effect for less than six months when the Commission first promulgated the money laundering sentencing guidelines in April 1987. Accordingly — and unlike the situation with most other criminal offenses for which the Commission was also developing an initial set of sentencing guidelines — no actual prosecutorial experience or judicial guidance existed to inform the Commission’s formulation of the initial money laundering guidelines.³

Without the benefit of either sentencing experience or settled jurisprudence interpreting the new statutes,⁴ the Commission necessarily based the guideline penalties for money laundering offenses upon its own understanding of the types of conduct about which Congress was most concerned, and on information from DOJ about how it expected to employ the new laws. The

Laundering (June 1996)(hereinafter “DOJ Report”).

² See title 18 of the United States Code, sections 1956 and 1957. Pub. L. No. 99-570, 100 Stat. 3207-18 (October 27, 1986). These two new provisions, which carry twenty and ten-year statutory maximum penalties, respectively, criminalized efforts to introduce the proceeds from specified unlawful activities into the stream of legitimate commerce through routine financial transactions. The corresponding sentencing guidelines are §§ 2S1.1 and 2S1.2.

³ As part of the coordinated effort to curb the use of illicit proceeds in legitimate commerce, Congress has also periodically widened the paper trail for cash and other financial transactions, and in 1984 increased to felony level efforts to circumvent Treasury Department and IRS regulatory reporting requirements. See 31 U.S.C. §§ 5311-5330 and Internal Revenue Code § 6050I. The Commission promulgated guidelines for these “structuring” offenses at §2S1.3 which were not affected by the proposed amendments of 1995, and are not the subject of this Report.

⁴ These complex and multi-faceted criminal statutes are described in some detail in the DOJ Report at pp. 5-7.

relatively high base offense levels⁵ for money laundering were premised on the Commission’s anticipation that prosecutions would address “money laundering activities [which] are essential to the operation of organized crime,” and would apply the money laundering sentencing guidelines to those offenses where the financial transactions “encouraged or facilitated the commission of further crimes” or were “intended to . . . conceal the nature of the proceeds or avoid a transaction reporting requirements.”⁶

Therefore, the Commission originally set relatively high base offense levels under the money laundering guidelines to penalize the conduct about which Congress seemed most concerned when it enacted the money laundering statutes, namely: 1) situations in which the “laundered” funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime; and 2) situations in which the financial transaction was separate from the underlying crime and was undertaken to either: a) make it appear that the funds were legitimate, or b) promote additional criminal conduct by reinvesting the proceeds in additional criminal conduct. Moreover, the penalty levels selected for the original money laundering guidelines were not tethered to any guideline measurement of the underlying crime’s seriousness. This created a penalty structure in which sentences for money laundering offenses were substantially greater than those for the less serious crimes that produced the laundered proceeds (*e.g.*, minor fraud), and substantially less than those far more serious, money-generating crimes (*e.g.*, substantial drug trafficking).

⁵ The base offense levels (the starting point for calculating the sentencing range under the sentencing guidelines) which the Commission established for the money laundering guidelines are significantly greater than the base offense levels for other non-violent, non-drug offenses; are within the same range as certain violent and national security offenses; and, are generally lower than serious drug trafficking offenses. Compare the base offense levels for money laundering, which range from 17 to 23, with the following: theft and fraud (4 to 6); gambling, bribery, and gratuity crimes (7 to 12); insider trading (8); blackmail (9); perjury, witness bribery and obstruction of justice (12); robbery and forcible extortion (18 to 20); arson (20 to 24); espionage (24 to 29); serious drug trafficking offenses (26 to 38).

Base offense levels under the sentencing guidelines are increased when certain specific factors aggravate the offense conduct. For money laundering, the increases are currently based on two primary characteristics: the amount of funds laundered in excess of \$100,000, and the derivation of the funds from drug trafficking. USSG § 2S1.1 covers convictions under 18 U.S.C. § 1956 and provides a base offense level of either 20 or 23. USSG §2S1.2 covers convictions under 18 U.S.C. § 1957 and provides a base offense level of 17.

⁶ USSG Pt.S, intro. comment. (October 22, 1987). See Appendix C, Amendment 342.

As cases prosecuted under the new money laundering statutes moved through the district and appellate courts, the Commission began receiving a substantial amount of public comment from members of Congress, judges, probation officers, and practitioners that criticized the structure and operation of the guidelines for these offenses. Consistent with its statutory mandate to review and revise the guidelines in consideration of comments and experiential data coming to its attention,⁷ the Commission undertook a detailed study of the important issues raised by the operation of the money laundering sentencing guidelines.

In its study, the Commission analyzed relevant statutes, case law, and a sample of presentence reports from cases sentenced during FY 1991 under the money laundering guidelines.⁸ These analyses were updated in February 1995, and supplemented by a targeted analysis from FY 1994 that focused on two groups of cases where sentencing disparities were considered particularly troublesome.⁹ One group consisted of cases involving the laundering of drug proceeds in which the only count of conviction was money laundering; the second group consisted of cases where both fraud and money laundering were charged as separate offenses.¹⁰

B. Broadened Scope of Money Laundering Conduct Being Prosecuted

One of the most salient conclusions of the Commission's multi-year study was that money laundering sentences are being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the money laundering guidelines were first formulated. This conclusion, derived from a detailed review of sentenced cases, is bolstered by the case law. For example, one of the more readily provable elements for a money laundering conviction under 18 U.S.C. § 1956 is "the intent to promote the carrying on of specified unlawful activity." This development results from the statutory interpretation that cashing or spending illegally obtained funds, in fact, "promotes" the original underlying specified unlawful activity, as illustrated by the holding in *United States v. Montoya*.¹¹ In *Montoya*, the deposit into a bank of a check representing the "proceeds" of a \$3,000 bribe paid

⁷ 28 U.S.C. § 994(o).

