
PUBLIC COMMENT

1996 AMENDMENT CYCLE



United States Sentencing Commission

March 1996



001-96
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J. Robert Cooper, Esquire

January 31, 1996

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

Re; Section 2D1.1(b)(1)

Dear Mr. Chairman:

Historically, the courts, the office of the U.S. Attorney, the Probation, have enhanced the base offense level of all codefendants in cases of conviction under 21 U.S.C. 841(b)(1), etc. Even though only one member of a conspiracy, either knowingly or unknowingly, to the others, possessed a weapon, assuming such a weapon was found, then the two (2) points were added in the sentencing process.

With the December 6, 1995 decision of the Supreme Court in Bailey v. U.S.A., 116, Supreme Court, 501, new light has been added to the word "use" in applying this particular section.

While 18 U.S.C. 924(c)(1) includes "use" or "carry" as part of the offense, the case itself dealt only with the "use" part of the Code Section. Obviously, the courts now must address the "carry" issue. Hopefully, the courts will be as enlightened in defining "carry" as they have in the definition of "use". The evidence in Bailey reflects that the weapon that he was carrying was in the trunk of his vehicle. The weapon in the Robinson case reflected that her weapon was concealed in the home. Bailey may have some difficulty in its application in some jurisdictions, however, Robinson should be clear in all jurisdictions that she was, not for the purpose of this statute, "carrying" a weapon.

In each of these cases, the defendants were the persons in "possession of" a weapon as suggested by 2D1.1(b)(1).

January 31, 1996

I have a particular case, and I am sure that there are many, many others around the nation, where my defendant neither "used" or "carried" the weapon. The facts in my case show that my client was a mule who drove an automobile to a point where money was to be exchanged for drugs. This was a "sting" operation. The buy money was in the trunk of my client's vehicle. He had been instructed, upon arriving at the scene, to go into a restaurant and tell a particular individual that the money had arrived. Once that was done, my client went to another part of the restaurant, seated himself, and ordered a meal.

The individual, now knowing that the money was on the premises, gave a signal to an individual standing by a telephone booth outside the restaurant. This was done without knowledge of my client. Once the individual by the telephone booth got the signal, he made a telephone call to the undercover DEA number telling the agent who answered the phone, that the money was on the premises. As soon as this happened the surveillance agents arrested the two (2) individuals in the restaurant (including my client) and attempted to arrest the individual at the telephone booth. When the arrest, as to this individual, started down, the individual fled the scene. He was apprehended a short distance away. When taken into custody, he was brought back to the restaurant and there a search of his person was conducted. The agents found a number of bullets in his pocket. When interrogated, the individual admitted that this bullets were to a pistol which he had had in his possession, however, he hid the pistol in the woods, prior to being taken into custody. He agreed to take the agents back to the site where the pistol was hidden and they did in fact, seize the pistol. The bullets in his pocket were similar in nature to those in the pistol, and they were of the same caliber. All of this was done without the knowledge of my client.

In the Indictment that was brought against the codefendants, only the one codefendant who had possessed the weapon was charged with the substantive violation. All codefendants pled guilty to one or more counts of the indictment. My client pled guilty to a conspiracy count, involving 841(a)(1).

However, at sentencing, Probation recommended, and the District Court over the objections of trial counsel, enhanced the base level by two (2) levels due to the fact that the one (1) codefendant had "possessed" a weapon during the commission of the crime.

January 31, 1996

Requested Application Change

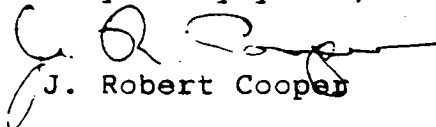
It is respectfully submitted, that the extension of 2D1.1(b)(1) to the facts of this case, is not warranted. It is further submitted that the Supreme Court, given the opportunity, will in all likelihood, determine that carrying and/or in this case, "possessing" is also subject to further definition and limitations. Foot Note 3, states that, the application should be applied, "unless it is clearly improbable that the weapon was connected with the offense". This present language should be broaden so as to instruct the District Court Judges that it is not to be applied in cases such as the one my client was convicted of. District Court Judges, as you well know, come under a lot of pressure to impose the "maximum possible" and those who do not do so, are singled out and criticized for their failure to give the maximum. It is very, very difficult if not impossible, to convince a District Court Judge to not apply 2D1.1(b)(1) under the circumstances described.

This is particularly true due to the fact that over the years, "case law" has developed on the subject in just about every circuit across the nation. Hypothetically, under these rulings, if there are 50 codefendants in a drug conspiracy case, and only one gun, then all codefendants could "literally" be held accountable for the two (2) point enhancement.

On behalf of my client, I would respectfully request the Commission to look at this situation and see if something can be done to give relief to my client. I understand that major changes to the guidelines must be considered to the Congress, however, it may not be necessary to submit the notes and commentary in a matter similar to this. This is particularly true, where the Commission has announced that it will only give two (2) matters to the Congress (crack cocaine and money laundering) in the year 1996.

I appreciate your thoughts and consideration.

Very truly yours,


J. Robert Cooper

JRC/mg

002-96
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January 31, 1996

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

Re: 2S1.2 (Money Laundering)

Dear Mr. Chairman:

After a two year delay, the Commission, as part of its submission to Congress in May of 1995, submitted a change to the provisions of part S. The move by the Commission, was intended to relieve the strict application and enforcement of this Section to those persons not involved in drug transactions. The Section, as originally drafted, contemplated enforcement of the Organized Crime Act of 1984. However, in its application, many defendants are placed into the "Money Laundering Section" even though their offense of conviction was totally unrelated to drugs. This is particularly true in Section 2S1.2(b)(1)B.

Perhaps the recommendation of the Commission came in part from their review of several District Court cases which dealt with the issue of "heartland" misconduct.

I have a client who was a small town "sports betting" bookie. His gambling operation was conducted through a small business, and frequently, those placing bets gave him their pay checks, and/or checks on their own companies. The District Court cases in favor of the bookies, stated that the placing of the bets, or the payment, under these circumstances was the crime itself. I am sure that you are familiar with these Opinions and their discussions.

In any event, when the Commission attempted to perhaps correct this inequity, the recommended change was seen by the Attorney General, the Department of Justice, and the Congress as an effort to reduce penalties on "drug dealers". Accordingly, the Money Laundering Amendment was defeated, and the Congress has requested that you come back to them with a further suggested change.

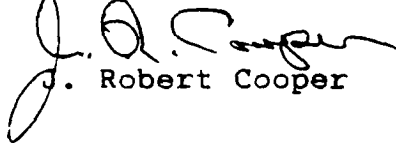
Mr. Richard P. Conaboy, Chairman
Page 2

January 31, 1996

This letter is to respectfully suggest, that the change to Section 2S1 be accomplished in such a fashion as to perhaps continue to strong penalties against drug dealing and give some relief to those who might warrant that their crimes be limited to, and considered under, the classified crimes of conviction, as was noted in the 1995 effort to modify this Section.

I appreciate your efforts and those of the Commission to continue to study this matter and perhaps carry forward with your good intentioned efforts.

Very truly yours,


J. Robert Cooper

JRC/mg

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003-96

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OF COUNSEL
MICHELE F. CROWN

February 20, 1996

BY HAND DELIVERY

The Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

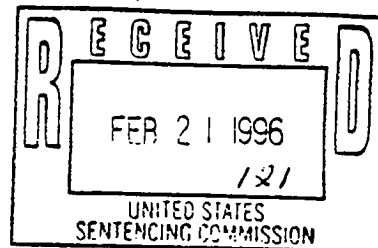
Re: Proposed Amendment To Sentencing Guideline 2N2.1

Dear Judge Conaboy:

On January 2, 1996, the Commission proposed to delete USSG § 2N2.1 ("Food, Drugs, and Agricultural Products"), 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal"). The purpose of this letter is to request the Commission to withdraw the Proposal or, alternatively, extend the comment period so that the Commission will postpone a decision on the Proposal until after May 1, 1996.

The Commission and entities affected by the Proposal would benefit if the March 6, 1996 comment deadline is either withdrawn or extended. The activities of approximately one-fourth of the economy of this country are regulated by the Food and Drug Administration. The effects of a precipitous change to the existing food and drug guideline would be severe.

USSG § 2N2.1 applies to sentences under statutes that regulate foods, drugs, medical devices and certain other consumer products. Where fraud is involved, USSG § 2F1.1 now applies. See USSG § 2N2.1(b)(1). Thus, USSG § 2N2.1 is only employed in regulatory cases not involving fraud. Most defendants in those cases are charged under the doctrine set forth in United States v. Park, 421 U.S. 658 (1975). That case upheld the authority of the United States Food and Drug Administration to obtain a conviction against a corporate officer without having to prove that the defendant had any mens rea. These so-called "strict liability" criminal prosecutions are often referred to as Park cases.



Letter to the Honorable Richard P. Conaboy

February 20, 1996

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Most, if not all, of affected industry will continue to support strict sentences against individuals and corporations convicted of felony food and drug offenses where fraudulent conduct is established. They do not oppose application of USSG § 2F1.1 to food and drug cases involving fraud. However, similar stiff jail sentences on individuals and corporations convicted of misdemeanor offenses, which generally are "strict liability offenses," is simply not warranted.

On February 15, 1996, James R. Phelps of the Washington D.C. law firm of Hyman, Phelps & McNamara, P.C., and the undersigned met with four officials from the Sentencing Commission: John R. Steer, Frank Larry, Marguerite Driessen, and Linda Wernery. Mr. Phelps and I represent companies and trade associations with members subject to USSG § 2N2.1. We asked for the meeting to discuss why the Proposal is flawed.

Mr. Phelps and I believe that the meeting was a mutually beneficial opportunity for the participants to engage in a healthy and productive dialogue. We raised issues, facts and opinions that we do not believe were considered fully in a February 1995 Final Report issued by the Commission's Food and Drug Working Group.

Mr. Phelps and I have spoken with many trade associations and others who have a keen interest in the Proposal. Firms (and their representatives) affected by the Proposal have raised a unanimous voice expressing strong opposition. Many of these entities are willing to explain their opposition in comments to be filed with the Commission. However, withdrawing the Proposal before the close of the comment period will relieve the affected industry from undergoing the expense and burden of submitting comments on a fast-track schedule to a Proposal that merits further study.

There is no factual basis for eliminating USSG § 2N2.1. In the Federal Register notice announcing the Proposal, the Commission referred to a two-year study conducted by the Food and Drug Working Group. 61 Fed. Reg. 83 (1996). The Working Group's Report did not propose to eliminate USSG § 2N2.1. Moreover, the Working Group never indicated that any judge, prosecutor, or defense attorney has complained that even one sentence for a misdemeanor food and drug offense was inappropriate under USSG § 2N2.1.^{1/}

We recognize, and have no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. See 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines may not justify deletion of USSG § 2N2.1. Nor should a desire to simplify the

^{1/} In fact, the Working Group stated that "the issue remains whether [§ 2N2.1] as currently drafted provides for adequate fines..." Food and Drug Working Group Final Report at 19.

Letter to the Honorable Richard P. Conaboy
February 20, 1996
Page 3

Guidelines form a basis to fit strict liability criminal cases into a Guideline that was promulgated to deal with fraud.

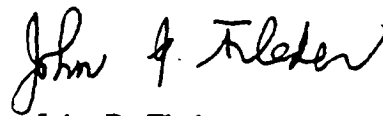
We believe that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are strict liability prosecutions commenced under statutes other than those now explicitly implicated by 2N2.1. The Commission might want to republish its Proposal to expand USSG § 2N2.1 to cover other regulatory statutes. Alternatively, the Commission might consider a new Guideline that would cover all regulatory violations where fraud is not involved. Indeed, the Commission could use that proposal to solicit comment on whether "harm" should be a relevant sentencing factor in regulatory cases.

In sum, USSG § 2N2.1 may need some modification. However, that modification should not be in the form of deleting USSG § 2N2.1 in its entirety, resulting in all food and drug cases being sentenced under USSG § 2F1.1.

Mr. Phelps and the undersigned are prepared to provide whatever assistance we can give the Commission. We have extensive backgrounds in food and drug criminal cases. Both of us have been prosecutors and defense counsel in this area. We would be pleased to serve on an Advisory Working Group, if the Commission chooses to form such a group, to deal with the issues raised in this letter.

We appreciate this additional opportunity to present our views.

Sincerely yours,


John R. Fleder

JRF:jch

cc: The Honorable Michael S. Gelacak
The Honorable A. David Mazzone
The Honorable Wayne A. Budd
The Honorable Julie E. Carnes
The Honorable Michael Goldsmith
The Honorable Deanell R. Tacha

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004-96



National Broiler Council

February 28, 1996

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

Re: Proposed Amendments to Sentencing Guidelines

Dear Sir/Madam:

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/} The National Broiler Council (NBC), the national trade association representing the producers/processors of more than 95 percent of the broiler chickens consumed in the United States, has strong reservations about the proposed amendments to Sections 2N2.1 and 2F1.1 and welcomes this opportunity to comment.

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

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

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 foods, 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. NBC strongly opposes the proposed amendments to Sections

^{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.

United States Sentencing Commission
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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, NBC urges the Commission to include commentary that would allow prosecutors and judges more discretion in sentencing purely negligent regulatory violations.

NBC 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,

A handwritten signature in black ink, appearing to read "George Watts", with a stylized flourish at the end.

George Watts
President

March 5, 1996

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

Re: Proposed Amendments to U.S.S.G § 2N2.1

Dear Sir/Madam:

The following comments are submitted on behalf of the Grocery Manufacturers of America, Inc. ("GMA"), the Nonprescription Drug Manufacturers Association ("NDMA"), and the Pharmaceutical Research and Manufacturers of America ("PhRMA") in response to the United States Sentencing Commission's ("the Commission") recently proposed amendments to Section 2N2.1 of the U.S. Sentencing Guidelines ("the Guidelines"). 1/

SUMMARY

On January 2, 1996, the Commission announced a series of proposed amendments to the federal Sentencing Guidelines, including one directed to the manner in which individuals and corporations are treated following conviction for

1/ GMA is a national trade association of approximately 140 companies that manufacture food sold in retail grocery stores through the United States and internationally. Its member companies are responsible for producing more than 85 percent of the packaged food sold at retail in the United States.

NDMA is a national trade association representing approximately 75 manufacturers and distributors of over-the-counter ("OTC") medications. NDMA members represent roughly 95 percent of the retail sales of OTC medications in the United States.

PhRMA represents the country's leading research-based pharmaceutical and biotechnology companies. Investing nearly \$16 billion annually toward the discovery and development of new medicines, PhRMA companies are the source of nearly all new drug discoveries worldwide.

violations of the Federal Food, Drug, and Cosmetic Act, 2/ the Poultry Products Inspection Act, 3/ and the Federal Meat Inspection Act, 4/ among other statutes. See 61 Fed. Reg. 79, 83 (Jan. 2, 1996). This proposed change would delete Guideline Section 2N2.1 in its entirety and would, instead, treat all those offenses originally within its ambit as cases involving fraud, governed by Section 2F1.1. Thus, purely regulatory violations would be treated in the same manner as intentionally fraudulent conduct. We believe the Guidelines as currently worded properly provide the flexibility needed both to respond to the broad spectrum of conduct involved in the prosecution of these so-called "public welfare" statutes and to avoid the injustice that would otherwise result by imposing sanctions designed to address fraud in cases arising out of strict liability regulatory violations. Consequently, we urge that the amendment, as proposed, be rejected.

BACKGROUND

Sentencing in criminal cases involving violations of statutes and regulations dealing with consumer products, including any food, drug, biological product, device, cosmetic or agricultural product, is currently governed by Guideline Section 2N2.1. 5/ That Section provides for a base offense level of six, assuming that the underlying regulatory offense involves "knowing or reckless" conduct. See U.S.S.G. § 2N2.1, comment. (n.1). In cases involving, at most, mere negligence, the Guidelines indicate a downward departure may be warranted. If, on the other hand, the offense involved fraud, Section 2N2.1 is cross-referenced to Guideline Section 2F1.1, which governs more traditional crimes of fraud and deceit, such as mail and wire fraud and bank fraud. 6/ Section 2F1.1 similarly begins with a base

2/ 21 U.S.C. §§ 301 et seq.

3/ 21 U.S.C. §§ 451 et seq.

4/ 21 U.S.C. §§ 601 et seq.

5/ 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. As currently worded, food, drug, and agricultural products offenses are specifically excluded from the organizational sentencing guidelines. As a result, fines for organizations convicted of offenses covered by Section 2N2.1 continue to be governed by pre-guidelines law. Under the proposed amendments, sentences in cases involving organizational defendants would similarly be calculated in all cases using the fraud guidelines.

6/ Although, as noted, the organizational guidelines are not strictly applicable to food and drug offenses, the existing commentary to Section 8C2.1 similarly cross-references Section 2F1.1, specifically noting that "where the conduct set forth in a

offense level of six, but provides for significant increases in offense level -- and, by extension, the range of the fine and/or term of incarceration that may be imposed -- based upon the amount of "loss" occasioned by a defendant's conduct.

Under the amendments proposed by the Commission, Section 2N2.1 would be deleted in its entirety, sweeping all food, drug, and related regulatory prosecutions of individual and/or corporate defendants under Section 2F1.1. While allowance is made in the proposed amendments for the possibility of an upward departure in a case involving conscious or reckless risk of serious bodily injury, the proposed commentary makes no specific reference regarding the appropriateness of a downward departure, even in a case arising out of a conviction for a simple regulatory offense involving no finding of moral culpability.

DISCUSSION

The apparent motivation behind the proposed changes to Section 2N2.1 is what the Commission's Food and Drug Working Group perceived as an "inappropriate failure" on the part of sentencing courts to apply the fraud guideline in cases involving intentional and fraudulent conduct. See Food and Drug Working Group Final Report at 12 (Feb. 1995). To the contrary, the reported case law indicates that courts routinely have relied upon Section 2F1.1 in appropriate cases. More importantly, by making fraud the rule rather than the exception, the revisions threaten to impose sanctions designed to address fraudulent conduct in cases involving simple negligence or strict liability.

Unlike most other criminal statutes, laws governing foods, drugs, and cosmetics have been characterized as "public welfare" provisions. The upshot of such a classification was first explained in United States v. Dotterweich, 7/ in which the Supreme Court dispensed with the conventional requirement for criminal conduct -- awareness of some wrongdoing -- and instead sustained the conviction of a pharmaceutical company and its president and general manager for shipping misbranded and adulterated drugs under a theory approaching strict liability. In Dotterweich, the Court rejected the notion that an individual defendant could escape criminal liability based upon his lack of knowledge of any wrongdoing. Instead, the Court explained that the statute "puts the burden of acting at hazard

court of conviction ordinarily referenced to § 2N2.1 (an offense guideline not listed in subsection (a) [governing applicability of the organizational guidelines]) establishes § 2F1.1 (Fraud and Deceit) as the applicable offense guideline (an offense listed in subsection (a)), [the organizational guidelines applicable to fraud] would apply because the actual offense level is determined under § 2F1.1." U.S.S.G. § 8C2.1, comment (n.2).

7/ 320 U.S. 277 (1943).

upon a person otherwise innocent but standing in responsible relation to the public danger." 8/

More recently, the Supreme Court reaffirmed the principles established in Dotterweich in United States v. Park. 9/ In that case, the Court held that the government's prima facie case against a corporate officer is established merely by 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." 421 U.S. at 673-74. Indeed, some circuits have taken the Supreme Court's lead so far as to reject defenses based upon objective impossibility and even sabotage. See United States v. Y. Hata & Co., Ltd., 535 F.2d 508 (9th Cir. 1976) (affirming trial court's refusal to give instruction on objective impossibility, despite maintenance by defendant of the highest standard of foresight and vigilance); United States v. Starr, 535 F.2d 512 (9th Cir. 1976) (holding that responsible employee's duty of foresight and diligence extends to anticipating and counteracting the "shortcomings" of delegees, including acts of sabotage).

By contrast, evidence of a "knowing" violation in cases not involving public welfare statutes requires a considerably greater showing of scienter, typically requiring proof that the defendant had actual knowledge not only of his own actions, but also of the fact that those actions constituted a violation of law. 10/

As the Food and Drug Working Group Final Report acknowledges, the required application of the fraud guideline will have a dramatic impact on the severity of sentences imposed in food and drug cases. For example, in a case involving distribution of adulterated meat, and assuming the amount of "loss," by whatever calculation, exceeds \$500,000, application of Section 2F1.1 will 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. If the sentence is instead determined by application of Section 2N2.1, the resulting base offense level is six, with a corresponding sentencing range of 0-6 months. 11/ Criminal sanctions for

8/ 320 U.S. at 284-85. Accord United States v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964).

9/ 421 U.S. 658 (1975).

10/ See, e.g., Liparota v. United States, 471 U.S. 419 (1985) (distinguishing statute governing unlawful possession of food stamps from public welfare statutes requiring lesser degree of intent).

11/ Under U.S.S.G. § 2N2.1, a first-time offender would also, based upon this range, be eligible for a sentence of probation. The range resulting from application of Section 2F1.1, on the other hand, would of course preclude the possibility of a

organizational defendants will be similarly affected calling for the imposition of sanctions previously reserved for intentionally fraudulent conduct in cases involving virtually blameless violations of regulatory provisions.

Imposition of the more severe sanctions that result from application of Section 2F1.1 may be entirely just in a case involving intentional or purposeful conduct, traditionally a required element of fraud. However, such a result is plainly inappropriate in cases involving regulatory strict liability that nevertheless would be swept under the fraud guideline if the proposed changes were to become law. Such offenses are, of course, relatively common in the heavily regulated food, drug and cosmetic industry.

It is important to remember that the goal of sentencing reform has been to eliminate unwarranted disparities in sentencing, not to treat all offenders as if they were the same. It is no more rational to treat offenders of widely different culpability as if they were the same than it is to treat similar offenders differently.

More to the point, application of 2F1.1 is currently an available option under the existing provisions. As currently worded, Section 2N2.1 imposes a flat base offense level for any regulatory violation, while allowing for enhanced sentences, by cross-reference to Section 2F1.1, in cases in which the regulatory violations are part of a pervasive scheme. At the same time, in recognition of the virtual strict liability applicable to cases in this highly regulated area of the law since Dotterweich, the present guideline also provides for downward departures in those cases in which the conviction stems from simple negligence or dereliction.

Moreover, based upon a review of the reported decisions involving violations of the food and drug laws, and contrary to the conclusions of the Food and Drug Working Group's Final Report, it is apparent that sentencing courts routinely have applied Section 2F1.1 in food and drug prosecutions involving fraud, consistent with the cross-reference set out in existing Section 2N21. ^{12/} Even if this

probationary sentence. See also United States v. West, 942 F.2d 528 (8th Cir. 1991), in which the defendant was sentenced under Section 2F1.1 for selling adulterated meat. Under the fraud guideline, the defendant's adjusted offense level was 16, calling for a 21-month sentence. Had the sentence been calculated using Section 2N2.1, the defendant would have faced a sentence of between one and seven months.

^{12/} See, e.g., United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) (applying Section 2F1.1 in imposing sentence in case involving sale of drugs without FDA site approval, in violation of 21 U.S.C. §§ 331(p) and 333(a)(2)); United States v. Kohlbach, 38 F.3d 832 (6th Cir. 1994) (applying Section 2F1.1 in case involving distribution of adulterated orange juice from concentrate, in violation of 21 U.S.C. §§ 331(a), 333(a)(2)); United States v. Strassburger, 26 F.3d 860 (8th Cir. 1994)

were not the case, however, such failure does not warrant wholesale abandonment of the existing provision in favor of an overinclusive amendment to Section 2F1.1. Instead, in a case in which the government believes that the sentencing court erred by failing to apply the fraud guideline, the appropriate recourse is appeal. 13/

Indeed, the proposed revisions are inconsistent with the manner in which the guidelines govern sentences in other areas, such as environmental crimes, that are similarly subject to the less rigorous scienter requirements accorded so-called "public welfare" statutes. The guidelines governing the calculation of base offense levels in cases involving the mishandling or unlawful discharge of pollutants, for example, like Section 2N2.1, provide for a base offense level of six. See U.S.S.G. § 2Q1.3. Moreover, the guidelines governing environmental crimes similarly assume knowing conduct, and expressly refer to the appropriateness of a downward departure in cases involving, at most, negligent conduct. U.S.S.G. § 2Q1.3, comment. (n.3). Finally, like existing Section 2N2.1, these guidelines make wise use of various special offense characteristics and application notes to cover a broad spectrum of conduct, stretching from simple negligence to knowing and intentional criminal conduct.

This same flexibility should be retained in connection with the investigation and prosecution of food, drug, and related regulatory cases. As a matter of practice, prosecutors are reluctant to charge only corporate defendants. Indeed, to our knowledge, at least with respect to alleged criminal violations of the food and drug laws, federal prosecutors have, without exception, always charged individual employees and/or officers, as well. However, in light of the relaxed burden of proof under Dotterweich, Park, and their progeny, prosecutors' purposes have often been best served by charging related misdemeanor violations available under the statutes, or stipulating to base offense levels in a range that would permit a court to sentence the defendant to a probationary term. 14/ By branding

(applying Section 2F1.1 in case involving sale of misbranded meat and related violations of the Federal Meat Inspection Act); United States v. Von Mitchell, 984 F.2d 338 (9th Cir. 1993) (applying Section 2F1.1 in context of case involving unlawful sale of steroids, in violation of 21 U.S.C. §§ 331, 333 and 353); United States v. Arlen, 947 F.2d 139 (5th Cir. 1991), cert. denied, 112 S.Ct. 1480 (1992) (same); United States v. Cambra, 933 F.2d 752 (9th Cir. 1991) (applying Section 2F1.1 in case involving sale of misbranded drugs).

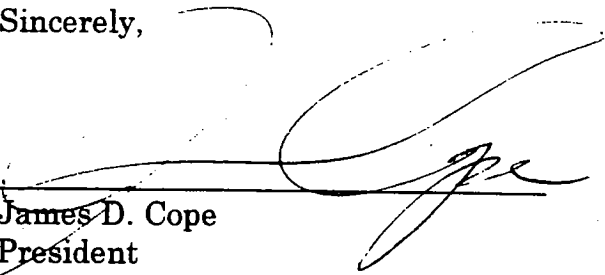
13/ None of the reported decisions pertaining to Section 2N2.1 involves a government appeal of the trial court's refusal to apply Section 2F1.1. This fact suggests that courts are applying the cross-reference provision and in a manner consistent with prosecutors' perceptions of the severity of the involved offenses and/or culpability of the individual defendants.

14/ See, e.g., 21 U.S.C. § 676(a).

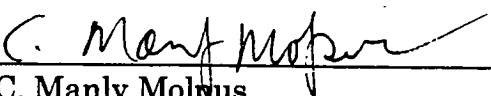
all violations of statutes pertaining to food, drugs, and agricultural products as fraud, the proposed amendments strip away any distinction between negligent, purposeful, and fraudulent acts, and threaten to impose, in cases approaching strict liability, penalties heretofore reserved for intentional and fraudulent conduct. We believe this to be unwarranted and inappropriate, and we therefore, urge that the amendment as proposed not be adopted.

We appreciate this opportunity to comment and your careful consideration of our views.

