Updated June 2007 to input current (2006) Application Note citations.

This is a letter analyzing loss under U.S.S.G. 2B1.1 (2006). The 2B1.1 guideline applies to offenses begun, completed, or continued after November 1, 2001.

Note: this letter assumes that you have or can obtain a declaration from the case agent which provides:

-average high and low mileage on vehicles whose odometers were rolled back;
-the average mileage rollback;
-total number of vehicles whose odometers were rolled back (Section III C below discusses how to estimate this number); and
-retail price information for the vehicles clocked (or at least information which can be used to estimate retail price).

Often these numbers are derived from only a portion of the vehicles involved in a case, since "perfect" information is seldom available. References to the declaration should be incorporated in the letter where these numbers (average rollback, number of vehicles, price information) are used.

Early in the case, try to have your agent know he or she needs to obtain this type of information.

[DATE]

[name]
Probation Officer
United States Probation Office
[ ] District of **[state]**
[address]
[city, state zip]

Re: United States v. **[name]**, et al.,
Criminal No. **[docket number]**

Dear **[ ]**:

This letter will provide background on the defendant**[s]** in this case and **[his/her/their]** crimes. It will also discuss pertinent considerations under the Sentencing Guidelines, and outline the United States's views on a Guidelines' analysis. I trust the information will be of value to you.

I. THE INDICTMENT

On **[date]** a federal grand jury in **[city]** returned a **[#]** count indictment against **[#]** defendants. All charges stemmed from an odometer rollback scheme. All defendants were charged in each count **[except . . . .]**.

The offenses charged in the indictment were as follows:

[Describe the charges in the indictment.]

II. THE PLEA AGREEMENTS

The defendants pled guilty to the following counts:

[List the counts to which the defendants pled guilty.]

Enclosed are copies of the plea agreements which each defendant entered. As set out more fully in each of the agreements, the United States has agreed to recommend **[describe any provisions in the plea agreement relating specifically to recommendations on terms of sentences, departures, substantial assistance, sentencing at the bottom or top of the range]**.

III. FACTUAL DISCUSSION

A. The Odometer Fraud Scheme

All odometer-tampering enterprises, of necessity, involve several interrelated activities. First, a late-model, high-mileage vehicle is purchased at a low price that reflects the significant wear and tear on the vehicle. This vehicle will then be "reconditioned" to remove many outward appearances of long use, and the odometer will be reset, often more than 40,000 miles below its true reading.

In addition to the cosmetic "reconditioning" of the car, the odometer tamperer must also "recondition" the paperwork accompanying the vehicle. Most automobile titles include a declaration of the vehicle's mileage at the time ownership was transferred to the individual involved in odometer fraud. To hide the actual mileage that is declared on the title when the car was sold to the odometer tamperer, the individual must take one of several measures.

First, the odometer tamperer may simply alter the mileage figures appearing on the vehicle's title documents so as to cause the documents to reflect the false, lower mileage figure after the rollback. In so doing, the odometer tamperer may also create one or more transfers of the vehicle to fictitious dealerships, thereby seeking to make it unclear which entity was responsible for the odometer rollback and title alteration.

Second, the odometer tamperer may destroy the original certificate of title documents indicating the vehicle's true high mileage, and obtain a duplicate certificate of title, upon which the false, lower mileage figure is entered.

Third, the odometer tamperer may engage in a practice known as "washing" the automobile titles. Here, the odometer tamperer transfers ownership of the vehicle on paper to a "straw" dealership, which may exist or be fictitious. This "straw" dealership uses the altered title documents to obtain a new replacement title listing the false low mileage reading.

Under each of these scenarios, the result is the same. The odometer tamperer now possesses an altered, forged, or replacement title document(s) (which are securities under federal law) containing a false low mileage reading. He uses these documents to sell the car (for several thousand dollars above its actual value) to a purchaser who is deceived regarding the vehicle's remaining useful life by the altered odometer, by the vehicle's outward appearance, and by the counterfeit, low-mileage paperwork (title and odometer statement).

B. The Defendants' Scheme

The charges in this case focus upon **[lead defendant]** and his associates.

1. **[name of lead defendant]** -- the Ringleader

Defendant has been in the used car business in **[place]** for many years. He has conducted business under a variety of names, including _____. For the most part, defendant has not dealt directly with the public, but has purchased and sold vehicles at wholesale. He has acquired used motor vehicles from numerous sources, both in **[name of state where he did business]** and out of state. Similarly, he has sold vehicles to firms as near to home as **[place]**, and as far away as **[place]**.

Defendant gave direction to his co-conspirators, deciding what cars to purchase, how much to pay for them, and how far to roll back their odometers. He also arranged and paid for the rollbacks, as well as the falsification of title documents to show false low mileage on the titles. He personally sold many of the vehicles. In short, he was in control of the conspiracy.

[Describe lead defendant's role with any details we have showing the number of vehicles involved; evidence of knowledge of wrongdoing; evidence of profits; and examples of controlling the conspiracy, such as giving directions to others.]

