Testimony of

The Honorable James B. Comey, Jr.

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INTRODUCTION

Chairman Biden, Senator Grassley, Members of the Subcommittee -
I thank you for the invitation and very much welcome the opportunity to appear before this Subcommittee today to discuss the important issue of penalties for white collar crime.

Mr. Chairman, as you know, the swift and certain punishment of financial crimes helps protect our country's economy. The prosperity of the United States is, in part, made possible by the federal, state, and local laws that bring a degree of order and predictability to commerce and protect citizens from the predation of criminals who use a pen or a computer, rather than a knife or a gun. But as you also know, the real and immediate prospect of significant periods of incarceration is necessary to give force to law. Nothing erodes the deterrent power of our laws -- and breeds contempt for obeying the law -- more quickly than if certain criminals appear to receive punishment not according to the gravity of the offense, but according to their social or economic stature. We think it absolutely critical - not only to maintain trust and confidence in our economy and in our criminal justice system, but also for the sake of justice itself - that there be appropriate and stiff penalties for what we commonly call "white collar" criminals. We thank you for your leadership in convening this hearing and for raising the important issues being discussed today.

The Department of Justice is committed to the vigorous enforcement of the laws against all forms of financial crime. Our position on this issue is straightforward, and, we hope, inarguable: White collar criminals have broken serious laws, done grave harm to real people - like the people who just testified -- should be subject to the same serious treatment that we accord all serious crimes: substantial periods of incarceration. While we have made significant progress on some issues in recent years, especially in improving the applicable sentencing guidelines, we believe that current federal penalties for white collar offenses should be toughened. We are pleased that last year the United States Sentencing Commission amended the sentencing guidelines for these offenses to raise penalties on white collar offenders who are responsible for significant financial loss, although penalties were decreased to some extent for criminals who are responsible for less. Both the Department and the Commission will be closely examining the effects of those recent amendments on cases that are just now being prosecuted, and we at the Department will pay particular attention to what happens with the lower-level cases, which constitute a significant number of prosecutions. We also remain concerned with amendment proposals that have been made to the Sentencing Commission in past years - and which may be made again - that could undermine federal sentencing policy for white collar offenders. We are pleased that the Commission has so far seen fit to reject such proposals, and we hope to work with this Subcommittee and with the Commission in the coming months and years to insure that penalties for white collar offenses are appropriately severe.

WHAT IS A WHITE COLLAR OFFENSE?

Of the nearly one thousand criminal offenses listed in the Statutory Index to the 2000 Federal Sentencing Guidelines, approximately twenty-five percent get sentenced under the theft and/or fraud guidelines. Frank O. Bowman, III, The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History, 35 INDIANA L. REV. 5, 17 (2001). The Department's definition of white collar crime sweeps more broadly. While we consider securities fraud, tax fraud, and antitrust violations to be white collar cases, we also believe that bankruptcy fraud, bank fraud, health care fraud, federal program fraud, and many other crimes committed by the use of deception for the purposes of economic gain fit comfortably within the category of white collar crime. This definition encompasses the significant problem of corruption in the private, as well as the public, sector. Private industries can be prey to bribery and kickbacks in exchange for contracts or other benefits. This corruption corrodes the integrity of business dealings and gives an unfair competitive advantage to those willing to pay. As the previous witnesses have told us, corruption also harms average Americans - those people who devote their careers to a corporation with the expectation of a secure job and a comfortable retirement, and those who invest their hard-earned savings in a company that claims to be sound. Just as the Internet and other technologies have improved our ability to communicate, to learn, and to trade, these innovations have also enabled criminals to more easily, and more creatively, commit crimes, and also to harm a much greater population than could ever have been imagined before. We believe our broad definition of "white collar crime" gives us added flexibility in identifying, investigating, and prosecuting these high-tech thieves and fraudsters.