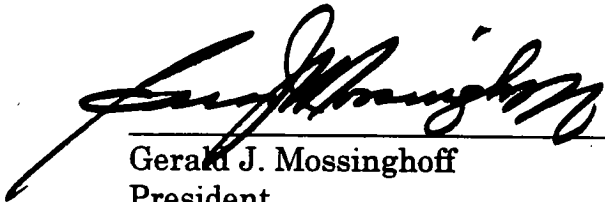
Sincerely,



James D. Cope
President
Nonprescription Drug Manufacturers
Association



C. Manly Molpus
President and Chief Executive Officer
Grocery Manufacturers of America, Inc.



Gerald J. Mossinghoff
President
Pharmaceutical Research and
Manufacturers of America



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



007-96

John W. Snow
Chairman

Jerry R. Junkins
Cochairman

Ralph S. Larsen
Cochairman

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Washington, D.C. 20036-5610
(202) 872-1260 FAX (202) 466-3509

Samuel L. Maury
President

Patricia Hanahan Engman
Executive Director

March 5, 1996

HAND DELIVERED

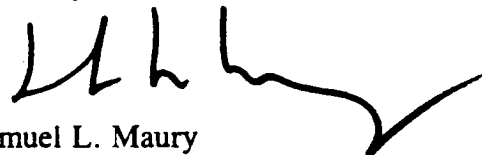
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Information

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

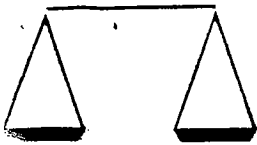
^{7/} Compare analogous rulings in civil actions which permit rough estimates of the amount of damage once the fact of some damage has been proven with greater rigor. E.g. Northwest Publications v. Crumb, 752 F.2d 473, 476-77 (9th Cir. 1985) ("The burden on [plaintiffs] to show causation is more stringent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

008-96



Eric E. Sterling, President

1899 L Street, N.W., Suite 500

Washington, D.C. 20036

202.835.9075

Fax: 202.833.8561

March 5, 1996

Judge Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
(Attention: Public Information)

Dear Judge Conaboy:

First, the Commission must be commended for having issued its outstanding report, *Cocaine and Federal Sentencing Policy* last year. I have read scores of government reports since I began working for the U.S. Congress in 1979, and I think the Commission's report is the finest government report I have ever read. It was well-organized, well-researched, thorough, and well-written. The report set forth a compelling case for reforming Federal cocaine sentencing.

Second, I commiserate with the members of the Commission who must feel chastened by Congress' overwhelming rejection of its recommendations for ending the 100-to-1 cocaine sentencing disparity by recommending a 1-to-1 equivalency between "crack" and powder cocaine. While this was the first time the Congress rejected a Commission recommendation, you should not exaggerate the meaning of that vote.

Congress, by the same vote, asked you again to submit recommendations for changes to the statutes and the sentencing guidelines regarding cocaine offenses. This is very important. First, Congress affirmed your crucial role in guiding sentencing policy. And second, Congress recognized that the 100-to-1 ratio is not appropriate. The vote and voices of disapproval of 1-to-1 equivalency reflected the popular prejudice about crack cocaine that has built up over the past dozen years, the attack upon the Commission's recommendation by the Justice Department and White House in conformity with that prejudice, and the lack of unanimity within the Commission regarding the 1-to-1 recommendation.

The vote of disapproval, while disheartening, highlights the importance of the Commission's role in making controversial decisions Congress would like to avoid. Your agency is unique for a number of reasons. Unlike the typical "regulatory" agency such as FDA or FCC, the delegation of power to the Commission is not because Congress believes it lacks the expertise to make highly complex technical decisions, because in the case of sentencing, Congress acts regularly. Instead, the delegation is in part designed to insulate the Congress from the electoral consequences of making desirable sentencing revisions that could be called "soft." (The Base Closing Commission serves a similar role in undertaking the politically unpopular "heavy lifting" of recommending the closing of economically important but militarily unnecessary military bases.) In effect, it is the unwritten responsibility of the Commission to push for these sentencing reforms precisely because they are politically objectionable.

However, what -- if anything -- should the Commission do regarding cocaine sentencing in the 1996 "cycle?" Some will counsel that you do nothing. The political climate has not changed. That is true, but in my experience, the political climate regarding drug sentencing changes very little.

Some very important observers will advise the Commission to bring forward exactly the same 1-to-1 ratio as it did last year on the basis that your recommendation was factually correct, logical, and intellectually honest. Those are very strong reasons, but they disregard the political reality which has not changed. If there is to be any reform, the reform proposal must be changed.

Reform is an incremental process. Therefore, advance a less ambitious reform than last year, which if adopted, would promote a more just outcome for those individuals who it helps. Such a proposal would not hinder the Commission in making additional reforms if the political climate does change.

As unsatisfactory as it will be to some, if not all, of the members of the Commission, I urge the members to attempt to reach a unanimous compromise ratio in the neighborhood of 10- or 20-to-1 -- that is, crack cocaine quantities would be raised at each base offense level, but not to equivalence with powder cocaine. This will be difficult for you to argue for except: (1) a significant number of offenders (which your staff can quantify) will receive somewhat less harsh sentences for drug trafficking in relatively small quantities of crack cocaine than would otherwise be the case; and (2) it has a realistic chance of being agreed to by the Attorney General and adopted by Congress. For those men and women sentenced for crack offenses at a new level (and especially for their children, parents and other family members), this would be a benefit.

Those of you who are judges and those who have been prosecutors will find this kind of political compromising extremely unpleasant, even odious. It will feel unethical, perhaps reprehensible -- and indeed if you were to make this type of

political compromise while sitting as a judge or making a decision as a prosecutor it would be unethical. However, as should now be starkly clear to you, this is a *political* decision, and compromise is often a critical ingredient for success in the political realm.

No doubt it will sound like the voice of one who has worked in Washington since 1979, but I urge the members of the Commission to set aside the commitment to intellectual honesty that you bring to the bench, to your teaching, and to your prosecutorial decision-making, and to agree *unanimously* that you will seek a *result* that enables some judges to sentence some offenders to terms of imprisonment that are closer to what the Commission's majority sees as the ideal than is now the case.

As part of your 1996 report, I urge you to expand upon your analysis of "Defendant's Function in Drug Trafficking Operation which you reported in Table 18 of your 1995 report. What Congress intended in the Anti-Drug Abuse Act of 1986 was to encourage the Justice Department to focus on the "major traffickers...the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." (H.Rept. 99-845, Pt. 1, pp. 11-12). Having failed to hold hearings and to obtain testimony from DEA and the Justice Department, Congress made a fairly obvious mistake in choosing the very low quantities that it used as the triggers for identifying such high-level traffickers. Your report shows that only 11.2% of the 1992 sample of Federal drug defendants were "high-level dealers" (only 9.2% of powder cocaine defendants and only 9.5% of heroin defendants). 11% of some 20,000 Federal drug defendants is roughly 2200 high-level offenders.

This data is extremely valuable information for assisting the public in reviewing the performance of the Justice Department in choosing drug prosecutions. As you know, any of the nation's more than 200,000 felony arrests for cocaine or heroin trafficking could be prosecuted in Federal court. Deciding who should be prosecuted in Federal court is a discretionary matter for DEA, other law enforcement agencies and the U.S. Attorneys offices.

Perhaps the 1% of all felony narcotics defendants who are prosecuted in Federal court is the sum total of "high-level" narcotics traffickers in a year. But given the \$40 billion in annual narcotics trafficking in the United States and around the world, it would be very disappointing if the government could identify and prosecute only some 2200 high-level traffickers in a year. Perhaps the Justice Department should more carefully screen the nation's 200,000 heroin and cocaine trafficking arrests to find more high-level traffickers.

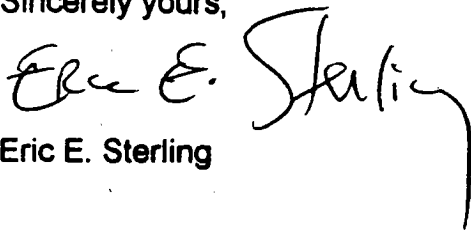
Perhaps more careful case selection might ameliorate the dissatisfaction of the Federal judiciary that must impose long sentences on crack offenders who are found to be street-level dealers, bodyguards, couriers and mules almost 64% of the time. Perhaps an increased investigative effort should be directed at traffickers

operating outside the United States who direct drugs to U.S. markets, or at money launderers who corrupt the international financial system.

In any event, the Justice Department ought to be encouraged to increase the percentage of high-level traffickers that they investigate and prosecute. If they concentrated more on genuinely high-level offenders, that effort in itself, would tend to reduce the number of low-level and minor offenders who are being subject to unconscionably long sentences.

With very best wishes,

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Eric E. Sterling". The signature is written in dark ink and is positioned above the printed name.

Eric E. Sterling



009-96
800 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20006-2701
TELEPHONE: 202/452-8444
FAX: 202/429-4519

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.

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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.

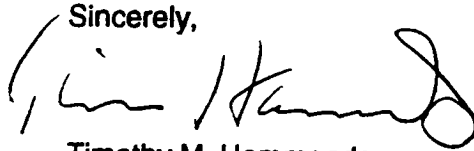
It is our understanding that guidelines for other strict liability regulatory offenses are not treated in this manner. We believe it would be unreasonable and unfair to treat strict liability offenses inconsistently because such treatment would result in disparate treatment among defendants with similar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

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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 in a cursive style.

Timothy M. Hammonds
President and CEO

VIA Federal Express

March 5, 1996

Hoechst Marion Roussel, Inc.

10236 Marion Park Drive
Mail: P.O. Box 9627
Kansas City, MO 64134-0627
Telephone (816) 966-5000

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

RE: PROPOSED AMENDMENTS TO U.S.S.G. SECTION 2N2.1;
61 FED. REG. 79 (JANUARY 2, 1996)

Dear Sir/Madam:

The following comments are filed on behalf of Hoechst Marion Roussel, a research based global pharmaceutical company whose North America headquarters are located in Kansas City, Missouri. The company's operations are directly regulated by the U.S. Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.) ("FFDCA"). Therefore, the changes proposed in the above-referenced Federal Register notice could have an impact on the company. In addition, Hoechst Marion Roussel is a member of the Pharmaceutical Research and Manufacturers of America (PhRMA) and concurs in the comments filed with the Commission on behalf of PhRMA.

The January 2 proposal by the Commission included a section on food and drug offenses affecting how individuals and corporations are treated following a conviction for a violation of the FFDCA, among other statutes. 61 Fed. Reg. at 83. The proposal would delete guideline Section 2N2.1 in its entirety and would instead treat all offenses originally covered by this Section as cases involving fraud, governed by Section 2F1.1.

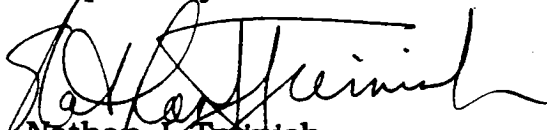
The effect would be that purely regulatory violations would be treated in the same manner as intentionally fraudulent conduct. Sanctions designed to address fraudulent conduct could then be imposed on cases involving violations of the FFDCA which do not require knowledge or proof of fraud. We believe such a change is unnecessary, and that current guidelines more adequately provide the flexibility needed to respond to the broad spectrum of conduct involved in the prosecution of offenses under the FFDCA.

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Under United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975), the Supreme Court dispensed with the conventional requirements for criminal conduct (i.e., awareness of some wrongdoing) and basically established a standard of strict liability. Under these cases an individual cannot escape criminal liability based upon lack of knowledge of any wrongdoing. The Dotterweich court explained that the FFDCA "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to the public danger." 320 U.S. at 284-85.

As currently worded, Section 2N2.1 imposes a base offense level for any regulatory violation while permitting enhanced sentences, by cross-reference to Section 2F1.1, in cases where regulatory violations are part of a pervasive scheme. This flexibility should be retained in connection with the investigation and prosecution of cases under the FFDCA. The proposed amendments would have the effect of treating all cases the same. It is important to retain the current distinction and provide for tougher penalties for intentional and fraudulent conduct. Therefore, the proposed amendment should not be adopted.

Respectfully submitted,



Nathan J. Treinish
Corporate Counsel-Regulatory

NJT/usscltr:pb



011-96

International Community Corrections Association

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James Murphy
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March 5, 1996

The Honorable Richard P. Conoboy, Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chairman Conoboy:

Enclosed please find for your review copies of testimony on behalf of the International Community Corrections Association, formerly known as the International Association of Residential and Community Alternatives on the most recent Notice for Comment. We are particularly interested in any simplification of the Guidelines that pertains to probation, split sentences and alternatives. If the Community Corrections Association can provide you with additional information, please contact me at 703. 836. 0279. Thank you for this opportunity to comment.

Sincerely,

Mary K. Shilton
ICCA Washington Representative

enclosure

Dedicated to Promoting and Enhancing Community Corrections
Formerly International Association of Residential & Community Alternatives

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International Community Corrections Association

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(608) 785-0200 • FAX (608) 784-5335 PETER R. KINZIGER, EXECUTIVE DIRECTOR

TESTIMONY CONCERNING PROPOSED UNITED STATES SENTENCING COMMISSION NOTICE FOR PUBLIC COMMENT

March 5, 1996

Submitted by:

The International Community Corrections Association

I am Mary Shilton, Washington D.C. Representative for the International Community Corrections Association (ICCA). ICCA is a professional and educational organization dedicated to promoting and enhancing community-based corrections services and to improving professional development for its members.

My comments relate to two issues that are to be considered by the Commission this year: simplification of sentencing guidelines with respect to the use of probation, split sentences and other alternatives; and cocaine offenses.

Simplification of the sentencing guidelines

We are pleased that the Commission is reviewing the Guidelines in an effort to make them more accessible. The following principles should be considered with respect to simplification: 1) developing improved policies that fit the statutory purposes of restitution, rehabilitation and sentencing equity noted in 18 U.S.C. Sec. 3553(a) (1988); 2) providing clear guidance to judges on what offenders are eligible for alternatives; 3) increasing the full utilization of alternatives to increase restitution, and offender accountability; 4) providing equivalencies between community sentences and term length that satisfy fundamental principles of justice; and 5) addressing the underlying problems of a growing number of low level Federal offenders by sentences including a component of community treatment.

1) Simplify to meet the purposes of the statute.

The Guidelines should expand the opportunities for sentencing a variety of first time offenders to

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Formerly International Association of Residential & Community Ales*

probation or split sentences. This would enable the purposes of rehabilitation and restitution to be more fully developed under the Guidelines. At the present time, relatively few persons are sentenced to alternatives.

2) Clarify who is eligible.

We believe that the Guidelines should include a non-incarcerative option for all nonviolent first time offenders and for many with low-level priors. A simplification will make it possible for judges to select who will go to community corrections. Judicial discretion is needed to recommend conditions of supervision related to restraining risk, and managing offender compliance. Judges could select appropriate conditions of supervision for the majority of such offenders who are ranked at the lowest and second lowest security levels and are not classified as dangerous. However, the present Guidelines and mandatory minimums often preclude this possibility because most receive prison terms.

3) Increase full utilization of alternatives.

The utilization of community sentencing could be increased if the Guidelines presented judges with a wider range of options including a variety of intermediate sanctions such as means based fines and day reporting centers. Such sanctions should be used for a majority of Federal sentences where there is no violent offense. Options to be considered would be: victim offender reconciliation and reparation, residential facilities, intensive supervision, public service work, boot camps, day reporting and other substitutes for imprisonment.

4) Define equivalencies between community sentences and incarcerative terms.

Equity and fairness can be served by alternatives that are both punitive and that have other elements such as restitution or rehabilitation. The simplification process should expand the notion of various types of punishments as equivalent to prison. The use of equivalencies will allow sentences to be constructed that are proportionate. In addition, the potential number of persons who could be sentenced to probation and split sentences would be increased by reclassifying and consolidating levels and equivalencies. The

equivalencies could also permit a change in transitional release programs for up to twelve months prior to end of prison terms.

5) Address the underlying problems of a growing number of low level Federal offenders by sentences including a component of community treatment.

Making alternative sentences more accessible to a number of low level offenders is supported by the growing research that rehabilitation is more likely to occur with use of halfway houses or other alternatives in lieu of confinement. ICCA has completed three research conferences on this subject. The papers delivered by researchers support the notion that community corrections is an effective and appropriate approach to punishment.

Although the public is increasingly punitive toward violent crime, there is widespread support for intermediate sanctions. Public opinion polls by the Wirthlin Group, the Public Agenda Foundation, Figgie International, Gallup, and Harris polls found that the public wants tough but rehabilitative programs for nonviolent offenders.

Cocaine offenses

We urge the Commission to continue in its efforts to eliminate unnecessary disparity with respect to cocaine. Inequitable sentencing practices for similar drug offenses raise grave issues about the fairness of our present Federal cocaine sentences. We applaud the Commission for its *Special Report to the Congress on Cocaine and Federal Sentencing Policy* and urge the Commission to continue to evaluate the issues set forth therein. We hope the Commission re-evaluates the impact of the Guideline's emphasis on quantity of drug involved rather than other factors such as whether a weapon was involved, whether there was violence or injury to another.

Additionally, ICCA is opposed to the use of mandatory minimum sentences. We believe that mandatory incarceration of drug offenders has little incapacitation or deterrence value. Furthermore, many of these individuals are addicted and in need of detoxification and stabilization treatment. It is about seven times more costly to incarcerate these drug offenders than it is to

supervise, treat and monitor them in a community corrections setting.

In conclusion, we note that ICCA represents more than 250 private and public agencies operating over 1500 programs. Founded in 1964, ICCA has over 600 individual members working to provide community supervision and residential programs. Our members are employed by courts, departments of corrections, probation, the Federal Bureau of Prisons, counties, cities and states. Approximately eighty percent of the adult community-based corrections facilities in the United States are represented by ICCA and its members. Such facilities and services include: community-based centers, educational and vocational services, drug testing and treatment, tutoring services, day treatment, crisis intervention, family or individual counseling, victim services, community service, bail supervision, home detention, neighborhood outreach, and aftercare.

I thank the Commission for this opportunity to comment on proposed policy changes. The Commission's interest in opposing sentencing disparity and more appropriate sentencing options is commendable. We would be happy to provide copies of the papers from our research conferences on the subject of sentencing and community corrections upon request.



Fred M. McQueary, Chairman of the Board
Ronald J. Streck, President & CEO

012-96

National Wholesale Druggists' Association

P.O. Box 2219, Reston, VA 22090-0219 Fax # 703/787-6930
1821 Michael Faraday Drive, Suite 400, Reston, VA 22090-5348 • 703/787-0000

March 5, 1996

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

Attention: Public Information

Dear Commissioners:

This comment is submitted by the National Wholesale Druggists' Association (NWDA). NWDA is the national trade association for wholesale distributors of prescription drugs. Our members operate over 200 distribution centers across the country that handle a majority of the wholesale sales of pharmaceutical products nationwide. Drug wholesalers are subject to the requirements of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*)

NWDA members are very concerned about proposed amendments to the Federal Sentencing Guidelines "regulatory" guideline found at United States Sentencing Commission, Guidelines Manual ("U.S.S.G."), § 2N2.1 (Nov. 1994), which published in the January 2, 1996, Federal Register (61 Fed. Reg. 83). The Commission has proposed to delete § 2N2.1 and to sentence persons convicted of offenses previously covered by § 2N2.1 under the fraud guideline found at § 2F1.1. We believe this change would have an unfair impact on individuals and organizations convicted of regulatory offenses.

The offenses currently covered by § 2N2.1 do not require proof of fraud or criminal intent. Indeed, the Application Note to § 2F2.1 states that the guideline assumes an offense involving knowing or reckless conduct. If, however, fraud was involved in the offense, the current language of § 2N2.1 already provides for sentencing by reference to the fraud guideline. We believe that § 2N2.1 provides an appropriate structure for imposition of sentences for offenses that do not involve fraud. The fraud guideline assumes the criminal intent of the offender, a mental state that is not an element of the regulatory offenses. By treating these offenses under the fraud guideline, excessive punishment will result. The application of sentences designed to address fraudulent conduct to misdemeanor regulatory offenses will result in proportionately greater punishment for these offenses, a result which the Guidelines were intended to avoid.

While simplification of the Guidelines is a worthy goal, it should not be accomplished through similar treatment of unlike offenses. Consistency in sentencing is one of the guiding principles of the Guidelines. The Introduction and General Application Principles of the Guidelines state that Congress sought "reasonable uniformity in sentencing by narrowing the wide disparity in sentences

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Commissioners
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imposed for similar criminal offenses committed by similar offenders" and "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. Ch. 1, Pt.A § 3. We note that the Commission has not proposed to subsume environmental offenses under the fraud guideline. We do not propose that the Commission do so, but we suggest that the strict liability offenses currently sentenced under § 2N2.1 are more similar to environmental offenses than to fraud offenses and should be treated similarly.

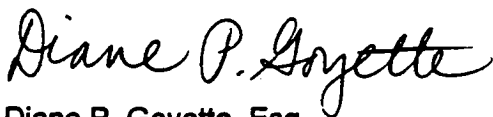
Another effect of the Commission's proposal is that regulatory offenses committed by organizations would be sentenced under the organizational sentencing guidelines. Our objections are the same as our objections to sentencing of individuals convicted of regulatory offenses under the fraud guideline. Imposition of the full weight of the organizational guidelines is heavy-handed and unwarranted for regulatory offenses.

The Commission has also invited comments on "whether 'gain' should be a substitute for 'loss' when the essence of the offense is fraud against regulatory authorities with no economic loss." 61 Fed. Reg. 83 (proposed January 2, 1996). Application Note 8 of § 2F2.1 provides that gain realized as a result of the offense may be used as an alternative estimate of loss, but that gain ordinarily will underestimate the loss. In the context of regulatory offenses, we strongly disagree that gain will ordinarily underestimate the loss. Where no economic loss can be shown, we maintain that gain vastly overstates the loss, especially in those situations where courts have used gross profits as a measure of a defendant's gain. This effect would be even more egregious if applied to strict liability regulatory offenses, as contemplated in the Commission's proposal to include these offenses under § 2F2.1.

Whether applied to strict liability regulatory offenses, or regulatory offenses committed through fraud, measurement of punishment by reference to gain, in the absence of demonstrable loss, flies in the face of the Guidelines' Resolution of Major Issues regarding Regulatory Offenses which provides a low base offense level with increases based on specific offense characteristics "designed to reflect substantive harms." U.S.S.G. Ch.1, Pt.A § 4(f). The Commission should reaffirm its goals of punishing technical, recordkeeping and reporting offenses through low base offense levels. Where no loss can be proved, the potential penalties are lower, which is appropriate where the goal is to punish the harm caused by the conduct. Carefully drawn grounds for an upward departure from the regulatory guideline may be a more appropriate remedy.

Thank you for the opportunity to express our views on this important proposal.

Sincerely,



Diane P. Goyette, Esq.
Director of Regulatory Affairs

013-96

MERCK & CO., INC.

ONE MERCK DRIVE
P.O. BOX 100
WHITEHOUSE STATION, NJ 08889-0100

MARY M. McDONALD
SENIOR VICE PRESIDENT AND GENERAL COUNSEL

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March 5, 1996

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

via Federal Express

Re: Comments on Proposed Amendments to U.S.S.G. Sec. 2N2.1

Dear Sir/Madam:

Merck & Co., Inc., a worldwide research-intensive pharmaceutical company that discovers, develops, produces and markets a broad range of human and animal health and pharmaceutical products and services, submits the following comments to the proposed revisions to Section 2N2.1 of the U.S. Sentencing Guidelines ("the Guidelines" or "U.S.S.G.").

The Commission proposes to delete Section 2N2.1 which addresses violations by individuals of statutes and regulations dealing with any food, drug, biological product, device, cosmetic or agricultural product and to require federal judges to sentence all violations of food and drug laws under Section 2F1.1, the fraud sentencing guideline. This proposed revision would mean that negligent violations of federal food and drug regulations, which currently are sentenced in accordance with Section 2N2.1, would be sentenced under the same guideline applied to fraudulent violations of the food and drug laws.

Under the current guidelines, sentences for criminal violations by individuals of statutes and regulations governing food, drug and device products are subject to the application of U.S.S.G. Section 2N2.1 which provides for a base offense level of six, when "knowing or reckless" conduct is involved, but allows judicial discretion for downward departures from this level in cases involving simple negligence or oversight. See U.S.S.G. Section 2N2.1 (Application Note 1). Cases involving fraud require the application of Section 2F1.1 which also has a base offense level of six but provides for significant increases in the offense level based on the amount of "loss" caused by the violative conduct. Unlike Section 2N2.1, the fraud guideline does not contain a specific reference to the

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appropriateness of a downward departure for certain cases such as those involving simple negligence.

The stated purpose of the proposed revision is to simplify the application of the sentencing guidelines and address the failure of sentencing courts, in some cases, to cross reference the fraud guideline. The proposed deletion of Section 2N2.1, however, could have the potential result of imposing significantly harsher sentences in cases involving unintended or negligent violations of food and drug laws. Moreover, the apparent failure of some courts to cross-reference the fraud guideline in appropriate cases involving fraudulent conduct could be addressed when it occurs by an appeal of the sentencing court's decision. The wholesale deletion of an existing guideline and wider application of the fraud guideline is too broadsweeping a fix that may result in unjust sentences.

The goal of sentencing reform was to eliminate the inherent unfairness caused by wide disparities in the sentencing of similar defendants for similar crimes. It would be no less unfair to treat defendants with wide-ranging culpability as if their offenses were the same.

For the reasons set forth above, Merck is opposed to the proposed revision to delete Section 2N2.1. Thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. M. David", written in dark ink.

01496



Jill M. Bruzga
Attorney—Food and Drug Law

March 5, 1996

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

Attention: Public Information

Re: Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary

Dear Sir/Madam:

Pfizer Inc (Pfizer) submits the following comments concerning the proposed amendments to the Sentencing Guidelines ("Guidelines"), policy statements, and commentary, pursuant to the request of the Sentencing Commission ("Commission") set forth in the January 2, 1996 Federal Register (61 Fed. Reg. 79-83). Pfizer's comments are limited to the proposed amendments to §2N2.1 of the Guidelines, entitled "Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product" and the corresponding amendments to §2F1.1, entitled "Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States", which are set forth at 61 Fed. Reg. 83. Pfizer is a corporation engaged in the research, development, manufacture, and distribution of various healthcare products, including human and animal drugs and medical devices, and thus has an interest in the proposed amendments.

The Commission is proposing to eliminate §2N2.1 in its entirety and fold all offenses that currently fall under its scope into §2F1.1, the fraud provision. Pfizer opposes this proposal because it would result in assessment of excessive sentences in those instances where the violation was the result of mere negligence rather than intentional fraud. The amendments, as proposed, attempt to address a narrowly defined problem (possible failure to consistently and correctly follow cross-referencing requirements) by revising wholesale the sentencing scheme for violations of food, drug, biological product, and device statutes and regulations. Further, elimination of the discretion that is currently allowed under §2N2.1 may result in the imposition of harsher penalties than are warranted by a specific offense. In addition, the proposed

amendments appear to characterize all violations currently covered by §2N2.1 as offenses involving fraud and deceit. These concerns are explored more fully below.

The Commission's proposal apparently is based upon the concern, expressed in the February 1995 Food and Drug Working Group Final Report ("Final Report") at p. 12, that the courts have failed to correctly or consistently cross-reference to the fraud guideline, which in turn may have resulted in the assessment of inadequate penalties. Although this concern may be appropriate, the proposed amendments fail to target the narrow area of concern, namely the correct and consistent application of the cross-reference requirement. In fact, the proposed amendments attempt to eliminate the problem by severely curtailing discretion in the sentencing of all violations of food and drug statutes and regulations, regardless of a finding of fraudulent activity.

The current guideline that addresses such offenses, §2N2.1, is, on its face, broad enough to allow the fashioning of a sentence that specifically addresses a particular offense and the unique circumstances surrounding that offense. The cross-references listed under §2N2.1(b) (requiring application of other offense guidelines, including the fraud guideline, in those situations where it is warranted), combined with Application Note 1 (allowing a downward departure in situations where only negligence is involved) and Application Note 3 (allowing for an upward departure in situations involving death or bodily injury, extreme psychological injury, property damage or monetary loss), comprise an appropriately flexible sentencing scheme to address the spectrum of offenses that fall under the scope of this guideline. Although the proposed amendments maintain the ability to increase the sentence in those situations that warrant it, they eliminate the ability to decrease the sentence in those situations where a less severe penalty is warranted, such as where negligence is involved. As the Food and Drug Working Group admits in the Final Report at p. 12, "The impact of sentencing under §2F1.1 rather than §2N2.1 can be dramatic . . ." The proposed amendments mandate, rather than permit or restrict, this possibly dramatic increase in sentencing results.

