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American Frozen Food Institute • 2000 Corporate Ridge, Suite 1000 • McLean, Virginia 22102

Telephone (703) 821-0770 • Fax (703) 821-1350

March 6, 1996

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

Re: Proposed Amendments to Sentencing Guidelines

Dear Sir/Madam:

The American Frozen Food Institute (AFFI) is the national trade association representing frozen food processors, suppliers, and marketers. AFFI's more than 530 member companies account for over 90 percent of frozen food production in the United States. AFFI members are located throughout the country and are engaged in the manufacture, processing, transportation, distribution, and sale of products nationwide. AFFI appreciates the opportunity to comment on the above-captioned proposed amendments.

On January 2, 1996, the United States Sentencing Commission (the Commission) announced in the *Federal Register* several 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. ^{1/} AFFI has strong reservations about the proposed amendments to Sections 2N2.1 and 2F1.1.

SUMMARY

The *Sentencing Guidelines* already provide stiff sanctions, in the form of imprisonment and fines, for violations of the nation's food and drug laws. The proposed amendments to Sections 2N2.1 and 2F1.1 would treat all violations of these statutes as cases involving fraud,

^{1/} 61 Fed. Reg. 79-83 (Jan. 2, 1996)

severely limiting the ability of federal prosecutors and courts to respond appropriately to the broad spectrum of conduct punishable under these laws.

BACKGROUND

Sentences 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. 2/ That section provides for a "base offense level" of six, assuming that the underlying regulatory offense involves "knowing or reckless" conduct. 3/ In the event of a merely negligent violation of a 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.

DISCUSSION

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 mere negligence. This change would have a dramatic impact on the severity of sentences imposed in food and drug cases.

2/ Chapter 2 of the Guidelines governs sentences for individuals. Chapter 8, in turn, sets forth the Organizational Sentencing Guidelines, pursuant to which a corporate offense level and, by extension, base fine, are determined. Food, drug, and agricultural products were, however, specifically excluded from the 1991 amendments which added the organizational guidelines. As a result, fines for organizations convicted of offenses covered by Section 2N2.1 continue to be governed by pre-*Guidelines* law.

3/ See U.S.S.G. § 2N2.1 (Application Note 1).

Laws governing food, drugs, and cosmetics are characterized as "public welfare" 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. ^{4/} 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 amounts to no more than simple negligence or oversight.

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. ^{5/}

In sum, the proposed amendments would brand all violations pertaining to food, drugs, and agricultural products as fraud, eliminating any distinction between negligent, purposeful, and fraudulent acts, and impose, in cases involving mere negligence, penalties previously reserved for intentional and fraudulent conduct. AFFI 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 for Congressional consideration, AFFI urges the Commission to include commentary that would allow prosecutors and judges more discretion in sentencing purely negligent regulatory violations.

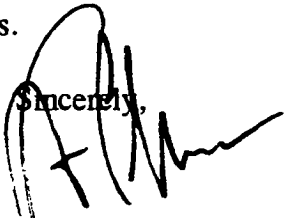
^{4/} United States v. Park, 421 U.S. 658, 673-74 (1975). See also United States v. Dotterweich, 320 U.S. 277 (1943).

^{5/} For example, in a case involving distribution of adulterated meat where the amount of "loss" exceeds \$500,000, application of Section 2F1.1 would result in a base offense level, before adjustment, of not less than 16, subjecting a first-time offender to a minimum of 21 months incarceration. Currently, under Section 2N2.1, the base level for such a violation is six, with a corresponding sentencing range of 0 to 6 months. A first-time offender, moreover, would be eligible for a sentence of probation.

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AFFI appreciates this opportunity to submit comments on this highly important issue and would be happy to provide any additional assistance the Commission may require in preparing its recommendations to Congress.

Sincerely,



Steven C. Anderson
President

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