PRINCIPLES OF PUNISHMENT FOR WHITE COLLAR OFFENDERS

We begin with the principle that the certainty of real and significant punishment best serves the purposes of deterring white collar criminals, in fact to a greater extent than this principle applies to other types of offenders. People with a lot to lose, especially people who have never been in trouble with the law before, don't want to go to prison. On the other hand, enforcement can be undermined when criminals perceive the risk of incarceration as minimal and view fines and probation merely as a cost of doing their criminal business. We believe that if it is unmistakable that the automatic consequence for one who commits a significant white collar offense is prison, then many will be deterred. White-collar offenders are generally better educated and more sophisticated than most criminals. They commit their crimes not in a fit of passion, but with cold, careful calculation. Accordingly, they are the most rational offenders and are more likely than most to weigh the risks of possible courses of action against the anticipated rewards of criminal behavior.

The certainty of incarceration for white collar offenses in Sentencing Guidelines Zone C and above increases the prospect of significant cooperation by defendants who are (as in many, if not most, white collar cases) part of broader conspiracies. White collar criminals, oftentimes more than other types of criminals, engage in concealment, deceit, and coverups as part and parcel of their criminal schemes. They depend on each other to maintain a "cover story" to explain away the criminal implications of their actions. The prospect of added cooperation, encouraged through the likelihood of significant periods of imprisonment, goes a long way towards piercing

such cover stories -- in effect, efforts to obstruct justice -- and successfully prove the full extent of white collar conspiracies.

Just as importantly, the certainty of real jail time in white collar cases fosters trust and confidence in the criminal justice system. If drug and violent offenders are routinely sentenced to long prison terms while white collar offenders are routinely sentenced to probation, people will draw the conclusion that felons with wealth and influence are not held to the same standards as those without; that there is a double standard; that perhaps certain people are above the law. This is unacceptable in our republican form of government and corrosive to societal order.

In addition, contrary to what some have argued, certain and significant punishment can foster restitution. Some may argue that a white collar offender sentenced to prison is not likely to make restitution. This is wrong. We believe that, if structured properly, white collar sentences that include imprisonment can and will lead to restitution for the victims of the crime. The Sentencing Guidelines appropriately provide incentives for defendants who reveal and turn over all of their assets in order to pay restitution to their victims - something a defendant who does not face incarceration, but only probation or a halfway house, may not feel compelled to do. Legislation passed by Congress in recent years has helped to insure that restitution is always a top priority of federal sentencing policy.

RECENT DEVELOPMENTS IN SENTENCING POLICY FOR WHITE COLLAR OFFENSES

Over the past several years, the Justice Department has worked closely and constructively with the Sentencing Commission on sentencing policy for white collar offenses. As I mentioned, the current sentencing guideline penalty structure for many white collar offenses is new - a product of many years of debate and compromise that culminated in last year's amendments to the sentencing guidelines. The so-called "Economic Crime Package," passed by the Commission in April 2001, and which went into effect in November 2001, consolidated the sentencing guidelines for theft, property destruction, and fraud offenses, revised the definition of "loss" - a key element of such guidelines - and increased penalties for offenses involving moderate and high losses. The package reduced penalties on some lower level offenses. The amendment also provided a revised loss table for tax offenses that provided for higher penalty levels for offenses involving moderate and high tax losses. The new tax table did not, however, generally reduce any sentences with lower loss amounts.

We believe the Economic Crime Package generally improved and furthered federal sentencing policy, and both we and the Commission are now monitoring the impact of the Package to see what the real impact of the amendments will be. As mentioned, we remain concerned about the effect of the Package's changes to sentences for lower-level defendants - roughly those defendants responsible for less than $70,000 in financial loss to the victim or victims. Plainly, to most people $70,000 is a lot of money, and in many areas of the country federal prosecutors bring cases against criminals based on those amounts. We also want to see if defendants who face lesser sentences in such cases will be more willing to roll the dice and go to trial rather than plead guilty. Because the amendments were prospective only, it may be some time before complete data is available to fully evaluate the impact of the Package. Notwithstanding these

concerns, we believe that the changes made by the Package are consistent with the principles of appropriate certainty and severity and are generally a step in the right direction.

