



006-96

AMERICAN BAKERS ASSOCIATION

March 5, 1996

BY MESSENGER

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Information

Re: Proposed Deletion of USSG § 2N2.1

Dear Sir or Madam:

The American Bakers Association ("ABA") hereby submits the following comments in response to the United States Sentencing Commission's ("Commission") recent proposal to delete USSG section 2N2.1, which governs sentences for food and drug offenses. See 61 Fed. Reg. 79, 83 (Jan. 2, 1996).

The ABA is the trade association that represents the Nation's wholesale baking industry. It consists of more than 300 baker and allied member firms. The ABA's membership consists of companies of all sizes, ranging from family-owned enterprises to companies that are affiliated with Fortune 500 corporations. Together, these companies produce approximately 80 percent of the Nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their productions, sales, and distribution operations.

The ABA is particularly interested in the Commission's proposal to delete USSG section 2N2.1 because its members are regulated under (among other statutes) the Federal Food, Drug and Cosmetic Act ("Act"), 21 U.S.C. § 301 et seq., which authorizes criminal penalties for certain regulatory offenses. Specifically, because large-scale baking operations may involve changes in ingredients that may be subject to strict labelling and recordkeeping requirements under the Act, we are concerned that misdemeanor violations that result from application of "strict liability" doctrines or from mere negligent conduct will be unfairly punished, under the Commission's proposal, as felonies under the fraud provisions of the Sentencing Guidelines.

The Commission proposes to delete USSG section 2N2.1 in its entirety and to amend the existing fraud guideline (USSG section 2F1.1) so that "food and drug cases for individuals and organizations could appropriately be sentenced under that guideline," 61 Fed. Reg. at 83. In other words, purely regulatory violations would be treated, for sentencing purposes, in the same manner as intentionally fraudulent conduct. We believe that such a change would create a significant anomaly in the sentencing scheme for food and drug offenses, would deprive the existing sentencing scheme of needed flexibility, and would result in unfairness in a very real class of cases.

First, eliminating USSG section 2N2.1 will create an anomaly in the sentencing of food and drug regulatory offenses. Under the existing guidelines scheme, the sentencing of food and drug regulatory offenses is covered by section 2N2.1, which contains not only a cross-reference to the fraud guideline for offenses involving intentionally fraudulent conduct (USSG section 2F1.1), but also a note permitting a downward departure where mere negligence is involved. See USSG § 2N2.1 comment note 1. This scheme is generally consistent with the Act's express distinction between felony offenses, which require proof of intent to defraud or mislead, see 21 U.S.C. § 333(a)(2), and misdemeanor regulatory offenses, which do not, see id. § 333(a)(1). Under the Commission's proposal, however, cases involving knowing, reckless, negligent or even non-negligent conduct will automatically be swept within the ambit of section 2F1.1, which is designed to cover intentional fraud and which contains more severe penalties (depending on, among other factors, the resulting "loss"). This result is anomalous because it means that an important category of cases (food and drug regulatory offenses) will be treated in a manner totally at odds with the mental state that underlies such offenses.

Second, the Commission's proposal deprives the existing sentencing scheme of needed flexibility to handle a broad spectrum of fact-specific situations. Although the Commission's proposal provides for the possibility of an upward departure under section 2F1.1 for circumstances in which the offense places a large number of persons at risk of serious bodily injury, see 61 Fed. Reg. at 83, there is no reciprocal provision for a downward departure for circumstances in which the offense results from mere negligence or recklessness. As noted above, section 2N2.1 incorporates a more fact-sensitive approach to determining appropriate sentences for regulatory offenses. By proposing to delete

section 2N2.1, the Commission seeks to purchase apparent simplification of the Guidelines at the expense of a false consistency in the treatment of food and drug offenses.

Finally, adoption of the Commission's proposal would result in unfairness in a very real class of cases. Because courts have treated food and drug offenses as strict liability "public welfare" offenses, responsible corporate officials may be subject to criminal liability even if they had no knowledge of any wrongdoing, much less intentionally commit wrongdoing. See, e.g., United States v. Park, 421 U.S. 658, 673-74 (1975) (finding a corporate officer criminally liable upon proof that "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of and that he failed to do so"); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (food and drug statute "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to the public danger"). The facts of the Park are instructive, because it involved the imposition of criminal liability on the president of a national food store chain who had no knowledge of the unsanitary warehouse conditions that led to the allegation of shipment of adulterated food in interstate commerce. The Commission's proposal would unfairly treat such offenders under the same rubric as someone who purposefully and fraudulently caused adulterated food to be shipped in interstate commerce.

The Commission's proposal appears to be an attempt to fix something that does not appear to be broken. For the foregoing reasons, we believe that the Commission should decline to adopt its proposal to delete USSG § 2N2.1. Thank you for your careful consideration of our views.

Very truly yours,

Robb MacKie

Robb MacKie
Vice President
Government Relations