2. **[name]** -- the "Spinner" **[if the spinner was charged]**

A "spinner" is a person who does the physical work of altering an odometer. Defendant was a professional spinner. **[Describe how we know the number of vehicles he rolled, and how he was paid (e.g., in cash). Outline any cooperation provided, and admissions in debriefing, unless this last item is precluded by the plea agreement.]**

3. **[name]** -- Document Alterations **[if the title alterations person was charged]**

This defendant performed the work of altering the titles to reflect each vehicle's new, lower mileage, after the odometers were rolled back. This work is essential to a rollback scheme because mileage is recorded on the title or title reassignment on sale of a car, and when an odometer is rolled back, title documents relating to the car have to be altered to reflect the false low mileage.

[Describe how long this defendant was involved in alterations; estimate the number of titles altered, and provide the basis for this estimate. Describe who paid this person, and how (e.g., paid in cash). Describe any cooperation during investigation, and admissions in debriefing, unless this last item is precluded by the plea agreement.]

4. **[name] -- [role]**

[Provide similar information for any other defendant, describing their role, the number of vehicles with which they were involved, their cooperation, if any, and admissions made in debriefing.]

C. Total Cars Purchased and Sold with Rolled-back Odometers

[Describe how the government knows the total number of clocked cars. It may be that we checked for rollbacks on 300 cars, and found 200 rollbacks. This may be all we use for sentencing.

But if there is reason to believe this understates the defendants' criminal activity, explain why that is so and provide a reliable estimate of the total number of cars clocked. For example, provide the number of vehicles the government knows the defendants purchased and on which we checked for rollbacks, and state the number of rollbacks found among those vehicles. Such as, "Defendants purchased 300 vehicles for which the government checked for rollback activity, discovering 200 rollbacks. This is 67% rollback rate for vehicles the defendants purchased."

Then explain how many vehicles we believe the defendants actually purchased and sold during the period they were clocking cars. For example, "Defendants produced no records to the United States showing their total volume. Moreover, they did business in numerous places and dealt with multiple banks and other institutions, making it difficult to collect records showing a complete picture of their operation over the entire period of illegal activity. Nevertheless, bank records, auction records, dealer records, and witness interviews establish that defendants purchased and sold at least 900 cars during the conspiracy period." Explain the basis for this conclusion.

United States v. Berndt, 86 F.3d 803, 811 (8th Cir. 1996), supports this type of estimation. In Berndt, although the government could identify only 67 cars involved in the fraud, the court held that the estimate of 90 vehicles was not unreasonable. In support of this holding, the court noted: "Considering that fraud involves the element of deceit and secrecy, it is likely that there are more automobiles involved in this odometer-tampering scheme than the government can track down." Id.

Provide sufficient information to draw this sort of conclusion: "From the above, we know that defendants handled 900 vehicles during the period they were clocking cars, and that their rollback rate was 67%. Thus, the best estimate of the number of cars defendants clocked is 67% of 900 vehicles, for a total of 600 rollbacks."]

D. Victim Impact

The primary victims of the defendant**[s]**' odometer fraud scheme were the consumers who ultimately purchased the cars with altered odometers. The harms suffered by odometer-tampering activities generally fall upon those persons least able to afford them. Buyers of used cars include elderly people on fixed incomes, younger people who have not yet earned enough to afford new cars, and others who, for many reasons, are simply unable to buy new cars. Additionally, rolling back a car's odometer directly affects the safety of the car. Indeed, in enacting the federal odometer laws, Congress expressly found that "an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle[.]" 49 U.S.C. § 32701(a)(3).

As explained further below, each purchaser was harmed in several ways. First, the consumers were provided an inaccurate indication of the mileage previously traveled by the vehicle, which impeded their ability to determine the vehicle's value, safety, and reliability. Accordingly, the consumer paid a higher price for the vehicle than its fair market value. Second, cars with altered odometers have substantially reduced resale value once the fact that the odometer has been altered has been made known (as must occur when the consumer attempts to resell the car). Thus, consumers will lose significant money when they sell their cars. Third, cars with higher mileage are more costly to maintain, and more likely to require extensive repairs. Thus, consumers will lose significant money if they do not sell their cars. Fourth, consumers incur increased expenses (such as higher insurance premiums, lost time) than they would have if they had known the cars' true mileage.

IV. SENTENCING UNDER THE GUIDELINES

In this letter, the United States discusses elements of analysis under the United States Sentencing Guidelines (U.S.S.G.) that are common to all defendants. We discuss elements that pertain only to one defendant, and application of general principles to individual defendants, in separate attachments applicable to each defendant.

A. U.S.S.G. § 2B1.1, Involving Theft, Fraud, and Deceit, Applies

Each defendant pled guilty to violations of odometer tampering and related statutes (failure to keep odometer records, providing false odometer statements), in violation of **[cite applicable statutes]**. Guideline § 2N3.1, "Odometer Laws and Regulations," cites to these statutory provisions. The background for this guideline explains that it applies only where "a single vehicle" was involved. It goes on to provide: "If more than one vehicle was involved, § 2B1.1 (Theft, Property Destruction, and Fraud) is to be applied because it is designed to deal with a pattern or scheme."