Furthermore, eliminating the current guideline merely to address a perceived problem in the application of the cross-reference requirements results in the assessment of an inappropriately burdensome penalty in those instances where the offense would currently be addressed by a downward departure of the sentence, as allowed by Application Note 1 when the offense involves only negligence. The guideline should allow enough discretion to fashion a sentence, by applying upward or downward departures, that is appropriate for a specific offense.

In addition, the proposed amendments appear to characterize all violations that would currently be covered by §2N2.1 as offenses involving fraud and deceit. Unlike the offenses covered by §2F1.1, such as fraud and deceit, forgery and counterfeiting, certain violations covered by §2N2.1 occur through mere negligence, and it is incorrect and unfair to characterize these types of violations as involving fraudulent activity. Further to this point, the proposed amendments

United States Sentencing Commission
March 5, 1996
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do not appear to contemplate that the title to Part F, "Offenses Involving Fraud Or Deceit," would be revised to indicate that this part would also now cover violations of statutes and regulations dealing with foods, drugs, biological products, devices, cosmetics, and agricultural products, regardless of a finding of fraud.

We respectfully request that the above comments and recommendations be considered by the Commission when determining promulgation of amendments to the Guidelines. We appreciate the opportunity to present our comments for the Commission's consideration.

Respectfully,

A handwritten signature in cursive script, reading "Jill M. Bruzga". The signature is written in dark ink and is positioned above the printed name.

Jill M. Bruzga

3/6/96 ag
015-96

AD HOC COALITION FOR FAIR
SENTENCING OF REGULATORY OFFENSES

March 6, 1996

HAND DELIVERED

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

Re: Proposed Amendment To Sentencing Guideline On Food and Drug Offenses

Dear Sir or Madam:

This comment is submitted on behalf of the Ad-Hoc Coalition For Fair Sentencing of Regulatory Offenses (hereinafter "the Coalition"). The Coalition consists of a group of trade associations and companies representing a broad-based segment of the food, drug, device, biological product, cosmetic, and agricultural product industries (see signature pages and attached list of organizations supporting this comment). Because members of the Coalition (and the firms they represent) are regulated under the Federal Food, Drug, and Cosmetic Act (FFDCA), the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and/or other related statutes which authorize criminal penalties for regulatory offenses, the Coalition has a keen interest in the United States Sentencing Commission's (Commission) January 2, 1996 Federal Register notice, 61 Fed. Reg. 79 (1996) (hereinafter "the Proposal"), insofar as the Commission proposes to delete United States Sentencing Guideline (USSG) § 2N2.1.

The Proposal will have serious and unwarranted ramifications for many food, drug, medical device, and biological companies and their executives and employees. The Commission has proposed to delete the current food and drug "regulatory" Guideline, United States Sentencing Commission, Guidelines Manual, § 2N2.1, (Nov. 1995), applicable to individuals convicted of violating the FFDCA, the FMIA, and the PPIA. 61 Fed. Reg. 83 (1996). Persons convicted under these and other statutes would be sentenced under the "fraud" Guideline (USSG § 2F1.1) if the Proposal is adopted, even if the defendant is not charged with fraudulent conduct. In

addition, the Proposal would, for the first time, establish a guideline for corporations and other organizations convicted of "strict liability" offenses under these statutes. Currently, such organizations are fined by federal judges outside the confines of the Federal Sentencing Guidelines.^{1/} For the reasons discussed below, the Coalition strongly opposes eliminating USSG § 2N2.1.

As an introductory note, the Coalition supports, and will continue to support, strict sentences against individuals and corporations convicted of felony food and drug offenses where fraudulent conduct is established. Thus, the Coalition does not oppose application of USSG § 2F1.1 to food and drug cases involving fraud. However, the Proposal would also dramatically increase the likelihood of severe jail sentences and massive fines on individuals and corporations convicted of misdemeanor "strict liability" offenses. To that extent, the Proposal has no valid basis, is patently unfair, and appears inconsistent with other analogous Guidelines.

A. THE PROPOSAL LACKS A VALID BASIS

In support of the Proposal, the Commission referenced a two-year study conducted by the Commission's Food and Drug Working Group (Working Group). *See* 61 Fed. Reg. 83 (1996). However, this Working Group did not propose to eliminate USSG § 2N2.1. Moreover, despite conducting a study of food and drug cases sentenced under USSG § 2N2.1, the Working Group never identified even one case in which a judge, a prosecutor, a defense attorney, or a defendant complained that the sentence imposed under USSG § 2N2.1 was inappropriate. All empirical evidence strongly suggests that USSG § 2N2.1 is working quite well.

The Coalition recognizes, and has no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. *See* 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines does not justify a rush to delete USSG § 2N2.1. Nor should a desire to simplify the Guidelines form a basis to fit strict liability criminal cases into a Guideline that was promulgated to deal with fraud.

^{1/} The Guidelines for imposing fines on corporations and other organizations, USSG § 8C, does not reference USSG § 2N2.1, and is thus not applicable to misdemeanor food and drug offenses. USSG § 8C2.1. Accordingly, organizations convicted of committing such misdemeanor offenses are currently fined under 18 U.S.C. §§ 3571 and 3572. However, the organizational fine Guidelines, USSG § 8C, is applicable to fraud offenses subject to USSG § 2F1.1. Thus, organizations committing food and drug offenses involving fraud are currently fined under USSG § 8C. If the Proposal is adopted, organizations convicted of misdemeanor food and drug offenses will be fined under USSG § 8C, as well.

We believe that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are strict liability prosecutions commenced under statutes other than those now explicitly implicated by USSG § 2N2.1. The Commission might want to republish its Proposal to expand USSG § 2N2.1 to cover other regulatory statutes. Alternatively, the Commission might consider a new Guideline that would cover all regulatory violations where fraud is not involved.

B. THE PROPOSAL IS CONTRARY TO THE PURPOSE OF THE GUIDELINES

The Commission has received a statutory mandate to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). We are unaware of any study or finding suggesting that this mandate has been ignored by the Courts imposing sentences under USSG § 2N2.1.

Further, the Proposal seems wholly inconsistent with the Commission's General Application Principles. See USSG Ch.1, Pt. A § 4(f), which sets forth guiding principles for the Commission's promulgation of guidelines concerning regulatory offenses. It states that a typical guideline for a so-called "regulatory offense" will provide a low base offense level aimed at certain regulatory offenses. Nevertheless, under the Proposal, persons convicted of regulatory violations under the food and drug laws would be sentenced according to the monetary loss incurred by "victims." We see no reason why the Commission should depart from its General Application Principles by deleting USSG § 2N2.1 until the Commission examines whether "loss" should be a relevant sentencing factor in all regulatory offenses.

C. THE PROPOSAL IS INCONSISTENT WITH OTHER ANALOGOUS GUIDELINES

If the Proposal is adopted, it will establish for the first time, a guideline for fines to be imposed on corporations and other organizations convicted of strict liability food and drug offenses. As such, the Proposal is inconsistent with the Commission's treatment of other similar regulatory guidelines.

Like USSG § 2N2.1, the Commission has promulgated regulatory offense guidelines for individuals convicted for environmental crimes. See USSG § 2Q. The USSG § 2Q Guidelines encompass misdemeanor offenses, and in some cases, strict liability environmental offenses. See e.g., 33 U.S.C. § 411 (sentenced under USSG § 2Q1.3). There are close parallels between the food and drug laws and the environmental statutes in terms of their purposes, effects, deterrent value, and statutory structure. A careful analysis should be conducted comparing how the food

and drug laws do and do not compare to the environmental laws. Where similar, it is reasonable to suggest that the Sentencing Commission treat similarly the two categories of cases.

However, the Commission has not proposed to include environmental cases involving fraud under the fraud guideline, USSG § 2F1.1. Nor has the Commission promulgated organizational guidelines for environmental offenses. We believe that the Commission should defer any modification to USSG § 2N2.1 until the Commission has studied the extent to which food and drug cases should be sentenced under the same basic principles as environmental cases. The Commission has not asserted any grounds to treat strict liability food and drug offenses different than strict liability environmental offenses. As both types of offenses closely parallel each other, so too should their respective guidelines.

D. CONSULTATION WITH OUTSIDE GROUPS IS ESSENTIAL

In promulgating or revising guidelines, the Commission is required to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). The Commission's Proposal was apparently not preceded by any dialogue with the industry (or their legal representatives), academicians, public interest groups, or other organizations which have a wealth of knowledge in this area. The limited comment period to respond to the Proposal is simply inadequate for this purpose.

With respect to environmental offenses, the Commission has met its "consultation" obligations by forming an advisory working group composed of government officials, law professors, lawyers in private practice, in-house corporate lawyers, and others. See e.g., 58 Fed. Reg. 65,764 (1993) (Commission established independent working group to promulgate organizational guidelines for environmental offenses). Similarly, the Coalition submits that the Commission should form a food and drug advisory working group consisting of individuals from the government, defense bar, business community, and academia. Such members would provide valuable, first-hand input regarding the adequacy of the current food and drug regulatory guideline, USSG § 2N2.1.

E. CONCLUSION

For all the reasons discussed above, the Coalition urges the Sentencing Commission to refrain from adopting the Proposal, insofar as it would delete USSG § 2N2.1. The Coalition urges the Sentencing Commission to establish an advisory working group, partly composed of members of the affected industry, to ensure that misdemeanor food and drug offenses are sentenced fairly under either USSG § 2N2.1 or a new guideline that would apply to all regulatory misdemeanor offenses.

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We appreciate this opportunity to present our views.

Sincerely yours,

[see attached signature pages]

Attachment

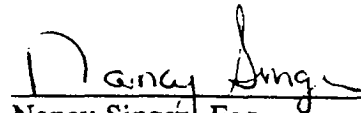
Comment to U.S. Sentencing Commission
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Page 6

David A. Bossman B.T.S.

David A. Bossman, President
Animal Feed Industry Association
1501 Wilson Boulevard
Suite 1100
Arlington, VA 22209-2403

The American Feed Industry Association (AFIA) is the national trade association representing manufacturers of both medicated and non-medicated animal feeds. AFIA's members produce more than 70% of the commercial livestock, poultry, and aquaculture feed sold in the United States. AFIA's members also manufacture and distribute feed ingredients, feed manufacturing machinery, and animal health products.

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Nancy Singer, Esq.
Associate Vice President and
Special Counsel
Health Industry Manufacturers Association
1200 G Street, N.W.
Suite 400
Washington, D.C. 20005

The Health Industry Manufacturers Association (HIMA) is a Washington, D.C.-based national trade association representing more than 700 manufacturers of medical devices, diagnostics products, and health information systems. HIMA's members manufacture more than 90 percent of the nearly \$50 billion of health care technology products purchased annually in the United States. The Association is dedicated to representing the long-term interests, concerns, and needs of the health care technology industry through education programs that encourage high quality, cost-effective health care.

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Page 6

John R. Block *B.T.S.*

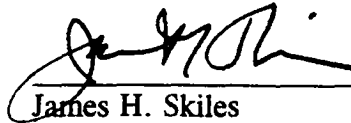
Mr. John R. Block
President
National-American Wholesale Grocers'
Association/International Foodservice
Distributors Association
201 Park Washington Court
Falls Church, VA 22046

The National-American Wholesale Grocers' Association/International Foodservice Distributors Association (NAWGA/IFDA) member companies supply food and related products to independent supermarkets, convenience stores, restaurants, hotels, schools, hospitals, and military bases. NAWGA/IFDA's 300 member companies operate more than 1,200 distribution centers and employ more than 350,000 people. NAWGA members supply 56% of the groceries sold in the United States; IFDA members annually sell \$33 billion in food and related products.

Comment to U.S. Sentencing Commission

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Page 6



James H. Skiles

Vice President, General Counsel

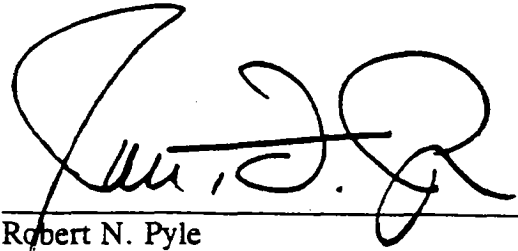
Grocery Manufacturers of America

1010 Wisconsin Avenue, N.W.

Washington, D.C. 20007

The Grocery Manufacturers of America, Inc. (GMA) is a national trade association of approximately 140 companies that manufacture food sold in retail grocery stores throughout the United States and internationally. GMA's member companies are responsible for producing more than 85% of the packaged food sold at retail in the United States.

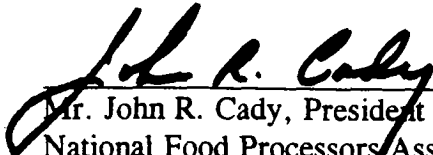
Comment to U.S. Sentencing Commission
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Page 6

A handwritten signature in black ink, appearing to read "R. N. Pyle", written over a horizontal line.

Robert N. Pyle
President
Independent Bakers Association
1223 Potomac Street, N.W.
Washington, D.C. 20007

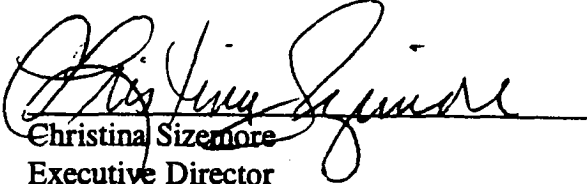
The Independent Bakers Association is a Washington, D.C. based national trade association of over 360 mostly family-owned wholesale bakeries and allied trades to the baking industry. The Association was founded in 1967 to specifically protect and represent the interests of the regional, family-owned, independent segment of the baking industry. The group is a 501 C, tax exempt organization that does lobby Congress.

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Mr. John R. Cady, President & CEO
National Food Processors Association
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005

The National Food Processors Association (NFPA) is the voice of the \$400 billion food processing industry on scientific and public policy issues involving food safety, nutrition, technical and regulatory matters, and consumer affairs. NFPA's three laboratories, its scientists, and professional staff represent food industry interests on government and regulatory affairs and provide research, technical services, education, communications, and crisis management support for the Association's United States and international members, who produce, process, and package foods, drinks, and juices.

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Christina Sizemore
Executive Director
National Pharmaceutical Alliance
421 King Street, Suite 222
Alexandria, VA 22314

The National Pharmaceutical Alliance (NPA) is a trade association of more than 165 independent companies that manufacture and distribute prescription drugs and over-the-counter medications. NPA has members in 28 states. The majority of NPA's members distribute prescription drugs throughout the United States.

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Page 6

Diane P. Goyette, Esq.

Diane Goyette
Director of Regulatory Affairs
National Wholesale Druggists' Association
1821 Michael Faraday Drive
Suite 400
Reston, VA 22090-5348

The National Wholesale Druggists' Association (NWDA) represents full-service drug wholesalers who distribute approximately three-quarters of all pharmaceutical products sold in the United States. NWDA's active and affiliate distributor member corporations own and operate more than 225 distribution centers across the country.

OTHER COALITION MEMBERS SUPPORTING THIS COMMENT:

**American Bakers Association
1350 I Street, N.W.
Suite 1290
Washington, D.C. 20005-3305**

The American Bakers Association (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% 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.

**American Meat Institute
1700 N. Moore Street
Suite 1600
Arlington, VA 22209**

The American Meat Institute (AMI) represents the interests of packers and processors of beef, pork, lamb, veal, and turkey products and their suppliers throughout North America. Headquartered in Washington, D.C., the Institute provides legislative, regulatory, and public relations services, conducts scientific and economic research, offers marketing and technical assistance and sponsors education programs.

**American Veal Association
4714 Orchard Street
Harrisburg, PA 17109**

The American Veal Association (AVA) is an industry-funded and governed association which represents the interests of the entire veal industry, including producers, feed representatives, and packers. The mission of the association is to actively promote the veal industry on a national level; to promote the increased consumption of veal; to encourage communication and cooperation between growers; to gather, evaluate, and distribute information pertinent to the veal industry; to provide information and direction to public agencies and/or elected officials on issues concerning the veal industry; and to encourage cooperation between members of the association and all other segments of the special fed veal industry. AVA represents more than 1,200 industry representatives.

AVA conducts two primary programs for its members. An industry-wide Veal Quality Assurance Program is designed to improve the quality and wholesomeness of the product, and services produced by the industry; the Veal Issues Management Program is designed to manage issues confronting the industry.

National Grocers Association
1825 Samuel Morse Drive
Reston, VA 22090

National Soft Drink Association
1101 16th Street, N.W.
Washington, DC 20036

The National Soft Drink Association is the national trade association of the United States soft drink industry. NSDA's members manufacture, bottle and distribute approximately 95% of all soft drinks consumed annually in the United States.

Snack Food Association
1711 King Street, Suite 1
Alexandria, VA 22314

The Snack Food Association is a national not-for-profit trade association of approximately 1,000 company members representing snack manufacturers and suppliers to the snack industry.

March 6, 1996

HAND DELIVERED

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

Attn: Public Information

Re: Proposed Amendment To Sentencing Guideline On Food and Drug Offenses

Dear Sir or Madam:

This comment is submitted by the American Feed Industry Association (AFIA) in response to the United States Sentencing Commission's (Commission) January 2, 1996 Federal Register notice proposing to eliminate the current "regulatory" Guideline that is applicable to offenses committed under the Federal Food, Drug, and Cosmetic Act (FFDCA). United States Sentencing Commission, Guidelines Manual, § 2N2.1 (Nov. 1995). See 61 Fed. Reg. 79, 83 (1996) (hereinafter "Proposal").

AFIA is the national trade association representing manufacturers of both medicated and non-medicated animal feeds. AFIA's members produce more than 70% of the commercial livestock, poultry, and aquaculture feed sold in the United States. AFIA's members also manufacture and distribute feed ingredients, feed manufacturing machinery, and animal health products. Because members of AFIA are regulated under the FFDCA, which authorizes criminal penalties for regulatory offenses, AFIA has a keen interest in the Commission's January 2 Proposal.

AFIA strongly opposes the Proposal to delete USSG § 2N2.1. If the Proposal is adopted, all persons convicted of violating the FFDCA would be sentenced under the "fraud" guideline (USSG § 2F1.1) even if the defendant is not charged with fraudulent conduct. In addition, the Proposal would, for the first time, establish a guideline for corporations and other organizations convicted of "strict liability" offenses under the FFDCA.¹ Without benefit of any prior input

¹ Currently, such organizations are fined by federal judges outside the confines of the Federal Sentencing Guidelines.

[69]

from the industry groups most affected, the Proposal proposes to dramatically increase the likelihood of unjustified jail sentences and massive fines on individuals and corporations convicted of misdemeanor "strict liability" offenses. Although AFIA supports, and will continue to support, strict sentences against individuals and corporations convicted of felony food and drug offenses where fraudulent conduct is established, similar stiff sentences for misdemeanor "strict liability" food and drug offenses are simply not warranted.

A. THE PROPOSAL'S IMPACT ON AFIA MEMBERS

The Proposal will potentially have serious and unwarranted ramifications for AFIA's members and their executives and employees. AFIA's members are primarily regulated under both the food provisions and the animal drug provisions of the FFDCA and their implementing regulations. These provisions set forth numerous detailed requirements intended to ensure that medicated and non-medicated animal feeds are safe before and after they enter the market. These mandates, if violated, subject the offending persons to a variety of regulatory and judicial sanctions. The most extreme of these sanctions is a criminal prosecution.

Because of the FFDCA's broad definition of "food," 21 U.S.C. § 321(f), all animal feeds, both non-medicated and medicated, are subject to the Act's general requirements for food. The Act provides the means for bringing safe and wholesome animal foods to the market by requiring all food and color additives and other added substances to be proven safe before they are used in animal feeds. See 21 U.S.C. § 348; 21 U.S.C. § 379e; 21 U.S.C. § 346. The Act also mandates that all animal feeds must be prepared, packed, and held under sanitary conditions. 21 U.S.C. § 342(a)(4).

Medicated feeds must meet additional FFDCA requirements. Depending on the particular starting drug ingredients used and their concentrations, feed manufacturers may have to hold an approved medicated feed application. 21 U.S.C. § 360b(m). In addition, all animal feeds containing drugs must comply with FDA's separate current good manufacturing practice (CGMP) regulations for medicated feeds. 21 C.F.R. Part 225. These CGMPs establish controls for all aspects of manufacturing medicated feeds, including production and process controls, packaging and labeling controls, storage and distribution controls, and laboratory controls. The CGMPs also mandate strict recordkeeping and reporting requirements.

The failure to comply with any of the above food or animal drug requirements may lead to a FDA determination that animal feed is adulterated or misbranded in violation of the FFDCA. See 21 U.S.C. § 342 (food adulteration), § 343 (food misbranding), § 351 (drug adulteration), and § 352 (drug misbranding). Any person who manufactures and distributes an adulterated or misbranded product may be subject to criminal penalties. 21 U.S.C. §§ 331 and 333(a).

[70]

Feed manufacturers and their officials may be held criminally liable despite the fact that they had no intention to violate the FFDCA or even knew the FFDCA was being violated. Defendants have been criminally charged under the "strict liability" doctrine set forth in United States v. Park, 421 U.S. 658 (1975), which upheld the authority of FDA to obtain a conviction against a corporate officer or organization without having to prove that the defendant had any mens rea.

The Park case demonstrates how the sometimes technical requirements of the FFDCA have lead to criminal prosecutions. In Park, John Park (whose conviction was upheld in the case), had consulted with legal counsel upon hearing that his company's Baltimore warehouse had sanitation problems. Mr. Park, who lived and worked in Philadelphia, was assured that the subordinate who managed that facility was investigating the situation and that the matter was apparently under control. However, the FDA subsequently brought charges against Mr. Park alleging that the company's food had become adulterated because of insanitary conditions. The Supreme Court upheld Mr. Park's conviction even though Mr. Park did not order the FFDCA violations or even know they were occurring. The Court found that Mr. Park could be convicted because, as President, he had the power to prevent the violations from occurring. The Court stated that he had a positive duty to implement measures to ensure that his company did not violate the law. If those measures were inadequate, he could be criminally prosecuted.²

It is easy to realize that the type of prosecution brought in the Park case bears no resemblance to a fraud case where FDA alleges that someone violates the FFDCA with the intent to defraud or mislead the government, a customer, or a consumer. 21 U.S.C. § 333(a)(2). In the former type of case, FDA prosecutes people with no allegation that the person intended to violate the FFDCA, or even knew about the violation. In the latter case, FDA charges a person with a crime based on traditional mens rea where the defendant knew that he was participating in illegal conduct.

AFLA is not proposing that misdemeanor (strict liability) cases under the FFDCA are never warranted. However, we fail to understand the logic of having persons convicted under the FFDCA's misdemeanor provisions sentenced the same way as persons who have violated the law with the specific intent of defrauding someone.

² The government has also brought misdemeanor "strict liability" criminal prosecutions against low level employees of large companies. See United States v. General Nutrition, Inc., 638 F. Supp. 556 (W.D.N.Y. 1986) (misdemeanor criminal prosecution properly initiated under FFDCA against a store clerk at a retail outlet who made promotional statements about products sold at the store).

Although there are thousands of companies in the animal feed industry, there have been remarkably few criminal prosecutions brought against such companies or their officials. Nevertheless, AFIA is quite concerned about the potential impact on its members if the proposal is adopted. FDA is committed to vigorous enforcement of the strict liability criminal provisions of the FFDCA. For instance, in 1990 FDA stated that the deterrent power of misdemeanor strict liability violations could not be underestimated. AFIA has no quarrel with that proposition. However, AFIA strongly believes that the punishment for these violations should be commensurate with the violation. A person or company should not receive felony sanctions for strict liability violations.

If the Commission's Proposal is adopted, sentencing judges will almost certainly be compelled to impose a term of imprisonment for "strict liability" food and drug offenses, particularly in cases where a large volume of product is implicated. This is due to the fact that the "fraud" guideline sets a sentence according to the "loss" to the victims. Further, the proposal will establish a guideline for a fine to be imposed on corporations and other organizations in regulatory (non-fraud) cases. Consequently, courts will be obligated to increase fines they impose on corporations and other organizations in the animal feed industry.

Such stiff punishments, for non mens rea criminal conduct, would have a severe impact on feed manufacturers and their officials. A jail sentence would be devastating for a corporate executive or official with a respectable career, family, and a previously untarnished background. Indeed, many persons may well choose to forego a career in the animal feed business if they know that they can be subject to sanctions under the fraud Guideline simply because of their position as a high level executive in a company. Moreover, as many feed manufacturers are small businesses, massive fines would be crippling.

B. THE PROPOSAL LACKS A VALID BASIS

In support of the Proposal, the Commission referenced a two-year study conducted by the Commission's Food and Drug Working Group (Working Group). See 61 Fed. Reg. 83 (1996). However, this Working Group did not propose to eliminate USSG § 2N2.1. Moreover, despite conducting a study of cases sentenced under USSG § 2N2.1, the Working Group never identified even one case in which a judge, a prosecutor, a defense attorney, or a defendant complained that the sentence imposed under USSG § 2N2.1 was inappropriate.^{3/}

³ In fact, the Working Group stated that "the issue remains whether [§ 2N2.1] as currently drafted provides for adequate fines. . . ." United States Sentencing Commission Food and Drug Working Group Final Report at 19 (Feb. 1995).

In addition to the Working Group's study, AFIA is unaware of any case in which anyone sentenced under USSG § 2N2.1, the sentencing court, or even the government displayed dissatisfaction with the sentence imposed. In sum, all empirical evidence strongly suggests that USSG § 2N2.1 is working quite well.

AFIA recognizes, and has no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. See 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines does not justify a rush to delete USSG § 2N2.1. Nor should a desire to simplify the Guidelines form a basis to fit "strict liability" criminal cases into a Guideline that was promulgated to deal with fraud.

AFIA believes that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are "strict liability" prosecutions commenced under statutes other than those now explicitly implicated by USSG § 2N2.1.⁴ The Commission might want to republish its Proposal to expand USSG § 2N2.1 to cover other regulatory statutes, including those statutes that are not now covered by an existing Guideline. Alternatively, the Commission might consider a new Guideline that would cover all regulatory violations where fraud is not involved.

C. THE PROPOSAL IS CONTRARY TO THE PURPOSE OF THE GUIDELINES

The Commission has received a statutory mandate to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). In that regard, Congress intended the Commission to periodically review judicial decisions and revise the Guidelines when sentencing disparities are found to exist. See Braxton v. US, 500 U.S. 344, 348 (1991); Neal v. US, 116 S. Ct. 763, 766 (1996) ("Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime"). AFIA is unaware of any study or finding suggesting that unwarranted sentencing disparities occur under USSG § 2N2.1. In fact, most courts have invariably imposed low fines on FDA-regulated organizations, to permit the entities to spend their money on remedial measures.

⁴ See United States v. Luv N' Care International, Inc., 897 F. Supp. 941 (W.D. La. 1995) (prosecution initiated under the Federal Hazardous Substances Act, a statute as to which the Commission has not established a Guideline).

Further, the Proposal seems wholly inconsistent with the Commission's General Application Principles. USSG Ch. 1, Pt. A § 4(f) sets forth guiding principles for the Commission's promulgation of guidelines concerning regulatory offenses. It states that a typical guideline for a so-called "regulatory offense" will provide a low base offense level. Nevertheless, under the Proposal, persons convicted of regulatory violations under the food and drug laws would be sentenced according to the monetary loss incurred by "victims." AFIA sees no reason why the Commission should depart from its General Application Principles by deleting USSG § 2N2.1 until the Commission examines whether "loss" should be a relevant sentencing factor in all regulatory offenses.

Application of USSG 2F1.1, rather than USSG § 2N2.1, to misdemeanor food and drug offenses would simply be inequitable. One of the primary purposes of the Guidelines is to preserve proportionality in sentencing. *See Neal v. US*, 116 S. Ct. at 767. *See also, Mistretta v. US*, 488 U.S. 361, 374 (1989); United States Sentencing Commission, *Guidelines Manual* at 2 (Nov. 1994) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). Accordingly, the Commission was directed to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

As explained above, many prosecutions brought against officials and corporations regulated by FDA involve only technical violations of the FFDCA and do not present a true risk of harm to the public or to animals. Accordingly, under USSG § 2N2.1, courts have traditionally imposed no jail sentences for such "non-serious" crimes. However, applying the "fraud" guideline to misdemeanor food and drug offenses will certainly increase the potential for incarceration, possibly reaching jail sentences at the statutory maximum. Certainly, Congress did not intend the Commission to mandate stiff sentences on relatively minor criminal offenses.

