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January 25, 1990

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

The Sentencing Commission again has solicited public comment on a revised interim policy regarding public access to Sentencing Commission documents and data. On behalf of the American Bar Association's Committee on the United States Sentencing Commission, I would like to offer the following comments on that revised interim policy statement.

When I last wrote to you in this regard commenting on the Commission's publication of its initial interim policy (Letter of August 30, 1989, copy attached), the principal thrust of my remarks were directed towards the Commission's decision to not make certain "source documents" publically available. The Commission's persistence in retaining such a posture within this revised document again provides the basis for our continuing concern and disagreement.

The Commission offers three reasons to support its position in this regard: it is under no legal obligation to provide access to these documents; it would be fiscally burdensome to do so; and a surrogate or substitute for the information contained within those documents will, indeed, be made available in the datasets provided to the Inter-university Consortium for Political and Social Research. It is respectfully submitted that those rationales are neither individually nor collectively sufficient to justify the Commission's policy decision here.

Without rehashing the arguments provided in detail in my August 30, 1989, letter, suffice it to say that, first, the perceived lack of a legal obligation to provide access to such materials does not negate the demonstrable wisdom of the Commission's responsibl

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Director
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making those items available to litigants, practitioners and researchers and, further, such affirmative action on its behalf avoid the time and expense necessary to determine the propriety of the Commission's belief in that regard. Next, in an area as important as this, administrative convenience and budgetary priorities should not be used as the decisional linchpin. And, finally, in addition to the critical delay it introduces, abstracting of documents, by definition, results in a product far less than the whole, with significant and (to some) necessary material and information being lost forever in the process.

The Commission has indicated that this policy will be maintained as "interim" rather than "final" to afford more flexibility in responding to suggested revisions. On behalf of the Committee, I urge you to reconsider the comments made herein and in my prior letter as well as those similar suggestions in this regard made by other commentators. And I urge you to amend the proposed policy to make clear that the public will have access to all nonconfidential court documents in the hands of the Commission.

I again commend the Commission for seeking public comment and I thank you for this opportunity to provide input. Furthermore, I renew my offer to meet and work with you to help craft what I believe would be a more reasonable and appropriate policy on accessibility and accountability.

Sincerely,



Samuel J. Buffone

SJB/ms
Enclosure

cc: Laurie Robinson

THE UNITED STATES SENTENCING COMMISSION

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Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



February 5, 1990

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Staff Director
John Steer, Charles Betsey, David Anderson, Candy Johnson

FROM: Paul K. Martin *PKM*

SUBJECT: ABA Response to Revised Public Access Policy

Appended for your review is a letter from Sam Buffone spelling out the ABA's position on the revised interim policy on public access to Commission documents and data.

Attachment

Description: This regulation prescribes limitations on the payment of dividends by national banks in relation to the bank's capital and earnings position and requires approval from the Comptroller of the Currency for dividend payments in excess of statutory limitations.

Respondents: Businesses or other for-profit, small businesses or organizations.

Estimated Number of Respondents: 115.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 115 hours.

Clearance Officer: John Ference (202) 447-1177, Comptroller of the Currency, 5th Floor, L'Enfant Plaza, Washington, DC 20219.

OMB Reviewer: Gary Waxman (202) 395-7340, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.
Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 89-14643 Filed 6-20-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: June 15, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512-0220.

Form Number: ATF F 5170.4.

Type of Review: Extension.

Title: Application for Importers and/or Wholesaler's Basic Permit Under Federal Alcohol Administration Act.

Description: Form 5170.4 is completed by persons intending to engage in the business of importing and/or wholesaling alcoholic beverages. The information provided allows ATF to identify the applicant and the location of the business and to determine whether the applicant qualifies for a

basic permit under the Federal Alcohol Administration Act.

Estimated Number of Respondents: 1,300.

Estimated Burden Hours Per Response: 3 hours.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 3,900 hours.

OMB Number: 1512-0398.

Form Number: ATF F 2093 (5200.3) and ATF F 2098 (5200.16).

Type of Review: Extension.