Finally, all counts of conviction should be grouped together. This is because all counts of conviction were part of a common scheme or plan (U.S.S.G. § 3D1.2(b)), and because the

fraud guideline applies to each count and determines an offense level largely on the basis of total loss (U.S.S.G. § 3D1.2(d)).

Thus, U.S.S.G. § 2B1.1 applies, with a base offense level of six. U.S.S.G. § 2B1.1(a).

B. Amount of Loss Increase

Guideline 2B1.1(b)(1) provides for an increase in offense level based on the amount of loss incurred by a scheme or course of conduct such as that here.[1] All that is required is a "reasonable estimate of the loss" that is to be based upon "available information." Application Note 3(C). That Note, entitled "Estimation of Loss," specifically contemplates an estimate based on the "approximate number of victims multiplied by the average loss to each victim." Application Note 3(C)(iii). **[NOTE: in the 2001 and 2002 editions of the Guidelines, this was Application Note 2(C)(iii) – a new Application Note 2 and other changes inserted in 2003 changed the numbering of the Application Notes to 2B1.1. This letter uses the 2006 numbering system, which in this instance is the same as in 2003.]**

In this case, the amount of loss is estimated by multiplying a figure representing the average loss per victim by the number of cars with rolled-back odometers. **[Describe any sentencing stipulations regarding amount of loss here. Even when amount of loss is stipulated, it is valuable to include a rationale for the agreed upon loss amount, so some or all of the following analysis remains relevant. Similarly, it is important that the Court be provided with a rationale for stipulated loss amounts, either in the PSR or through a sentencing brief from the government.]**

1. Average Loss Per Victim - $4,000 **[The loss may be higher, depending on retail prices. $4,000 is based on 40% of retail.]**

The loss to the ultimate purchaser of each car the defendant**[s]** sold with a rolled odometer can conservatively be estimated as $4,000. This is based on case law and other factors that establish the validity of a loss per vehicle based on 40% to 50% of the retail price paid by consumer victims. There are a number of approaches that reach this same conclusion.

a. Courts Consistently Find Loss to be $4,000 to $6,000 per Vehicle

Several Federal Courts of Appeals have affirmed sentences in odometer fraud cases where the trial court found consumer loss of $4,000 per car or more under the old fraud guideline, 2F1.1. The analysis under § 2B1.1 is significantly similar to that under former § 2F1.1, so the case law remains relevant. Several of these cases are "unpublished," but most are available on Westlaw. Some are also published in the Federal Reporter series, as indicated

1/ Application Note 18 provides: "The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." Application Note 3(A) provides: "Subject to [exclusions for certain interest and governmental costs] loss is the greater of actual loss or intended loss."

below. These decisions provide guidance in this area based on other courts which have examined these issues. Moreover, the guidelines specifically permit estimating loss "based on . . . the scope and duration of the offense and revenues generated by similar operations." Guideline 2B1.1, Application Note 3(C)(v).

United States v. Whitlow, 979 F.2d 1008, 1012 (5th Cir. 1992), explicitly affirms a loss finding of $4,000 per vehicle based on 40% of retail price consumers paid. In Whitlow, the district court had noted that the National Automobile Dealers Association guide for used car values stated that "High Mileage" deductions should not reduce the value of a vehicle by more than forty percent. Accordingly, the district court calculated the loss per vehicle as forty percent of the average $10,000 retail purchase price of the cars. This resulted in a loss per car of $4,000, which the Fifth Circuit said was plausible in light of the record as a whole. 979 F.2d at 1012. The analysis of the Fifth Circuit in Whitlow is directly applicable. Here, the cars the defendant sold had an average retail sale price of approximately $_____. If the loss per vehicle is calculated at forty percent of the average retail purchase price, the loss per vehicle here will be $ _____ **[40% of avg. retail sale price].**

United States v. Berndt, 86 F.3d 803, 811 (8th Cir. 1996). The defendant rolled back the odometer on 80 - 100 cars. The loss finding of $4,000/car was not contested, but is mentioned in the opinion.

United States v. Jarrahi, et al., Nos. 97-4289, 4311 (4th Cir., May 11, 1998), 1998 WL 230825. Defendants appealed sentencing guideline loss findings. The Fourth Circuit held that the district court did not commit clear error by holding the defendants responsible for rollbacks committed by others even though the defendants were in a rather "loose-knit" association in which they purchased vehicles for each other. The loss finding was just over $4,800 per car on a total of 364 cars.

United States v. Carroll, et al., Nos. 97-4022, 4259 (4th Cir., November 19, 1998), 1998 WL 801880. Richard Carroll and Charles Granata were convicted after trial and sentenced to prison. The court found that the ultimate consumer purchaser was the real victim of the crime, and that a loss estimate of $6,000 per car was reasonable.

United States v. Alami, 1997 WL 570867 (4th Cir., September 16, 1997). The court upheld a loss finding under the Sentencing Guidelines of $6,000 per car. That was the average difference between the price defendants paid for the cars, and the ultimate consumer purchase prices.