⁸ See U.S.S.C. Staff Working Group Report (October 14, 1992).

⁹ See U.S.S.C. Staff Working Group Report (February 25, 1995) at pp. 10-12.

¹⁰ Further analysis was subsequently conducted of 200 cases sentenced in FY 1995 where the defendant was convicted under 18 U.S.C. § 1956 and sentenced under § 2S1.1 of the money laundering guidelines.

¹¹ 945 F.2d 1068 (9th Cir. 1991), *cert. denied*, 116 S. Ct. 82 (1995).

to a state legislator was held to constitute the “promotion” of the underlying criminal activity, so that the defendant was punished under the federal money laundering law as well as the applicable state bribery statute.

Under this line of cases¹² and similarly expansive judicial interpretations of the statutory element of “concealment” under 18 U.S.C. § 1956,¹³ handling virtually any negotiable instrument that represents the proceeds from a crime, such as committing an insurance fraud or trading securities on inside information, and then depositing the funds in a bank or spending them on items unrelated to the criminal conduct, may support a money laundering conviction in addition to a conviction for the underlying offense. Although some jurisdictions disfavor such an expansive reach of the money laundering statutes,¹⁴ the Commission continues to see money laundering sentences imposed where the money laundering conduct is so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing

¹² See, e.g., *United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993)(cashing embezzled IRS refund checks and spending proceeds on personal items considered “promotion”), *cert. denied*, 114 S.Ct. 1076 (1994); *United States v. Maranite*, 44 F.3d 1407 (9th Cir.)(cashing stolen casino chips constitutes “promotion” of chip-skimming scheme), *cert. denied*, 115 S.Ct. 2610 (1995).

¹³ See, e.g., *United States v. Sutera*, 933 F.2d 641 (8th Cir. 1991)(depositing three checks representing gambling proceeds into a restaurant’s account, which bore the name of its owner, considered “concealment”); *United States v. Edgmon*, 952 F.2d 1206, 1210-11 (10th Cir. 1991)(using a parent’s name to sell cattle in violation of FHA loan regulations constituted “concealment”), *cert. denied*, 505 U.S. 1223 (1992).

¹⁴ See, e.g., *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991)(using proceeds from drug sale to purchase a cellular phone for personal use that did not further additional drug activities not “promotion”); *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994)(putting cash payment for drugs into shoe box is not “promotion.” . . . “The [money laundering] statute should not be interpreted to make any drug transaction a money laundering crime.”); *United States v. Willey*, 57 F.3d 1374 (5th Cir.)(transfer of funds from one bank account to another when both accounts in same name not “concealment”), *cert. denied*, 116 S. Ct. 675 (1995); *United States v. Sanders*, 928 F.2d 940, 945 (10th Cir.)(rejecting government argument that registering car purchased with drug proceeds in spouse’s name was “concealment” and holding that such an interpretation would impermissibly “turn the money laundering statute into a ‘money SPENDING statute.’”)(emphasis in original), *cert. denied*, 502 U.S. 845 (1991).

guidelines were drafted.¹⁵

C. Lack of Sentencing Proportionality and Uniformity

The Commission's long-term analysis of money laundering cases also demonstrated that the intended relationship between the harm caused and the measurement of the offense seriousness under the money laundering sentencing guidelines has become distorted. Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both.¹⁶ In this regard, one district court has recently observed that "invoking the money laundering statute in this instance [involving a conviction for a federal campaign financing violation] could directly controvert the . . . objectives of the [Sentencing] Commission, uniformity and proportionality in sentencing, and would provide the prosecutor with the ability to fashion disparate sentences based upon similar criminal offenses committed by similar offenders."¹⁷

To illustrate this phenomenon, consider that, under the current sentencing guidelines, a first-time offender who fraudulently obtains \$20,000 of insurance payments and conducts routine financial transactions with the proceeds may be incarcerated for an 8- to 14-month period if charged and sentenced only for mail fraud. In contrast, that same offender would be subject to a

¹⁵ This point is illustrated by the following cases in the Commission's sentence monitoring database where proceeds were openly traded for assets: U.S.S.C. ID No. 229000 (less than \$10,000 used for down payment on home bought in defendant's own name); U.S.S.C. ID No. 249697 (purchase of vehicles in defendant's own name).

¹⁶ This situation is further complicated by the inconsistent application of the multiple count and grouping guidelines (USSG §§3D1.1-3D1.5), which provide a systematic method for calculating punishment levels for multiple offenses where the harms caused by the perpetrator are similar. *Compare, e.g., United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995)(permitting grouping of fraud and money laundering offenses because offenses were a "single integrated scheme to obtain money from elderly victims") with *United States v. Lombardi*, 5 F.3d 568 (1st Cir. 1993)(grouping of fraud and money laundering offenses not allowed because there were different individual victims of the insurance fraud scheme).

¹⁷ *United States v. Ferrouillet*, No. 96-198, 1997 WL 266627 at 19 (E.D. La. May 20, 1997).