D. THE PROPOSAL IS INCONSISTENT WITH OTHER ANALOGOUS GUIDELINES

If the Proposal is adopted, it will establish, for the first time, a guideline for fines to be imposed on corporations and other organizations convicted of strict liability FFDCA offenses. As such, the Proposal is inconsistent with the Commission's treatment of similar regulatory guidelines.

Like USSG § 2N2.1, the Commission has promulgated regulatory offense guidelines for individuals convicted for environmental crimes. *See* USSG § 2Q. The USSG § 2Q Guidelines encompass misdemeanor offenses, and in some cases, strict liability environmental offenses. *See*

e.g., 33 U.S.C. § 411 (sentenced under USSG § 2Q1.3). There are close parallels between the FFDCA and the environmental statutes in terms of their purposes, effects, deterrent value, and statutory structure. A careful analysis should be conducted comparing how the FFDCA does and does not compare to the environmental laws. Where similar, it is reasonable to suggest that the Sentencing Commission treat the two categories of cases similarly.

However, the Commission has not proposed to include environmental cases involving fraud under the fraud guideline, USSG § 2F1.1.⁵ Nor has the Commission promulgated organizational guidelines for environmental offenses. AFIA believes that the Commission should defer any modification to USSG § 2N2.1 until the Commission has studied the extent to which FFDCA cases should be sentenced under the same basic principles as environmental cases. The Commission has not asserted any ground to treat strict liability food and drug offenses different than strict liability environmental offenses. As both types of offenses closely parallel each other, so too should their respective guidelines.

E. CONSULTATION WITH OUTSIDE GROUPS IS ESSENTIAL

In promulgating or revising guidelines, the Commission is required to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). The Commission's Proposal was apparently not preceded by any dialogue with the industry (or their legal representatives), academicians, public interest groups, or other organizations which have a wealth of knowledge in this area. The limited comment period to respond to the Proposal is simply inadequate for this purpose.

With respect to environmental offenses, the Commission has met its "consultation" obligations by forming an advisory working group composed of government officials, law professors, lawyers in private practice, in-house corporate lawyers, and others. See e.g., 58 Fed.

⁵ Indeed, in United States v. Carpenter's Goldfish Farm, 998 F.2d 692 (9th Cir. 1993), the Ninth Circuit vacated a sentence in an environmental case. The defendant had committed two offenses that were subject to sentencing. One of the offenses was properly subject to USSG § 2F1.1 because fraud and deceit were involved. However, the other offense (a strict liability environmental crime) was not covered by any Guideline. The Court vacated the sentence because the district court had imposed sentence for the strict liability offense by employing the Guideline applicable to felony environmental offenses. This case reinforces AFIA's position that regulatory strict liability misdemeanor offenses must be accorded different sentencing status than more serious felony charges. The case also demonstrates the need to have a general regulatory Guideline that will cover regulatory offenses that are not now subject to the Sentencing Guidelines.

Comment to U.S. Sentencing Commission
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Page 8

Reg. 65,764 (1993) (Commission established independent working group to promulgate organizational guidelines for environmental offenses). Similarly, AFIA submits that the Commission should form an advisory working group consisting of individuals from the government, defense bar, business community, and academia who specialize in matters relating to the FDA. Such members would provide valuable, first-hand input regarding the adequacy of regulatory guideline USSG § 2N2.1.

F. CONCLUSION

For all the reasons discussed above, AFIA urges the Sentencing Commission to refrain from adopting the Proposal, insofar as it would delete USSG § 2N2.1. Further, AFIA believes the Sentencing Commission should establish an advisory working group, partly composed of members of the affected industry, to ensure that misdemeanor FFDCA offenses are sentenced fairly under either USSG § 2N2.1 or a new guideline that would apply to all regulatory misdemeanor offenses. AFIA stands ready and willing to participate in that working group or to provide any further assistance to the Commission that it can.

We appreciate this opportunity to present our views.

Sincerely yours,



David A. Bossman
President

DAB:mhc

[76]



017-96

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.

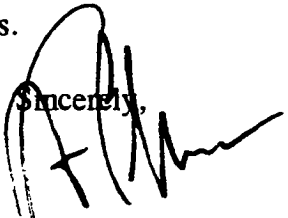
^{4/} United States v. Park, 421 U.S. 658, 673-74 (1975). See also United States v. Dotterweich, 320 U.S. 277 (1943).

^{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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Page Four

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

SCA/krq

[79]



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THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
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Washington, D.C. 20064-8030
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March 6, 1996

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment-1996 Cycle

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1996 amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the

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Commission is to truly abide by the duties which were entrusted to it by Congress in the enabling legislation.

* * *

COMMENTS ON SPECIFIC AMENDMENT PROPOSALS AND ISSUES FOR COMMENT

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth.

Issue for Comment #1--Offenses Involving Drugs (Crack Cocaine)

We strongly endorsed the action which the Commission took last year in what was labelled Amendment #5 for 1995. We reaffirm our support for those changes. In its legislation of October 30, 1995, which rejected Amendment #5, the Congress has requested that the new proposed ratio be higher for crack than powder so our and your preferred one-to-one ratios would be inappropriate.

Given this fact, we recommend a five-to-one ratio. We select five to one because it would make the crack cocaine ratio to powder cocaine the same as the ratio for Heroin, PCP, Methamphetamine, and their equivalents, which are clearly among the most dangerous, addictive and destructive drugs, to powder cocaine. Also, a five-to-one ratio preserves the inner harmony of the ratios associated with the drug table which increases penalties systematically as societal harms increase. A five-to-one ratio would recognize that the harms associated with crack are significant, but would lessen somewhat the impact of the current racial inequities of crack sentencing which result because crack use is more popular among minorities.

Obviously, a five-to-one ratio with a ceiling of Level 38 for quantity would, along with §3B1.2, result in longer sentences for wholesale distributors rather than for retailers, so that a five to one recommendation would satisfy the concerns articulated by Congress in Subsection (B) of the legislation which rejected one to one.

That legislation's Subsection (C)'s concern about powder cocaine trafficking defendants who knowingly sell to individuals who will convert to crack are currently adequately met by the Pinkerton doctrine embodied in U.S.S.G. §1B1.3(1)B. Likewise, Subsection (D)'s litany of harms are all addressed by specific offense characteristics or enhancements which already exist or which were part of last year's proposed Amendment 5. We believe that those proposals for violence and weapons should be resubmitted, along with the five-to-one ratio.

We further believe that harms not accounted for by any other

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guideline section or by last year's proposed #5, such as neighborhood deterioration, child neglect by parental users, and the spread of sexually transmitted diseases by users who engage in increased sexual activity are adequately addressed by the illegality of the substance in the first instance, and most definitely by a five-to-one ratio. We note that these harms are extremely difficult to quantify and their existence is largely anecdotal, especially insofar as they supposedly occur with any greater frequency among crack rather than powder users. Also, these behaviors occur more frequently in the lower socio-economic strata so that attributing them to drug use is highly speculative.

We believe that a five-to-one ratio is the right choice for this difficult decision. We also recognize that politics largely influenced the Congress in its rejection of last year's proposal. We believe it would help this Congress for the Commission's action to be approved unanimously. When the Warren Court began to integrate America, they did so by unanimous decision so as to send a clear message. Full support by the Commission for a five-to-one ratio would likewise send a clear message to Congress. We ask that all Commissioners support five to one. Not only is this the right thing to do, but it will aid the Congress in doing the right thing.

Proposed Amendment #2--Money Laundering

Proposed Amendment Numbers 2(A) and 2(B) - Money Laundering

The PAG strongly supports the Commission's proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. Unlike the Department of Justice's proposal, which we oppose, the Commission's suggested amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. While the Commission's proposal constitutes a much needed reform, we believe that the underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by incorporating certain modifications which are set forth below.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a \$3000 check representing a bribe). We note that defense attorneys from around

the country have informed the PAG that certain prosecutors are using the statute to prosecute state misdemeanor offenses (e.g., prostitution, gambling) as federal money laundering and, as such, exposing defendants to significant prison sentences for crimes which would have otherwise resulted in the defendants receiving probation.

Furthermore, as noted by the Money Laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Working Group recognized, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they significantly reduce the potential for actual or threatened sentence manipulation through charging practices.

Unfortunately, based on the Department of Justice's proposal, it would appear that the Department is intent on maintaining its ability to control sentencing exposure through the charging decision. The Department's proposal to increase the base offense levels in § 2S1.1(a)(2) and (3) by four levels would perpetuate a system in which defendants facing a money laundering charge would be exposed to a greater sentence despite the fact that they did little, if anything, more than commit the underlying offense. We urge the Commission to reject the Department's position because, as the Working Group noted, where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same as for the underlying offense." Id.

Moreover, the Department's doomsday predictions regarding sophisticated money launderers receiving too light a sentence under the Commission's proposal are unfounded. Initially, we are not aware of any examples provided by the Department which support its claim that penalties under the proposed amendment would be too lenient. In fact, the Commission's own prison impact estimate reveals that passage of the Commission's proposal would actually result in a small net increase in the prison population.

Under the Commission's proposal, for example, there would be little, if any, change in the punishment applicable to those cases involving funds which "were the proceeds of, or were used to promote, an offense involving the manufacture, importation, or distribution of controlled substances...; a crime of violence, or an offense involving firearms or explosives, national security or international terrorism." U.S.S.G. § 2S1.1(a)(2) (as proposed). In addition, the amendment provides for enhancements of up to four

additional points whenever there are actual efforts to conceal or disguise criminal proceeds and where there is "sophisticated money laundering." U.S.S.G. § 2S1.1(b) (1-2) (as proposed). Finally, when a convicted defendant has committed the underlying offense, and the underlying offense carries a heavier penalty than the money laundering offense, the more substantial penalties for the underlying offense will "trump" the money laundering guidelines; indeed, in such situations, the enhancements for sophisticated money laundering would be added to the already substantial offense levels for the underlying offense.

Indeed, the PAG continues to believe that the Commission proposal (while far superior to both the current guideline and the DOJ proposal) does not go far enough in "tying offense levels more closely to the underlying conduct." Accordingly, we recommend that the Commission make the following modifications to its proposal:

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a) (2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, we suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (2).

Without this modification, the proposed guideline, at least in certain situations, would perpetuate the inequitable system of having the sentence based on the charging decision rather than by the defendant's actual conduct. For example, in a situation where the defendant through illegal gambling obtains \$150,000 in proceeds and deposits those proceeds in the bank, the defendant (assuming he was not running a gambling business) would be subject to a base offense level of 6, if charged under the federal gambling statutes. See U.S.S.G. § 2E3.1(a) (2). However, if that same defendant were charged with money laundering, his or her guideline level under the proposed amendment would be 15. See § 2S1.1(a) (3) (base offense level of 8 plus 7 levels based on § 2F1.1). Because the proposed amendment instructs the sentencing judge to "apply the greatest" guideline level, the defendant would receive a nine point enhancement based entirely on the charging decision.¹

Second, the proposed amendment would eliminate reliance on the table found in § 2S1.1(b) (2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of funds involved in a money laundering transaction. While we understand the Commission's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss

¹ The situation would be far worse under the Department's proposal: the defendant would receive a 13 point enhancement based solely on the charging decision.

involved from fraud, is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving force behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a \$5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendment's proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate, a revised money laundering table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. The PAG strongly disagrees with the suggestion set forth in last year's Synopsis of Proposed Amendment that the additional two points are required because money laundering typically involves more than minimal planning. As previously noted, our experience is that most money laundering cases involve little more than the deposit of allegedly criminally derived proceeds into a bank account. Indeed, where there is actual money laundering, and not just a bank deposit, the proposed amendment includes a two point adjustment. See § 2S1.1(b)(1). If the base offense level in § 2S1.1(a)(3) is not changed to 6, then the guideline will continue to produce inequitable and irrational sentences. For example, where a defendant commits a \$1,600.00 mail fraud and deposits the proceeds in a savings account, the defendant could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's base offense level is 6; but, as a money laundering case under the currently proposed amendment, the

base offense level is 8.²

Fourth, the proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. The Ninth Circuit has held, in the context of a drug case, that sentencing manipulation/entrapment provided the basis for a downward departure, see United States v. Stauffer, 38 F.3d 1103 (9th Cir. 1994); however, there is little uniformity among the courts on this subject.

In order to prevent such guideline manipulation in sting cases and to promote uniformity in this area of the law, we suggest that the Commission include the following statement as Application Note 6.

If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

Proposed Amendment 3--Food and Drug Offenses

The PAG supports proposed amendments 3.(A) and (B). As to the Issue for Comment under 3.(C) we do not support any change to the Guidelines under § 2F1.1 so as to allow "gain" to be a substitute for "loss" when the essence of the offense is fraud against regulatory authorities with no economic loss. We believe United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995) and United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) were correctly decided.

We note that Chatterji has been held in its own Circuit not to apply to welfare fraud offenses where "gain" to the defendant can be used to calculate "loss" under §2F1.1. See, United States v.

² Under the Department's proposal, the base offense level is 12.

Adam, 70 F.3d 776 (4th Cir. 1995). In short, both Chatterji and Andersen are fact specific holdings.

No amendment in this area is needed and the Commission should simply leave the matter to the Courts for resolution on a case by case basis.

[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

A handwritten signature in black ink that reads "Fred Warren Bennett". The signature is written in a cursive style with a large, stylized "F" and "B".

Fred Warren Bennett
Chairman
Practitioners' Advisory Group

019-96

Congress of the United States
House of Representatives
Washington, DC 20515

March 6, 1996

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

Ladies and Gentlemen:

We are writing to comment on amendments proposed by the United States Sentencing Commission ("Commission") as published in the Federal Register, Vol. 61, No. 1, pp. 80-83. Our comments are directed toward those proposed amendments relating to cocaine offenses included in the section designated Chapter Two, Part D.

As Members of Congress who actively supported the amendments proposed by the Commission last year to eliminate the 100-to-1 disparity in base penalties for crack and powder cocaine trafficking offenses and eliminating mandatory minimum sentences for simple possession of crack cocaine, we urge the Commission to propose these same amendments this amendment cycle. We do so for the following reasons:

First, the amendments proposed last year were correct. After extensive study of all the relevant factors surrounding the sentencing disparity, the majority of Commissioners concluded that there was no justification for treating two forms of the same drug differently. Even those Commissioners who dissented agreed that the 100-to-1 disparity for trafficking offenses could not be justified and that the mandatory minimum penalties for simple possession ought to be eliminated. In light of this, there is no defensible reason for the Commission to retreat from its original proposed amendments.

Second, the Commission was expressly created to make judgments independent of political considerations. It is not the role of the Commission to either consider or accommodate the political will of those public officials who take irrational, racially prejudged positions to prove that they are "tough on crime." Retreating from the position taken last year would compromise the integrity and political independence of the Commission. We believe that proposing the same amendments this year would not be inconsistent with the legislation passed during the first session of the 104th Congress. The Commission should not be influenced by the disapproval of these proposed amendments previously. Nor should the Commission be influenced by the possibility of a similar outcome if it reoffers the amendments during this presidential

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election year. Indeed, we submit that the Commission should continue to offer these proposed amendments every year until justice and fairness prevail over political expediency.

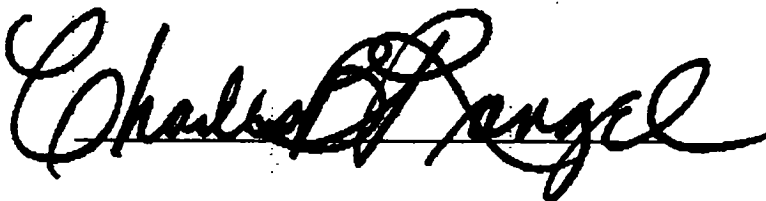
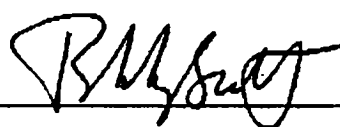
Finally, failing to offer the proposed amendments again this year would allow a racially discriminatory sentencing scheme to remain unchallenged. While we are all concerned about crime and its impact upon innocent victims, in our zeal to be "tough on crime" we cannot ignore statistics which show that 95% of those convicted for crack cocaine offenses are minorities, even though the majority of crack users are white. The continued existence of such a flawed scheme undermines the credibility of our entire system of justice. We can hardly afford any further erosion of the public's confidence.

Cases like United States v. Armstrong, which was argued before the Supreme Court on February 26, have again brought into focus the racially discriminatory impact of one of our laws. Nora Manella, the U.S. Attorney for Los Angeles, has openly and unapologetically admitted that federal law enforcement targets minority communities. Statistics herald the success of such targeting. African Americans account for nearly 90% of all federal crack cocaine defendants in the Los Angeles area. Similarly, court documents in other jurisdictions indicate that only minorities are prosecuted for crack cocaine offenses in federal courts in other large cities, including Boston, Chicago, Dallas, Denver and Miami. Recently, yet another case of unequal recently came to the public's attention in the Washington, D.C. area. Maryland's Prince George's County Police Department released three white defendants who were caught smoking crack cocaine with an infant present. African Americans caught in similar circumstances, on the other hand, are routinely prosecuted to the fullest extent of the law and their children placed in foster care.

We recognize that the Commission takes pride in its Congressional approval record for proposed amendments and that last year's disapproval of the proposed amendments for cocaine sentences represented the first Congressional "veto" of a Commission proposal. We would expect more amendments to be disapproved in the future, if Congress continues to be dominated by members who are willing to ignore evidence and tolerate racism in order to prove their toughness on crime. Rather than be unduly concerned about these rejections, we believe that the Commission should expect them as the natural consequence of exercising political independence.

We appreciate your consideration of these comments.

Sincerely,

Alfred Hastings

Earl F. Hilliard

Leah C. Dean

John J. Brown

William Blackwell

John A. Harper

Raymond R. Brown

Caroline Brown

Alma M. Watson

Donald M. Payne

Cyril McKim

Dean H. Norton

Albert R. Lyon

Samuel B. Brown

John J. Clyn

John L. West

William H. Johnson

Mrs M. Clayton

Baby L. L. L.

~~Chield~~

Shelby J. L.

James H. L.

Ch. Fatt

Victor O. Trayer

Major R. L.

~~Chield~~

W. L. L.
E. L. L.

Charles Collins

Ronald V. Sullivan



020-96

March 6, 1996

HAND DELIVERED

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

Re: Proposed Amendment To Sentencing Guideline On Food and Drug Offenses

Dear Sir or Madam:

These comments are submitted by the Health Industry Manufacturers Association (HIMA) in response to the United States Sentencing Commission's (Commission) January 2, 1996 Federal Register notice proposing to eliminate the current "regulatory" Guideline that is applicable to offenses committed under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 333(a)(1). United States Sentencing Commission, Guidelines Manual, § 2N2.1 (Nov. 1995). See 61 Fed. Reg. 79, 83 (1996) (Proposal).

HIMA is a Washington, D.C.-based national trade association representing more than 700 manufacturers of medical devices, diagnostic products, and health information systems. HIMA's members manufacture more than 90 percent of the nearly \$50 billion of health care technology products purchased annually in the United States. The Association is dedicated to representing the long-term interests, concerns, and needs of the health care technology industry through educational programs that encourage high quality, cost-effective health care. Because members of HIMA are regulated under the FFDCA, which authorizes criminal penalties for regulatory offenses, HIMA has a keen interest in the Commission's January 2 Proposal.

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HIMA strongly opposes the Proposal to delete United States Sentencing Guidelines (USSG) § 2N2.1. If the Proposal is adopted, persons convicted of violating the FFDCA would be sentenced under the "fraud" guideline (USSG § 2F1.1) even if the defendant is not charged with fraudulent conduct. In addition, the Proposal would, for the first time, establish a guideline for corporations and other organizations convicted of "strict liability" offenses under the FFDCA.^{1/} Without benefit of any prior input from the industry groups most affected, the Proposal would, if adopted, have the potential of dramatically increasing the likelihood of unjustified jail sentences and massive fines on individuals and corporations convicted of misdemeanor "strict liability" offenses. Although HIMA supports, and will continue to support, strict sentences against individuals and corporations convicted of felony FFDCA offenses where fraudulent conduct is established, similar stiff sentences for misdemeanor "strict liability" FFDCA offenses, where fraudulent conduct is not an element of the offense, are simply not warranted.

A. THE PROPOSAL'S IMPACT ON HIMA MEMBERS

The Proposal will potentially have serious and unwarranted ramifications for HIMA's member companies and their executives and employees. HIMA's members are primarily regulated under the various sections of the FFDCA that relate to medical devices as enacted in three major pieces of legislation. See Pub. L. No. 94-295, 90 Stat. 540 (1976); Safe Medical Devices Act of 1990, Pub. L. No. 101-629, 104 Stat. 4511 (1990); and the Medical Device Amendments of 1992, Pub. L. No. 102-300, 106 Stat. 238 (1992). The FFDCA and its implementing regulations, set forth numerous detailed requirements intended to ensure that medical devices are safe and effective before and after they enter the market. These mandates, if violated, subject the offending persons to a variety of regulatory and judicial sanctions. The most extreme of these sanctions is a criminal prosecution.

The FFDCA covers every aspect of the manufacturing, marketing, and distribution of medical devices. The Act provides the means for bringing safe and effective medical devices to the market by requiring that, for break through technology, a premarket approval application (PMA) be submitted to the United States Food and Drug Administration (FDA) before that medical device is commercially distributed. See 21 U.S.C. § 360c. In addition, the FFDCA establishes a system of

^{1/} The Guidelines for imposing fines on corporations and other organizations, USSG § 8C, does not reference USSG § 2N2.1 and is thus not applicable to misdemeanor food and drug offenses. USSG § 8C2.1. Accordingly, organizations convicted of committing such misdemeanor offenses are currently fined under 18 U.S.C. § 3571 and §3572. However, the organizational fine Guidelines, USSG § 8C, are applicable to fraud offenses subject to USSG 2F1.1. Thus, organizations committing food and drug offenses involving fraud are currently fined under USSG § 8C. If the Proposal is adopted, organizations convicted of misdemeanor food and drug offenses will be fined under USSG § 8C as well.

premarket notification (510(k)) for products that are substantially equivalent to legally marketed devices. In this way, FDA clears for commercial distribution those devices, based on a comparison to an existing product, with demonstrated safety and effectiveness. See 21 U.S.C. § 360k. The PMA and 510(k) requirements ensure that manufacturers of medical devices are currently required to have their devices precleared prior to marketing.

The FFDCA also requires that medical devices be manufactured in compliance with current good manufacturing practices (CGMPs). 21 U.S.C. § 360j(f). The CGMPs establish controls for various aspects of manufacturing of medical devices, including production and process controls, packaging and labeling controls, storage and distribution controls, and laboratory controls. The CGMPs also mandate strict record keeping and reporting requirements. See 21 C.F.R. Part 820.

Although the CGMPs contain numerous requirements, they fail to establish precise definitions of acceptable conduct. The regulations use words like "reasonable" and "adequate." A CGMP violation, which could subject an individual and manufacturer to criminal prosecution, often involves a disagreement over interpretations but rarely involves fraud.

The failure to comply with any of the above requirements may lead to an FDA determination that a medical device is adulterated or misbranded in violation of the FFDCA. Any person who manufactures and distributes an adulterated or misbranded product may be subject to criminal penalties. 21 U.S.C. §§ 331 and 333(a). As in the case of many CGMP violations, a medical device may be found to be adulterated or misbranded even though it meets all relevant specifications and does not pose a risk of harm to the consumer or the public. The same is true for many other violations of the FFDCA, where a violation can occur despite the fact that the product is safe and effective.

Medical device corporations and their officials may be held criminally liable despite the fact that they had no intention to violate the FFDCA, or even knew the FFDCA was being violated. Defendants have been criminally charged under the "strict liability" doctrine set forth in United States v. Park, 421 U.S. 658 (1975), which upheld the authority of FDA to obtain a conviction against a corporate officer or organization without having to prove that the defendant had any mens rea. The Park Court concluded that a corporate officer who is in a "responsible relationship" to activity that violates the FFDCA can be criminally prosecuted even though the person did not personally engage in or even know about that activity. In fact, in Park, the Supreme Court noted that the defendant, John Park (whose conviction was upheld in the case), had consulted with legal counsel upon hearing that his firm's Baltimore warehouse had sanitation problems. Mr. Park, who lived and worked in Philadelphia, was assured that the person who controlled that facility was investigating the situation and that the matter was apparently under control. The Court found that even though Mr. Park did not order the FFDCA violations or even know they were occurring, he could be convicted because, as President of the company, he had the power to prevent the violations from occurring. The Court stated that he had a positive duty to implement measures to ensure that

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his company did not violate the law. If those measures were inadequate, he could be criminally prosecuted.^{2/}

The type of prosecution brought under 21 U.S.C. § 333(a)(1) bears no resemblance to a fraud case where FDA alleges that someone violates the FFDCA with the intent to defraud or mislead the FDA, a customer, or a consumer. 21 U.S.C. § 333(a)(2). In the former type of case, FDA prosecutes people with no allegation that the person intended to violate the FFDCA or even knew about the violation. In the latter case, FDA charges a person with a crime based on traditional mens rea where the defendant knew that he or she was participating in illegal conduct. We fail to understand the logic of having persons convicted under the FFDCA's misdemeanor provisions sentenced the same way as persons who have violated the FFDCA with the specific intent of defrauding someone.

Although there are thousands of companies in the medical device industry, there have been remarkably few criminal prosecutions brought against medical device companies or their officials. Nevertheless, HIMA is quite concerned about the potential impact on its members if the proposal is adopted. FDA is committed to vigorous enforcement of the strict liability criminal provisions of the FFDCA. For instance, in 1990 FDA stated that the deterrent power of misdemeanor strict liability violations could not be underestimated. However, HIMA strongly believes that the punishment for these violations should be commensurate with the violation. A person or company should not receive felony sanctions for strict liability violations.

If the Commission's Proposal is adopted, sentencing judges will almost certainly be compelled to impose a term of imprisonment for "strict liability" medical device offenses, particularly in cases where a large volume of product is implicated or the cost of the product is high. This is due to the fact that the "fraud" Guideline sets a sentence according to the "loss" to the victims. Further, the proposal will establish a guideline for a fine to be imposed on corporations and other organizations in regulatory (non-fraud) cases. Consequently, courts will be obligated to increase fines they impose on corporations and other organizations in the medical device industry.

Such stiff punishments, for non mens rea criminal conduct, would have an unduly harsh impact on medical device corporations and their officials. A jail sentence would be devastating for a corporate executive or official at any level within a corporation who takes pride in his job, has a family, and a previously untarnished background. The Commission needs to be aware of the fact that many regulatory requirements are subject to different interpretations and individuals can not always quit their jobs whenever their interpretation differs from that of management. In light of the

^{2/} The government has also brought misdemeanor "strict liability" criminal prosecutions against low level employees of large companies. See United States v. General Nutrition, Inc., 638 F. Supp. 556 (W.D.N.Y. 1986) (misdemeanor criminal prosecution properly initiated under FFDCA against a store clerk at a retail outlet who made promotional statements about products sold at the store).

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subjective way medical devices are regulated, it is unfair to mandate high penalties for what turns out after the fact to be interpreted as violative conduct. Moreover, as many medical device, diagnostic products, and health care information system corporations are small businesses, massive fines would be crippling to the development of innovative products. Additionally, this amendment to the sentencing Guidelines will add to the already existing reservations that companies have about entering an industry where there is a potential for high criminal penalties for inadvertent violative conduct.

B. THE PROPOSAL LACKS A VALID BASIS

HIMA recognizes, and has no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. See 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines does not justify deleting USSG § 2N2.1. Nor should a desire to simplify the Guidelines form a basis to fit "strict liability" criminal cases into a Guideline that was promulgated to deal with fraud.