See United States v. Sprague, 35 F.3d 559 (5th Cir. 1994) (table) (affirming $4,000 loss per vehicle estimate); United States v. David Allen Hatley, Crim. No. SA-96-CR-230 (W.D. Tex. December 13, 1996) (applying $6,000 los per vehicle); United States v. Hampton, No. SA CR 96-40-GLT (C.D. Cal. Oct. 16, 1996) (rejecting PSR recommendation of $3,200 per vehicle loss estimate and holding that loss estimate should be $4,000 per vehicle); United States v. Sadeghi, No:95CR00267-001 (M.D.N.C. May 7, 1996) (loss of $4,000 per victim); United States v. Rossi, Cr. No. 94-506 (E.D. Pa. Aug. 1, 1995) (loss finding $4,000/car loss on 1,600 cars; $6.4

million total loss); see also United States v. Welch, Crim. No. 93-30004-F (D. Mass. October 19, 1993) (adopting PSR loss estimate using $4,000/car figure); United States v. Cooper, Cr. No. HCR 92-0149 (N.D. Ind. March 3, 1993) (same); United States v. Coker, Cr. No. H-92-00089 (S.D. Tex. Aug. 7, 1992) (same).

b. Loss of Value at Resale

As indicated above, the guidelines contemplate determining the amount of loss on the basis of a reasonable estimate of loss per victim. Guideline 2B1.1, Application Note 3(C); see, e.g., United States v. Tardiff, 969 F.2d 1283, 1288 (1st Cir. 1992). "Actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense." Application Note 3(A)(i). "Pecuniary harm" means harm "that is monetary or that otherwise is readily measurable in money," but does not count non-economic harm such as emotional distress. Application Note 3(A)(iii).

The guidelines provide a rule of construction for product substitution cases. Odometer fraud is a type of product substitution case: the defendant substituted high-mileage vehicles for the low-mileage vehicles he claimed to be selling. In product substitution cases, pecuniary harm includes "reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered . . . ." Application Note 3(A)(v)(I). For an odometer fraud victim, this would be the cost of obtaining a low-mileage vehicle (the substitute transaction) less a credit for what the consumer could receive for the vehicle with an altered odometer (the proceeds of disposing of the product delivered).

This approach is consistent with the spirit of the guideline which gives the defendant credit for value actually given to the victim of the offense. See Application Note 3(E). It is also consistent with the general rule that loss can be estimated as "[t]he fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property." Application Note 3(C)(i). Determining the amount of the purchase price that was unlawfully taken requires calculating the value of what the victim actually received, versus what he or she paid.

Alternatively, loss in a product substitution case should *include* "the reasonably foreseeable costs . . . of retrofitting the product so that it can be used for its intended purpose . . . ." Application Note 3(A)(v)(I). With respect to the odometer fraud victim, a high-mileage car can be used for transportation. The costs the consumer will face that may be considered relevant to "retrofitting" are increased maintenance costs during the life of the car, and loss of resale value at the end of the victim's ownership of the vehicle.

When the odometer on a motor vehicle is altered, and the vehicle resold, it becomes impossible to know the vehicle's true mileage. As a result, such vehicles must be sold with notice to the buyer of an odometer discrepancy. See 49 U.S.C. § 32705(a) and 49 C.F.R. Part

580.[2] Not surprisingly, consumers resist purchasing cars branded as having an odometer discrepancy, which diminishes their value dramatically.

A study of odometer fraud conducted by the Pennsylvania Attorney General's Bureau of Consumer Protection (copy attached) explains: "Many consumers and dealers have told the Pennsylvania Bureau of Consumer Protection and NHTSA odometer fraud investigators that they simply would not knowingly purchase a rolled back vehicle regardless of price." (Section D of the study, "Monetary Damage to Consumers," page 13.) The United States Department of Transportation contracted for this study.

Richard Diklich, an Instructor of Automotive Technology at Longview Community College in Lee's Summit, Missouri, has quantified the effect of this consumer resistance. Mr. Diklich has extensive experience in the automobile industry, and has developed expertise in evaluating the diminution of value that arises when a vehicle is sold with notice that its odometer has been rolled back. (Diklich Dec., attached, ¶¶ 1 - 8.) Mr. Diklich states:

> A vehicle with a Not Actual Mileage title does not have the same value in the marketplace as does a vehicle with the same odometer reading and a clean title. The diminution in value in most cases will be 40% to 50% of fair market value. This is true whether the vehicle is being sold at wholesale or retail.

Id., ¶ 8. Mr. Diklich's Declaration goes on to explain the reasons for this decline in value. Id., ¶¶ 9 - 11.