33- to 41-month period of incarceration if charged and sentenced for money laundering.¹⁸ The opposite disparity occurs with major drug trafficking. A drug trafficker who is a first-time offender and who sells 1,000 grams of heroin may be incarcerated for a 121- to 151-month period if charged and sentenced only for drug trafficking, but would be incarcerated for a substantially shorter period — 46 to 57 months — if charged and sentenced only for laundering the money from such a drug transaction.

Unfortunately, these comparisons illustrate a problem that is neither hypothetical nor isolated in occurrence. In fact, the Commission’s analysis of money laundering sentences reflects that disparate sentencing persists as a result of the structure of the current money laundering guidelines. For example, from 1992 through 1996, the election to pursue a money laundering charge in addition to an underlying fraud-related offense would raise the guideline penalty in 85 to 95 percent of the cases. In marked contrast, the election to pursue a money laundering charge in lieu of a drug trafficking charge would lower guideline penalties in 75 to 86 percent of those kinds of cases. See Attachment 1. The potential for such disparate results between economic and drug trafficking offenses in connection with money laundering is problematic, and reinforces the need for fundamental revisions to the money laundering sentencing guidelines.

The degree to which judges depart from the guideline range when money laundering counts are involved provides another indication of sentencing disparity and underlying structural concerns with the current money laundering guidelines. Judicial dissatisfaction with the broad reach of the money laundering guidelines has often resulted in a determination that the actual conduct for which the defendant was convicted was outside the “heartland” of the money laundering guidelines as drafted by the Commission, thereby justifying a substantial downward departure.¹⁹ As the Second Circuit recognized within just a few years of the promulgation of the

¹⁸ See *United States v. Cavalier*, 17 F.3d 90 (5th Cir. 1994)(insurance company’s transfer of check to lienholder to pay off defendant’s vehicle after false report of stolen vehicle held to violate money laundering statute).

¹⁹ See *United States v. Walters*, 87 F.3d 663, 671 (5th Cir. 1996)(“[A] downward departure . . . is not disproportionate in light of the district court’s conclusion that the guideline calculation overstates the seriousness of [defendant’s] involvement.”), *cert. denied*, 117 S. Ct. 498 (1996); *United States v. Caba*, 911 F. Supp. 630, 636 (E.D.N.Y.)(deposit of funds from unauthorized food stamp transaction into bank account)(“[T]he crime here is not the type of major money laundering fraud that would warrant a 10 to 12 year jail sentence. The . . . relationship [with drug crimes] drives the high guidelines level and would in this case produce a custodial range that grossly exaggerates the seriousness of the actual conduct.”), *aff’d*, 104 F.3d 354 (2d Cir. 1996); *United States v. Ferrouillet*, *supra* n. 17, at 6 (“The structure of the money laundering guidelines provides additional evidence that these guidelines were intended for large

money laundering guidelines, “[a]lthough the appellant’s conduct [payment for drug purchases with money orders] falls within the words of the Money Laundering Act, the terms of the relevant [sentencing guideline] commentary show that this conduct lies well beyond the ‘heartland’ or the ‘norm.’”²⁰

Excluding departures attributable to substantial assistance motions under USSG §5K1.1, which are initiated by the prosecutor, the average judicial downward departure rate for non-drug money laundering convictions for the past five years is 32 percent higher than the overall departure rate.²¹ By contrast, the downward departure rate for drug-related money laundering convictions is 35 percent lower than the overall departure rate. The appreciably higher downward departure rate for non-drug money laundering convictions (in comparison to the downward departure rates for all cases and for drug-related money laundering cases) suggests that judicial dissatisfaction with the money laundering guideline structure, at least as it relates to laundering of funds from non-drug-related offenses, is far more commonplace than the reported decisions alone suggest.

In summary, the Commission’s multi-year analysis of money laundering sentencing found that the broad and inconsistent use of money laundering charges, coupled with an inflexible, arbitrarily determined guideline structure, is resulting in substantial unwarranted disparity and disproportionality in the sentencing of money laundering conduct. It is for these reasons that the Commission undertook to recalibrate the money laundering sentencing guidelines more directly to the seriousness of the defendant’s actual offense conduct. The revised guideline structure sought by the Commission would have tied the money laundering sentencing guidelines to the base

scale criminal operations involving sizable amounts of money . . .”); Transcript of Sentencing Hearing at 85-86, *United States v. Fleiss*, CR- 94-00603 (C.D. Cal. March 5, 1997)(involving state prostitution charges) (“To the extent that the Sentencing Commission or the policy makers set the sentence for money laundering cases at the level that they did was [sic] because they expected in a majority of cases that the money laundering would stem from the distribution of drugs. This case does not fall into this category . . .”); *see also*, *United States v. Bart*, SA-94-CR-244, 1997 WL 535173 (E.D. Tex. Aug. 27, 1997).

²⁰ *United States v. Skinner*, 946 F.2d 176, 179 (2d Cir. 1991).