We also remain concerned with proposals that have been made to the Commission in past years for changes to federal sentencing policy that we believe would have the unintended effect of benefitting white collar offenders. In fact, some of these proposals would, if enacted, undermine the progress embodied in the Economic Crimes Package, the goals of certain and real punishment for white collar offenders, of compensating victims, and various important white collar enforcement programs. Fortunately, the Commission has rejected such proposals in the past, but some of them seem perennial and we may see them again in future years.
For example, some amendments that have been proposed to the Commission in recent years would have increased the availability of probation to low-level offenders with few or no prior criminal convictions or arrests. Such proposals typically are meant to address situations involving young, first-time drug offenders facing significant jail time. However, the effect of such proposals on white collar defendants - who also commonly have little or no prior experience with the criminal justice system - would be to greatly increase the eligibility of such criminals to serve no jail time at all, or to be eligible to serve home detention or some other "alternative to incarceration." Such proposals seem to us inconsistent with the Commission's historical treatment of white-collar offenders. The Commission has regularly recognized the need to deter white-collar and other similar offenses and to provide proper sentences for those who commit such offenses. It was for this reason that the Commission, when drafting the initial guidelines during the Eighties, explicitly excluded white collar offenses - which have historically received modest (and oftentimes probationary) sentences - from its early focus on past sentencing practice and deliberately raised penalties for such offenses from low historical levels. It was for this reason that the Commission deliberately changed sentencing policy and increased penalties for tax offenses on several occasions to insure appropriate punishment for such offenders. And it was for this reason that the Commission considered and increased penalties recently for antitrust offenses. On the other hand, the Commission has considered many proposals over the years - of the kind I just described - to "increase flexibility" for judges in sentencing these offenders by expanding the availability of sentences other than incarceration.

There may be legitimate concerns about judicial discretion and its role in sentencing under the Guidelines, and an important role of the Commission is to explore and evaluate the issue of judicial discretion in sentencing. But reducing the certainty of punishment for white collar offenders, we believe, is an inappropriate way to address these concerns. Congress created the sentencing guidelines to cabin judicial discretion. While changes to the balance of discretion in the system may be appropriate, cabined discretion is still the baseline, unless Congress says otherwise.

One important example of where these issues can significantly impact enforcement and compliance with the law is in with criminal tax enforcement. Creating more flexibility for judges in tax cases - where again, defendants typically have never been in trouble with the law before - would devastate tax enforcement. One of the proposals considered by the Sentencing Commission during the 2001 - 2002 amendment cycle would have expanded the availability of home detention and other alternatives to incarceration. Under that proposal, a probationary sentence would have been available to a defendant with a "tax loss" in a single year of up to

$30,000. Under the guidelines, assuming, for example, that a taxpayer is married, files a joint return, and is in the 35% marginal tax bracket, a $30,000 tax loss equates to $85,715 in unreported taxable income. Thus, a taxpayer who failed to report up to $85,000 in income would have been eligible under that proposal for a purely probationary sentence, without any imprisonment time whatsoever.

The picture under the proposal was even worse when the likelihood of a sentence reduction for acceptance of responsibility (elsewhere in the guidelines) was considered. Most people charged with federal crimes enter guilty pleas rather than going to trial, and in most such circumstances the Guidelines permit a downward of adjustment for "acceptance of responsibility." In fiscal year 2000, approximately 89% of the defendants in tax cases received an acceptance of responsibility adjustment (64.4% received a two-level reduction and 24.4% received a three-level reduction). See United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, Table 19 (Offenders Receiving Acceptance of Responsibility Reductions Sentencing Options in Each Primary Offense Category (Fiscal Year 2000)). This means that a number of defendants responsible for major "tax losses" would be likely to receive a reduction for acceptance of responsibility. Under the alternatives to incarceration proposal, such defendants would not have faced any mandatory prison time and could escaped with a probationary sentence only.