Thus, consumers have lost 40 to 50% of what they paid for the vehicle as a result of the diminution in value caused by the necessity of disclosing the rollback on the title. This is precisely what the Application Notes to Guideline 2B1.1 discussed above provide should be the measure of loss, and the measure approved in Whitlow.

c. Actual Expenses While Operating Clocked Vehicle

Another approach to showing consumer loss is to look at the types of actual expenses a consumer pays as a direct result of this type of fraud. A typical rollback in this scheme was **[avg. rollback]** miles. See Declaration of case agent, attached. In addition to paying a fraudulent purchase price, a consumer who purchases a vehicle with a rolled-back odometer incurs a series of costs which stem directly from the fraud perpetrated by the defendant. These increased costs include the following:

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[2] The federal regulations implementing 49 U.S.C. § 32705 require that the odometer disclosure statement for a vehicle whose odometer does not display the vehicle's true mileage must state "that the odometer reading does not reflect the actual mileage, and should not be relied upon. This statement shall also include a warning notice to alert the transferee that a discrepancy exists between the odometer reading and the actual mileage." 49 C.F.R. § 580.5(e)(3). "True Mileage Unknown," or "TMU," is an industry colloquialism that refers to vehicles that must be sold with this disclosure.

Maintenance Costs: increased maintenance costs are not always reflected in purchase price considerations, as some owners have vehicles that are virtually worthless as the result of a rollback.

Lost Time: buyers of high mileage vehicles frequently spend considerable time dealing with unexpected maintenance--often time is lost from work when a car is the person's method of transport to his or her employment.

Taxes: the sales tax imposed on the amount of a purchase price attributable to the rollback, and annual property taxes imposed based on a falsely inflated purchase price.

Finance Charges: the cost of financing the portion of a vehicle's cost that stems from the rollback.

Insurance Costs: unnecessary insurance carried due to a false belief that a vehicle is low mileage.

The Pennsylvania Attorney General's study attempts to quantify losses that consumers face. The study reaches a figure of $6,653 as the total loss, not including amounts for various losses that are difficult to quantify (Pennsylvania Attorney General study, page 17).[3] Consideration of all of these factors–some of which (e.g., property taxes and insurance costs) are recurring–demonstrates that the $4,000 per vehicle the government suggests is rather conservative, particularly so when one considers that the Pennsylvania Attorney General's study was released in 1993, and has not been adjusted for inflation.

d. Loss per Mile Rolled Back Alternative

Another approach to viewing loss is through the use of "book value." The Pennsylvania Attorney General's study cites automotive industry publications that provide deductions from "book" value that are associated with mileage. The figures cited are six cents and ten cents per mile.[4] For a **[avg. rollback]** mile rollback, this deduction would convert to a $_____ (at

[3] U.S.S.G. 2B1.1, Application Note 3(D)(i) states that interest of any kind should be excluded from loss. Accordingly, the $797 of the loss in the Pennsylvania Attorney General's study that is attributed to excess finance charges (study at page 17) would not be considered under § 2B1.1. Subtracting this $797 from the $6,653 loss found in the study leaves a $5,858 loss per vehicle.

[4] The six cents per mile figure was from Automotive Market Report (AMR), while the ten cents/mile estimate comes from Galves Auto Price List (Pennsylvania Attorney General study, p. 14). Both are among the more reliable mileage deduction indicators in the industry, according to an industry publication. "According to resale dealers, . . . [t]he used-car guides that did the best job of adding/subtracting for high miles, in order, were AMR, NADA, Galves, Kelley Blue Book, Black Book, and Gold Book." Automotive Fleet, April 1993, p. 68 (copy attached). Note that the graphic on page 1 of this article lists the "Top Factors in Determining Resale Price," and the first factor is "Mileage."

six cents per mile) or a $_____ (at ten cents per mile) fraud.

However, for reasons discussed above, and in the Pennsylvania Attorney General's study itself, such "book" value deductions underestimate the impact of this type of fraud. "Book" values compare two vehicles with honest odometers. At most, this reflects only loss associated with purchase price as such.

Nevertheless, support for conservatively evaluating loss at ten cents per mile removed can be found in a February 1993 bulletin published by the National Association of Fleet Resale Dealers (NAFRD). The bulletin reported a 1992 study by Associates Leasing which showed that resale value of cars fall off markedly after 60,000 miles (copy attached, page 2). The NAFRD bulletin reported an 18% drop in value at about 60,000 miles, and another 10% reduction at about 70,000 miles. In other words, this report indicates a drop in value of 28% at these two marks alone.

The NAFRD bulletin also included a table (on page 2) showing that variable costs per mile for a car increase slowly to about ten cents per mile at about 45,000 miles, but reach twenty cents per mile after about 80,000 miles. Using the average involved in this case, rolling an odometer from **[avg. pre-rollback mileage]** to **[avg. post-rollback mileage]** (see Declaration of case agent) would thereby push a car from being a high cost per mile vehicle to falsely appearing to be a low cost per mile vehicle. The costs of operating such a vehicle will thus be considerably higher than expected as a result of the fraud. If these excessive operating expenses are ten cents per mile to repeat the **[avg. rollback]** miles rolled off the odometer, the consumer would be paying another $_____ in costs attributable to the fraud.