²¹ Using data from Attachment 2, the average difference in downward departure rates for non-drug or drug money laundering cases when compared to the overall downward departure rate was computed as follows: For each year’s data, the rate of downward departure for all cases was subtracted from the downward rate for money laundering cases (either non-drug or drug). The result was then divided by the downward departure rate for all cases. The result for each year was totaled and divided by five (years) to yield the average.

offense level for the underlying conduct that was the source of the illicit funds.²²

III. Commission Objectives in Revising the Money Laundering Sentencing Guidelines

The Commission agrees with DOJ that money laundering constitutes a serious national and international problem, and has consistently endorsed a sentencing structure that imposes substantial penalties for financial transactions which promote drug trafficking or other serious criminal activity or which obscure the origins of illicit funds. The Commission's focus in revising the money laundering sentencing guidelines was never to lessen the penalties per se for such serious cases but, rather, to recalibrate the penalties to the seriousness of the underlying offense.

The Commission's approach was intended to effectuate two primary purposes of the Sentencing Reform Act of 1984²³ — avoiding unwarranted sentencing disparity²⁴ and achieving reasonable proportionality in sentencing by ensuring that serious misconduct is punished more severely than less serious offenses.²⁵ This is fully consistent with the Commission's statutory mandate to establish appropriately severe and reasonably proportionate penalties for violations of federal laws — penalties which are sufficient, but not greater than necessary, to accomplish the purposes of sentencing.²⁶

²² A potentially higher automatic base offense level “floor” was also proposed for all money laundering offenses relating to drug trafficking, crimes of violence, and offenses involving firearms or explosives, national security, or international terrorism. Increases in the offense level corresponding to the value of the laundered funds were also proposed to ensure proportionally greater punishment for more serious conduct. Finally, additional increases and more severe punishment would have attached when there was: a) the concealment of the proceeds of criminal conduct; b) the promotion of further criminal conduct; and c) the use of foreign banks, international transactions, or other sophisticated forms of money laundering.

²³ Pub. L. No. 98-473, 98 Stat 1873, 1987 (codified at 18 U.S.C. §§ 3551-3472; 28 U.S.C. §§ 991-998).

²⁴ 28 U.S.C. § 991(b)(1)(B).

²⁵ 28 U.S.C. § 991(b)(1)(A), referencing 18 U.S.C. § 3553(a)(2); 1995 U.S.S.G. Ch. 1, Pt. A, intro. comment. 3.

²⁶ 28 U.S.C. § 991(b)(1)(A). *See also* 18 U.S.C. § 3553(a)(mandating that the courts shall impose a sentence no greater than necessary to comply with the purposes of punishment set forth in 18 U.S.C. § 3553(a)(2), and 28 U.S.C. § 994(a)(1)(A)(establishing that the first duty of the Commission is to promulgate guidelines for the use of the courts in determining the

As DOJ states, money laundering charges “. . . should not be used in cases where the money laundering activity prosecuted is minimal or incidental to the underlying crime, or in novel, or creative ways where there is insignificant prosecutive benefit.”²⁷ The Commission, having examined numerous cases where the money laundering activity prosecuted was, in fact, incidental to the underlying crime,²⁸ sought a revised guideline structure that would accommodate these kinds of prosecutions when they do occur and provide guideline penalties more proportionate to the seriousness of the conduct. The Commission’s proposed guideline changes, unlike the current guidelines, were also designed to avoid arbitrarily determined, heightened penalty levels in those situations where a financial transaction may *technically* violate the money laundering statutes but not present additional societal harm sufficient to merit substantially more severe sanctions than those appropriate for the underlying offense from which the illicit funds were generated. Moreover, a properly restructured money laundering guideline would have significantly increased punishment for those persons involved in large-scale drug trafficking who would be charged only with money laundering instead of the actual underlying drug-related activity for which they also would be accountable.²⁹

DOJ has emphasized the need for stringent money laundering guideline penalties to

appropriate sentence).

²⁷ DOJ Report at 14.

²⁸ See U.S.S.C. Staff Working Group Report (October 14, 1992) at pp. 15-16; 18. See also U.S.S.C. ID No. 218336 (five checks totaling \$2,100 of funds generated by fraud scheme used to pay routine expenses of the operation, *e.g.*, mortgage, phone and delivery bills, charged as five separate counts of money laundering in addition to mail and wire fraud offenses); U.S.S.C. ID No. 242409 (depositing separate checks paid by insurance companies because of fake accident claims charged as multiple counts of money laundering in addition to underlying mail fraud charges); U.S.S.C. ID No. 237772 (a “pimp” who made telephone appointments for prostitutes charged with 143 counts of money laundering under 18 U.S.C. § 1956 for each separate money order (each valued at \$50 to \$150) which he deposited in his own name; prostitute sent “pimp” \$50 “fee” for each appointment); U.S.S.C. ID No. 216359 (defendant who recruited others to transport large drug quantities valued at over \$2 million also charged with money laundering for payment of \$1,000 to a courier to rent an automobile later used to carry drugs).

²⁹ U.S.S.C. Staff Working Group Report (February 25, 1995) at pp. 10-11. Moreover, under the Commission’s prior proposal, individuals who physically transport or exchange cash as part of a large-scale drug-trafficking operation would have a guideline penalty level commensurate with the seriousness of their drug trafficking activity. See, for example, U.S.S.C. ID Nos. 231575, 232352; 268467; and 229154.

combat international money laundering efforts. While it appears that nearly 75 percent of the money laundering sentences analyzed by the Commission in FY 1995 involved domestic conduct only, the Commission has nonetheless recognized the importance of supporting heightened international law enforcement efforts. The Commission agrees that any revised guideline structure must provide very substantial penalties for concealment or promotion involving international transactions.

