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March 5, 1996

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Attention: Public Information

RE: Proposed Amendments to Sentencing Guidelines
for Food and Drug Offenses

Dear Sir/Madam:

The Food Marketing Institute (FMI) is pleased to submit these comments to the United States Sentencing Commission (the Commission). On January 2, 1996, the Commission proposed revisions to the federal *Sentencing Guidelines*, including amendments to Sections 2N2.1 and 2F1.1 governing the manner in which individuals and corporations are treated following convictions under the Federal Food, Drug, and Cosmetic Act, Poultry Products Inspection Act, and Federal Meat Inspection Act. FMI believes the proposed amendments to Sections 2N2.1 and 2F1.1 would have unintended negative consequences and should not be adopted.

The Food Marketing Institute (FMI) is a nonprofit association conducting programs in research, education, industry relations and public affairs on behalf of its 1,500 members including their subsidiaries — food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of \$220 billion — more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms and independent supermarkets. Its international membership includes 200 members from 60 countries.

36

BACKGROUND

Under the existing guidelines, sentences for individuals in criminal cases involving violations of statutes and regulations dealing with any food, drug, biological product, device, cosmetic or agricultural product currently are governed by U.S.S.G. § 2N2.1. That section provides for a "base offense level" of six, assuming that the underlying regulatory offense involves "knowing or reckless" conduct. In the event of a merely negligent or unintentional violation of statute or regulation, the Guidelines permit a sentencing court discretion to grant a "downward departure" in order to more appropriately match a defendant's conduct and sentence.

In particularly egregious cases in which the regulatory violation involves fraud, Section 2N2.1 requires application of U.S.S.G. § 2F1.1, which governs crimes involving fraud and deceit. That section similarly begins with a base offense level of six, but provides for significant increases in offense level -- and, by extension, the possible range of any fine and/or jail term imposed -- based upon the amount of "loss" occasioned by a defendant's conduct.

PROPOSAL

Under the proposed amendments, Section 2N2.1 would be deleted in its entirety, and all food, drug, and related regulatory offenses, including violations by corporations and other organizations, would be sentenced under Section 2F1.1. Although an allowance would be made for an upward departure in a case involving conscious or reckless risk of serious bodily injury, the proposed commentary makes no reference to the appropriateness of a downward departure, even in cases involving unintentional regulatory violations. This change would have dramatic impact on the severity of sentences imposed in food and drug cases.

DISCUSSION

Laws governing foods, drugs, and cosmetics are characterized as "strict liability" statutes and, as such, the government need not prove awareness of wrongdoing. Mere proof that "the defendant has, 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" is sufficient.¹ Grouping all violations of the food and drug laws under Section 2F1.1 would deprive federal prosecutors and sentencing judges of the flexibility they need to fashion appropriate sentences in those cases where the defendant's violative conduct amount to no more than simple negligence or lack of oversight.

¹ United States v. Park, 421 U.S. 658, 673-74 (1975). See also United States v. Dotterweich 320 U.S. 277 (1943)

The fact that enhanced penalties are already available in food and drug cases involving fraud further underscores the inadvisability of the proposed amendments. Current Section 2N2.1 imposes a flat base offense level for any regulatory violation but permits prosecutors to seek enhanced penalties under Section 2F1.1 for cases involving fraud or where the regulatory violations are part of a pervasive scheme. The proposed amendments, therefore, would have little, if any, impact on sentences in cases in which the conduct involved would have been charged as fraud or otherwise triggered application of Section 2F1.1. Instead, by making fraud the rule rather than the exception, the amendments would substantially increase the penalties in cases that otherwise do not warrant severe punishment.

In proposing these amendments, the Commission has cited no study or evidence that would justify this change. The Commission has not identified any cases in which sentences imposed under § 2N2.1 are inappropriate. The Guidelines in this area appears to be working well. As a matter of fairness, persons convicted of strict liability regulatory offenses without criminal intent should not be sentenced under the guidelines for fraud.

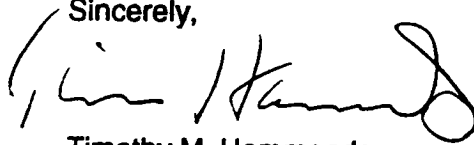
It is our understanding that guidelines for other strict liability regulatory offenses are not treated in this manner. We believe it would be unreasonable and unfair to treat strict liability offenses inconsistently because such treatment would result in disparate treatment among defendants with similar records who have been found guilty of similar crimes.

In sum, the proposed amendments would brand all violations pertaining to food, drugs, and agricultural products as fraud, eliminating any distinction between unintentional or negligent acts, and purposeful or fraudulent acts, and impose, in cases involving mere negligence, penalties previously reserved for intentional and fraudulent conduct. FMI strongly opposes the proposed amendments to Sections 2N2.1 and 2F1.1 of the *Guidelines* for these reasons and urges the Commission to delete these provisions from any recommendations submitted to Congress. If the Commission nevertheless elects to submit the proposed changes in these sections for Congressional consideration, FMI urges the Commission to modify the guidelines to allow prosecutors and judge more discretion in sentencing purely negligent regulatory violations.

United States Sentencing Commission
March 5, 1996
Page 4

FMI appreciates this opportunity to submit comments on this important issue. We would be pleased to participate in further discussion of these issues either informally or as part of a formal working group.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Hammonds", written over the printed name.

Timothy M. Hammonds
President and CEO