United States v. Fraaza, No. 97-3863 (7th Cir., March 12, 1998), 1998 WL 122159, involved low-value vehicles. In that case, the Seventh Circuit agreed with an approach to loss based on six cents per mile rolled back. Such old vehicles can give rise to particularly difficult valuation issues because consumers pay relatively small amounts for the cars. Fraaza pled guilty to one count of making false odometer disclosure statements, and received a 10-month jail term. He had altered odometers on nine cars which were 9-13 years old, and sold at retail for a total of less than $30,000, which means each car cost the consumer around $3,000. The Seventh Circuit upheld the district court's loss finding, which was based on 50% of consumer price or six cents per mile removed, which led to a loss of $10,000 to $20,000. (This case thus also supports 50% of retail as being a good measure of loss.)

Since the defendant here was not selling very old cars as in Fraaza, a loss of ten cents per mile removed from the odometer, consistent with the Pennsylvania Attorney General's study and the NAFRD bulletin discussed above, would be more appropriate. This would lead to an average loss of more than $4,000 per vehicle.

e. Total Loss Alternative

Guideline 2B1.1, Application Note 3(C)(i) states that ordinarily fair market value of property taken is used to evaluate a loss. However, "if the fair market value is impracticable to

determine or inadequately measures the harm, the cost to the victim of replacing that property" can be used as the measure of loss. The cost of replacement would be equal to the consumer purchase price of the vehicle. Thus, the Probation Office is not obligated to calculate a precise fair market value for the TMU cars, and may consider replacement cost if it determines that market values are impracticable to determine.

The Pennsylvania Attorney General's study of odometer fraud agrees that one measure of damages to consumers is the entire price paid for the car:

> Many consumers and dealers have told the Pennsylvania Bureau of Consumer Protection and NHTSA odometer fraud investigators that they simply would not knowingly purchase a rolled back vehicle regardless of price. Therefore, the proper measure of damages would often be the entire price the consumer paid for the car.

Pennsylvania Attorney General Study, page 13. This method to calculate loss is applied by some state courts. See, e.g., People v. Ross, 25 Cal. App. 3d 190, 195, 100 Cal. Rptr. 703 (1972) (treating odometer fraud as theft and holding that proper determination of theft amount is full purchase price paid by the victim).

Given that many defrauded purchasers of cars with rolled-back odometers will be unable to sell their cars at all, this translates into a consumer loss figure that equals the consumer's full purchase price of the used vehicle. In comparison to this amount, a loss figure of only $4,000 as suggested by the government is an extremely conservative means of calculating loss under U.S.S.G. 2B1.1.

f. Summary

In sum, the government's loss figures are well-founded yet conservative. They are based on methodology embraced by the courts. The loss estimate reflects the loss of value when a car is resold as well as expenses that are incurred when a vehicle is kept and maintained. The loss per vehicle is conservative, when compared to the Pennsylvania Attorney General's study and the total loss analysis set forth above.

The substantial loss consumers face results from the reality that clocked vehicles have but a fraction of the value of cars with known low mileage, which is what the consumers believed they had purchased. A consumer with a clocked car is in a poor position to discover the true mileage of the vehicle, and faces the fact that dealers simply do not want to purchase clocked cars at all.

In light of all these factors, an estimate of $4,000 per vehicle is truly a highly conservative estimate of the losses suffered by a consumer who purchases a rolled-back car.

[Note: Defendants frequently ask that the court use "Blue Book" values to determine loss. To some extent "book values" can be used to support our evaluations, as is done above, and in another respect book values underestimate loss, for reasons discussed above. In

addition, OCL has obtained declarations from the publishers of Kelley's Blue Book and the N.A.D.A. Official Used Car Guide which state that their publications are not appropriate to use in attempting to estimate the loss in value caused by an odometer rollback.

Nevertheless, DOT's National Highway Traffic Safety Administration in 2002 released a study that uses high and low-mileage figures from the N.A.D.A. Official Used Car Guide ("book value analysis") to conclude that consumers pay about $2,336 more for a clocked car than they should. The study makes it clear that this figure is merely an estimate of increased purchase price, and does not include other losses consumers suffer from odometer fraud. The Executive Summary of the study states:

> **That sum [$2,336] does not include inflated financing, insurance and tax costs; additional amounts consumers pay for vehicle repairs; other consequential damages; the decreased resale value due to the vehicle having an altered odometer; or the many indirect or intangible costs of odometer fraud: time spent waiting for vehicle repairs and road service, consumers' anger and frustration at being cheated and getting a car they wouldn't have wanted, and costs of government programs to detect and deter odometer fraud.**

Study, p. vii. See also id. at p. 35.

Thus, the most significant items beyond purchase price that contribute to consumer loss are not considered by the NHTSA report: repair costs and loss of resale value. These items are properly counted in measuring loss under U.S.S.G. § 2B1.1. Accordingly, the figure in the NHTSA study only measures a portion of what constitutes loss under U.S.S.G. § 2B1.1, making the study essentially irrelevant to loss analysis under the Guidelines. Note that U.S.S.G. § 2B1.1, Application Note 3(D)(i), states that interest is excluded from loss; and Application Note 3(A)(iii) states that emotional distress and other non-economic harm is not included in loss. Thus, nothing can be added to loss under U.S.S.G. § 2B1.1 for these items.