In support of the Proposal, the Commission referenced a two-year study conducted by the Commission's Food and Drug Working Group (Working Group). See 61 Fed. Reg. 83 (1996). However, this Working Group did not propose to eliminate USSG § 2N2.1. Moreover, despite conducting a study of cases sentenced under USSG § 2N2.1, the Working Group never identified even one case in which a judge, a prosecutor, a defense attorney, or a defendant complained that the sentence imposed under USSG § 2N2.1 was inappropriate.

In addition to the Working Group's study, HIMA is unaware of any case in which anyone sentenced under USSG § 2N2.1, the sentencing court, or even the government displayed dissatisfaction with the sentence imposed. In sum, all empirical evidence strongly suggests that USSG § 2N2.1 is working quite well.

HIMA believes that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are "strict liability" prosecutions commenced under statutes other than those now explicitly implicated by USSG § 2N2.1.^{3/} The Commission might want to republish its Proposal to expand USSG § 2N2.1 to cover other regulatory statutes, including those statutes that are not now covered by an existing Guideline. Alternatively, the Commission might consider a new guideline that would cover all regulatory violations where fraud is not involved.

3/ See United States v. Luv N' Care International, Inc., 897 F. Supp. 941 (W.D. La. 1995) (prosecution initiated under the Federal Hazardous Substances Act, a statute as to which the Commission has not established a guideline).

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**C. THE PROPOSAL IS CONTRARY TO THE PURPOSE OF THE
GUIDELINES**

The Commission has received a statutory mandate to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). In that regard, Congress intended the Commission to periodically review judicial decisions and revise the Guidelines when sentencing disparities are found to exist. See Braxton v. United States, 500 U.S. 344, 348 (1991); Neal v. United States, 116 S. Ct. 763, 766 (1996) ("Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime"). HIMA is unaware of any study or finding suggesting that unwarranted sentencing disparities occur under USSG § 2N2.1. In fact, most courts have invariably imposed low fines on FDA-regulated organizations, to permit the entity to spend its money on remedial measures.

Further, the Proposal seems wholly inconsistent with the Commission's General Application Principles. See USSG Ch. 1, Pt. A § 4(f), which sets forth guiding principles for the Commission's promulgation of guidelines concerning regulatory offenses. It states that a typical guideline for a so-called "regulatory offense" will provide a low base offense level. Nevertheless, under the Proposal, persons convicted of regulatory violations under the food and drug laws would be sentenced according to the monetary loss incurred by "victims." HIMA sees no reason why the Commission should depart from its General Application Principles by deleting USSG § 2N2.1 until the Commission examines whether "loss" should be a relevant sentencing factor in all regulatory offenses.

Application of USSG 2F1.1, rather than USSG § 2N2.1, to misdemeanor FFDCA offenses would simply be inequitable. One of the primary purposes of the Guidelines is to preserve proportionality in sentencing. See Neal v. United States, 116 S. Ct. at 767, (1996). See also, Mistretta v. United States, 488 U.S. 361, 374 (1989); United States Sentencing Commission, Guidelines Manual at 2 (Nov. 1994) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). Accordingly, the Commission was directed to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

As explained above, many prosecutions brought against officials and corporations regulated by the FDA involve only technical violations of the FFDCA and do not present a true risk of harm to the public or the consumer. Accordingly, under USSG § 2N2.1, courts have traditionally imposed no jail sentences for such "non-serious" crimes. However, applying the "fraud" Guideline to misdemeanor medical device offenses will certainly increase the potential for incarceration, possibly reaching jail sentences at the statutory maximum. Certainly, Congress did not intend the Commission to mandate stiff sentences on relatively minor criminal offenses.

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D. THE PROPOSAL IS INCONSISTENT WITH OTHER ANALOGOUS GUIDELINES

If the Proposal is adopted, it will establish, for the first time, a guideline for fines to be imposed on corporations and other organizations convicted of strict liability FFDCA offenses. As such, the Proposal is inconsistent with the Commission's treatment of other similar regulatory guidelines.

Like USSG § 2N2.1, the Commission has promulgated regulatory offense guidelines for individuals convicted of environmental crimes. See USSG § 2Q. The USSG § 2Q Guidelines encompass misdemeanor offenses, and in some cases, strict liability environmental offenses. See, e.g., 33 U.S.C. § 411 (sentenced under USSG § 2Q1.3). There are close parallels between the FFDCA and the environmental statutes in terms of their purposes, effects, deterrent value, and statutory structure. A careful analysis should be conducted comparing how the FFDCA does and does not compare to the environmental laws. Where similar, it is reasonable to suggest that the Sentencing Commission treat similarly the two categories of cases.

However, the Commission has not proposed to include environmental cases involving fraud under the fraud Guideline, USSG § 2F1.1.^{4/} Nor has the Commission promulgated organizational guidelines for environmental offenses. HIMA believes that the Commission should defer any modification to USSG § 2N2.1 until the Commission has studied the extent to which FFDCA cases should be sentenced under the same basic principles as environmental cases. The Commission has not asserted any ground to treat strict liability FFDCA offenses differently than strict liability environmental offenses. As both types of offenses closely parallel each other, so too should their respective guidelines.

E. CONSULTATION WITH OUTSIDE GROUPS IS ESSENTIAL

In promulgating or revising guidelines, the Commission is required to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). The Commission's Proposal was apparently not preceded by any dialogue with the industry (or their legal representatives), academicians, public

4/ Indeed, in United States v. Carpenter's Goldfish Farm, 998 F.2d 692 (9th Cir. 1993), the Court vacated a sentence in an environmental case. The defendant had committed two offenses that were subject to sentencing. One of the offenses was properly subject to USSG § 2F1.1 because fraud and deceit was involved. However, the other offense (a strict liability environmental crime) was not covered by any guideline. The Court vacated the sentence because the district court had imposed the Guideline applicable to felony environmental offenses. For the strict liability environmental crime, this case reinforces HIMA's position that regulatory strict liability misdemeanor offenses must be accorded different sentencing status than more serious felony charges.

interest groups, or other organizations which have a wealth of knowledge in this area. The limited comment period to respond to the Proposal is simply inadequate for this purpose.

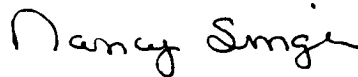
With respect to environmental offenses, the Commission has met its "consultation" obligations by forming an advisory working group composed of government officials, law professors, lawyers in private practice, in-house corporate lawyers, and others. See e.g., 58 Fed. Reg. 65,764 (1993) (Commission established independent working group to promulgate organizational guidelines for environmental offenses). Similarly, HIMA submits that the Commission should form an advisory working group consisting of individuals from the government, defense bar, business community, and academia who specialize in matters relating to the FDA. Such members would provide valuable, first-hand input regarding the adequacy of regulatory Guideline USSG § 2N2.1.

F. CONCLUSION

For all the reasons discussed above, HIMA urges the Sentencing Commission to refrain from adopting the Proposal, insofar as it would delete USSG § 2N2.1. Further, HIMA believes the Sentencing Commission should establish an advisory working group, partly composed of members of the affected industry, to ensure that misdemeanor FFDCA offenses are sentenced fairly under either USSG § 2N2.1 or a new guideline that would apply to all regulatory misdemeanor offenses. HIMA stands ready and willing to participate in that working group or to provide any further assistance to the Commission that it can.

We appreciate this opportunity to present our views.

Sincerely yours,



Nancy Singer
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March 6, 1996

BY MESSENGER

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Attn: Public Information

Re: January 2, 1996 Proposed Amendment To
Sentencing Guideline On Food And Drug
Offenses

Dear Sir or Madam:

This comment is submitted on behalf of Genentech, Inc. (Genentech). Because Genentech is regulated under the Federal Food, Drug, and Cosmetic Act (FDC Act), and other related statutes which authorize criminal penalties for regulatory offenses, Genentech has substantial concerns regarding the United States Sentencing Commission's (Commission's) January 2, 1996 Federal Register notice, insofar as the Commission proposes to delete United States Sentencing Guidelines (USSG) § 2N2.1. See 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal").

Genentech has reviewed, and adopts as its own, the comments filed in this matter by the Health Industry Manufacturers Association (HIMA). Genentech has business interests that are wider than those of the HIMA membership; Genentech is one of the leading biotech companies in the world, making such products as Tissue Plasminogen Activator (tPA). Nonetheless, the comments of HIMA relating to the technical violations that might be charged as misdemeanors relating to medical devices under the FDC Act apply with the same force to other products regulated under the FDC Act.

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Genentech agrees with HIMA both about the potential unfair impact of the proposal, and that the proposal is lacking a valid basis, that it is contrary to the purpose of the guidelines, and that it is inconsistent with other analogous guidelines. In addition, we believe the procedure used to reach the proposal is so flawed that it cannot be a proper basis for any action.

Administrative Procedure Act

Guidelines promulgated by the Commission are subject to the Administrative Procedure Act (APA) rulemaking requirements and are therefore reviewable. Congress stated in the Sentencing Reform Act of 1984 (Act) that "the provisions of section 553 of title 5 . . . shall apply to the promulgation of guidelines pursuant to this section." 28 U.S.C. § 994(x).

The APA rulemaking requirements pertain to agency action. The APA defines the term "agency" to exclude "the courts of the United States." 5 U.S.C. § 551(1)(B). However, although the Commission is within the Judiciary, it is not a court. The Supreme Court emphasized this distinction, saying:

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body....

Mistretta v. United States, 488 U.S. 361, 384-85 (1989) (emphasis added).

Moreover, the Court said:

The Commission . . . is an independent agency in every relevant sense.

Id. at 393. And:

In contrast to a court, its rulemaking is subject to the notice and comment requirements of the [APA]. . . .

Id. at 394.

Finally, the Commission itself acknowledges that the promulgation of guidelines is subject to the rulemaking requirements of the APA. See 61 Fed. Reg. at 79 ("Ordinarily, the rule-making requirements of the [APA] are inapplicable to

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judicial agencies; however, 28 U.S.C. 99(x) makes the rulemaking provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.")

APA rulemaking requirements are required by law. The Commission's rulemaking activities affect the most fundamental liberties and should therefore be accented by unimpeachable reason and deliberation. In this instance, the Commission has not met the minimum requirements of APA rulemaking.^{1/}

A. POTENTIAL APA VIOLATIONS

1. The Commission Did Not Provide Adequate Notice

The APA provides as follows:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description

1/ Among other things, a reviewing court must set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .

of the subjects and issues
involved.

5 U.S.C. § 553(b).

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. § 553(c).

The legislative history states that:

Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.

Sen. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

The courts have observed that "[o]bviously, a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed." Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Administrator, EPA, 417 U.S. 921 (1974).

The Commission's January 2 notice is defective because:

1. The Commission has not articulated a basis or reason for making the proposed changes to the guidelines;
2. FDC Act misdemeanor violations do not constitute fraud under that statute or the ordinary meaning of the word; and
3. The Commission is seeking to overturn existing law by forcing judges to calculate "loss" in cases where no loss may exist,

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breeding uncertainty contrary to the purpose
of the Guidelines.^{2/}

Because the public has not been given notice of important aspects of the proposal nor a reason for it, the public has not been given a meaningful opportunity to comment on the proposed changes.

2. The Administrative Record Does Not
Support the Proposal

It is a fundamental principle of administrative law that an agency's actions must be set aside if the agency relies on information not disclosed in its record of consideration. Motor and Equipment Mfrs. Ass'n. Inc. v. Environmental Protection Agency, 627 F.2d 1095 (D.C. Cir. 1979), cert. denied sub nom. General Motors Corp. v. Costle, 446 U.S. 952 (1980). Indeed, for agency action not to be "arbitrary and capricious," the agency must, at a minimum, (1) consider all relevant factors, and (2) articulate a rational basis between the facts found and the choices and decisions made. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Here, the record does not support the Commission's proposed Guidelines regarding food and drug misdemeanor violations. The Commission itself offers no evidence regarding the appropriateness of treating all FDC Act violations as fraud, it merely attributes such a determination to its Working Group. However, upon examination, the Working Group did not recommend or even deem appropriate that all food and drug cases could appropriately be sentenced under the Fraud Guideline. Rather, the Working Group found that the Fraud Guideline is applied inconsistently and is, perhaps, under-utilized. Moreover, despite conducting a study of food and drug cases sentenced under section 2N2.1, the Working Group never identified even a single case in which a judge, prosecutor, a defense attorney, or a

2/ For instance, the medical device good manufacturing practice (GMP) regulations at 21 C.F.R. Part 820 require that all personnel have the necessary training to perform their jobs. 21 C.F.R. § 820.25(a). Such training must be documented. Failure to document training is a GMP violation and therefore a misdemeanor under the FDC Act. Under the section 2N2.1 regulatory guideline, no loss for this kind of violation would be presumed to exist. The Commission fails to explain how such a violation would cause a "loss" to anyone, or how such a loss would be calculated under its Proposal.

defendant complained that the sentence imposed under that section was inappropriate.

The Working Group's specific "conclusions" focussed only on:

1. The need to improve proper application of the existing cross-references;
2. How to achieve consistent application of the existing grouping rules;
3. The need to determine how to adequately address the risk of harm; and
4. Whether the incorporation of the current version of § 2N2.1 into § 8C1.2(a) should result in adequate fines for organizations convicted of food and drug offenses.

Food and Drug Group Final Report 21 (Feb. 1995). Nowhere does the Working Group recommend or justify the subsumption of the § 2N2.1 Regulatory Guideline into the Fraud Guideline. Certainly, the Commission fails to articulate a rational relationship between the facts and the Working Group's conclusions, and its proposal.

3. The Commission is Illegally Departing from Its Own Precedent

"It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them." UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972). "This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them." Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977). In Greyhound, the court went on to say that "when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." Id. (quoting Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). Another court invalidated an agency order because "an agency cannot abandon a rule established by its precedent without first stating its reasons for doing so . . ." and asserted that "it is vital that an agency justify a departure from its prior determinations." Baltimore and Annapolis R.R. Co. v. Washington Metropolitan Area Transit Comm'n, 642 F.2d 1365, 1366, 1370 (D.C. Cir. 1980). "Failure to explain the reversal of directly controlling precedent is unlawful." RKO General, Inc. v. FCC,

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670 F.2d 215, 223 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

The Commission is departing from its prior position of treating FDC Act misdemeanor violations as regulatory violations, and not fraud. The only attempted justification for its departure is that the Commission's Food and Drug Working Group --

determined that food and drug cases for individuals and organizations could appropriately be sentenced under that [fraud] guideline.

61 Fed. Reg. at 83 (emphasis added).

The capacity to change does not justify a change. Moreover, the Commission's attribution that the Working Group determined that food and drug cases could be sentenced under the Fraud Guideline is erroneous. Rather, the Working Group stated that "cases involving regulatory violations of food and drug statutes or requirements . . . should be sentenced pursuant to § 2N2.1" (the Regulatory Guideline). See Food and Drug Working Group Final Report at 13.

Consultation

Other comments to the Proposal have stressed the need for consultation with industry representatives. Genentech wholeheartedly agrees that a dialogue with the regulated industry is necessary for the Commission to understand the implications of the proposed sentencing changes.

The industry regulated by the Food and Drug Administration is subject to the heaviest of regulatory requirements. Part of this system of regulation is the power to enforce misdemeanor violations without proof of guilty intent or knowledge of wrongdoing. In every misdemeanor case brought under the FDC Act, the court instructs the jury that this is the standard. Of itself, this rule is a strong disincentive to many; there are instances of businesses deliberately dropping product lines that are regulated by the agency. If innocent misdemeanor violations under the FDC Act are elevated to the point that they are treated as "fraud," the disincentive will be even greater.

Genentech strongly encourages the Commission to renew the process of consideration of the Proposal, and to take steps to engage the representatives of the regulated industry.

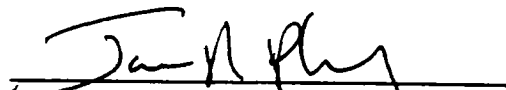
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Conclusion

Genentech agrees with the Commission's desire to simplify the Guidelines. The January 2 Proposal to sentence food and drug misdemeanor violations under the Fraud Guideline, however, was done in violation of APA requirements. Renewed consideration of the matter, taking into account the realities of FDC Act regulation practices, and in consultation with the industry, is indicated.

Sincerely,

Hyman, Phelps & McNamara, P.C.,
Attorneys for Genentech, Inc.


by: James R. Phelps, Esq.

022-96

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March 6, 1996

BY MESSENGER

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

Re: January 2, 1996 Proposed Amendment To
Sentencing Guideline On Food And Drug
Offenses

Dear Sir or Madam:

This comment is submitted on behalf of Life Technologies, Inc. (LTI). Because LTI is regulated under the Federal Food, Drug, and Cosmetic Act (FDC Act), and other related statutes which authorize criminal penalties for regulatory offenses, LTI has substantial concerns regarding the Federal Register notice dated January 2, 1996 of the United States Sentencing Commission (Commission) insofar as the Commission proposes to delete United States Sentencing Guidelines (USSG) Section 2N2.1. See 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal").

LTI has reviewed, and adopts as its own, the comments filed in this matter by the Health Industry Manufacturers Association (HIMA). LTI has business interests that are wider than those of the HIMA membership, which are largely focused in research rather than in the medical community; however, LTI develops, manufactures and markets in vitro diagnostics and medical devices. Nonetheless, the comments of HIMA relating to the technical violations that might be charged as misdemeanors relate to all products regulated under the FDC Act.

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LTI agrees with HIMA that the proposal is lacking a valid basis, that it is contrary to the purpose of the guidelines, and that it is inconsistent with other analogous guidelines. In addition, we believe the procedure used to reach the proposal is so flawed that it cannot be a proper basis for any action.

Administrative Procedure Act

Guidelines promulgated by the Commission are subject to the Administrative Procedure Act (APA) rulemaking requirements and are therefore reviewable. Congress stated in the Sentencing Reform Act of 1984 (Act) that "the provisions of section 553 of title 5 . . . shall apply to the promulgation of guidelines pursuant to this section." 28 U.S.C. § 994(x).

The APA rulemaking requirements pertain to agency action. The APA defines the term "agency" to exclude "the courts of the United States." 5 U.S.C. § 551(1)(B). Although the Commission is within the Judiciary, it is not a court. The Supreme Court emphasized this distinction, saying:

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body....

Mistretta v. United States, 488 U.S. 361, 384-85 (1989) (emphasis added).

Moreover, the Court said:

The Commission . . . is an independent agency in every relevant sense.

Id. at 393. And:

In contrast to a court, its rulemaking is subject to the notice and comment requirements of the [APA]....

Id. at 394.

Finally, the Commission itself acknowledges that the promulgation of guidelines is subject to the rulemaking requirements of the APA. See 61 Fed. Reg. at 79 ("Ordinarily, the rule-making requirements of the [APA] are inapplicable to judicial agencies; however, 28 U.S.C. 99(x) makes the rulemaking

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provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.")

APA rulemaking requirements are required by law. The Commission's rulemaking activities affect the most fundamental liberties and should therefore be accented by unimpeachable reason and deliberation. In this instance, the Commission has not met the minimum requirements of APA rulemaking.^{1/}

A. POTENTIAL APA VIOLATIONS

1. The Commission Did Not Provide Adequate Notice

The APA provides as follows:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

^{1/} Among other things, a reviewing court must set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right

5 U.S.C. § 553(b).

Section 553 of the APA further states:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. § 553(c).

The legislative history of the APA states that:

Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.

Sen. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

The courts have observed that "[o]bviously, a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed." Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Administrator, EPA, 417 U.S. 921 (1974).

The Commission's January 2 notice is defective because:

1. The Commission has not articulated a basis or reason for making the proposed changes to the guidelines;
2. FDC Act misdemeanor violations do not constitute fraud under that statute or the ordinary meaning of the word; and
3. The Commission is seeking to overturn existing law by forcing judges to calculate "loss" in cases where no loss may exist,

[110]

breeding uncertainty contrary to the purpose
of the Guidelines.^{2/}

Because the public has not been given notice of important aspects of the proposal nor a reason for it, the public has not been given a meaningful opportunity to comment on the proposed changes.

2. The Administrative Record Does Not
Support the Proposal

It is a fundamental principle of administrative law that an agency's actions must be set aside if the agency relies on information not disclosed in its record of consideration. Motor and Equipment Mfrs. Ass'n. Inc. v. Environmental Protection Agency, 627 F.2d 1095 (D.C. Cir. 1979), cert. denied sub nom. General Motors Corp. v. Costle, 446 U.S. 952 (1980). Indeed, for agency action not to be "arbitrary and capricious," the agency must, at a minimum, (1) consider all relevant factors, and (2) articulate a rational basis between the facts found and the choices and decisions made. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Here, the record does not support the Commission's proposed Guidelines regarding food and drug misdemeanor violations. The Commission itself offers no evidence regarding the appropriateness of treating all FDC Act violations as fraud, it merely attributes such a determination to its Working Group. However, upon examination, the Working Group did not recommend or even deem appropriate that all food and drug cases could appropriately be sentenced under the Fraud Guideline. Rather, the Working Group found that the Fraud Guideline is applied inconsistently and is, perhaps, under-utilized. Moreover, despite conducting a study of food and drug cases sentenced under § 2N2.1, the Working Group never identified even a single case in which a judge, prosecutor, defense attorney, or defendant

2/ For instance, the medical device good manufacturing practice (GMP) regulations at 21 C.F.R. Part 820 require that all personnel have the necessary training to perform their jobs. 21 C.F.R. § 820.25(a). Such training must be documented. Failure to document training is a GMP violation and therefore a misdemeanor under the FDC Act. Under the § 2N2.1 regulatory guideline, no loss for this kind of violation would be presumed to exist. The Commission fails to explain how such a violation would cause a "loss" to anyone, or how such a loss would be calculated under its Proposal.

[111]

complained that the sentence imposed under that section was inappropriate.

The Working Group's specific "conclusions" focussed only on:

1. The need to improve proper application of the existing cross-references;
2. How to achieve consistent application of the existing grouping rules;
3. The need to determine how to adequately address the risk of harm; and
4. Whether the incorporation of the current version of § 2N2.1 into § 8C1.2(a) should result in adequate fines for organizations convicted of food and drug offenses.

Food and Drug Group Final Report 21 (Feb. 1995). Nowhere does the Working Group recommend or justify the subsumption of the § 2N2.1 Regulatory Guideline into the Fraud Guideline. Certainly, the Commission fails to articulate a rational relationship between the facts and the Working Group's conclusions or its proposal.

3. The Commission is Illegally Departing
from Its Own Precedent

"It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them." UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972). "This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them." Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977). In Greyhound, the court went on to say that "when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." Id. (quoting Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). Another court invalidated an agency order because "an agency cannot abandon a rule established by its precedent without first stating its reasons for doing so . . ." and asserted that "it is vital that an agency justify a departure from its prior determinations." Baltimore and Annapolis R.R. Co. v. Washington Metropolitan Area Transit Comm'n, 642 F.2d 1365, 1366, 1370 (D.C. Cir. 1980). "Failure to explain the reversal of directly controlling precedent is unlawful." RKO General, Inc. v. FCC,

[112]

670 F.2d 215, 223 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

The Commission is departing from its prior position of treating FDC Act misdemeanor violations as regulatory violations, and not fraud. The only attempted justification for its departure is that the Commission's Food and Drug Working Group --

determined that food and drug cases for individuals and organizations could appropriately be sentenced under that [fraud] guideline.

61 Fed. Reg. at 83 (emphasis added).

The capacity to change does not justify a change. Moreover, the Commission's attribution that the Working Group determined that food and drug cases could be sentenced under the Fraud Guideline is erroneous. Rather, the Working Group stated that "cases involving regulatory violations of food and drug statutes or requirements . . . should be sentenced pursuant to § 2N2.1" (the Regulatory Guideline). See Food and Drug Working Group Final Report at 13.

Consultation

Other comments to the Proposal have stressed the need for consultation with industry representatives. LTI wholeheartedly agrees that a dialogue with the regulated industry is necessary for the Commission to evaluate the implications of the proposed sentencing changes.

The industry regulated by the Food and Drug Administration is subject to the heaviest of regulatory requirements. Part of this system of regulation is the power to enforce misdemeanor violations without proof of guilty intent or knowledge of wrongdoing. In every misdemeanor case brought under the FDC Act, the court instructs the jury that this is the standard. Of itself, this rule is a strong disincentive to many, there are instances of businesses deliberately dropping product lines that are regulated by the agency. If innocent misdemeanor violations under the FDC Act are elevated to the point that they are treated as "fraud," the disincentive will be even greater.

LTI strongly encourages the Commission to renew the process of consideration of the Proposal, and to take steps to engage the representatives of the regulated industry.

[113]

Conclusion

LTI agrees with the Commission's desire to simplify the Guidelines. The January 2 Proposal to sentence food and drug misdemeanor violations under the Fraud Guideline, however, was promulgated in violation of APA requirements. We respectfully recommend and request renewed consideration of the matter, in consultation with the industry, taking into account the realities of conducting business under the FDC Act and related statutes and regulations.

Sincerely,

Hyman, Phelps & McNamara, P.C.,
Attorneys for Life Technologies, Inc.


by: James R. Phelps, Esq.

[114]

023-96

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March 6, 1996

BY MESSENGER

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

Re: Proposed Amendment To Sentencing
Guideline On Food And Drug Offenses

Dear Sir or Madam:

This comment is submitted on behalf of Mallinckrodt Group, Inc. (Mallinckrodt). Because Mallinckrodt is regulated under the Federal Food, Drug, and Cosmetic Act (FDC Act), and other related statutes which authorize criminal penalties for regulatory offenses, Mallinckrodt has substantial concerns regarding the United States Sentencing Commission's (Commission's) January 2, 1996 Federal Register notice, insofar as the Commission proposes to delete United States Sentencing Guidelines (USSG) § 2N2.1. See 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal").

Mallinckrodt has reviewed, and adopts as its own, the comments filed in this matter by the Health Industry Manufacturers Association (HIMA). Mallinckrodt has business interests that are wider than those of the HIMA membership; for example, Mallinckrodt sells bulk pharmaceutical products. Nonetheless, the comments of HIMA relating to the technical violations that might be charged as misdemeanors relating to medical devices under the FDC Act apply with the same force to other products regulated under the FDC Act.

Mallinckrodt agrees with HIMA that the proposal is lacking a valid basis, that it is contrary to the purpose of the

[115]

guidelines, and that it is inconsistent with other analogous guidelines. In addition, we believe the procedure used to reach the proposal is so flawed that it cannot be a proper basis for any action.

Administrative Procedure Act

Guidelines promulgated by the Commission are subject to the Administrative Procedure Act (APA) rulemaking requirements and are therefore reviewable. Congress stated in the Sentencing Reform Act of 1984 (Act) that "the provisions of section 553 of title 5 . . . shall apply to the promulgation of guidelines pursuant to this section." 28 U.S.C. § 994(x).

The APA rulemaking requirements pertain to agency action. The APA defines the term "agency" to exclude "the courts of the United States." 5 U.S.C. § 551(1)(B). However, although the Commission is within the Judiciary, it is not a court. The Supreme Court emphasized this distinction, saying:

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body....

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Moreover, the Court said:

The Commission . . . is an independent agency in every relevant sense.

Id. at 393. And:

In contrast to a court, its rulemaking is subject to the notice and comment requirements of the [APA]. . . .

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Finally, the Commission itself acknowledges that the promulgation of guidelines is subject to the rulemaking requirements of the APA. See 61 Fed. Reg. at 79 ("Ordinarily, the rule-making requirements of the [APA] are inapplicable to judicial agencies; however, 28 U.S.C. 99(x) makes the rulemaking

[1169]

provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.")

APA rulemaking requirements are required by law. The Commission's rulemaking activities affect the most fundamental liberties and should therefore be accented by unimpeachable reason and deliberation. In this instance, the Commission has not met the minimum requirements of APA rulemaking.^{1/}

A. POTENTIAL APA VIOLATIONS

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1/ Among other things, a reviewing court must set aside agency action, findings, and conclusions found to be --

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(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .

5 U.S.C. § 706(2).

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5 U.S.C. § 553(b).

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. § 553(c).