Moreover, according to the most recently available statistics, almost 90% of the taxpayers who filed returns in tax year 1999 had an income of $95,000 or less. Internal Revenue Service, Statistics of Income (SOI) Bulletin, Fall 2001 (Table 1, Individual Income Tax Returns, 1999). This means that nearly 90% of the taxpaying public would have been eligible for a probationary sentence under these proposals if they willfully failed to report any of their income for three consecutive years -- quite aside from any reductions for acceptance of responsibility. (Using the Tax Code's tables for 2002, a married taxpayer filing jointly with taxable income of $95,000 would be in the 27% marginal tax bracket and would face a tax liability of about $19,450.)

This proposal was flatly inconsistent with Commission's own stated view as to the critical importance of deterrence in enforcing the criminal tax laws:
The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

USSG Ch.2, Pt.T(1), intro. comment.

The deterrence message is substantially undercut by proposals that reduce the likelihood that tax violators and other white collar offenders will spend some time in prison for their crimes. Common sense tells us that the realistic probability of imprisonment acts as a powerful deterrent to someone who is weighing the costs and benefits of cheating the IRS. In criminal tax cases, however, a large number of violators do not face that risk. In fiscal year 2000, 46.2% of tax defendants received some form of probation, and half of that number (23.1%) received a sentence of straight probation. See United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, Table 12 (Offenders Receiving Sentencing Options in Each

Primary Offense Category (Fiscal Year 2000)). While we acknowledge that the percentage of probationary sentences in criminal tax cases has been decreasing since 1995, we are very concerned that the expansion of alternatives to incarceration would increase the pool of tax and other white collar violators eligible for a probationary sentence and send the message that white collar violations are not likely to result in any prison time.

Obviously, increasing judicial flexibility does not in and of itself result in more probationary sentences. It simply increases the number of defendants eligible for probationary sentences and gives sentencing judges discretion to impose such sentences in a wider array of cases. Our experience as prosecutors - and the Commission's own data - suggest that if white collar defendants are eligible for probation, they likely will receive probation. Unfortunately, this seems to be especially true in the my own district, the Southern District of New York, which is home to our financial capital.

Problematic Non-Substantial Assistance Downward Departures in White Collar Cases

Because Congress contemplated that the Sentencing Guidelines would cover nearly every factual circumstance that could be anticipated in criminal cases, judges are rarely supposed to depart from the sentence range prescribed by the Guidelines in a particular instance. In those cases where the facts were unique and not previously addressed, a judge could depart upward or downward to reflect the unusual gravity of the crime or the inordinate extremity of the punishment compared to similarly-situated defendants. Appropriately, the Guidelines also permit judges to grant downward departures for "substantial assistance," rewarding a defendant's willingness and ability to cooperate with law enforcement in prosecuting more serious crimes - to use a classic example, the hit man can get a reduced murder sentence for testifying against the mob boss. However, the pattern now seems clear that federal judges are using downward departures frequently, in some cases nearly routinely, as a way of getting around the prescribed Guidelines sentences. This phenomenon is just as detrimental to the overall goal of deterring and equitably punishing white collar crime as the related problem I previously discussed of judges' using additional flexibility within the Guidelines to sentence white collar defendants to probation rather than jail. Further exacerbating the problem, the more deferential standard of review announced by the Supreme Court in Koon v. United States, 518 U.S. 81 (1996), has impaired the government's ability successfully to challenge district court departures. This Administration is very concerned about the type and increasing number of non-substantial assistance downward departures. The impact of these departures in white collar cases cannot be overstated.