As mentioned above, OCL has declarations from the authors of the N.A.D.A. Official Used Car Guide and Kelley's Blue Book which state that using their publications to try to establish losses caused by odometer fraud is not appropriate. The Diklich declaration (¶ 9) makes the same point. If you need a copy of these declarations or the NHTSA study to use at a sentencing, contact OCL.]

2. The Total Number of Vehicles Involved in the Fraud

As discussed above, the evidence indicates that defendant should be held accountable for ___ vehicles.

3. Total Loss Caused by Defendant's Fraud

Thus, there were ___ vehicles involved in the fraud, at $4,000 loss per vehicle. The total fraud is $_____, an extremely conservative figure. An additional ____ offense levels should be added to a defendant's total offense level under 2B1.1(b)(1)(_).

C. Multiple Victim Increase

The offenses here required involved more than **(10/50/ or 250)** victims. Accordingly, the upward adjustment of **(2/4/ or 6)** offense levels provided by U.S.S.G. § 2B1.1(b)(2) applies.

D. Sophisticated Means

[Under U.S.S.G. § 2B1.1(b)(9)(C), there is an increase of 2 offense levels if an offense involved "sophisticated means." "Sophisticated means" is defined in Application Note 8(B) to include "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." The Application Note provides as examples telemarketers who locate the main office of the scheme in one jurisdiction, but locate soliciting operations in another. Further, conduct "such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." Application Note 8(B).

In odometer fraud schemes, the use of bogus dealer names and straw transactions, or bank accounts in bogus dealer names, to hide responsibility for the offense suggests "sophisticated means." In addition, operating in multiple states, creating victims in different jurisdictions than where cars are purchased and the defendant does business, would also indicate the applicability of this enhancement.]

E. Acceptance of Responsibility

In each plea agreement, the United States agreed to a **[2 or 3]** level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. These agreements stemmed from both the defendant**[s]**' agreements to enter pleas of guilty **[well in advance of trial]**, and from the indication of acceptance provided by cooperation given to the government by discussing criminal activity in this case and related odometer fraud investigations. The government expects to move pursuant to U.S.S.G. 3E1.1(b) for the third level provided by that guideline section.

F. Restitution

[The "mandatory restitution" provisions of 18 U.S.C. § 3663A-3664 have applied to Title 18 fraud offenses since 1996. Title 49 odometer offenses themselves are not subject to mandatory restitution. See 18 U.S.C. § 3663A(c)(1). However, U.S.S.G. § 5E1.1(a)(2) directs that a court impose a restitution order as a term of supervised release for offenses [such as odometer tampering] that are not restitution-authorized under 18 U.S.C. § 3663(a)(1). Under U.S.S.G. § 5E1.1(b)(2)(B), that provision does not apply where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide

restitution to any victim is outweighed by the burden on the sentencing process."

For mandatory restitution offenses, section 3664(f)(1)(A) states that the defendant's economic circumstances may not be considered in determining the amount of restitution, though they can be considered in ordering nominal periodic payments in lieu of full restitution at once. 18 U.S.C. § 3664(f)(3)(B). Nevertheless, section 3663A(c)(3) provides that restitution need not be ordered if (A) "the number of identifiable victims is so large as to make restitution impracticable" or (B) if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."

The victims are generally the first consumer purchaser of the vehicles. However, if that information is unavailable and current owners are known, the current owners can properly be viewed as victims, as they cannot readily resell the vehicles once notified of the rollback.

With large numbers of vehicles and the vagaries of consumer car repair bills, determining restitution amounts consumer by consumer is virtually impossible, suggesting that the average loss per vehicle amount used to calculate loss under § 2B1.1 should be used as the restitution amount where restitution is practicable. In those cases, probation should be provided as complete a list of victims as possible, and urged to grant as restitution the figure that is used to calculate "loss" under 2B1.1.

Some jurisdictions view use of an "average" loss figure as inappropriate. In those jurisdictions, the Probation Office contacts victims seeking individualized loss information. If OCL or the USAO is sending victim notification letters (informing consumers that they are victims of the offense) in the period of time before sentencing, it is frequently efficient to send in the same mailing to victims the notice that the Probation Office provides to victims, in which the Probation Office solicits information about consumer losses.

In cases where restitution is not practicable, the following, reflecting the language of the statute, may apply:]

It is difficult to identify all the victims of the fraud scheme. Not only did the wholesale and retail car dealers, to whom the clocked cars were sold, suffer a monetary loss, but each dealer who thereafter bought and sold the vehicle, as well as the consumers who purchased the vehicles for their own use, was defrauded. By this point in time, some of the consumers may have already resold the clocked cars to second- or third-generation purchasers without suspecting the fraud. Tracing chains of ownership for the many vehicles involved here would be labor-intensive and time-consuming.