The Commission and DOJ have narrowed their differences over money laundering sentencing policy in recent years.³⁰ While a final consensus has not yet been reached on the precise methodology for deriving the offense levels and the resulting penalty structure, the Commission is committed to resolving these issues. In addition, the Commission is currently considering revisions to the loss tables for fraud offenses which would substantially increase the penalties for mid- and high-dollar fraud offenses. To the extent that DOJ's opposition to the Commission's proposed money laundering revisions has been based on its repeated criticism that the fraud penalties under the guidelines are too low,³¹ the outcome of the Commission's current effort may mitigate that concern and provide additional common ground with DOJ to support a fair and effective revision of the money laundering guidelines.

IV. Specific Observations on the DOJ Report

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A. Overview

The DOJ Report provides a detailed historical description of the conduct that comprises money laundering, the criminalization of this conduct by the Anti-Drug Abuse Act of 1986, and the application of the two money laundering statutes, 18 U.S.C. §§ 1956 and 1957, in prosecutions of these relatively new federal offenses. The initial section emphasizes the law enforcement objectives of the money laundering laws, particularly the growing international problem, describes the applicable sentencing guidelines, and presents DOJ's assessment of the Commission's efforts to achieve proportionality and uniformity in sentencing under the money laundering guidelines.

The second portion of the DOJ Report contains a compilation of the guidance and coordination provided by DOJ's Asset Forfeiture and Money Laundering Section to federal

³⁰ DOJ Report at 9-10.

³¹ DOJ Report at 9; *see also* Statement of Jay P. McCloskey, United States Attorney, District of Maine, and Robert D. Litt, Deputy Assistant Attorney General, Criminal Division, before the United States Sentencing Commission, March 15, 1995, at 12.

prosecutors throughout the nation. It relates principles of general charging policies, as well as specific money laundering charging policies, some aspects of which were developed to address particular concerns raised by the Commission during its multi-year analysis of money laundering sentencing practices. DOJ describes how it implements these policies through semi-annual training sessions for federal prosecutors, frequent presentations at law enforcement agencies, publication of a separate money laundering manual, and circulation of a newsletter related to money laundering issues. The DOJ Report concludes with a description of the required approval, consultation, and reporting requirements for certain categories of money laundering prosecutions, as well as the informal communication process which is encouraged between field prosecutors and DOJ's specialists in the Asset Forfeiture and Money Laundering Section.

B. Shortcomings in Coverage and Force of DOJ Policies

The Commission commends DOJ for the steps it has taken to implement policies designed in part to address the Commission's concerns about the need for predictable and appropriate sanctions for serious money laundering activity.³² Nonetheless, while the Commission and DOJ share the stated goal of avoiding unwarranted sentencing disparity in this area, the Commission views DOJ's methods, unaccompanied by a properly restructured money laundering guideline, as inadequate to the task. For one thing, many of these DOJ policies are not proscriptive and thus do not require uniform application within the 94 Offices of the United States Attorneys.³³ Moreover, such policies do not afford a justiciable right of redress to any individual defendant.³⁴ For these and other reasons, these policies alone are not sufficient, in the Commission's view, to avoid unwarranted disparity and lack of proportionality under the current money laundering guidelines. Thus, a primary goal of federal sentencing policy as enunciated by Congress in the Sentencing Reform Act is not being achieved to the fullest extent possible.

³² For example, DOJ issued a "Blue Sheet" on August 4, 1993, that requires federal prosecutors throughout the country to consult with DOJ's specialized Asset Forfeiture and Money Laundering Section in certain designated situations, such as when the prosecution is based on the deposit of illicit proceeds ("receipt-and-deposit cases"), or on transactions that are intertwined with the underlying offense such that there is no clear delineation between the underlying offense and the money laundering transaction ("merger cases"). In addition, all offices of the United States Attorneys are required to send to the Asset Forfeiture and Money Laundering Section a copy, for informational and tracking purposes, of every money laundering indictment after it is filed in situations for which prior approval or consultation were not required. *Id.* at 16.

³³ *See* DOJ Report at 15.

³⁴ United States Attorney's Manual §1-1.100 (October 1, 1988).

Compounding the likelihood of continued sentencing disparity is the information reported by DOJ that, within the 94 United States Attorneys' offices, well over half (59 of 94) have not instituted either approval procedures or prosecutive guidelines for money laundering cases.³⁵ Only 35 United States Attorneys' offices have some form of internal guidance, and these prosecutorial guidelines are far from uniform. They range from perfunctory, monetary thresholds for the initiation of money laundering charges (an unspecified number of offices), to required consultation with DOJ's specialized Asset Forfeiture and Money Laundering Section for more types of cases than are required by DOJ's own policy (20 offices), to substantive guidelines which discourage, but do not prohibit, "receipt and deposit" and potentially merged cases (11 offices).³⁶ In sum, the discretionary and variable nature of federal prosecutorial charging and plea policies for money laundering offenses, though well-intentioned, fails to ensure the degree of certainty and proportionality in sentencing envisioned by the Sentencing Reform Act.

C. Failure to Address Key Concerns About Charging Practices

Moreover, the DOJ policies do not appear to address concerns repeatedly expressed to the Commission about the inappropriate use of threatened money laundering charges to obtain pleas to other statutory offenses, concerns that are exacerbated by a guideline structure that does not properly coordinate penalties with the seriousness of underlying conduct.³⁷ It is difficult to

³⁵ DOJ Report at 16.