Title: Application for Permit Under 28 U.S.C. Chapter 52—Manufacturer of Tobacco Products or Proprietor of Export Warehouse and Application for Amended Permit Under 28 U.S.C. 5712—Manufacturer of Tobacco Products or Proprietor of Export Warehouse.

Description: These forms are used by tobacco industry members to obtain and amend permits necessary to engage in business as a Manufacturer of Tobacco Products or Proprietor of Export Warehouse.

Estimated Number of Respondents: 336.

Estimated Burden Hours Per Response: 1 hour 30 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 504 hours.

Clearance Officer: Robert Masarsky, (202) 566-7077, Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue, NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 89-14644 Filed 6-20-89; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES SENTENCING COMMISSION

Public Access to Sentencing Commission Documents and Data

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed policy regarding public access to Sentencing Commission documents and data; interim adoption of policy.

SUMMARY: Pursuant to its authority under section 995(a) of Title 28, United States Code, the Sentencing Commission adopts as an interim policy and proposes for public comment the policy on public access to Sentencing

Commission documents and data set forth below. The Commission invites comment on this proposal.

DATE: Comments should be received by the Commission no later than September 1, 1989.

ADDRESS: Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., Suite 1400, Washington, DC 20004, Attention: Public Access Comment.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director for the Commission, telephone: (202) 662-8800.

SUPPLEMENTARY INFORMATION: Section 995(a)(1) of Title 28 authorizes the U.S. Sentencing Commission, an independent agency in the judicial branch of government, to establish general policies and promulgate rules and regulations for the Commission as necessary to carry out the purposes of the Sentencing Reform Act of 1984.

Providing public access to non-confidential sentencing information is consistent both with the letter and spirit of the Sentencing Reform Act of 1984. The Act also envisions the Commission serving as a clearinghouse for information on Federal sentencing practices.

The Commission seeks to carry out its Congressional mandate in a manner that provides the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents pertaining to imposition of sentence in individual cases. To this end the commission proposes that Commission publications and other reports will be made available to the public through the Government Printing Office or other administratively efficient means. Statistical information contained in published and/or commission approved reports will be available upon request. Photocopies of documents exceeding five pages will be provided at fifteen (15) cents per page.

Access to Commission data in the form of comprehensive datasets will be provided through public use tapes provided to the Inter-university Consortium for Political and Social Research at the University of Michigan. Source documents in the Commission's possession, including presentence reports, plea agreements, and judgment and sentence orders, will not be made available to the public. Approved Commission minutes will be available for public inspection. Photocopies of the minutes will be available at a cost of fifteen (15) cents per page. The

Commission's library is open to the public. Selected books and other documents may be borrowed and others may be photocopied at the user's expense.

The Commission has authority to enter into cooperative agreements with private individuals, firms, and organizations. Under certain circumstances the Commission may enter into cooperative agreements with private researchers to undertake an analysis of sentencing data. All confidentiality requirements pertaining to Commission staff shall apply to any party who enters into a cooperative agreement with the Commission. Proposals for such agreements shall be considered by the Commission on the basis of the nature of sponsorship, the purpose of the research, and the administrative burden it will impose.

Proposals will be reviewed by a group including the Commission's Staff Director (or his representative), the General Counsel (or his representative), and the Director of Monitoring. The group will forward its recommendation to the Commission after assessing the feasibility and appropriateness of the proposal. The Staff Director shall ensure consultation with representatives of the Administrative Office of the U.S. Courts with respect to the proposed cooperative agreement as it relates to confidentiality of sentencing data.

Authority: 28 U.S.C. 995(a)(1), Sentencing Reform Act of 1984 (Pub. L. 98-473, October 12, 1984).

William W. Wilkins, Jr.,
Chairman.

Public Access to Sentencing Commission Documents and Data

I. Introduction: General Purpose and Authorities

Providing public access to non-confidential sentencing information is consistent both with the letter and the spirit of the Sentencing Reform Act of 1984. Among the Commission's duties under the Act is to "establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C). As part of that mandate, Congress envisioned that the Commission would "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices." 28 U.S.C. 995(a)(12)(A).