Although the Supreme Court adopted a deferential appellate standard of review in Koon, the Court also noted that in developing the Guidelines, the Sentencing Commission contemplated that departures based upon grounds not mentioned in the Guidelines would be "highly infrequent." Unfortunately, in some districts, non-substantial assistance downward departures are anything but infrequent (9,286 non-substantial assistance downward departures were made in 2000). In 2000, districts without large illegal alien caseloads reported large downward departure percentages (e.g., E.D. Washington (43.6%), Connecticut (31.9%), Vermont (30.7%), E.D. Oklahoma (29.2%), W.D. Washington (24.1%), Massachusetts (22.8%), and Minnesota (20.3%)). In contrast, only one district within the Fourth Circuit exceeded 10% non-substantial assistance downward departures, and the districts in that Circuit averaged 5%. In fraud cases in 2000,

11.6% (669) of the defendants received non-substantial assistance downward departures. Sentences for money laundering (13.9%), tax crimes (14%), and embezzlement (13%) shared similar statistics for non-substantial assistance downward departures. In contrast, none of the upward departure rates for these categories exceeded 1.1%. While available analyses do not detail the bases of these departures in white collar cases, a number of district judges appear to believe that white collar defendants should not be incarcerated in order to facilitate payment of restitution and fines. Of course, this is at odds with the view that incarceration can deter such crime in the first instance.

Further, departures made pursuant to U.S.S.G. §5K2.0 - - civic or charitable work (§5H1.11), aberrant behavior (§5K2.20), employment record (§5H1.5), family ties (§5H1.6), post-offense rehabilitation, diminished capacity (§5K2.13), mental condition (§5H1.3), and other departures not mentioned in the guidelines, but construed as outside the heartland of the guideline in question (i.e., "Koon paradigm" departures) - - are fodder in virtually every sentencing of a white collar defendant given the community standing and background of most white collar defendants. These departures further erode the relatively less onerous guideline ranges in white collar cases.

It may be useful for the work of the Subcommittee to learn of some recent cases emblematic of the problem faced by the government in white collar sentences.

White collar defendants oftentimes attempt to buy their way out of incarceration. Although the guidelines specifically preclude the use of socioeconomic factors (see U.S.S.G. §5H1.10 (socioeconomic status is "not relevant in the determination of a sentence")), in a recent case in the Western District of North Carolina, a defendant received a ten-month downward departure for "extraordinary restitution" because he liquidated his inheritance to pay $500,000 to a victim. In other cases, this has been termed "extraordinary acceptance of responsibility". See United States v. Bean, 18 F.3d 1367, 1368-69 (7th Cir. 1994). As I mentioned, the Guidelines do encourage defendants to pay full restitution to their victims, and will permit the court to grant leniency if that occurs under compelling circumstances. However, this should not become a routine avenue to grant downward departures to any wealthy defendant who can write a check to pay back his ill-gotten gains.

In a recent case in the District of Kansas, a defendant was found guilty following a jury trial of conspiring to offer to pay remuneration in exchange for Medicare and Medicaid referrals and of offering or paying remuneration to induce such referrals in violation of the Medicare Antikickback Act, 42 U.S.C. § 1320a-7(b)(2)(A), (B). Although the presentence report indicated that his total offense level was 13 and that the sentencing range was 12-18 months without the possibility of probation given its classification as a Zone D offense, the defendant was sentenced to three years probation, including six months of home detention, and fined $30,000. The government asserted that the offense conduct required at least a total offense level of 23 and a sentencing range of 46-57 months. The court made a downward departure for aberrant behavior and extraordinary family circumstances, which allowed imposition of the sentence of probation and home confinement with electronic monitoring. The court also commented on the defendant's community service.

In a recent Ninth Circuit opinion, United States v. Britt, 2001 WL 1587596 (9th Cir. 2001) (unpublished), the government unsuccessfully appealed the district court's four level downward

departure in a bankruptcy fraud case. The specified guideline range called for a sentence between 21-27 months (Offense Level 16, Criminal History Category I). The departure appears to have been based upon the fact that the defendant's "plans to start a new career as a lawyer have been dashed, and the record reflects that she was under considerable mental stress as a result of her divorce and custody battle." Instead of mandatory incarceration, Ms. Britt was eligible for a split sentence under Zone C.