³⁶ *Id.* "Receipt and deposit" cases refer to those instances where a person convicted of a specified unlawful activity, such as mail fraud, deposits the proceeds in a financial institution, does virtually nothing to camouflage either the source of the funds or the identity of the depositor, and is nonetheless convicted of money laundering under 18 U.S.C. § 1957. *See, e.g.*, U.S.S.C. ID No. 234353 (payments to "lull" investors in fraudulent commodities investment scheme charged as violations of 18 U.S.C. § 1956 and drawing checks to make the "lulling" payments charged as violations of 18 U.S.C. § 1957); U.S.S.C. ID No. 230418 (in addition to 10 counts of mail fraud for misrepresentation of investment scheme as successful even where it was losing money, 18 U.S.C. § 1956 violations charged for two checks drawn on business's account to lull investors, and 12 violations of 18 U.S.C. § 1957 charged for depositing checks from investors). "Merger" cases refer to situations where the conduct comprising the money laundering conviction is virtually indistinguishable from the conduct comprising the specified unlawful activity. *See* n. 43 below.

³⁷ The Commission acknowledges the well-established principle that it is not inconsistent with constitutional guarantees of due process for prosecutors to employ the leverage of threatened charges to encourage a plea of guilty to other charges. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). However, a central premise of the guidelines' modified real offense structure is

document this problem, as information released by the Executive Office for U.S. Attorneys subsequent to the DOJ Report reflects. Of the 4,898 defendants charged with a money laundering violation of 18 U.S.C. § 1956 from FY 1993 through FY 1995, 1,697 defendants pleaded guilty, 421 defendants were convicted at trial, and 103 defendants were acquitted.³⁸ See Attachment 3. No disposition is reported for the remaining 55 percent of the defendants (2,677) who were charged with, but neither convicted nor acquitted of, this offense. Presumably, a substantial number of these unaccounted for cases were dismissed, others were resolved by guilty pleas to a different money laundering³⁹ or a non-money laundering offense, and some are still pending. Data on the disposition of money laundering charges against these 2,677 defendants, as well as data on prosecutions under 18 U.S.C. § 1957, would have greatly enhanced an understanding of DOJ's charging and plea practices, and would have provided valuable information to help evaluate concerns frequently expressed to the Commission about widespread inappropriate use of prosecutorial leverage under the guidelines system to induce guilty pleas.

The DOJ Report also does not discuss the policies which inform the government's decision of not bringing money laundering charges when the underlying conduct would appear to sustain such convictions. In light of DOJ's prior criticism about inadequacies in the Commission's analysis,⁴⁰ the presentation of specific information about actual charging and plea practices based

that the incremental penalty for any additional conduct charged, or considered in determining the overall guideline sentence, whether or not charged, will appropriately represent the seriousness of that additional conduct. The problem with the current money laundering guideline structure, vis-a-vis the threat by prosecutors to add a money laundering charge, is that the incremental guideline penalty associated with that charge often does not reasonably relate to the seriousness of either the underlying conduct or the money laundering activity engaged in by the defendant. Hence, the prosecutor's "club" may be disproportionate to the defendant's conduct.

³⁸ "Scorecard On Prosecutions Under the U.S. Money Laundering Guidelines," Money Laundering Alert, October 1, 1996, at Attachment 3.

³⁹ The Executive Office for U.S. Attorneys did not release information about the number of prosecutions under 18 U.S.C. § 1957, or for criminal violations of Internal Revenue Code and Bank Secrecy Act regulations in titles 26 and 31 through "structuring" activity.

⁴⁰ DOJ has consistently maintained that "[t]o be fair, the universe of cases under examination must include cases where plea negotiations resulted in pre-indictment resolution of these charging issues, as well as situations in which the early exercise of discretion (even at the investigative stage) reflects the recognition of the issues presented by the [Commission] staff." Appendix to DOJ's Testimony on 1993 Sentencing Guideline Amendments at 15, appended as Attachment 1 to DOJ Report.

on information which is exclusively in the control of DOJ or United States Attorneys' offices would have been very illuminating.

D. Additional Areas of Concern

In addition, although DOJ noted its agreement with the Tenth Circuit holding in *United States v. Johnson*⁴¹ that money laundering cannot properly be charged for “merged” transactions that are part of the underlying crime,⁴² the Commission has continued to receive documentation on defendants who have been convicted and sentenced for money laundering where there is nearly complete identity between the money laundering and the underlying conduct.⁴³

Further, as we understand DOJ's explanation of how its policies apply in practice, the Commission has access to substantially more actual case history to inform its policy decisions. As DOJ has explained, the specialized Asset Forfeiture and Money Laundering Section received a copy of the indictment (which may charge multiple defendants) after the case was instituted in approximately 700 instances from FY 1993 through FY 1995. Apparently, somewhat more information is provided to this central office on either a formal or informal basis when approvals are sought (9 instances), consultations are required (70 instances), or consultations are voluntarily undertaken by the United States Attorneys' offices (240 instances).⁴⁴

⁴¹ 971 F.2d 562 (10th Cir. 1992). In *Johnson*, the government alleged that the funds which the defendant had investors wire to him as part of the wire fraud scheme which he perpetrated were “proceeds” from the specified unlawful activity, an interpretation which the court rejected as a basis for a money laundering conviction under 18 U.S.C. § 1957.

⁴² DOJ Report at 14, n.16.