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Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.

Sen. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

The courts have observed that "[o]bviously, a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed." Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 n.67 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Administrator, EPA, 417 U.S. 921 (1974).

The Commission's January 2 notice is defective because:

1. The Commission has not articulated a basis or reason for making the proposed changes to the guidelines;
2. FDC Act misdemeanor violations do not constitute fraud under that statute or the ordinary meaning of the word; and
3. The Commission is seeking to overturn existing law by forcing judges to calculate "loss" in cases where no loss may exist,

breeding uncertainty contrary to the purpose
of the Guidelines.^{2/}

Because the public has not been given notice of important aspects of the proposal nor a reason for it, the public has not been given a meaningful opportunity to comment on the proposed changes.

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Here, the record does not support the Commission's proposed Guidelines regarding food and drug misdemeanor violations. The Commission itself offers no evidence regarding the appropriateness of treating all FDC Act violations as fraud, it merely attributes such a determination to its Working Group. However, upon examination, the Working Group did not recommend or even deem appropriate that all food and drug cases could appropriately be sentenced under the Fraud Guideline. Rather, the Working Group found that the Fraud Guideline is applied inconsistently and is, perhaps, under-utilized. Moreover, despite conducting a study of food and drug cases sentenced under section 2N2.1, the Working Group never identified even a single case in which a judge, prosecutor, a defense attorney, or a

2/ For instance, the medical device good manufacturing practice (GMP) regulations at 21 C.F.R. Part 820 require that all personnel have the necessary training to perform their jobs. 21 C.F.R. § 820.25(a). Such training must be documented. Failure to document training is a GMP violation and therefore a misdemeanor under the FDC Act. Under the section 2N2.1 regulatory guideline, no loss for this kind of violation would be presumed to exist. The Commission fails to explain how such a violation would cause a "loss" to anyone, or how such a loss would be calculated under its Proposal.

[119]

defendant complained that the sentence imposed under that section was inappropriate.

The Working Group's specific "conclusions" focussed only on:

1. The need to improve proper application of the existing cross-references;
2. How to achieve consistent application of the existing grouping rules;
3. The need to determine how to adequately address the risk of harm; and
4. Whether the incorporation of the current version of § 2N2.1 into § 8C1.2(a) should result in adequate fines for organizations convicted of food and drug offenses.

Food and Drug Group Final Report 21 (Feb. 1995). Nowhere does the Working Group recommend or justify the subsumption of the § 2N2.1 Regulatory Guideline into the Fraud Guideline. Certainly, the Commission fails to articulate a rational relationship between the facts and the Working Group's conclusions, and its proposal.

3. The Commission is Illegally Departing
from Its Own Precedent

"It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them." UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972). "This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them." Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977). In Greyhound, the court went on to say that "when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." Id. (quoting Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). Another court invalidated an agency order because "an agency cannot abandon a rule established by its precedent without first stating its reasons for doing so . . ." and asserted that "it is vital that an agency justify a departure from its prior determinations." Baltimore and Annapolis R.R. Co. v. Washington Metropolitan Area Transit Comm'n, 642 F.2d 1365, 1366, 1370 (D.C. Cir. 1980). "Failure to explain the reversal of directly controlling precedent is unlawful." RKO General, Inc. v. FCC,

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The Commission is departing from its prior position of treating FDC Act misdemeanor violations as regulatory violations, and not fraud. The only attempted justification for its departure is that the Commission's Food and Drug Working Group --

determined that food and drug cases for individuals and organizations could appropriately be sentenced under that [fraud] guideline.

61 Fed. Reg. at 83 (emphasis added).

The capacity to change does not justify a change. Moreover, the Commission's attribution that the Working Group determined that food and drug cases could be sentenced under the Fraud Guideline is erroneous. Rather, the Working Group stated that "cases involving regulatory violations of food and drug statutes or requirements . . . should be sentenced pursuant to § 2N2.1" (the Regulatory Guideline). See Food and Drug Working Group Final Report at 13.

Consultation

Other comments to the Proposal have stressed the need for consultation with industry representatives. Mallinckrodt wholeheartedly agrees that a dialogue with the regulated industry is necessary for the Commission to understand the implications of the proposed sentencing changes.

The industry regulated by the Food and Drug Administration is subject to the heaviest of regulatory requirements. Part of this system of regulation is the power to enforce misdemeanor violations without proof of guilty intent or knowledge of wrongdoing. In every misdemeanor case brought under the FDC Act, the court instructs the jury that this is the standard. Of itself, this rule is a strong disincentive to many; there are instances of businesses deliberately dropping product lines that are regulated by the agency. If innocent misdemeanor violations under the FDC Act are elevated to the point that they are treated as "fraud," the disincentive will be even greater.

Mallinckrodt strongly encourages the Commission to renew the process of consideration of the Proposal, and to take steps to engage the representatives of the regulated industry.

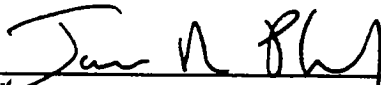
[1219]

Conclusion

Mallinckrodt agrees with the Commission's desire to simplify the Guidelines. The January 2 Proposal to sentence food and drug misdemeanor violations under the Fraud Guideline, however, was done in violation of APA requirements. Renewed consideration of the matter, taking into account the realities of FDC Act regulation practices, and in consultation with the industry, is indicated.

Sincerely,

Hyman, Phelps & McNamara, P.C.,
Attorneys for Mallinckrodt Group, Inc.


by: James R. Phelps, Esq.



U. S. Department of Justice

Criminal Division

02496

Washington, D.C. 20530

MAR 6 1996

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the sentencing guideline amendments recently proposed by the Sentencing Commission in the areas of food and drug offenses and child sex offenses.

Food and Drug Offenses

The proposed amendment would fold the food and drug guideline, §2N2.1, into the fraud guideline, §2F1.1. We have considered this proposed amendment in the overall context of guideline simplification. Preliminarily, we support this merger but only if additional amendment of the fraud guideline and its commentary is promulgated regarding "loss." Of course, the Commission's future actions on guideline simplification may alter our initial position.

The published proposal will be effective in rectifying certain problems which have arisen under the current regime and which were identified by the Commission's Food and Drug Working Group. Those problems include inconsistent application of section 2N2.1's cross-reference to section 2F1.1 in cases involving fraud and confusion about the application of Chapter Three's multiple count rules to offenses governed by section 2N2.1. (see, e.g., *United States v. Pilgrim Market Corp.*, 944 F.2d 14 (1st Cir. 1991)).

We believe, however, that an amendment is necessary to address the Commission's invitation to comment on the computation of "loss," for purposes of section 2F1.1(b)(1), when the essence of the offense is fraud against regulatory authorities, and there is no readily monetizable harm. For instance, it is now settled that under the Federal Food, Drug, and Cosmetic Act (FDCA) a seller of illegal products satisfies the FDCA felony element "intent to defraud" if he takes affirmative steps to evade detection by, and thus "defraud," regulatory authorities. This

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is true even if the customers of such products are well aware of their violative status. See, e.g., *United States v. Arlen*, 947 F.2d 139, 143 (5th Cir. 1991), cert. denied, 503 U.S. 939 (1992); *United States v. Cambra*, 933 F.2d 752, 755 (9th Cir. 1991); *United States v. Bradshaw*, 840 F.2d 871, 874 (11th Cir.), cert. denied, 488 U.S. 924 (1988); see also *United States v. Mitcheltree*, 940 F.2d 1329, 1350-51 (10th Cir. 1991) (adopts the *Bradshaw* analysis concerning "intent to defraud or mislead" but adds a refinement pertinent to misbranding offenses). Appellate courts have uniformly held that FDCA felony cases arising from fraud on regulatory authorities are properly sentenced under section 2F1.1. E.g., *United States v. Andersen*, 45 F.3d 217, 220 (7th Cir. 1995); *Arlen*, 947 F.2d at 143-44, 146-47; *Cambra*, 933 F.2d at 756.

United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), and *United States v. Andersen*, 45 F.3d 217 (7th Cir. 1995), cited in the Commission's notice, have clouded the issue of dollar-based adjustments for "loss" in cases in which the U.S. Food and Drug Administration ("FDA") is the defrauded party. In such cases, it has been the practice of the Department to seek "loss" enhancements measured by dollar volume. In this regard, the seminal authority had been *United States v. Cambra*, 933 F.2d 752 (9th Cir. 1991). In that opinion, the Ninth Circuit held that

[t]he monetary table in the fraud guideline is intended to reflect "the harm to the victim and the gain to the defendant." . . . Federal agencies may be the victims of fraud in counterfeiting and misbranding drugs. There is no meaningful distinction between the government as victim and individual consumer victims. . . . In this case, the district court found that Cambra intended to profit from his activity and that at least federal agencies were defrauded by his acts. Adjusting the guideline range based on the amount involved is therefore appropriate.

933 F.2d at 756.

Until recently, federal district courts and probation offices had fairly uniformly accepted the notion that those who defraud FDA, and thereby subvert the regulatory process, inflict a *per se* "loss" on the public that can be fairly approximated for purposes of section 2F1.1(b)(1) by gain (for which gross sales volume has been the figure used). However, the practice of finding, in cases of fraud on FDA, a *per se* "loss" equal to gross sales volume recently came under question in *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995).

Chatterji held that a direct financial "loss" to someone is a *sine qua non* of a dollar-based upward adjustment under the fraud guideline, irrespective of how much gain the fraud may have

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made possible. 46 F.3d at 1340. The defendant in *Chatterji*, who was an owner and employee of a generic drug company, pleaded guilty to offenses stemming from the company's false statements to FDA, and related obstruction of FDA investigations. The District Court applied an upward adjustment of 11 levels under section 2F1.1(b)(1) based on the gross revenues from the sale of two products. 46 F.3d at 1340. However, the Court of Appeals rejected the notion that *per se* "loss" to consumers of regulated products flows from a manufacturer's fraudulently obtaining (or retaining) required FDA approval of the products. The opinion stresses the absence of any evidence that the generic drug products in question failed to meet established specifications or were otherwise deficient. It holds that gain cannot serve as a proxy for "loss," pursuant to section 2F1.1(b)(1), in the absence of some demonstrable economic injury. In addition, there is no standard expressed as to when an upward departure should be considered. 46 F.3d at 1342 n.10.

Similarly, in *United States v. Andersen*, 45 F.3d 217 (7th Cir. 1995), the Seventh Circuit ruled that defendants who had defrauded FDA about their unlawful sales of unapproved veterinary drugs had not necessarily caused anyone a "loss" that would trigger an adjustment under section 2F1.1(b)(1). In that case the defendant-veterinarians had furtively engaged in the unauthorized sale of unapproved drugs intended for use in food-producing animals (primarily dairy cattle). The defendants had not, as required, registered with FDA as drug manufacturers, and they lacked required FDA approval of their drug products. However, their customers were knowledgeable about the "black market" status of the products, and apparently quite happy to have access to cut-rate (unapproved) drugs. 45 F.3d at 218, 221. Although clearly disturbed that the defendant veterinarians had potentially endangered the food supply by trafficking in unapproved drugs, the Seventh Circuit declined to find a *per se* "loss" for purposes of section 2F1.1(b)(1). While recognizing that the guidelines expressly authorized use of a defendant's gain as a proxy for "loss," 45 F.3d at 221, the court insisted that it first must find that someone had incurred a monetary loss. On the record before it, the Seventh Circuit found no such evidence, although it strongly implied that it would have been receptive to a finding of "loss" based on concrete evidence of competitor injury -- i.e., lost sales -- suffered by legitimate providers of regulated products. *Id.*

In remanding for resentencing under section 2F1.1 without a "loss" adjustment, the court in *Andersen* satisfied its apparent concern for the public health by effectively inviting the district court to depart outside the guideline range. The court cited Application Note 10 to section 2F1.1, which suggests the possibility of upward departures to capture the harmfulness and seriousness of non-pecuniary harms, and counseled that an "upward departure may certainly be warranted by the non-monetizable risk

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to human and animal health caused by the defendants' failure to follow FDA licensing regulations, failure to conduct required purity testing and intentional marketing of unapproved drugs." 45 F.3d at 222. For the purpose of determining an appropriate departure, the court expressly suggested that gain would be a relevant consideration. 45 F.3d at 222-23.

Although counterbalanced by the Ninth Circuit's decision in *Cambra, Andersen and Chatterji* are troubling precedents in the area of FDCA sentencing under the guidelines. They augur serious obstacles to felony FDCA prosecutions founded upon fraud on FDA. If fraud on FDA does not result in *per se* "loss" that can be measured by gain, federal prosecutors will be forced to prove pecuniary harm in order to trigger adjustments pursuant to the table in section 2F1.1(b)(1). If, as *Andersen* suggests, competitor injuries can suffice, it might be possible in some cases to establish harm at sentencing through extensive proceedings laden with economic analysis. Although *Chatterji* gives no hint that competitor injuries would suffice, it proposes that the government's investigative costs can be counted. 46 F.3d at 1341. These, however, are unlikely to be well-correlated with the degree of harm in individual cases. Thus, prosecutors will have difficulty in establishing "loss" commensurate with the gravity of the conduct, or will be able to succeed in individual cases only at the cost of protracted proceedings in which sentencing courts will be called upon to make difficult judgments about the quality and value of products tainted by fraud.

We strongly believe the unavailability of predictable "loss" adjustments in FDCA fraud cases would deal a serious blow both to the cause of effective law enforcement and to the goal of uniformity in sentencing. Before *Andersen* and *Chatterji*, the prospect of predictable and appropriate sentences keyed to dollar volume gave would-be violators a powerful incentive to obey the law; gave prosecutors and defense lawyers a clear framework in which to negotiate dispositions; gave defendants (and would-be defendants) good reason to cooperate; and gave prosecutors and sentencing courts the ability meaningfully to reward cooperation. That very useful system of predictable results is disintegrating.

Upward departures, as suggested in the Commission's proposed amendments, are not sufficient to account for the risk of injury to the public health and safety that regulatory schemes seek to prevent. The underlying purpose of the food and drug laws is to protect the public from such risk. Treating risk of harm as a basis for departure from the guidelines, as if such risk presented the unusual case rather than the heartland case, misses the point of these offenses entirely. Moreover, reliance on departures is too unpredictable to be satisfactory from the standpoint of the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. §3553(a)(2), including

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deterrence of criminal activity. Additionally, a sentencing regime dependent upon upward departures is likely to result in wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

Given the concerns discussed above, we suggest that the Commission's present proposal for merging section 2N2.1 into section 2F1.1 be coupled with an amendment of section 2F1.1(b)(1) and a new Application Note to section 2F1.1. The proposed new language should give instructions consistent with the Ninth Circuit's approach in *Cambra*, and, more generally, with the principle that subverting the regulatory process by defrauding authorities causes a *per se* "loss" to the public that can fairly be approximated for purposes of section 2F1.1(b)(1) by resultant gain. In addition, the new language should recognize that a minimum guideline increase is needed for every case where a regulatory scheme protects the public health or safety.

The following language is an example of how appropriate guidance could be formulated:

Amend section 2F1.1(b)(1) to provide at the end thereof:

In cases in which fraud on regulatory authorities is the gravamen of the fraud, as opposed to cases of more conventional consumer fraud involving direct economic loss to identifiable victims, "loss," for purposes of subsection (b)(1), should be measured by the gross amount received or expected from the enterprise facilitated by the fraud. Where the regulatory scheme violated protects the public health or safety, an increase under this subsection shall be no less than 4 levels.

Add an Application Note to section 2F1.1 to provide:

In pervasively regulated areas, regulatory authorities protect the public's interest in safe, effective and reliable products and services. For purposes of subsection 2F1.1(b)(1), an example of fraud on regulatory authorities would be making false or misleading statements in a matter within the jurisdiction of the Food and Drug Administration in order to secure or maintain regulatory approval, to divert the attention of investigators from areas of noncompliance, or otherwise to facilitate the distribution or use of nonconforming products. Another example would be taking affirmative steps to evade detection in the first instance, such as dealing exclusively or primarily in cash, operating at clandestine business premises, assuming fictitious names, and adopting other measures of stealth.

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The above suggestion is, of course, preliminary and may depend upon further action by the Commission in the area of guideline simplification and our own further consideration of these issues. It represents one option for addressing the problems discussed above, but the Department will continue to address these issues as the broader question of possible revision of the fraud guideline is considered. In addition, there may be a need for further refinement to address those relatively few food and drug offenses that are prosecuted as misdemeanors -- that is, where a specific intent to defraud or mislead is not required for conviction. See, e.g., *United States v. Park*, 421 U.S. 658, 672-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

Child Sex Offenses

Amendment 1

The Commission has published proposed amendments for comment in response to the recently enacted "Sex Crimes Against Children Prevention Act of 1995." In general, we believe that the proposed amendments are responsive to the statutory directives.

Amendment 1 addresses section 2 of the Act, which directs the Commission to increase the base offense level for offenses under sections 2251 and 2252 of title 18, United States Code (producing or advertising child pornography and trafficking, receiving, or possessing child pornography) by at least two levels. The Commission proposes increasing the offense level under section 2G2.1 (for producing child pornography and related offenses) from level 25 to 27, 28, or 29. Amendment 1 also proposes increasing the offense level under section 2G2.2 (for trafficking in or receiving child pornography and related offenses) from level 15 to 17, 18, or 19; and the offense level under section 2G2.4 (for possessing child pornography) from level 13 to 15, 16, or 17.

While a two-level increase would comply with the statutory directive, there may be cases where a greater increase is needed. We urge the Commission to pay special attention to offenses involving the distribution of child pornography for other than pecuniary purposes and the production of child pornography. In this regard, the results of the study required by section 6 of the Sex Crimes Against Children Prevention Act should be instructive.

Amendment 1 also implements section 3 of the Act, which directs the Commission to increase the offense level by at least two levels for advertising, trafficking in, receiving, or possessing child pornography if a computer was used to transmit the notice or advertisement or to transport or ship the visual depiction. The amendment would provide an enhancement of two,

three, or four levels for offenses sentenced under sections 2G2.2 and 2G2.4. The use of computers to distribute child pornography has enabled violators to reach a large audience instantaneously and has made the offenses more difficult to detect. The results of the Commission's study should be instructive as to whether more than a two-level increase in the applicable offense levels is appropriate.

The Commission has invited comment as to whether section 2G2.1 should be amended to add an enhancement for the use of a computer to solicit the participation of minors in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of section 2251(c)(1)(B). While the Sex Crimes Against Children Prevention Act directed the Commission to provide at least a two-level increase for offenses involving the computer advertising of child pornography in violation of section 2251(c)(1)(A), it did not direct the Commission to provide an enhancement for computer advertising to solicit minors for the purpose of producing child pornography in violation of section 2251(c)(1)(B). We believe that the use of computers for soliciting minors in violation of this latter provision is equally worthy of an increased sentence.

However, to provide an increase under the current guideline structure would mean that computer advertising to solicit minors for the purpose of producing child pornography would have a higher offense level than actually producing the child pornography. See §2G2.1. Such a result would produce disproportionality in sentencing in our view. An increase applicable both to the production of child pornography, which may be called for independently, and the use of computers to solicit minors would remedy this proportionality problem. However, the sentences produced by this scheme would be trumped by the 10-year statutory maximum in too many cases, particularly in light of the four-level increase applicable to offenses involving children under 12 years of age. Thus, we urge the Commission in studying sentences relating to the sexual exploitation of children to consider whether the ten-year statutory maximum (15 years with a five-year mandatory minimum for repeat offenders) for violations of section 2251 is adequate. This section provides the same penalties as offenses involving the distribution and receipt of child pornography under section 2252 -- offenses that may be less serious than the production of child pornography.

Finally, the Commission has invited comment on whether the guidelines applicable to the sexual exploitation of minors should be amended to indicate that an upward departure may be warranted if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense. We favor substantially increased sentences for repeat offenders, particularly in light of the statutory increase for repeat offenders and its limitation to prior federal offenses. However,

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we do not believe that commentary inviting departures is sufficient or that it will contribute toward the goal of reducing unwarranted sentencing disparity. The Commission should study repeat child pornography and child sex offenses and should provide a guideline enhancement that at least meets the degree of increase mandated by statute but that would also apply to repeat offenders whose prior offenses violated State law. It is our view that the need for incapacitation and deterrence is particularly great regarding repeat offenders in the area of child pornography and child sex offenses and that the guidelines should provide a significant increase in the sentence.

Amendment 2

Amendment 2 responds to the directive in section 4 of the Sex Crimes Against Children Prevention Act. It directs the Commission to provide at least a three-level increase for offenses under section 2423(a) of title 18, United States Code, which prohibits the interstate transportation of a minor with the intent that the minor engage in prostitution or criminal sexual activity. The Commission has presented two options. The first raises the base offense level under section 2G1.2 from level 16 to 19, 20, or 21. The second accomplishes this goal but combines section 2G1.2 with section 2G1.1, which addresses transportation for the purposes of prostitution or prohibited sexual conduct generally.

Although Option 2 has some advantages, we question whether it is wise to promulgate a major revision of sections 2G1.1 and 2G1.2 before the Commission can evaluate the study required by section 6 of the Act in conjunction with its simplification project. We are concerned that the many cross-references in section 2G1.2, which would be incorporated into the combined guideline, may be confusing. In particular, we question to what extent sentences under section 2G1.2 are imposed in keeping with these cross-references. Thus, we would recommend simply complying with the statutory directive regarding offenses under section 2423(a) and determining as part of the guidelines simplification project whether consolidation of the two guidelines is advisable.

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We would be pleased to provide further assistance to the Commission regarding these and other areas of the guidelines.

Sincerely,



Mary Frances Harkenrider
Counsel to the
Assistant Attorney General

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National Grocers Association

March 6, 1996

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

Attention: Public Information

RE: Proposed Revisions of Sentencing Guidelines for United States Courts; Food and Drug Offenses, 61 Fed. Reg. 79 (Jan. 2, 1996)

Dear Sir/Madam:

These comments are submitted on behalf of the National Grocers Association (N.G.A.), representing the retail and wholesale grocers who comprise the independent sector of the food distribution industry. This industry segment accounts for nearly one-half of all food store sales in the United States. N.G.A. members are especially opposed to the United States Sentencing Commission's proposal on food and drug offenses published in the January 22, 1996, Federal Register, because the present sentencing guidelines for the Federal Food, Drug and Cosmetic Act (FFDCA), Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) violations are more than adequate.

The Commission's proposal will have unfair and serious negative consequences for the executives and employees of retail and wholesale food distribution companies, as well as the business entities themselves. Rather than sentencing individuals convicted of violating the FFDCA, the FMIA, and the PPIA under the current food and drug Guideline, §2N2.1, the Commission proposes that persons convicted of misdemeanors under the statutes should be sentenced under the fraud Guideline §2F1.1. The increased "fraud" sentencing standard would apply to defendants who did not engage in fraudulent conduct. The Commission's proposal is a substantial deviation from the present standard that grants federal judges the discretion to impose lesser sentences for violations that are merely negligent or inadvertent.

The current Guideline §2F1.1 provides for the application of strong fraud sentencing standards when fraudulent conduct is involved. It is unfair to apply the fraud standard to nonfraudulent conduct. N.G.A. strongly opposes its application in food and drug cases where fraud is not a factor. The effect of the Commission's proposal would be to eliminate judicial discretion by imposing §2F1.1 jail sentences and excessive fines for misdemeanor offenses. There is no record or data that justifies the Commission's proposed change.

NATIONAL GROCERS ASSOCIATION

1825 Samuel Morse Drive • Reston, VA 22090-5317 • (703) 437-5300 FAX: (703) 437-7768

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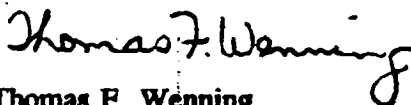
United States Sentencing Commission
March 5, 1996
Page Two.

Under §2F1.1, the Commission would permit an allowance to be made for increased penalties in cases involving conscious or reckless risk of bodily injury. The proposal does not indicate that judges would be allowed any of their present appropriate discretion to issue lower or reduced sentences where negligence or inadvertent violations occur. Under current provision §2N2.1, the judge may have the discretion to impose penalties ranging from several hundred dollars to \$5,000 for such violations, but under §2F1.1 those penalties against individuals are most likely to require fines of anywhere from \$5,000 to \$100,000. In addition, whereas probation may have been granted under §2N2.1, §2F1.1 would require actual incarceration of at least one year. Business entities are now subject to monetary penalties at the judge's discretion under §2N2.1, but under §2F1.1 those money penalties imposed would begin in the hundreds of thousands of dollars. This clearly illustrates the unfairness of imposing the fraud standard in all food and drug law violation cases. Judges should be permitted the flexibility to impose monetary penalties and jail sentences in their discretion, both up and down.

In conclusion, N.G.A. strongly believes that the sentencing guidelines under §2N2.1 should remain in effect. This will allow judges sentencing discretion in food and drug law cases where mere negligence, and not intentional or fraudulent conduct, exists. N.G.A. urges the Commission to eliminate the proposed change in sentencing provisions for food and drug offenses from any recommendation that is submitted to Congress. The current sentencing guidelines contained in §2N2.1 and §2F1.1 provide sufficient deterrence and judicial guidance regarding food and drug offenses.

The National Grocers Association appreciates the opportunity to provide the views of its members on this most important issue and would be pleased to provide any additional information that the Commission may require in its further consideration.

Sincerely,



Thomas F. Wenning
Senior Vice President and
General Counsel

TFW/sh



National-American Wholesale Grocers' Association



International Foodservice Distributors Association

• THE Food Distributors Association
Educational Services • Government Relations

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March 6, 1996

HAND DELIVERED

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

Re: Proposed Amendment To Sentencing Guideline On Food and Drug Offenses

Dear Sir or Madam:

This comment is submitted by the National-American Wholesale Grocers' Association and its foodservice partner organization, the International Foodservice Distributors Association (NAWGA/IFDA) in response to the United States Sentencing Commission's (Commission) January 2, 1996 Federal Register notice proposing to eliminate the current "regulatory" Guideline that is applicable to offenses committed under the Federal Food, Drug, and Cosmetic Act (FFDCA), the Federal Meat Inspection Act (FMIA), and the Poultry Products Inspection Act (PPIA). United States Sentencing Commission, Guidelines Manual, § 2N2.1 (Nov. 1995). See 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal").

NAWGA/IFDA is an international trade association comprised of food distribution companies which primarily supply and service independent grocers and foodservice operations throughout the U.S. and Canada. NAWGA/IFDA member companies supply food and related products to independent supermarkets, convenience stores, restaurants, hotels, schools, hospitals, and military bases. Our 300 member companies operate more than 1,200 distribution centers and employ more than 350,000 people. NAWGA members supply 56% of the groceries sold in the U.S.; IFDA members annually sell \$33 billion in food and related products. Because members of NAWGA/IFDA are regulated under the FFDCA, the FMIA, and the PPIA, statutes authorizing criminal penalties for regulatory offenses, NAWGA has a keen interest in the Commission's January 2 Proposal.

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NAWGA/IFDA strongly opposes the Proposal to delete USSG § 2N2.1. If the Proposal is adopted, all persons convicted of violating the FFDCA, the FMIA, or the PPIA would be sentenced under the "fraud" guideline (USSG § 2F1.1) even if the defendant is not charged with fraudulent conduct. In addition, the Proposal would, for the first time, establish a guideline for corporations and other organizations convicted of "strict liability" offenses under the above federal food safety statutes.^{1/} Without benefit of any prior input from the industry groups most affected, the Proposal proposes to dramatically increase the likelihood of unjustified jail sentences and massive fines on individuals and corporations convicted of misdemeanor "strict liability" offenses. Although NAWGA/IFDA supports, and will continue to support, strict sentences against individuals and corporations convicted of felony food offenses where fraudulent conduct is established, similar stiff sentences for misdemeanor "strict liability" food offenses are simply not warranted.