Consistent with its clearinghouse function, the Commission is required to provide certain information to the public

regarding sentencing in the federal system. Thus, the Commission is reasonable for: (a) Collecting systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process (28 U.S.C. 995 (a)(13)); (b) publishing data concerning the sentencing process (28 U.S.C. 995(a)(14)); (c) collecting systematically and disseminating information concerning sentences actually imposed, and the relationship of such sentences to the statutory purposes of sentencing set forth in section 3553(a) of title 18, United States Code (28 U.S.C. 995(a)(15)); (d) collecting systematically and disseminating information regarding effectiveness of sentences imposed (28 U.S.C. 995(a)(16)); and, (e) maintaining and making available for public inspection a record of the final vote of each member on any action taken by it (28 U.S.C. 995(e)).

The U.S. Sentencing Commission seeks to carry out its Congressional mandates in a manner that provides for the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents.

II. Public Access to Commission Publications and Other Reports

Publications. Official Commission publications are available to the public through the Government Printing Office or other administratively efficient means. Copies of all such documents are available in the Commission library for public review.

Other Reports. Requests for statistical information regarding federal sentencing practices will be limited to published and/or Commission approved reports. The reports produced from monitoring data collected by the Commission will be available on an updated-monthly basis and photocopies of such reports may be requested from the Commission. Photocopied documents exceeding five pages are available at a cost of fifteen (15) cents per page.

III. Public Access to Commission Data

Comprehensive Datasets. The Commission will create a comprehensive dataset on federal sentencing practices under the Sentencing Guidelines that will be made available for public use through the Inter-university Consortium for Political and Social Research. The dataset, with information that specifically identifies an individual deleted, will be updated periodically. To ensure against the dissemination of confidential

information, those receiving information from the consortium will be required to sign confidentiality agreements.

Source documents. Source documents, in general, will not be available to the public. Much of the information contained within individual files is of a confidential nature and is protected by an agreement entered into by the Commission with the Administrative Office of the U.S. Courts.

IV. Public Access to Commission Minutes and Library Services

Commission Minutes. Approved minutes of Commission meetings are available for public inspection. Appointments to view the minutes must be coordinated through the Communications Director. Photocopies of minutes are also available at a cost of fifteen (15) cents per page.

Library Services. The public is afforded full access to the library and the documents contained therein. Selected books and other documents are available on a lend basis and other materials are available for photocopying. The expense of photocopying rests with the user.

V. Special Research Projects

Authority and Purpose. Under 28 U.S.C. 995(a) (6)-(7), the Commission has authority to enter into "cooperative agreements [] and other transactions . . . with any person, firm, association, corporation, educational institution, or nonprofit organization" and to "accept and employ . . . voluntary and uncompensated services." From time to time the Commission may enter into cooperative agreements with private researchers to undertake an analysis of sentencing data. The purpose of such agreements would be to further the Commission's duty to "establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C).

Criteria and Requirements.

Cooperative agreements, when entered into, will involve formal arrangements with outside persons or organizations. All requirements with respect to preserving the confidentiality of information that are applicable to the Commission and its staff will apply equally to any party who enters into a cooperative agreement with the Commission. Proposals for cooperative agreements will be considered by the Commission in light of the following criteria:

- Whether the proposed research is sponsored by a recognized academic institution, non-profit research organization, or government entity;
- The purpose of the research and extent to which the proposed project would advance the knowledge of human behavior as it relates to the criminal justice process; and
- The amount of data that is being requested and the administrative burden involved in providing such data.

Special Project Coordination and Feasibility. Proposals for special projects will be reviewed by the Staff Director (or his representative), the General Counsel (or his representative), and the Director of Monitoring of the Sentencing Commission, who shall report to the Commission on the feasibility and appropriateness of the proposal. The Staff Director shall ensure that a representative of the General Counsel's Office and of the Probation Division of the Administrative Office of the U.S. Courts are consulted with respect to the proposed cooperative agreement as it may relate to the Commission's obligations involving confidentiality of sentencing data.

Explanation

Section I.

This section sets forth the statutory authorities under which the Commission adopted a policy on public access.

Section II.

