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March 5, 1996

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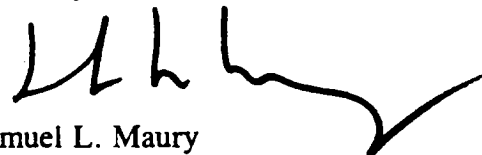
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
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Attn: Public Information

Ladies and Gentlemen:

Enclosed are comments submitted on behalf of The Business Roundtable in response to the Commission's request for public comment on proposed amendments to sentencing guidelines, published in the Federal Register on January 2, 1996.

If you have any questions about these comments, we will be pleased to respond.

Sincerely,



Samuel L. Maury

SLM/emc

Enclosure

March 5, 1996

COMMENTS OF THE BUSINESS ROUNDTABLE
ON PROPOSED AMENDMENTS TO SENTENCING
GUIDELINES FOR FOOD AND DRUG OFFENSES
(U.S.S.G. §§ 2 F1.1; 2N2.1)

The Business Roundtable is pleased to comment on the recently proposed revisions to the federal Sentencing Guidelines, 1/ insofar as they apply to food, drug and cosmetic offenses.

The members of The Business Roundtable are approximately 200 chief executive officers of major corporations, engaged in a wide variety of businesses. Accordingly, its constituency includes many companies not directly affected by the changes under consideration. However, as the following comments make clear, the proposed changes involve important issues of general principle that are of concern to the entire Roundtable membership.

These comments will address the matters of principle rather than the specifics of food, drug and cosmetic sentencing. The Commission will receive detailed comments from other business groups, whose members are more concentrated in the industries directly affected, 2/ and there is no need to repeat or paraphrase them.

1/ See 61 Fed. Reg. 79 (Jan. 2, 1996).

2/ The Roundtable particularly calls attention to the comments submitted on behalf of the Grocery Manufacturers of America, Inc., the Nonprescription Drug Manufacturers Assoc., and the Pharmaceutical Research and Manufacturers of America.

The Roundtable has two general and inter-related objections to this draft proposal: one of substance and one of process. The proposal should be rejected because it is contrary to the basic mandate of the Sentencing Reform Act and because there is no adequate support for the change. In addition, this Comment will briefly address the issue of "gain" as a proxy for "loss" when calculating fines.

I. The Proposal Is Contrary to the Mandate of the Sentencing Reform Act.

The Commission's working group proposes to eliminate the existing guideline for food, drug and cosmetic offenses (U.S.S.G. § 2N2.1) and treat all of these offenses under the fraud guideline in U.S.S.G. § 2F1.1. The proposal is described only in cursory terms at the conclusion of a long register notice devoted to other matters. In fact, however, the proposal to treat all defendants as if they were guilty of fraud, whether they have committed fraud or not, would represent a sea change in sentencing policy and is dramatically opposed to the instructions that Congress has given the Commission.

The U.S. Sentencing Commission was created by Congress in 1984 to establish sentencing standards for federal crimes. The principal problem that Congress sought to address was the "shameful disparity" in the jail sentences imposed on individuals who had been convicted of similar offenses. ^{3/}

^{3/} See 1984 U.S. Code & Admin. News, 98 Cong., 2d Sess. 3182, 3221, 3224-29, 3248.

Congress did not suggest that there was anything wrong with disparate jail sentences for different crimes. It is obviously just as perverse and "shameful" to treat differently situated defendants similarly as it is to treat similarly situated defendants differently. The Commission has recognized this fact by establishing no fewer than 43 basic offense levels (U.S.S.G. § 5A), with myriad mathematical adjustments up and down. It is absurd to propose that the issue of whether someone has committed fraud or not is less important than these other mathematical matters.

Congress has given the Commission guidance for the development of sentencing guidelines. In 18 U.S.C. § 3553(a), Congress listed the "[f]actors to be considered in imposing a sentence." Included in those factors are "the nature and circumstances of the offense," as well as "the need . . . to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense."

It is useful to remember the prolonged debate over the evolution of the guidelines for Sentencing of Organizations (U.S.S.G. § 8), which were ultimately adopted in 1991. The deepest divide in that debate was between those who believed that criminal sentences should be driven by purely economic calculations (analogous to the Working Group's proposal here) and those who believed that criminal sentences should take account of moral culpability (as mandated by the governing statute). The Commission was so torn over this issues that at one point

it even published for comment two alternative options that reflected the competing views. 4/

This battle was settled by a compromise, which tempered pure economic calculations by considerations of moral culpability. Thus, the alternative loss-based fine in U.S.S.G. § 8C2.4(a)(3) only applies to the extent "the loss was caused intentionally, knowingly, or recklessly." Moral culpability makes a big difference.