A. THE PROPOSAL'S IMPACT ON NAWGA/IFDA MEMBERS

The Proposal will potentially have serious and unwarranted ramifications for NAWGA/IFDA's members and their executives and employees. NAWGA/IFDA's members are primarily regulated under the FFDCA, the FMIA, the PPIA and their implementing regulations. These statutes provide requirements intended to ensure that food is wholesome and safe and prepared, packed, and held in sanitary conditions. These mandates, if violated, subject the offending persons to a variety of regulatory and judicial sanctions. The most extreme of these sanctions is a criminal prosecution.

The FDCA establishes industry-wide safety and quality standards for all foods except meat and poultry. See 21 U.S.C. § 301 et. seq. The United States Food and Drug Administration (FDA) has the regulatory authority to implement and enforce the requirements of the FFDCA. As a means of promoting food safety, the FDA requires that all foods subject to the FFDCA be manufactured in compliance with current good manufacturing practices (CGMPs). The CGMPs establish controls for all aspects of food manufacturing, including production and process controls, storage and distribution controls, and sanitation controls. 21 C.F.R. Part 110.

The FMIA and PPIA sets safety and quality standards for meat and poultry products. See 21 U.S.C. §§ 601 et. seq. (FMIA); 21 U.S.C. § 451 et. seq. (PPIA). The United States Department of Agriculture (USDA) has regulatory oversight over the production and distribution of these products. In the case of processing operations, USDA fulfills its obligation by conducting

¹ Currently, such organizations are fined by federal judges outside the confines of the Federal Sentencing Guidelines.

daily inspections at the plants. 21 U.S.C. §§ 603 - 608 (FMIA), 21 U.S.C. § 455 (PPIA). Although wholesaler's and distributors are generally exempt from daily inspection, they are required to properly label all food products and hold and distribute all food products under sanitary conditions. See 21 U.S.C. §§ 601(m)(4), (n), and 610 (FMIA); 21 U.S.C. §§ 453(g)(4), (h), and 458 (PPIA).

The failure to comply with any of the above requirements may lead to an FDA or an USDA determination that a food product is adulterated or misbranded in violation of the FFDCA, the FMIA, or the PPIA. Any person who manufactures and distributes an adulterated or misbranded product may be subject to criminal penalties. 21 U.S.C. §§ 331 and 333(a) (FFDCA); 21 U.S.C. § 610 and 676(a) (FMIA); 21 U.S.C. §§ 458 and 461(a) (PPIA). As in the case of sanitation violations, a food product may be found to be adulterated or misbranded even though it is wholesome and safe.

Wholesalers and distributors and their officials may be held criminally liable despite the fact that they had no intention to violate the FFDCA, the FMIA, or the PPIA, or even knew these statutes were being violated. Defendants have been criminally charged under the "strict liability" doctrine set forth in United States v. Park, 421 U.S. 658 (1975), which upheld the authority of FDA to obtain a conviction against a corporate officer or organization without having to prove that the defendant had any mens rea.

The Park case demonstrates how the sometimes technical requirements of federal food safety statutes have lead to criminal prosecutions. In Park John Park (whose conviction was upheld in the case), had consulted with legal counsel upon hearing that his food company's Baltimore warehouse had sanitation problems. Mr. Park, who lived and worked in Philadelphia, was assured that the person who controlled that facility was investigating the situation and that the matter was apparently under control. However, the FDA subsequently brought charges against Mr. Park alleging that food had become adulterated because of the insanitary conditions. The Supreme Court upheld Mr. Park's conviction even though Mr. Park did not order the FFDCA violations or even know they were occurring. The Court found that Mr. Parks could be convicted because, as President, he had the power to prevent the violations from occurring. The Court stated that he had a positive duty to implement measures to ensure that his company did not violate the law. If those measures were inadequate, he could be criminally prosecuted.^{2/}

² The government has also brought misdemeanor "strict liability" criminal prosecutions against low level employees of large companies. See United States v. General Nutrition, Inc., 638 F. Supp. 556 (W.D.N.Y. 1986) (misdemeanor criminal prosecution properly initiated under FFDCA against a store clerk at a retail outlet who made promotional statements about products sold at the

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It is easy to realize that the type of prosecution brought in the Park case bears no resemblance to a fraud case where FDA or USDA allege that someone violates a federal food safety statute with the intent to defraud or mislead the government, a customer, or a consumer. See 21 U.S.C. § 333(a)(2) (FFDCA); 21 U.S.C. § 676(a) (FMIA); 21 U.S.C. § 461(a) (PPIA). In the former type of case, FDA and USDA prosecute people with no allegation that the person intended to violate the FFDCA, the FMIA, or the PPIA, or even knew about the violation. In the latter case, FDA and USDA charge a person with a crime based on traditional mens rea where the defendant knew that he was participating in illegal conduct.

NAWGA/IFDA is not proposing that misdemeanor (strict liability) cases under the food safety statutes are never warranted.³ However, we fail to understand the logic of having persons convicted under these statutes' misdemeanor provisions sentenced the same way as persons who have violated the law with the specific intent of defrauding someone.

Although there are thousands of companies in the food wholesaler and distributor industry, there have been remarkably few criminal prosecutions brought against such companies or their officials. Nevertheless, NAWGA/IFDA is quite concerned about the potential impact on its members if the proposal is adopted. FDA is committed to vigorous enforcement of the strict liability criminal provisions of the FFDCA. For instance, in 1990 FDA stated that the deterrent power of misdemeanor strict liability violations could not be underestimated. NAWGA/IFDA has no quarrel with that proposition. However, NAWGA/IFDA strongly believes that the punishment for these violations should be commensurate with the violation. A person or company should not receive felony sanctions for strict liability violations.

If the Commission's Proposal is adopted, sentencing judges will almost certainly be compelled to impose a term of imprisonment for misdemeanor "strict liability" food offenses, particularly in cases where a large volume of product is implicated. This is due to the fact that the "fraud" guideline sets a sentence according to the "loss" to the victims. Further, the proposal will establish a guideline for a fine to be imposed on corporations and other organizations in regulatory (non-fraud) cases. Consequently, courts will be obligated to increase fines they impose on corporations and other organizations in the food wholesaler and distributor industry.

store).

³ Under the FMIA or the PPIA, it is a felony to distribute or sell adulterated product, even if there is no intent to adulterate or knowledge that the product is indeed adulterated. 21 U.S.C. § 676(a) (FMIA); 21 U.S.C. § 461(a) (PPIA)

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Such stiff punishments, for non mens rea criminal conduct, would have a severe impact on food wholesalers and distributors and their officials. A jail sentence would be devastating for a corporate executive or official with a respectable career, family, and a previously untarnished background. Moreover, as many food wholesalers and distributors are small businesses, massive fines would be crippling.

B. THE PROPOSAL LACKS A VALID BASIS

In support of the Proposal, the Commission referenced a two-year study conducted by the Commission's Food and Drug Working Group (Working Group). See 61 Fed. Reg. 83 (1996). However, this Working Group did not propose to eliminate USSG § 2N2.1. Moreover, despite conducting a study of cases sentenced under USSG § 2N2.1, the Working Group never identified even one case in which a judge, a prosecutor, a defense attorney, or a defendant complained that the sentence imposed under USSG § 2N2.1 was inappropriate.^{4/}

In addition to the Working Group's study, NAWGA/IFDA is unaware of any case in which anyone sentenced under USSG § 2N2.1, the sentencing court, or even the government displayed dissatisfaction with the sentence imposed. In sum, all empirical evidence strongly suggests that USSG § 2N2.1 is working quite well.

NAWGA/IFDA recognizes, and has no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. See 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines does not justify a rush to delete USSG § 2N2.1. Nor should a desire to simplify the Guidelines form a basis to fit "strict liability" misdemeanor criminal cases into a Guideline that was promulgated to deal with fraud.

NAWGA/IFDA believes that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are "strict liability" prosecutions commenced under statutes other than those now explicitly implicated by USSG § 2N2.1.^{5/} The Commission might want to republish its Proposal to expand USSG § 2N2.1

⁴ In fact, the Working Group stated that "the issue remains whether [§ 2N2.1] as currently drafted provides for adequate fines. . . ." United States Sentencing Commission Food and Drug Working Group Final Report at 19 (Feb. 1995).

⁵ See United States v. Luv N' Care International, Inc., 897 F. Supp. 941 (W.D. La. 1995) (prosecution initiated under the Federal Hazardous Substances Act, a statute as to which the Commission has not established a Guideline).

to cover other regulatory statutes, including those statutes that are not now covered by an existing Guideline. Alternatively, the Commission might consider a new Guideline that would cover all regulatory violations where fraud is not involved.

C. THE PROPOSAL IS CONTRARY TO THE PURPOSE OF THE GUIDELINES

The Commission has received a statutory mandate to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). In that regard, Congress intended the Commission to periodically review judicial decisions and revise the Guidelines when sentencing disparities are found to exist. See Braxton v. U.S., 500 U.S. 344, 348 (1991); Neal v. U.S., 116 S. Ct. 763, 766 (1996) ("Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime"). NAWGA/IFDA is unaware of any study or finding suggesting that unwarranted sentencing disparities occur under USSG § 2N2.1. In fact, most courts have invariably imposed low fines on FDA and USDA regulated organizations, to permit the entities to spend their money on remedial measures.

Further, the Proposal seems wholly inconsistent with the Commission's General Application Principles. See USSG Ch. 1, Pt. A § 4(f), which sets forth guiding principles for the Commission's promulgation of guidelines concerning regulatory offenses. It states that a typical guideline for a so-called "regulatory offense" will provide a low base offense level. Nevertheless, under the Proposal, persons convicted of regulatory violations under the food laws would be sentenced according to the monetary loss incurred by "victims." NAWGA/IFDA sees no reason why the Commission should depart from its General Application Principles by deleting USSG § 2N2.1 until the Commission examines whether "loss" should be a relevant sentencing factor in all regulatory offenses.

Application of USSG 2F1.1, rather than USSG § 2N2.1, to misdemeanor food offenses would simply be inequitable. One of the primary purposes of the Guidelines is to preserve proportionality in sentencing. See Neal v. U.S., 116 S. Ct. at 767. See also, Mistretta v. U.S., 488 U.S. 361, 374 (1989); United States Sentencing Commission, Guidelines Manual at 2 (Nov. 1994) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). Accordingly, the Commission was directed to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

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As explained above, many prosecutions brought against officials and corporations regulated by FDA and USDA involve only technical violations of the food safety statutes and do not present a true risk of harm to the public or the consumer. Accordingly, under USSG § 2N2.1, courts have traditionally imposed no jail sentences for such "non-serious" crimes. However, applying the "fraud" guideline to misdemeanor food offenses will certainly increase the potential for incarceration, possibly reaching jail sentences at the statutory maximum. Certainly, Congress did not intend the Commission to mandate stiff sentences on relatively minor criminal offenses.

D. THE PROPOSAL IS INCONSISTENT WITH OTHER ANALOGOUS GUIDELINES

If the Proposal is adopted, it will establish, for the first time, a guideline for fines to be imposed on corporations and other organizations convicted of strict liability food offenses. As such, the Proposal is inconsistent with the Commission's treatment of other similar regulatory guidelines.

Like USSG § 2N2.1, the Commission has promulgated regulatory offense guidelines for individuals convicted for environmental crimes. See USSG § 2Q. The USSG § 2Q Guidelines encompass misdemeanor offenses, and in some cases, strict liability environmental offenses. See e.g., 33 U.S.C. § 411 (sentenced under USSG § 2Q1.3). There are close parallels between the FFDCA, the FMLA, the PPIA and the environmental statutes in terms of their purposes, effects, deterrent value, and statutory structure. A careful analysis should be conducted comparing how the federal food safety statutes do and do not compare to the environmental laws. Where similar, it is reasonable to suggest that the Sentencing Commission treat similarly the two categories of cases.

However, the Commission has not proposed to include environmental cases involving fraud under the fraud guideline, USSG § 2F1.1.⁶ Nor has the Commission promulgated

⁶ Indeed, in United States v. Carpenter's Goldfish Farm, 998 F.2d 692 (9th Cir. 1993), the Ninth Circuit vacated a sentence in an environmental case. The defendant had committed two offenses that were subject to sentencing. One of the offenses was properly subject to USSG § 2F1.1 because fraud and deceit was involved. However, the other offense (a strict liability environmental crime) was not covered by any Guideline. The Court vacated the sentence because the district court had imposed sentence for the strict liability offense by employing the Guideline applicable to felony environmental offenses. This case reinforces NAWGA/IFDA's position that regulatory strict

organizational guidelines for environmental offenses. NAWGA/IFDA believes that the Commission should defer any modification to USSG § 2N2.1 until the Commission has studied the extent to which FFDCA, FMIA, and PPIA cases should be sentenced under the same basic principles as environmental cases. The Commission has not asserted any ground to treat strict liability food offenses different than strict liability environmental offenses. As both types of offenses closely parallel each other, so too should their respective guidelines.

E. CONSULTATION WITH OUTSIDE GROUPS IS ESSENTIAL

In promulgating or revising guidelines, the Commission is required to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). The Commission's Proposal was apparently not preceded by any dialogue with the industry (or their legal representatives), academicians, public interest groups, or other organizations which have a wealth of knowledge in this area. The limited comment period to respond to the Proposal is simply inadequate for this purpose.

With respect to environmental offenses, the Commission has met its "consultation" obligations by forming an advisory working group composed of government officials, law professors, lawyers in private practice, in-house corporate lawyers, and others. See e.g., 58 Fed. Reg. 65,764 (1993) (Commission established independent working group to promulgate organizational guidelines for environmental offenses). Similarly, NAWGA/IFDA submits that the Commission should form an advisory working group consisting of individuals from the government, defense bar, business community, and academia who specialize in matters relating to the FDA and USDA. Such members would provide valuable, first-hand input regarding the adequacy of regulatory guideline USSG § 2N2.1.

F. CONCLUSION

For all the reasons discussed above, NAWGA/IFDA urges the Sentencing Commission to refrain from adopting the Proposal, insofar as it would delete USSG § 2N2.1. Further, NAWGA/IFDA believes the Sentencing Commission should establish an advisory working group, partly composed of members of the affected industry, to ensure that misdemeanor FFDCA, FMIA, and PPIA offenses are sentenced fairly under either USSG § 2N2.1 or a new guideline that would apply to all regulatory misdemeanor offenses. NAWGA/IFDA stands ready and willing

liability misdemeanor offenses must be accorded different sentencing status than more serious felony charges. The case also demonstrates the need to have a general regulatory Guideline that will cover regulatory offenses that are not now subject to the Sentencing Guidelines.

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Comment to U.S. Sentencing Commission

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to participate in that working group or to provide any further assistance to the Commission that it can.

We appreciate this opportunity to present our views.

Sincerely yours,

John R. Block ^{BTS.}

John R. Block
President

JRB:mhc

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Malcolm C. Young
Executive Director

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6 March 1996

United States Sentencing Commission
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Attention: Public Information

To the Commission:

On behalf of The Sentencing Project, an independent non-profit organization which supports sentencing reform, including decreased reliance upon incarceration and greater use of more effective alternative approaches to the problem of crime, I am pleased to submit this comment on the United States Sentencing Commission's proposed amendments to Chapter Two, Part D (Offenses Involving Drugs), specifically cocaine offenses.

In our view, the Commission took the correct position on the crack/powder cocaine issue in its Special Report to Congress, Cocaine and Federal Sentencing Policy (February 1995). I would add, for the record, what we have stated in public many times: the Commission's Special Report is one of the more carefully researched and principled documents on sentencing policy to have been produced by a government agency in recent years. It is a resource document that will withstand scrutiny in years to come. Moreover, it is clearly written and readable. We refer the press and criminal justice researchers to it often, and we make use of it with public audiences. With deep regret we observed its rejection by Congress and the executive, searching hard for evidence that those rejections were in some modest way based upon research data or empirical evidence which supported a different approach than that adopted by the Commission.

The fact that the Commission's recommendations were rejected does not preclude the Commission from adhering to its principled approach in recognizing and addressing the disparity between sentencing of crack and powder cocaine offenders in the federal courts. We encourage it to do so.

As the Commission knows, the disparity between sentencing for crack and powder cocaine offenders is one of several contributors to the over-representation of African-

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Americans in the criminal justice system. Our report, "Young Black Americans and the Criminal Justice System: Five Years Later" documents that one in three young black males was under some form of criminal justice control, compared to one in four in 1989, and compared to one in fifteen white males in the same age group. We reported an increase of more than 800% for women incarcerated in state prison on drug offenses between 1986 and 1991, and, using the Commission's own data, the increasingly harsh impact of cocaine sentencing laws upon this same population. Other contributing factors to over-representation of African Americans in the criminal justice system which we cited include: patterns of arrests by police; increased arrests for some offenses; selective prosecution policies; and, overall lengthier sentences for drug offenders.

I am pleased to attach a copy of our report, which coincidentally was published in October 1995, just before Congress and the President rejected the recommendations set forth in the Commission's Special Report, as further documentation of the magnitude of the racial disparity problem in criminal justice.

While clearly there is no single solution or response to racial disparities, the Commission's Special Report was the first step by a major policy-making agency to take a stand and to propose a solution to a problem that affects --and is understood-- by many African Americans. The Commission's actions had a symbolic and leadership value that is perhaps better understood by those outside Congress and government than by those within. The problems the Commission described and attempted to remedy at the federal level are not going to go away. For these reasons we hope that the Commission will continue to address racial disparity and other issues of fundamental fairness in the same principled manner that it demonstrated with its Special Report. The integrity of the criminal justice system remains at stake.

Given that the Commission must now make a new set of recommendations, we would urge that the following be considered during its hearings and deliberations so that the issue of racial disparity is addressed as effectively as is possible under the circumstances:

- 1) If the sentences imposed for trafficking in a quantity of crack cocaine must "exceed the sentence imposed for trafficking in a like quantity of powder cocaine," the drug quantity ratio should reflect the de minimis difference in harm reported by the Commission. Most commentators suggest a difference not exceeding 5%, as opposed to the current 100%.
- 2) We recognize that Congress suggested several enhancements to punishments for crack cocaine, some are already provided for in the federal guidelines. We hope the Commission will carefully consider the extent to which the guidelines, as written, satisfy Congress's suggestions, and trust that the Commission will avoid

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duplicating enhancement provisions within the guidelines. Moreover, we would respectfully submit that, since the enhancing provisions are included in the sentencing scheme, the base penalties for crack cocaine can be lowered. The enhancements provided for in the guidelines, and any that the Commission might add, will allow courts to impose longer sentences when the facts merit, eliminating any need for greater penalties for the base offense.

- 3) Congress's recommendations seem to have dealt mostly with enhancements and factors pertaining to longer sentences. We would urge consideration of factors which should pertain to lower sentences. Some of these would help offset some concerns about the racial impact of the crack/powder cocaine sentencing differential. Factors which should pertain to lower sentences include:
- A) the offender played a minor or subordinate role in the offense;
 - B) the offender was intimidated by other actors in the crime or by economic dependency, a history of abuse, or by implied or actual threats to those dependent upon the offender. This factor would be particularly applicable to youths and women,^{1/} but could equally apply to males, when appropriate, based on the facts;
 - C) the offender is a substance abuser or dependent person for whom treatment resources appropriate to the dependency have been essentially unavailable, for reasons beyond the offender's direct control. This factor would simply avoid penalizing the poor and inner-city minorities for whom meaningful drug treatment resources were virtually unavailable; and
 - D) the offender is a substance abuser or dependent person for reasons related to the offender's prior victimization from violent crimes or abuse, or history of trauma, post-traumatic stress disorders, or stress resulting from violence in his or her community. These factors help explain substance abuse and involvement in drug trafficking among some minority and inner-city offenders, notably women, unable to escape intolerable living

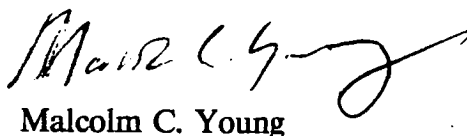
^{1/} Myrna Raeder, "Gender and Sentencing: Single Moms, Battered Women, and Other Sex-based Anomalies in the Gender-free World of the Federal Sentencing Guidelines," 20 Pepperdine Law Review No. 3 (1993).

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conditions.^{2/} They certainly are as relevant to questions of intent as are the enhancing factors proposed by Congress.

Thank you for this opportunity to comment on the Commission's proposed amendments. Please feel free to contact me if we can provide additional information.

Sincerely,


Malcolm C. Young

phg
Enc.

^{2/} Mindy T. Fullilove and Robert Fullilove, "Violence, Trauma and Post-Traumatic Stress Disorder Among Women Drug Users," Vol. 6 Journal of Traumatic Stress No. 4 (1993); Angela Browne and Mary Harvey, "Mental Health Consequences of Interpersonal and Family Violence," Report of the Council on Scientific Affairs, American Medical Association (June 1993).

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**Young Black Americans and
the Criminal Justice System:
Five Years Later**

**By
Marc Mauer
and
Tracy Huling**

October 1995

YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER

OVERVIEW

In 1990, The Sentencing Project released a report that documented that almost one in four (23%) African American males in the age group 20-29 was under some form of criminal justice supervision -- in prison or jail, on probation or parole.¹ That report received extensive national attention and helped to generate much dialogue and activity on the part of policymakers, community organizations, and criminal justice professionals.

Despite these efforts, many of the factors contributing to the high rates of criminal justice control for African American males remain unchanged or have worsened during the succeeding five years. Public policies ostensibly designed to control crime and drug abuse have in many respects contributed to the growing racial disparity in the criminal justice system while having little impact on the problems they were aimed to address.

The key findings of this report, as seen in Tables 1-7, are the following:

- Almost one in three (32.2%) young black men in the age group 20-29 is under criminal justice supervision on any given day -- in prison or jail, on probation or parole.
- The cost of criminal justice control for these 827,440 young African American males is about \$6 billion a year.
- In recent years, African American women have experienced the greatest increase in criminal justice supervision of all demographic groups, with their rate of criminal justice supervision rising by 78% from 1989-94.
- Drug policies constitute the single most significant factor contributing to the rise in criminal justice populations in recent years, with the number of incarcerated drug offenders having risen by 510% from 1983 to 1993. The number of Black (non-Hispanic) women incarcerated in state prisons for drug offenses increased more than eight-fold -- 828% -- from 1986 to 1991.
- While African American arrest rates for violent crime -- 45% of arrests nationally -- are disproportionate to their share of the population, this proportion has not changed significantly for twenty years. For drug offenses, though, the African American proportion of arrests increased from 24% in 1980 to 39% in 1993, well above the African American proportion of drug users nationally.

- African Americans and Hispanics constitute almost 90% of offenders sentenced to state prison for drug possession.

The criminal justice control rates documented in this report should prove even more disturbing than those revealed five years ago. Combined with the potential impact of current social and criminal justice policies, they attest to the gravity of the crisis facing the African American community.

The current high rates of criminal justice control are also likely to worsen considerably over the next several years. In addition to the steady twenty-year increase in criminal justice populations, the impact of current "get tough" policies in particular suggests continuing increases in criminal justice control rates and increasing racially disparate impacts.

CRIMINAL JUSTICE CONTROL RATES IN THE 1990s

Our 1990 report documented shockingly high rates of criminal justice control for young African American males in particular. We find that many of the contributing factors to these high rates endure or have worsened in the intervening years. As a result, they have failed to slow the increasing rate of criminal justice control for young black males and they have contributed to a dramatic rise in the number of black women in the criminal justice system. These factors include:

- The continuing overall growth of the criminal justice system;
- The continuing disproportionate impact of the "war on drugs" on minority populations;
- The new wave of "get tough" sentencing policies and their potential impact on criminal justice populations;
- The continuing difficult circumstances of life for many young people living in low-income urban areas in particular.

1994 Criminal Justice Control Rates

The data below represent estimates of the numbers of persons in each demographic group under criminal justice control -- in prison or jail, or on probation or parole -- on a given day in 1994.²

- As seen in Table 1, as of 1994, 30.2% of African American males in the age group 20-29 were under criminal justice control -- prison, jail, probation, or parole -- on any given day. This represented an increase of 31% from the figures of 1989.

Table 1

1994 CRIMINAL JUSTICE CONTROL RATES

Population Group 20-29	State & Federal Prisons	Jails	Probation	Parole	TOTAL	Criminal Justice Control Rate
<u>MALES</u>						
White	180,915	110,585	640,956	136,620	1,069,076	6.7%
Black	211,205	95,114	351,368	130,005	787,692	30.2%
Hispanic	81,391	41,641	138,703	56,412	318,147	12.3%
<u>FEMALES</u>						
White	9,875	11,872	177,360	15,802	214,909	1.4%
Black	12,138	10,876	96,481	14,921	134,416	4.8%
Hispanic	3,537	4,171	36,099	6,137	49,944	2.2%

These data all examine criminal justice control rates on any given day. If we were able to examine the flow of people through the criminal justice system over the course of a year or ten-year period, the rates would obviously be much higher. Other researchers have attempted to calculate these rates. A 1987 study by Robert Tillman found that 2/3 of black males in California had been arrested between the ages of 18 and 29, double the rate for white males.³

These figures only reflect arrest rates through the early 1980s, well before the dramatic rise in drug arrests and criminal justice populations overall. More recently, researchers at Northwestern University have estimated that it is possible that 1/3 - 2/3 of the 100,000 poorest black male three-year olds of today will eventually end up in prison.⁴

1995 Criminal Justice Control Rate for African American Males

• Using the annual rate of increase for criminal justice populations overall from 1989 to 1994 as a basis, we have calculated the estimated rate of control of young black males for 1995 as well. As seen in Table 2, these estimates suggest that almost one in three young black men is now under criminal justice supervision on any given day. Based on average costs for various components of the criminal justice system, we estimate that the cost of criminal justice control for these 827,440 males is about \$6 billion a year.

Table 2

AFRICAN AMERICAN MALE CONTROL RATES
(Ages 20-29)

Year	Number	Control Rate
1989	609,690	23.0%
1994	787,692	30.2%
1995	827,440	32.2%

Changes in Criminal Justice Control Rates, 1989-1994

• As seen below, the largest increase of the demographic groups studied in this period is for black women whose numbers increased from 78,417 in 1989 to 134,416 by 1994 and whose rate of criminal justice control increased by 78% during this period. We believe that much of this increase is due to the impact of the "war on drugs," a subject which is discussed later in this report.

Table 3

**CHANGES IN CRIMINAL JUSTICE
CONTROL RATES: 1989-1994
(Ages 20-29)**

Population Group	1989 Control Rate	1994 Control Rate	% Increase
<u>Males</u>			
White	6.2%	6.7%	8%
Black	23.0%	30.2%	31%
Hispanic	10.4%	12.3%	18%
<u>Females</u>			
White	1.0%	1.4%	40%
Black	2.7%	4.8%	78%
Hispanic	1.8%	2.2%	18%

Changes in Hispanic Incarceration

• Because of the difficulties in obtaining accurate data on Hispanics (see "Methodology"), we cannot be certain of the extent by which this population increased within the criminal justice system. Data on imprisonment rates for Hispanics (see Table 4) indicate that the proportion of Hispanic inmates in state and federal prisons has doubled since 1980.

Table 4

**HISPANIC INMATES (ALL AGES)
IN STATE AND FEDERAL PRISONS**

Year	Number of Inmates	Percent of Total Inmate Population
1980	25,200	7.7%
1985	54,700	10.9%
1990	103,100	13.6%
1993	138,700	14.3%

THE OVERREPRESENTATION OF YOUNG BLACK MALES IN THE CRIMINAL JUSTICE SYSTEM

We have documented the dramatically high rates of criminal justice control for young black men. In many respects it would be quite surprising if these rates were not high, given the social and economic circumstances and crime rates in their communities.

The growth of the criminal justice system in the past twenty years has coincided with a host of economic disruptions and changes in social policy that have had profound effects on income distribution, employment and family structure. Since the 1970s, many urban areas have witnessed the decline of manufacturing, the expansion of low-wage service industries and the loss of a significant part of the middle class tax base. Real wages have declined for most Americans during this period, with a widening of the gap between rich and poor beginning in the 1980s. For black male high school dropouts in their twenties, annual earnings fell by a full 50 percent from 1973 to 1989.⁵ Social service benefits such as mental health services and other supports have generally declined while the social problems that they address have been exacerbated.