Publications. This section refers to official Commission publications such as the Guidelines Manual, the Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, and the Annual Report that are currently available from the Government Printing Office (GPO). As new reports are produced and approved by the Commission for dissemination, they too will be made available through the GPO or other administratively efficient means. It is anticipated that the computer software developed to assist in application of the Sentencing Guidelines (ASSYST) will be made available to the general public through the National Technical Information Service.

Other Reports. This section provides that materials other than official publications will only be made available to the public upon specific approval by the Commission.

Section III.

Comprehensive Datasets. This section provides that comprehensive datasets of sentencing information will be made

available through the Inter-university Consortium for Political and Social Research. Making information available to the public in that manner is consistent with the policies of other federal agencies conducting or administering research related to sentencing and other criminal justice issues. The dataset will contain complete information on cases sentenced under the guidelines with individual identifiers deleted.

Source Documents. This section states that source documents will not be made available to the public. The Commission takes this position relative to source documents for two reasons. First, in June of 1988 the Commission entered into an agreement with the Administrative Office of the U.S. Courts concerning the appropriate treatment of confidential sentencing data.¹

This agreement places several limitations on the Commission in terms of the data collected by representatives of the U.S. Courts and provided by the Commission:

- It permits the use of confidential information "only in connection with" the Commission's "statutory duties;"
- It requires that "[n]o information that will identify an individual defendant or other person identified in the sentencing information" be released outside of the Commission without the express permission of the court for which the information was prepared and that public Commission reports or summaries containing sentencing information be free of confidential identifying information; and
- It requires the Commission to maintain administrative and physical security over the information and limits internal distribution of confidential sentencing information to Commissioners and Commission personnel with a "need for the information."

It is imperative that the Commission operate both by the letter and the spirit of the agreement with the Administrative Office. The cooperation of the Administrative Office in the collection of the data is essential to the Commission's ability to carry out its statutory mandate to "collect systematically and disseminate information regarding effectiveness of sentences imposed."

The second reason that the Commission is unable to make source documents available to the public relates to the physical and financial burden that such a policy would place

on the Commission. In order to protect the confidentiality of information, photocopies of every non-confidential document would be required. Each photocopy would require inspection and removal of individual identifying information. Separate storage would be required for the desensitized documents in order to remove the potential of accidental availability of confidential documents or documents that contained individual identifiers. The Commission simply does not have the resources to provide such a service, particularly given that all information available from such source documents would be available through the dataset provided to ICPSR.

Section IV

Commission Minutes. Section 995(e) of title 28, United States Code, requires that a record of votes of each member of the Commission to be made available to the public. This policy is proposed in furtherance of that statutory requirement.

Library Services. The Commission is assembling a library that will contain books, academic journals and articles, government reports and documents, reports of varied studies on federal sentencing, and bibliographic materials on selected topics related to federal sentencing. As part of its clearinghouse function it is proposed that library materials be made available to the public for review on Commission premises, duplication at the users' expense, or, with respect to some materials, on a lend basis.

Section V

This section provides a formal structure under which the Commission may share information with outside researchers for mutually beneficial purposes. The Commission possesses the authority under statute to enter into "cooperative agreements" with private individuals and organizations and to accept voluntary, uncompensated services. This section anticipates situations where the Commission may wish to cooperate with outside research organizations in the interests of furthering "the advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C). It provides that such cooperative agreements be formal and that all requirements concerning the confidentiality of information be observed. Criteria for accepting a proposed project are provided. Further, a staff committee is required to access proposals for feasibility and appropriateness. It is also required that

¹ Letter from L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, to Honorable William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, June 22, 1988.

certain offices within the Administrative Office of the United States Courts be consulted with respect to any questions concerning the Commission's obligations involving the confidentiality of sentencing data as they may relate to a proposed cooperative agreement.

[FR Doc. 89-14585 Filed 6-20-89; 8:45 am]
BILLING CODE 2210-40-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-73]

Initiation of Section 302 Investigation and Request for Public Comment; Certain Import Restrictions in Brazil

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of investigation under section 302 of the Trade Act of 1974, as amended; request for written comments.