⁴³ These cases, sentenced in 1995, are illustrative: U.S.S.C. ID Nos. 239315 and 236256 (conduct establishing elements of “underlying” bankruptcy fraud essentially the same as the financial transactions establishing money laundering); U.S.S.C. ID Nos. 216136 (bank loan manipulation and unauthorized borrowing on bank insurance policies to guarantee loans charged as embezzlement and bank fraud; part of the manipulation also separately charged as money laundering).

⁴⁴ DOJ Report at 15. We note that the Executive Office for U.S. Attorneys reported that 2,119 cases (indictments) for prosecutions under 18 U.S.C. § 1956 were filed in this same period. See Attachment 3. Neither the DOJ Report nor the Executive Office separately identify information about charging and plea activity under 18 U.S.C. § 1957, under which “receipt and deposit” cases, among other financial transactions greater than \$10,000, are prosecuted. In light of DOJ's statement that such cases have declined, *see* DOJ Report at 15, specific numbers on the

In contrast, the Commission generally receives the indictment, the Judgment and Commitment Order, the plea agreement, if any, and, most importantly, the presentence investigation report which includes the facts surrounding the offenses, the factors upon which guideline calculations were based, and the observations of the probation officer. For the same three-year period covered in the DOJ Report, the Commission received this detailed information on 3,178 defendants who were sentenced under the money laundering guidelines, permitting it to draw conclusions about sentencing issues on a broader base of information than what was apparently available to DOJ policy makers in that same period.

V. Conclusion
.....

In summary, the Commission intends to build on its previous work by continuing to study the problems engendered by the money laundering sentencing guidelines. Encouraged by DOJ's willingness to work with the Commission in considering revisions to the money laundering guidelines, the Commission believes that more proportionate and uniform guidelines can be developed cooperatively, and is committed to exploring these possibilities with DOJ in the months ahead.

volume of these cases would have been valuable information for the Commission to assess in commenting on DOJ's charging and plea practices, as mandated by Congress.

Comparison of Offense Levels for Money Laundering Conduct and Underlying Conduct ¹

Drug and Money Laundering Comparison

| Conviction Offense Type | FY 1996 | | FY 1995 | | FY 1994 | | FY 1993 | | FY 1992 | |
|--|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| | Number | Percent | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| Total number of cases | | | | | | | | | | |
| Money Laundering/Drug | 184 | 100.0 | 175 | 100.0 | 183 | 100.0 | 205 | 100.0 | 150 | 100.0 |
| Money laundering offense level lower than drug offense level | | | | | | | | | | |
| Money Laundering/Drug | 139 | 75.5 | 139 | 79.4 | 149 | 81.4 | 176 | 85.9 | 129 | 86.0 |
| Money laundering offense level same as drug offense offense level | | | | | | | | | | |
| Money Laundering/Drug | 12 | 6.5 | 22 | 12.6 | 11 | 6.0 | 15 | 7.3 | 9 | 6.0 |
| Money laundering offense level higher than drug offense level | | | | | | | | | | |
| Money Laundering/Drug | 33 | 17.9 | 14 | 8.0 | 23 | 12.6 | 14 | 6.8 | 12 | 8.0 |

Fraud and Money Laundering Comparison

| Conviction Offense Type | FY 1996 | | FY 1995 | | FY 1994 | | FY 1993 | | FY 1992 | |
|---|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| | Number | Percent | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| Total number of cases | | | | | | | | | | |
| Money Laundering/Fraud | 85 | 100.0 | 87 | 100.0 | 92 | 100.0 | 72 | 100.0 | 21 | 100.0 |
| Money laundering offense level lower than fraud offense level | | | | | | | | | | |
| Money Laundering/Fraud | 6 | 7.1 | 4 | 4.5 | 9 | 9.8 | 3 | 4.2 | 0 | 0.0 |
| Money laundering offense level same as fraud offense level | | | | | | | | | | |
| Money Laundering/Fraud | 7 | 8.2 | 2 | 2.3 | 3 | 3.3 | 4 | 5.6 | 1 | 4.8 |
| Money laundering offense level higher than fraud offense level | | | | | | | | | | |
| Money Laundering/Fraud | 72 | 84.7 | 81 | 93.1 | 80 | 87.0 | 65 | 90.3 | 20 | 95.2 |

¹ These cases had convictions for both money laundering (§§2S1.1 or 2S1.2) and either drug trafficking (§2D1.1) or fraud (§2F1.1). The co-occurrence of §2D1.1 or §2F1.1 with either of the money laundering guidelines is found in approximately 30 percent of cases involving money laundering (30.5% of 883 cases in 1996, 30.2% of 865 cases in 1995, 32.1% of 856 cases in 1994, 31.5% of 879 cases in 1993, and 31.4% of 544 cases in 1992).

This analysis determines the guideline impact of the money laundering conduct compared to the impact of the underlying offense conduct by comparing the guideline calculation for each component of the offense. That is, the final offense level for the money laundering conduct was computed and compared to the final offense level for the drug trafficking or fraud conduct.

As noted in the text, the money laundering calculation generally results in a lower offense level in drug trafficking cases and a higher offense level in fraud cases. This analysis compared offense level calculation and not sentence length. Under the guidelines, the offense conduct resulting in the greater sentence is the controlling guideline. Consequently, the drug trafficking calculation generally controlled in the money laundering/drug cases and the money laundering calculation generally controlled in the money laundering/fraud cases.