It should not be necessary to fight this battle all over again. Fraud is a serious offense in our legal system, characterized in common law by terms like "unconscionable," "venal," "corrupt" or a "willful intent to deceive." There is hardly a trivial difference between people who have committed fraud and those who have not, in terms of "the nature" or "the seriousness" of their offense and the deserved "just punishment." This is particularly true in a heavily regulated enterprise like the production and marketing of food, drugs and cosmetics -- where many of the "crimes" subject to the sentencing guidelines have no required element of intent or mens rea, but are in effect strict liability offenses which do not involve moral culpability.

4/ U.S. Sentencing Commission: Chapter Eight -- Sentencing of Organizations (Oct. 1989).

The working group's recommendation is therefore contrary to the Congressional mandate and to previous determinations of this Commission. Moreover, there is no demonstrated need for the change.

II. There Is No Stated Justification for Such a Major Change.

The Food and Drug Working Group met privately, so outside commentators are not in a position to know all the factors they may have considered in making their proposal. In their published Report, 5/ however, the only reason stated for the recommendation is that in some cases there was an "inappropriate failure to cross reference" from the food and drug offense guideline (U.S.S.G. § 2N2.1) to the fraud guideline (U.S.S.G. § 2F1.1).

Without intimate knowledge of the factual background and the arguments made by counsel in these cases, it is not possible for a commentator to know whether the criticism is justified. Moreover, the Working Group does not disclose whether its criticism applies to a large or a small number of cases. 6/ But even if there had been a demonstration that a guideline revision is needed, the Working Group should have recognized that there are better ways to cure the problem than to abolish the distinction between conduct that is fraudulent and conduct that is not.

5/ Food and Drug Working Group, Final Report at pp. 12, 20 (February 1995).

6/ The Report merely refers to two unidentified cases and indicates "some" others did not appropriately cross reference the fraud guidelines. See Food and Drug Working Group, Final Report at p. 12 (Feb. 1995).

More focused revisions are available and would be more just. For example, the Commission could expand on the pertinent explanatory note (U.S.S.G. § 2N2.1, Note 2), to make it clear that the cross reference is mandated in fraud cases. The reference to "fraud" in the current note may not be sufficiently prominent. A prosecutor could also appeal a sentence that improperly deviates from the guidelines, and an appellate decision would presumably flag the issue for the future.

Either or both of these approaches could address the perceived problem of disparate sentences for similar crimes without the unjust imposition of similar sentences for vastly different crimes.

III. The Risks of Basing Fines on Gains

The Commission has asked for comment on whether it is desirable to substitute a calculation of "gain" for a calculation of "loss" in applying U.S.S.G. § 2F1.1 "when the essence of the offense is fraud against regulatory authorities with no economic loss."

The Roundtable's concern here is purely one of principle because the change would not affect the fines paid by an organization. (If an organization were convicted of fraud, it presumably would be subject to the alternative gain/loss fines set out in U.S.S.G. § 8C2.4(a). See also U.S.S.G. § 8C2.1(a)). Nevertheless, the

Roundtable is concerned about the risk of prosecutorial over-reaching if fine levels are determined by "gain."

The problem is illustrated by U.S. v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), a case that the Commission's Federal Register notice cites as problematic. Chatterji was written by former Commission chairman, Williams Wilkins. Judge Wilkins refused to allow gain to be used as a proxy for loss because there was no showing of any loss whatever. ^{7/} That determination may have been affected by the fact that the claimed loss to consumers was vastly overstated. The court below had found that the loss was measured by defendant's total sales of a product -- apparently on the unwarranted assumption that the products were totally worthless. The dissenting opinion makes a similar mistake when it suggests an alternate "gain" calculation measured by total sales -- apparently assuming that sales are the same thing as profit.

A problem of a different kind would be presented if a prosecutor decided that the unwarranted gain was measured by the costs avoided through a defendant's non-compliance. This could lead to the perverse result that the most severe punishments are reserved for non-compliance with regulations that are the

^{7/} Compare analogous rulings in civil actions which permit rough estimates of the amount of damage once the fact of some damage has been proven with greater rigor. E.g. Northwest Publications v. Crumb, 752 F.2d 473, 476-77 (9th Cir. 1985) ("The burden on [plaintiffs] to show causation is more stringent than the burden to prove the amount of damages.")

most difficult and burdensome with which to comply -- again without regard to the degree of moral culpability.

Judicial recognition of this concept would be of particular concern to the Roundtable if it found its way into the interpretation of the alternative fine provisions of U.S.S.G. § 8C2.4(a), which apply to organizational offenses generally. If a prosecutor claims that the "gain" was the difference in the cost of the existing compliance regime and the cost of a compliance regime that would have effectively prevented the offense in question, it could mean that the most statistically improbable offenses will carry the heaviest fines because it would require extraordinarily comprehensive and burdensome compliance programs to prevent them.

The Commission therefore should recognize the potential for abuse and misapplication of a gain measure, and also recognize that action it takes in this specific area could have broad application across the range of organizational sentences.