SUMMARY: The United States Trade Representative (USTR) has initiated an investigation under section 302 of the Trade Act of 1974, as amended ("the Trade Act") with respect to certain import restrictions maintained by the Government of Brazil. USTR invites written comments on the matter being investigated.

DATES: This investigation was initiated on June 16, 1989. Written comments from interested persons are due July 18, 1989.

ADDRESS: Comments should be addressed to the Chairwoman, Section 301 Committee, Office of the United States Trade Representative, Room 223, 600 17th St., NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Jon Huenemann, Director, Brazil and Southern Cone Affairs, (202) 395-5190, or Jane Bradley, Associate General Counsel, USTR, (202) 395-3432.

SUPPLEMENTARY INFORMATION: Under section 310 of the Trade Act of 1974, as amended (19 U.S.C. 2420), the USTR must identify as "priority practices" foreign trade barriers the elimination of which is likely to increase U.S. exports, either directly or through establishing a beneficial precedent. Accordingly, on May 28, 1989, the USTR identified as a "priority practice" certain quantitative import restrictions maintained by the Government of Brazil (54 FR 24438). Brazil maintains an import prohibition list which covers approximately 1,000 items, barring U.S. exports of agricultural items and manufactured goods, including meat, dairy products,

plastics, chemicals, textiles, leather products, electronic items, motor vehicles, and furniture. Brazil also uses its licensing regime to implement company-specific and sectoral import quotas, which impede many important U.S. export items, including office machine parts, internal combustion engine parts, and electrical machinery. The lack of transparency of Brazil's licensing system creates uncertainty for U.S. exporters to Brazil and inhibits market access.

Investigation

Section 319(b) of the Trade Act requires the USTR to initiate an investigation, pursuant to section 302(b)(1)(A) of the Trade Act, of this "priority practice", in order to determine whether it is actionable under section 301 of the Trade Act.

Public Comment

The public is invited to comment on the policies and practices of the Government of Brazil that are the subject of this investigation, including (1) whether Brazil's import restrictions referred to above are actionable under section 301, including comments on whether they are inconsistent with a trade agreement; and (2) the amount of the burden or restriction on U.S. commerce caused by the Brazilian restrictions on particular U.S. products.

Interested persons must submit 20 copies of their written comments, in English, by 5:00 p.m. on July 18, 1989, to the Chairwoman of the Section 301 Committee at the address listed above. All submissions must be filed in accordance with 15 CFR part 2006.8, and will be placed in a file (Docket 301-73) open to public inspection pursuant to 15 CFR 2006.12 (except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15).

A. Jane Bradley,
Chairwoman, Section 301 Committee.

[FR Doc. 89-14720 Filed 6-20-89; 8:45 am]
BILLING CODE 3190-01-M

[Docket No. 301-78]

Initiation of Section 302 Investigation and Request for Public Comment; Insurance Market Barriers Maintained by the Government of India

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of investigation under section 302 of the

Trade Act of 1974, as amended; request for written comments.

SUMMARY: The United States Trade Representative (USTR) has initiated an investigation under section 302 of the Trade Act of 1974, as amended ("the Trade Act") with respect to barriers to foreign insurance providers imposed by the Government of India. USTR invites written comments on the matter being investigated.

DATES: This investigation was initiated on June 16, 1989. Written comments from interested persons are due July 18, 1989.

ADDRESS: Comments should be addressed to the Chairwoman, Section 301 Committee, Office of the United States Trade Representative, Room 223, 600 17th Street NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Peter Collins, Director for Southeast Asian and Indian Affairs, (202) 395-6813, or Jane Bradley, Associate General Counsel, USTR, 395-3432.

SUPPLEMENTARY INFORMATION: Under section 310 of the Trade Act of 1974, as amended (19 U.S.C. 2420), the USTR must identify as "priority practices" foreign trade barriers the elimination of through establishing a beneficial precedent. Accordingly, on May 28, 1989, the USTR identified as a "priority practice" the barriers maintained by the Government of India with respect to sales of insurance in India by foreign insurance companies. Private insurance companies are not permitted to sell insurance in India. The state-owned General Insurance Company of India and its four subsidiaries have a monopoly on sales of general insurance, and the state-owned Life Insurance Corporation of India has a monopoly on the sale of life insurance in India.