Moreover, the number of victims in the case, the difficulty in setting a fair market value for each vehicle at the time of its fraudulent sale, and the difficulty of calculating the value of extra charges and expenses (such as the increased finance charges, insurance costs, and repairs)

makes it almost impossible to set an exact restitution amount that would be appropriate for each consumer who owned one of defendant's rollbacks for a period of time.

The government will provide victim information related to the specific vehicles identified as having been rolled back in the Indictment to which defendant pled guilty. However, the number of victims is so large that fashioning a broader restitution order is impracticable. The difficulty of identifying victims, and other considerations discussed above, leads the government to believe that determining complex factual issues related to the cause and amount of victim losses would complicate and prolong the sentencing process to a degree that the need to provide restitution on a broader scale (related to all the vehicles involved in this case) is outweighed by the burden on the sentencing process. Accordingly, a broader restitution order is not appropriate. 18 U.S.C. § 3663A(c)(3); U.S.S.G. § 5E1.1(b).

G. Special Condition of Supervised Release

Finally, the United States urges that an occupational restriction be placed on the defendant as a condition of supervised release. The defendant engaged in a massive consumer fraud, causing large economic harm to numerous consumers. In light of this, a condition of supervised release prohibiting the defendant both from operating a used car business and from being employed in automobile sales is necessary to protect the public.

Imposing this type of employment restriction as a special condition of supervised release is specifically provided for by U.S.S.G. §§ 5D1.3(b), and 5F1.5. The sentencing guidelines provide for the imposition of special conditions of supervised release that are reasonably related to (1) the nature and circumstances of the offense, (2) the need for adequate deterrence of further criminal conduct, and (3) the need to protect the public. U.S.S.G. § 5D1.3(b). Pursuant to U.S.S.G. § 5F1.5(a), an employment restriction is permissible as a condition of supervised release or probation if:

> (1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
>
> (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

Both of these factors exist in this case. The criminal conduct is a direct result of activities in the used car business. Moreover, in light of the defendant's multi-year involvement in odometer fraud there is substantial reason to believe that the defendant will continue to engage in such offenses absent such a court-imposed restriction.

In previous odometer fraud cases, district courts have not hesitated to impose precisely this restriction. See United States v. Whitlow, 979 F.2d 1008, 1012 (5th Cir. 1992); United States v. Mills, 959 F.2d 516, 519 (5th Cir. 1992).

V. CONCLUSION

The above describes the conspiracy, summarizes the role of each defendant in the conspiracy, and discusses guidelines applicable to all defendants. A copy of this letter will be provided to counsel for all defendants. In the following pages, we discuss how the guidelines apply to each defendant. A copy of the page(s) pertaining to each defendant will be provided to that defendant's counsel. Should you have any questions about any of the discussion provided or need any additional material, please do not hesitate to contact me.

Sincerely,

[NAME]
[ATTORNEY]
[OFFICE]

Enclosures:

1 Guidelines calculation for defendant
2 Declaration from case agent (providing average mileage rollback and retail price information for the case, as well as information on the total number of vehicles involved in the offenses.)
3 Pennsylvania Attorney General's Study
4 Declaration of Richard Diklich
5 Automotive Fleet, April 1993
6 National Association of Fleet Resale Dealers, February 1993 bulletin

[Copies of attachments 3 - 6 are available from the Office of Consumer Litigation.]

DEFENDANT A (An organizer in a 60 car case at $4,000 loss/car who obstructed justice)

OFFENSE LEVEL CALCULATIONS

2B1.1(a) BASE OFFENSE LEVEL	6
2B1.1(b)(1)(G) INCREASE ($200,000 - $399,999 LOSS)	12
2B1.1(b)(2)(B) MORE THAN 50 VICTIMS	4
2B1.1(b)(9) SOPHISTICATED MEANS	2
3B1.1(a) ROLE IN THE OFFENSE	4
3C1.1 OBSTRUCTION	2
TOTAL OFFENSE LEVEL:	30
-3E1.1 REDUCTION FOR ACCEPTING RESPONSIBILITY	-3
ADJUSTED OFFENSE LEVEL	27

CRIMINAL HISTORY

[Discuss any known criminal convictions and calculate criminal history.]

APPLICABLE GUIDELINE RANGES

a. Imprisonment

An adjusted offense level of 27 combined with a Criminal History Category of **[I]** results in a guideline range of **[70-87]** months imprisonment.

b. Supervised Release

The crimes to which the defendant pleaded guilty are **[Example] Class E** felonies. See **18 U.S.C. § 3559(a)(5)**. Accordingly, because defendant's guideline sentence will be greater than one year's imprisonment, a term of supervised release of one year is appropriate. U.S.S.G. §§ 5D1.1(a), 5D1.2(a)(3).

c. Fine

The sentencing guidelines require calculation of a minimum and a maximum amount for a fine. For an offense level of 27, under U.S.S.G. § 5E1.2(c)(3), the fine guideline is $12,500 - $125,000.

d. Special Assessment

Pursuant to 18 U.S.C. § 3013, the defendant must pay a special assessment of $100 for each count of conviction. The assessments here is **[$xxx]**.

[Similar pages of analyses for each defendant in multiple defendant cases should be added.]