Source: U.S. Sentencing Commission

Trends in Downward Departures

| Offense Type Category | Total | Other Downward Departure | |
|------------------------------------|--------|--------------------------|------|
| | n | n | % |
| 1996 | | | |
| All Cases | 40,879 | 4,201 | 10.3 |
| Money Laundering | 887 | 108 | 12.2 |
| Money Laundering/Drug ¹ | 262 | 12 | 4.6 |
| Money Laundering/Non-Drug | 625 | 96 | 15.4 |
| 1995 | | | |
| All Cases | 36,975 | 3,110 | 8.4 |
| Money Laundering | 906 | 74 | 8.2 |
| Money Laundering/Drug | 271 | 16 | 5.9 |
| Money Laundering/Non-Drug | 635 | 58 | 9.1 |
| 1994 | | | |
| All Cases | 38,493 | 2,932 | 7.6 |
| Money Laundering | 1,014 | 75 | 7.4 |
| Money Laundering/Drug | 337 | 9 | 2.7 |
| Money Laundering/Non-Drug | 677 | 66 | 9.8 |
| 1993 | | | |
| All Cases | 33,657 | 2,676 | 8.0 |
| Money Laundering | 931 | 88 | 9.4 |
| Money Laundering/Drug | 326 | 19 | 5.8 |
| Money Laundering/Non-Drug | 605 | 69 | 11.4 |
| 1992 | | | |
| All Cases | 29,518 | 2,175 | 7.4 |
| Money Laundering | 511 | 46 | 9.0 |
| Money Laundering/Drug | 182 | 14 | 7.7 |
| Money Laundering/Non-Drug | 329 | 32 | 9.7 |

¹ “Money Laundering/Drug” refers to the cases in which at least one of the guidelines used in the offense computation was §2D1.1. “Money Laundering/Non-Drug refers to all other cases which did not involve a §2D1.1 guideline.

Of the 1,017 cases reported to the U.S. Sentencing Commission which involved a conviction for money laundering conduct in FY 1996, 887 contained information as to the position of the sentence in the guideline range; 906 of the 1,032 cases in FY 1995; 1,014 of the 1,053 cases in FY 1994; 932 of the 1,093 cases in FY 1993; and, 511 of the 665 cases in FY 1992 contained this information.

Excluding departures attributable to substantial assistance motions under USSG §5K1.1, which are determined by the prosecutor, the average judicial downward departure rate for non-drug money laundering convictions for the past five years is 32 percent higher than the overall departure rate. By contrast, the downward departure rate for drug-related money laundering convictions is 35 percent lower than the overall departure rate. The average difference in downward departure rates for non-drug or drug money laundering cases when compared to the overall downward departure rate was computed as follows. For each year’s data, the rate of downward departure for all cases was subtracted from the downward departure rate for money laundering cases (either non-drug or drug). The result was then divided by the downward departure rate for all cases. The result for each year was totaled and divided by five (years) to yield the average.

Sources: U.S. Sentencing Commission, 1992-1996 Datafiles, OPAFY92-OPAFY96

Attachment 2

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Scorecard on prosecutions under the U.S. money laundering law*

* Title 18, U.S. Code Sec. 1956, "Laundering of Monetary Instruments"

| Year | Cases Filed | Defendants Charged | Guilty Pleas | Guilty Verdicts | Defendants Acquitted |
|--------|-------------|--------------------|--------------|-----------------|----------------------|
| 1987 | 6 | 17 | 1 | 0 | 0 |
| 1988 | 16 | 39 | 20 | 3 | 0 |
| 1989 | 42 | 95 | 26 | 2 | 0 |
| 1990 | 121 | 250 | 57 | 16 | 0 |
| 1991 | 144 | 364 | 158 | 42 | 8 |
| 1992 | 545 | 1,655 | 336 | 96 | 32 |
| 1993 | 712 | 1,614 | 520 | 133 | 28 |
| 1994 | 681 | 1,596 | 528 | 159 | 38 |
| 1995 | 726 | 1,688 | 649 | 129 | 37 |
| TOTALS | 2,993 | 7,318 | 2,295 | 580 | 143 |

Source: Executive Office for U.S. Attorneys, U.S. Department of Justice

Tracking stings under the money laundering law*

*Title 18 U.S. Code Sec. 1956 (a)(3) — "conducts or attempts to conduct financial transaction involving property represented to be the proceeds of specified unlawful activity . . ." (Enacted in 1988).

| Year | Cases Filed | Defendants Charged | Guilty Pleas | Guilty Verdicts | Defendants Acquitted |
|--------|-------------|--------------------|--------------|-----------------|----------------------|
| 1990 | 3 | 5 | 0 | 0 | 0 |
| 1991 | 3 | 6 | 0 | 0 | 1 |
| 1992 | 27 | 81 | 12 | 5 | 2 |
| 1993 | 46 | 87 | 29 | 9 | 2 |
| 1994 | 37 | 56 | 25 | 12 | 1 |
| 1995 | 26 | 55 | 23 | 3 | 0 |
| TOTALS | 142 | 290 | 89 | 29 | 6 |

Source: Executive Office for U.S. Attorneys, U.S. Department of Justice

Note: Another provision of the money laundering law, Section 1956(a)(2)(i) and (ii), also permits undercover stings, but the available data do not indicate which cases brought under this subsection were undertaken by stings or traditional means.

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Attachment 3