Investigation

Section 310(b) of the Trade Act requires the USTR to initiate an investigation, pursuant to section 302(b)(1)(A) of the Trade Act, of this "priority practice", in order to determine whether it is actionable under section 301 of the Trade Act.

Public Comment

The public is invited to comment on the policies and practices of the Government of India that are the subject of this investigation, including (1) whether India's insurance market barriers are actionable under section 301; and (2) the amount of the burden or restriction on U.S. commerce caused by these policies and practices.



AMERICAN BAR ASSOCIATION

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Victim/Witness Project

August 30, 1989

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Judge Wilkins:

The Sentencing Commission has solicited public comment on a proposed interim policy regarding public access to Sentencing Commission documents and data. I would like to offer the following comments of the American Bar Association's Committee on the United States Sentencing Commission on that proposed interim policy. At the outset, we again commend the Commission for seeking public input on this important aspect of the Commission's mission.

The Committee supports and agrees with the opening statement in the Commission's policy that: "Providing public access to non-confidential sentencing information is consistent with both the letter and the spirit of the Sentencing Reform Act of 1984." We further support and agree that the Commission has a duty to establish sentencing policies and practices that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process" and we applaud the Commission's very promising structure for public access to full library services and the to-be-developed comprehensive data set.

Our principal concern is the "source documents" paragraph of Section III of the Commission's proposed policy statement which provides that

Source documents, in general, will not be available to the public. Much of the information contained within individual files is of a confidential nature and is protected by an agreement entered into by the Commission with the Administrative Office of the U.S. Courts.

According to the release accompanying the Commission's publication of the policy statement, four "source documents in the possession of the Commission . . . will not be made available for public inspection: presentence reports, plea agreements, judgements and sentencing orders." We understand and agree as to the withholding of the first of these, but question and disagree with the decision as to the others.

Our comments are prompted by the fact that, while one of the four source documents referred to by the Commission -- the presentence report -- is ordinarily considered to be a confidential document, the other three items -- the plea agreement, the judgement and the sentencing order -- are not confidential matters. Written plea agreements are often found in public records. See, e.g., U.S. v. Perez, 1 FSR 93, U.S. v. Malaysiak, 1 FSR 94; U.S. v. Scott, 1 FSR 196; and U.S. v. Restrepo, 1 FSR 336. Judgements and sentencing orders are always parts of the public record. They are found in the court file of every federal criminal case in which a defendant has been convicted and sentenced.

Except for those presentence reports that are maintained as confidential by a district court, all other sentencing documents are nonconfidential sources of sentencing information. As to each of them, in the words of the Commission, public access is "consistent with both the letter and the spirit of the Sentencing Reform Act of 1984."

The Committee recommends that the Sentencing Commission revise the "Source Documents" provisions of Section III so as to provide that:

- 1) Source documents about sentencing will, in general, retain the same availability to the public in the hands of the Commission as they enjoy in the files of the district court;
- 2) Presentence reports, and any other document that is not public at the courthouse where sentence is imposed, will not be made available to the public by the Commission;
- 3) The Commission expects that copies of plea agreements, judgements, sentencing orders, statements of reasons, and the courts' sentencing opinions or transcripts of proceedings, whenever found in the public record of a criminal case, will be transmitted by the sentencing court to the Commission at the conclusion of each case;
- 4) Each of the papers specified in 3), as well as any other public information transmitted to the Commission by a court, will be available for inspection by members of the public at the offices of the Commission.

The documents to which this letter is addressed are already in the public record of each federal criminal case. These records are available to any judge, lawyer, reporter, researcher or other member of the public who seeks access through the clerk's office during normal business hours. These materials are also among the essential documents needed by the Commission to perform its monitoring,

research, policymaking and reporting functions. It would be anomalous, in light of the Commission's status as a public agency and a repository of knowledge about the sentencing process, if it were to withhold these nonconfidential documents from the public, thereby making it necessary for every lawyer, researcher and reporter who wishes to study current or past sentencing practices to travel to the particular federal court that sentenced an offender in order to read the public record of the sentence.