The Subcommittee may also wish to review United States v. Ruttner, 2001 WL 138308 (2nd Cir. 2001) (extraordinary acceptance of responsibility); United States v. Gee, 226 F.3d 885, 902-03 (7th Cir. 2000) (home confinement instead of incarceration because of physical condition although the government argued that the Bureau of Prison's medical services are adequate to address defendant's needs); United States v. Vitale, 159 F.3d 810, 812-13 (3rd Cir. 1998) (in a wire fraud and tax fraud case involving more than $400,000 in wire fraud and $1.2 million in tax fraud, the district court departed downward for extraordinary acceptance of responsibility, restitution efforts, community service, and post-offense rehabilitation and sentenced the defendant to 30 months incarceration, a 21 month departure from the bottom of the applicable range; the district court did not depart upon defendant's theory that diminished mental capacity created a compulsion to purchase antique clocks); United States v. O'Kane, 155 F.3d 969, 971-75 (8th Cir. 1998) (in a mail fraud and money laundering case, the defendant's adjusted offense level was 16, a Zone D classification which would have required 21-27 months incarceration; the district court made a four level departure for "unusual acceptance of responsibility, and sentenced the defendant to five months community confinement and five months home arrest); United States v. Yang, 281 F.3d 534 (6th Cir. 2002) (in case involving conspiracy to steal trade secrets in violation of the Economic Espionage Act, the district court made 14 level downward departure based upon the victim's participation in the prosecution); United States v. Coble, 2001 WL 431529 (4th Cir. 2001); and United States v. Yeaman, 248 F.3d 223 (3rd Cir. 2001). Some of these cases reflect successful results for the United States in the Courts of Appeals. Nevertheless, these cases are instructive in terms of the treatment of white collar defendants by district courts. Our experience suggests that similar departure decisions by the district courts are allowed to stand, because the record from the sentencing hearing does not allow the government to prove an abuse of discretion under Koon.

These cases demonstrate what the Sentencing Commission knew in the 1980's and attempted to address in the original guidelines: for a variety of reasons, federal judges are hesitant to incarcerate white collar defendants. If past is prologue, even though the economic crime amendments of 2001 increased penalties for these crimes, departures will be used to undercut the purposes of the new provisions.

For further support of the argument that white collar defendants do not receive adequate incarceration, consider the number of defendants who are sentenced at the low end of the applicable guideline range. 64.5% of all cases were sentenced within the guideline range in 2000. 62.7% of these defendants received the guideline minimum. White collar cases receive comparable treatment when measured with other crimes. Defendants in fraud cases received the guideline minimum in 61.4% of the cases. Defendants in tax cases received the guideline minimum in 76.1% of the cases. Embezzlement and money laundering defendants received the guideline minimum in 68.1% and 69.1% of the cases respectively.

CONCLUSION

For white collar offenses, certainty of punishment and appropriate severity are vitally important. We appreciate the work of the Sentencing Commission in promulgating the Economic Crimes Package and believe that principles of certainty and appropriate severity are being served through its enhanced penalties. We look forward to continue working with the Commission and this Subcommittee to insure that federal sentencing policy is designed to reduce crime in the best manner possible. But we also reiterate what then-Acting Deputy Attorney General Robert Mueller said in his testimony to the Commission last year regarding a proposed Amendment, ultimately disapproved by the Commission, that purported to increase "flexibility" in sentencing:

At a time when vigorous white collar crime prosecution is needed, these flexibility options and changes to the sentencing zones send entirely the wrong message. After all, many white collar defendants have generally benefitted from society, have strong educational backgrounds and are often successful professionals. When these individuals break the law, they should not be excused from serving a prison sentence simply because they did not commit crimes of violence. The public has a right to expect that people with privileged backgrounds who commit crimes will not be exempt from the full force of the law and will not be treated with inappropriate leniency. Accordingly, the Department strongly opposes these amendments.

Mr. Chairman, that concludes my prepared remarks. I would be glad to answer any questions the Subcommittee may have.