Moreover, it seems clear from Rule 32 of the Federal Rules of Criminal Procedure that the only document Congress intended to withhold from public view is the presentence report. No other paper or record mentioned as a "source document" by the Commission is, by law, a document entitled to confidentiality.

Section I of the Commission's interim policy statement refers to a not-yet-published agreement with the Administrative Office by which the Commission undertook to protect the "confidentiality of certain documents." Those "certain documents" are not specified in the policy itself. Furthermore, Section V of the statement indicates that some Commission information may be divulged to researchers for special research projects if the obligation of the Commission to preserve otherwise confidential information is preserved. Personnel of the Administrative Office are to be consulted if issues relating to "the Commission's obligations involving confidentiality of sentencing data" arise.

Insofar as presentence reports are concerned, the agreement between the Commission and the Administrative Office is appropriate. It signifies that the submission of presentence reports by courts to the Commission does not destroy their confidentiality. As to sentencing documents of an otherwise nonconfidential nature, however, transmittal by a court to the Commission cannot transform a public document into one that is now confidential. Nor can the submission of information by courts be considered a voluntary act since the Commission is required by 28 U.S.C. §994(w) of the Sentencing Reform Act to request from courts whatever information and documents it needs to carry out its statutory responsibilities.

The new statute alters many pre-existing norms about sentencing information in the federal system. The traditional structure tolerated a low level of visibility in the sentencing process. It has now been displaced by an entirely new construct, one characterized by guidelines, statements of reasons, and appellate review and one that emphasizes high visibility and judicial accountability.

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These Congressionally-imposed values may not be defeated or subordinated by agreement with the Administrative Office or any other entity for that matter.

It would be especially anomalous for the Commission to adopt a policy of withholding from the public plea agreements, judgements, sentencing orders and the like when materials of this sort are increasingly finding their way into print. Federal Supplement, Federal Reporter, Lexis, Westlaw, the Federal Judicial Center's Guideline Sentencing Update, the Federal Sentencing Reporter, the Criminal Law Reporter and other national and local publications are already bringing large numbers of federal sentencing decisions to public attention. As professional and public appetite for information about sentencing grows, the Commission ought to be in the vanguard of information providers, not in the caboose. Lawsuits and public demands ought not be necessary to encourage the Commission to take a leadership role and act as a clearinghouse in the dissemination of sentencing information.

The ABA believes that the Commission, as a matter of policy, ought to seek broad public and professional acceptance of its sentencing guidelines. We believe it can best do this by making its processes and those of sentencing courts visible, understandable and accountable. A policy of public access will promote public respect and trust. The opposite policy -- making it difficult for the public to see how public proceedings in the federal sentencing process are carried out -- is bound to lead to public mistrust.

To the extent that our recommendations concern sentencing documents already available at the court of origination, the Commission could not succeed in preventing them from reaching an interested press, legal profession or research community. At most, the Commission can make it expensive and vexatious for sentencing researchers to find what they are looking for. That ought not be the policy of a United States Sentencing Commission.

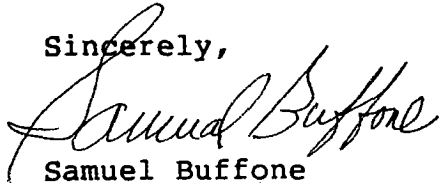
We recognize that due regard must be paid to the difficulties that judges, lawyers, defendants, the Commission and the public face as we all try to adapt to the new system. More specifically, the Committee is sensitive to the transitional problems that the Administrative Office/Sentencing Commission agreement has raised. We would be pleased to meet with the representatives of both agencies to help work out a reasonable transition from the old system of limited public information about sentencing to the new system of accessibility and accountability that Congress ordained to

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replace it. We believe that that transition can undoubtedly be made within the framework established by the Commission's interim draft. But the proposal should first be amended to make clear that the public will have access to all nonconfidential court documents in the hands of the Commission.

I again thank you for this opportunity to provide input and look forward to working with you on the resolution of this issue.

Sincerely,

A handwritten signature in cursive script, reading "Samuel Buffone".

Samuel Buffone
Committee Chairperson

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