The impact of these changes on the African American community has resulted from the intersection of race and class effects. Since African Americans are disproportionately represented in low-income urban communities, the effects of these social ills are intensified. As Douglas Massey and Nancy Denton have illustrated, the persistence of housing segregation exacerbates the difficult life circumstances of these communities, contributing to extremely high rates of unemployment, poor schooling, and high crime rates.⁶

Over the years many researchers have examined the extent to which racial disparity within the criminal justice system can be explained by higher crime rates among blacks or other relevant factors. Historically, there can be little doubt about the prominent role played by race in criminal justice processing, given the history of lynching in the South, the development of chain gangs, and the well-documented racial patterns involved in the imposition of the death penalty.

More recently, though, researchers have found that the evidence on these issues is mixed. While some studies have documented specific cases of racially unwarranted outcomes, much research has concluded that, with one significant exception, race plays a relatively minor role in sentencing and incarceration. Michael Tonry's review, for example, concludes that "for nearly a decade there has been a near consensus among scholars and policy analysts that most of the black punishment disproportions result not from racial bias or discrimination within the system but from patterns of black offending and of blacks' criminal records."⁷ Similarly, Alfred Blumstein's research has concluded that 76 percent of the racial disparity in prison populations is explained by higher rates of offending among blacks for serious offenses.⁸

But both authors find, as Tonry indicates, that "Drug law enforcement is the conspicuous exception. Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs." ⁹ Blumstein concludes that for drug offenses, fully half of the racial disproportions in prison are not explained by higher arrest rates.

While scholars will continue to study the relative influence of race within the criminal justice system, several key issues should not go unaddressed in explaining these disparities. First, as noted above, it is difficult to isolate the relative influence of race and class in public policy and decisionmaking. That is, to the extent that African Americans are overrepresented in the criminal justice system, to what degree is this a function of their being disproportionately low-income?

In its comprehensive examination of the problem of violence, the National Research Council reviewed existing studies of homicide victimization and class.¹⁰ The Council found that among low-income populations blacks had much higher rates of homicide victimization than whites but that among higher income groups, there was essentially no difference. The Council suggests that the more concentrated effects of inner-city poverty may contribute to a more serious breakdown of family and community support than in other low-income neighborhoods.

Studies of sentencing practices reveal that the current offense and the offender's prior record are the most significant factors determining a prison sentence. But if low-income youth are more subject to police scrutiny and have fewer counseling and treatment resources available to them than middle class adolescents, their youthful criminal activities will more likely result in a criminal record that will affect their chances of going to prison later on.

The most prominent example of the intersection of race and class in criminal justice processing, of course, is the O.J. Simpson case. Regardless of where one stands on his guilt or innocence, what is clear is that a wealthy and famous African American was able to assemble a very formidable defense. This is contrasted with the typical scene in almost every courthouse in cities across the country, where young African American and Hispanic males are daily processed through the justice system with very limited resources devoted to their cases.

Comparing sentencing policies in the U.S. with those of other nations sheds light on this issue as well. Although it is difficult to make comparisons across cultures, a number of studies have concluded that American sentencing policies tend to be harsher than those of many European nations, particularly regarding the length of sentence imposed for various crimes.¹¹ Given the relatively greater homogeneity of many European countries, one can ask whether policymakers and the public in these nations are less willing to lock up their fellow citizens for long periods of time since they view their societies as more cohesive.

IMPACT OF THE "WAR ON DRUGS"

While debate will continue on the degree to which the criminal justice system overall contributes to racial disparities, there is increasing evidence that the set of policies and practices contained within the phrase "war on drugs" has been an unmitigated disaster for young blacks and other minorities. Whether or not these policies were consciously or unconsciously designed to incarcerate more minorities is a question that may be debated. In essence, though, what we have seen are policy choices that have not only failed to reduce the scale of the problem but have seriously eroded the life prospects of the primary targets of those policies. The main elements of these policies have been the following:

Increased arrests

Arrest policies beginning in the 1980s have disproportionately affected African Americans and other minorities: first, through greatly increased numbers of drug arrests, and second, through an increased rate of minority drug arrests. Drug arrests increased dramatically in the 1980s, rising from 471,000 in 1980 to 1,247,000 by 1989.¹² As the number of arrests grew, so did the proportion of African Americans, from 24% of all drug arrests in 1980 to 39% by 1993.¹³

Some persons would contend that African Americans are arrested in larger numbers because of their higher rates of drug use and sales. There are no reliable data on the overall composition of drug sellers in the total population, but we have reasonably good data available on drug possession through the annual household surveys of the National Institute on Drug Abuse (NIDA). Their most recent survey reveals that African Americans comprise 13% of monthly drug users, compared to the 1993 arrest proportion of 39%. Even if we only consider arrests for drug possession, which should be reflective of drug use, African Americans still constitute 34.7% of such arrests. Although the NIDA surveys have some limitations,¹⁴ the degree of disparity between drug use and drug possession arrests is of such magnitude that it clearly points to disproportionate arrest practices.

A recent analysis by James Lynch and William Sabol points to additional significant racial effects of law enforcement practices.¹⁵ Lynch and Sabol analyzed data on incarceration rates, race, and class during the period 1979-91. They identified inmates as either being "underclass" or "non-underclass" (working class or middle class) based on educational levels, employment history, and income. They concluded that the most significant increase in incarceration rates was for working class black drug offenders, whose rates increased six-fold from 1.5 per 1,000 in 1979 to match that of underclass blacks at 9 per 1,000 in 1991. The trends for whites, on the other hand, were just the opposite, with the underclass drug incarceration rate being double that of the non-underclass by 1991.

Lynch and Sabol suggest several factors that may explain these trends. The "spillover" effect of residential racial segregation, along with law enforcement targeting of black neighborhoods, may sweep more non-underclass blacks into the criminal justice system than is the case in the more stratified white housing patterns. They conclude that:

All of the processes described above lead to the same result, an increased targeting of black working and middle class areas for discretionary drug enforcement and ultimately increased incarceration for drug offenses. The immunity that working and middle class status used to bring in the black community (and still does among whites) may have been lost. While the processes that produced these outcomes may not have been racially motivated in intent, they have resulted in racially disparate outcomes.

Prosecution policies

Aggravating the racial disparities in arrest patterns are decisions made by prosecutors which can increase the severity of the impact of drug policies on minorities. A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since 1986, despite the fact that whites comprise a majority of crack users.¹⁶ During the same period, though, hundreds of white crack traffickers were prosecuted in state courts. While federal prosecutors contend that they target high level traffickers, the Times analysis found that many African Americans charged in federal court were low-level dealers or accomplices in the drug trade.

The consequences of this prosecutorial discretion are quite serious since federal mandatory sentencing laws require five- and ten-year minimums even for first offenders. The study found that whites charged with crack offenses and prosecuted in California state courts received sentences as much as eight years less than in the federal courts.

Sentencing policies

Compounding the higher arrest rates for drug offenses have been changes in sentencing policies that have also disproportionately affected African Americans. The advent of a renewed generation of mandatory minimum sentencing statutes, now in place in all states and the federal system, has led to dramatic increases in the number of incarcerated drug offenders.

The impact of these policies can be seen in several ways. First, the risk of incarceration per drug arrest increased more than 400% from 19 per 100,000 in 1980 to 104 per 100,000 by 1992, far greater than for any other offense during that period.¹⁷ As seen below, this has led to a 510% increase in the number of incarcerated drug offenders between 1983 and 1993, with one out of four inmates now serving time or awaiting trial for a drug offense.

Table 5

DRUG OFFENDERS IN PRISON AND JAIL - 1983 AND 1993

	Total # Inmates		% Drug Offenders		# Drug Offenders	
	1983	1993	1983	1993	1983	1993
Jail	223,552	459,804	9.3%	23.0%	20,790	105,755
Federal Prison	31,926	89,586	27.6%	60.8%	8,812	54,468
State Prison	405,322	859,295	7.0%	22.5%	28,373	193,341
Total	660,800	1,408,685	8.8%	25.1%	57,975	353,564

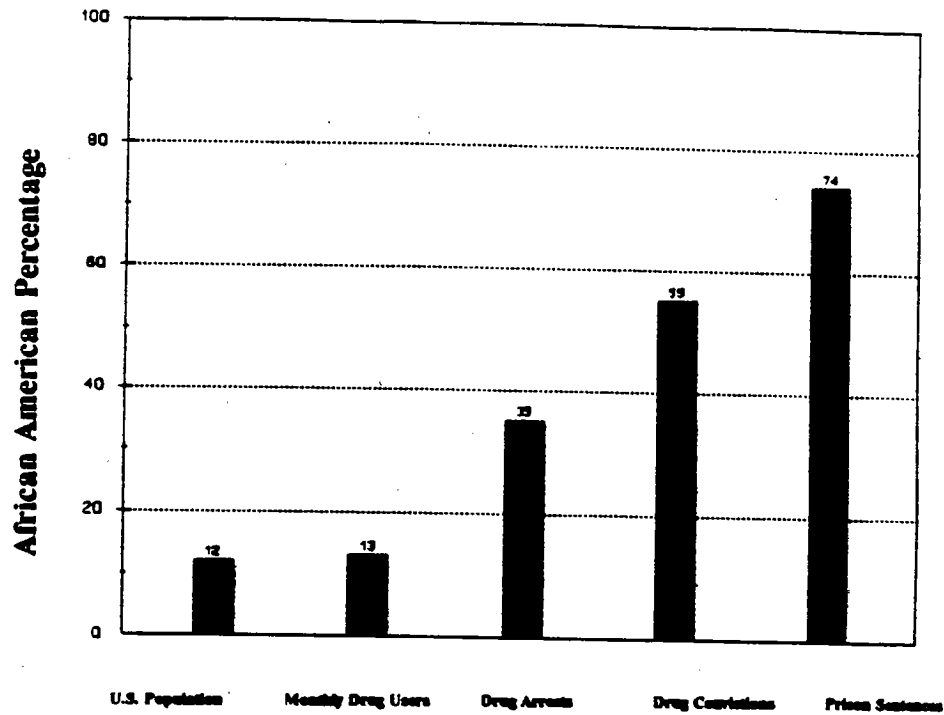
The full impact of these policies has yet to be seen, since many of the mandatory sentences only began to be applied in large numbers in the late 1980s. In state prison systems, therefore, while average time served in prison has not changed appreciably in recent years, we can expect it to rise in the years ahead due to the impact of mandatory sentencing and other harsh policies.

In the federal system, the impact of these changes is already being felt, with the average time served by drug offenders increasing 50% from 22 months in 1986 to 33 months by 1992. Compounding this has been the much-discussed disparity in sentencing between crack cocaine and powder cocaine, whereby those persons convicted of crack possession receive a mandatory prison term of five years by possessing only one-hundredth of the quantity of cocaine as those charged with powder cocaine possession. Fourteen states also have statutes that distinguish between crack and powder cocaine in sentencing.¹⁸ The U.S. Sentencing Commission found that blacks accounted for 84.5% of federal crack possession convictions in 1993, while comprising 38% of those who report using crack in the past year.¹⁹ The Sentencing Commission has also calculated that a person convicted of trafficking in five grams of crack with a maximum retail value of \$750 will receive the same sentence as an offender charged with selling 500 grams of powder cocaine retailing for \$50,000.²⁰

The cumulative impact of arrest and sentencing policies on African Americans can be seen in Figure 1 below. For drug arrests, convictions, and prison sentences, we only look at drug possession, and not trafficking, since this offense should presumably be more highly correlated with drug use.

Figure 1

AFRICAN AMERICANS AND DRUG POSSESSION



Criminal Justice Response to Drug Use

Note: Data are for 1992 or 1993 depending on the most recent available figures

Looking at minorities overall, we find that African-Americans and Hispanics represented almost 90% of all sentences to state prison for drug possession offenses in 1992, the most recent year for which data are available. While we have no available data regarding other factors which often correlate with a higher likelihood of incarceration, particularly prior criminal record, the findings displayed here are of such magnitude that they raise serious questions about the racial implications of current drug policies.

Table 6

**SENTENCES TO STATE PRISON
FOR DRUG POSSESSION, 1992**

Racial/Ethnic Group	% of Total Drug Sentences
African-American	73.7%
Hispanic ²¹	16.0%
Total African-American and Hispanic	89.7%

In summing up the rationale and impact of prevailing drug policies, Professor Michael Tonry states:

All that is left is politics. The War on Drugs and the set of harsh crime control policies in which it was enmeshed were undertaken to achieve political, not policy, objectives. It is the adoption for political purposes of policies with foreseeable disparate impacts, the use of disadvantaged black Americans as means to achieving politicians' electoral ends, that must in the end be justified. It cannot.²²

MEDIA IMAGES, CRIME RATES AND VIOLENCE

In recent years, a succession of media images and racially divisive political campaigns have created public images of a violent young African American male community. One need only turn on the 11 o'clock news in almost any urban area to witness that day's evidence of young black men engaging in murder and mayhem. To what extent is this image justified? An examination of crime rates and criminal justice populations shows that the issue is more complex than it might appear on the evening news.

First, as is true for other racial and ethnic groups, the typical African American male in the criminal justice system is not a violent offender. Combining the four components of the criminal justice system -- prison, jail, probation, and parole -- we find that about 3/4 of all offenders under supervision have been convicted of a non-violent offense.²³ (While these data apply to offenders of all races, it is unlikely that the black proportions differ substantially). Media interest in portraying violent and sensational crimes clearly contributes to the lack of understanding on this issue.

When we look at violent crime, we find that African American males are identified as the perpetrators and are arrested in numbers disproportionate to their makeup in the overall population. For 1993, African Americans (both male and female) constituted 45.7% of all arrests for violent crime.²⁴ While clearly disturbing and very disproportionate to the overall percentage of blacks in the population, it is nonetheless clear that the majority of arrestees for violent offenses are white.

Further, the proportion of overall violent crime attributed to African Americans has not changed appreciably over time, but has fluctuated within a narrow range of 44-47% of all violent crime for the past twenty years. What has changed in recent years is the age composition of those males engaged in violent crime, particularly with a substantial and disturbing increase in the murder rate of young black men since the mid-1980s. The murder rate for 14-17 year-old black males, for example, has risen from 32 per 100,000 in 1984 to 111.8 per 100,000 in 1991.²⁵

Thus, the image on the evening news, while indicative of some disturbing trends, is highly misleading in its overall impact. In recent years, we have seen some of the far-reaching impact that media images can have on public policy. In its comprehensive report on crack cocaine, the United States Sentencing Commission described how the adoption of harsh federal sentencing policies for crack followed upon the intense media attention devoted to the death of basketball star Len Bias in 1986 from cocaine intoxication.²⁶ While it was widely reported at the time that Bias had probably died of "free-basing" cocaine, it was not until a year later that Bias's drug supplier revealed that Bias and other players had snorted powder cocaine on the night of Bias's death. By that time, the crack cocaine laws were fully in place.

WHO ARE THE AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM?

As we have seen, increasingly larger numbers of African American males have come under criminal justice supervision as a result of drug offenses. Despite the national concern about drugs, the nature of the drug distribution process and the individuals involved in it remain poorly understood.

Several recent studies provide insight into the lives of young men who become involved in the drug trade. A 1990 study by Peter Reuter and colleagues at RAND examined the criminal histories and demographic characteristics of groups of young black males arrested for drug distribution in Washington, D.C., representing the overwhelming majority of persons arrested for that offense.²⁷ The researchers documented the vast extent to which drug dealing has become a source of income for this group, with fully one-sixth of the black males born in 1967 having an arrest for drug distribution by the age of 20, and projections of one-quarter having an arrest by the age of 29. Somewhat surprisingly, though, the study found that about two-thirds of the offenders had been employed at the time of arrest, primarily at low-wage jobs with a median income of \$800 a month. Thus, drug dealing became a type of "moonlighting" for some of these young men, with the daily sellers achieving median earnings of \$2000 a month in drug sales.

Similarly, Samuel Myers, Jr. has examined the potential for increasing legitimate wages earned by drug sellers as a means of reducing criminal activity.²⁸ Analyzing data from inmate surveys, Myers found that whites incarcerated for drug dealing had significantly higher legal wages than blacks relative to their illegal earnings. He concludes that "the dominant factor contributing to drug selling, especially among black males, is unattractive labor market opportunities."²⁹

Finally, research by John Hagedorn on African American and Latino gangs and drug dealing in Milwaukee has found great variation both in the extent to which gang members were involved in drug dealing and in their orientation toward conventional lifestyles.³⁰ While a small proportion of gang members were committed to drug dealing as a career, the majority "were not firmly committed to the drug economy." The main characteristics that they shared were: (1) working regularly at legitimate jobs, with occasional drug dealing, (2) conventional aspirations toward economic security; and (3) conventional ethical beliefs about the immorality of drug dealing, even while justifying their drug sales as necessary for survival.³¹

The findings of these studies enlighten us about the potential effectiveness of various responses to drug dealing. The RAND researchers found that despite the actual and perceived risks of drug dealing in Washington -- the chances of arrest or physical harm being significant -- "such risks failed to deter substantial numbers of young males from participating in the trade."³² They speculate that the prospects of immediate rewards combined with adolescents' lesser concern for physical harm and/or their future prospects

combined to make drug selling very appealing. They conclude that "The prospects for raising actual and perceived risks enough to make for markedly more deterrence through heavier enforcement against sellers do not appear promising."³³ Noting that many drug sellers are also users and therefore feel compelled to sell drugs to support their addiction, they suggest that reducing demand is critical if the rewards of the legitimate labor market are to be viewed as attractive.

Hagedorn asks whether current drug policies are actually producing criminogenic effects, by reducing the prospects of these young gang members for productive employment and life experiences, since the "key to their future lies in building social capital that comes from steady employment and a supportive relationship, without the constant threat of incarceration."³⁴ He concludes that:

Long and mandatory prison terms for use and intent to sell cocaine lump those who are committed to the drug economy with those who are using or are selling in order to survive. Our prisons are filled disproportionately with minority drug offenders ... who in essence are being punished for the "crime" of not accepting poverty or of being addicted to cocaine. Our data suggest that jobs, more accessible drug treatment, alternative sentences, or even decriminalization of nonviolent drug offenses would be better approaches than the iron fist of the war on drugs.³⁵

IMPACT OF HIGH RATES OF CONTROL ON THE AFRICAN-AMERICAN COMMUNITY

The high rate of incarceration of African American males raises concerns about its impact not only on the individuals who are incarcerated, but on their communities, as well.³⁶ As increasing numbers of young black men are arrested and incarcerated, their life prospects are seriously diminished. Their possibilities for gainful employment are reduced, thereby making them less attractive as marriage partners and unable to provide for children they father. This in turn contributes to the deepening of poverty in low-income communities.

The large scale rates of incarceration may contribute to the destruction of the community fabric in other ways as well. As prison becomes a common experience for young males, its stigmatizing effect is diminished. Further, gang or crime group affiliations on the outside may be reinforced within the prison only to emerge stronger as the individuals are released back to the community. With so few males in underclass communities having stable ties to the labor market, the ubiquitous ex-offenders and gang members may become the community's role models.

The cumulative impact of these high rates of incarceration has been to postpone the time at which large numbers of African American males start careers and families. While we should not ignore the fact that these men have committed crimes that led to their imprisonment, current crime control policies may actually be increasing the severity of the problem, particularly when other options for responding to crime exist.

INCREASING CRIMINAL JUSTICE CONTROL RATES FOR WOMEN

While we have seen that criminal justice control rates for young black men are shockingly high and increasing, from 1989 to 1994 young African-American women experienced the greatest increase in criminal justice control of all demographic groups studied. The 78% increase in criminal justice control rates for black women was more than double the increase for black men and for white women, and more than nine times the increase for white men.

What is causing this dramatic increase in the numbers of young black women under criminal justice control? Although research on women of color in the criminal justice system is limited, existing data and research suggest it is the combination of race and sex effects that is at the root of the trends which appear in our data. For example, while the number of blacks and Hispanics in prison is growing at an alarming rate, the rate of increase for women is even greater. Between 1980 and 1992 the female prison population increased 276%, compared to 163% for men. Unlike men of color, women of color thus belong to two groups that are experiencing particularly dramatic growth in their contact with the criminal justice system.

The key factor behind this explosion in the women's prison population is the war on drugs. We see this taking place at several levels.

Arrests

The majority of female arrests are for drug offenses and crimes committed to support a drug habit, particularly theft and prostitution.³⁷ According to Drug Use Forecasting (DUF) data, more than half of women arrestees test positive for drugs; in some cities, more than three-fourths.³⁸ From 1982 to 1991, the number of women arrested for drug offenses increased by 89%, compared with an increase of 51% for men during the same period.³⁹

Incarceration

By 1991, one in three women in state prisons was incarcerated for a drug offense – up from 1 in 8 in 1986 and 1 in 10 in 1979.⁴⁰ By comparison one out of five men in prison in 1991 was a drug offender. The Bureau of Justice Statistics has reported that drug offenders represented 55% of the national increase in women prisoners from 1986 to 1991.⁴¹ Trends in women's commitment to prison for drug offenses can be even more dramatic at the state level. In New York, in 1982, 67 women were committed to prison for drug offenses. By 1993, the figure had increased by 1863% to 1,315. In California, the state with the largest number of women prisoners, 37.8% of women prisoners in 1993 were drug offenders compared to 23.8% of men.⁴² Nationwide, the number of women in state prisons for drug offenses increased 433% between 1986 and 1991 compared to a 283% increase for men (see Table 7).

Sentencing

Overall, female prisoners have shorter maximum sentences than men. While it is often assumed that women benefit from chivalrous or lenient treatment by sentencing judges,

recent research and available data suggest that shorter sentences for women are in fact a result of gender differences in the offenses for which they are incarcerated, criminal histories and crime roles.⁴³ On average, women incarcerated in state prisons in 1991 had fewer previous convictions than men, and their record of past convictions was generally less violent. Women are more likely than men to be in prison for drug and property offenses, and less likely than men to be incarcerated for violent offenses.⁴⁴

While the question of bias for or against women in sentencing is often assumed to be made irrelevant by mandatory sentencing and sentencing guidelines systems which reduce or eliminate judicial discretion, some scholars have found such "gender-neutral" sentencing models may actually place women at a distinct and unfair disadvantage with respect to gender-specific characteristics, experiences and roles. Myrna Raeder's analysis of federal mandatory minimums, for example, concludes that these policies do not allow for the court's consideration of key issues regarding the role of women, including the role of single mothers in particular in caring for children; the minor and subordinate roles women play in many crimes, including drug conspiracies; the abusive/coercive environments in which many women play these roles; and the lower recidivism rates for women.⁴⁵

Raeder's conclusion is supported by a 1994 Department of Justice study on low-level drug offenders in federal prisons. The study found that women were over-represented among "low-level" drug offenders who were non-violent, had minimal or no prior criminal history, and were not principal figures in criminal organizations or activities, but who nevertheless received sentences similar to "high-level" drug offenders under the mandatory sentencing policies.⁴⁶

Examining data on sentence length for federal prisoners for 1988 and 1989, Raeder found that the number of women with sentences of more than one year rose at twice the rate of men and that women with sentences of less than a year rose at nearly five times the rate of men. Raeder suggests that women who would have received straight probation prior to the enactment of the federal mandatory minimums were being sentenced to serve time in prison, and those who would have been previously incarcerated now faced longer sentences.⁴⁷

African American Women and The War on Drugs

Looking at the criminal justice data that are available by gender and race/ethnicity a picture emerges of individuals who are doubly disadvantaged. Nationally, between 1980 and 1992 the number of black females in state or federal prisons grew 278% while the numbers of black males grew 186%; overall the inmate population increased by 168% during this period.

An enormous increase in the numbers of black women incarcerated for drug offenses is the primary factor causing this trend. Our analysis of Justice Department data shows that between 1986 and 1991, the number of black non-Hispanic women in state prisons for drug offenses nationwide increased more than eight-fold in this five-year period, from 667 to

6,193. This 828% increase was nearly double the increase for black non-Hispanic males and more than triple the increase for white non-Hispanic females. (See Table 7).

Table 7

**STATE PRISONERS INCARCERATED FOR DRUG OFFENSES
BY RACE/ETHNIC ORIGIN AND SEX
1986 AND 1991**

	1986		1991		% Increase	
	Male	Female	Male	Female	Male	Female
White non-Hispanic	12,868	969	26,452	3,300	106%	241%
Black non-Hispanic	13,974	667	73,932	6,193	429%	828%
Hispanic	8,484	664	35,965	2,843	324%	328%
Other	604	70	1,323	297	119%	324%
Total	35,930	2,370	137,672	12,633	283%	433%

As we have seen, prosecutions for crack cocaine offenses have had a disproportionate impact on African-Americans. The harsher treatment of crack cocaine offenders may also be having a significant impact on young black women in particular since there are indications that women are more likely to use crack⁴⁸ and are more likely to be involved in crack distribution relative to other drugs.⁴⁹

U.S. Sentencing Commission data show that in fiscal year 1994 black women represented 82% of all women sentenced for crack offenses (trafficking and possession). Of black women sentenced for drug offenses overall, half were sentenced for a crack offense compared to 5% of all Hispanic women drug offenders and 7% of all white women.⁵⁰

Urban Social and Economic Decline and its Impact upon Women

The social and economic decay in many inner-city communities has contributed to the rise of African American women under criminal justice control both in ways that resemble these processes for men and in ways that are substantially different. Both black men and black women, for example, have become increasingly involved in drug crime as legitimate economic opportunities have narrowed and underground drug economies have expanded.

The relationship between community decline and increased substance abuse, though, may be particularly strong for women. For example, several measures show that women in contact with the criminal justice system -- the majority of whom come from distressed communities -- are more likely than men to use drugs, to use more serious drugs more frequently and to be under the influence of drugs at the time of their arrest.⁵¹ Research showing alarming levels of violence in such communities⁵²; a high rate of violent victimization among women drug users and incarcerated women⁵³; and significant associations between violent victimization (including sexual abuse), post-traumatic stress disorders and substance abuse among women,⁵⁴ further suggest that many women in inner-cities are caught in a progressively tightening web with imprisonment as the likely outcome of their drug addiction.

Recent studies of black women crack users by Mindy Fullilove and her colleagues at the Columbia University School of Public Health describe a complex pattern whereby users initiate crack use to relieve the symptoms of depression or trauma associated with victimization, become traumatized by their efforts to secure it (often involving dangerous and degrading sex in exchange for drugs), and then relieve the new trauma by seeking additional occasions to obtain the drug. Since these efforts all too frequently provide added opportunities for trauma, the cycle is re-initiated.⁵⁵

Lack of Access to Treatment

Problems caused by the limited availability of drug treatment programs and facilities, particularly for low-income individuals, are also compounded for women. Overall, while women make up 33% of the addicted population, only 20.6% of treatment resources are used for women.⁵⁶ A 1991 Bureau of Justice Assistance report indicates that women arrestees (interviewed at 4 DUF sites) have had limited treatment experience. Nearly three-fourths (71%) had never been in treatment for substance abuse, and only 4% were in treatment at the time of their arrest.⁵⁷

Several studies have also shown that most treatment programs are based on male models and do not meet the special needs of women, such as accommodation for children. Also, few programs address the multiple problems of women in contact with the criminal justice system -- women who are apt to be indigent, undereducated, cut off from social networks such as family and community institutions, and who suffer disproportionately from histories of family violence, incest, rape and mental illness.⁵⁸ Although a number of treatment programs have been established specifically for women in the past decade, there are still serious gaps in meeting these needs.⁵⁹

The lack of appropriate or accessible drug treatment for women may also play a role in rendering women vulnerable to re-incarceration. A recent study of women felons in Hawaii revealed that half were in prison after having returned there for violations of parole for positive drug tests.⁶⁰ Another study of a randomly-selected sample of 294 women in prison in California in 1993 found that 40% of the women were probation or parole violators. Only 13% of the women reported no prior drug use.⁶¹

Women, Children, and the Criminal Justice System: Is There a Better Way?

While more research is needed to determine how race and gender bias may have contributed to the rise in the number of women of color under criminal justice control, it seems clear that the war on drugs has succeeded only in criminalizing women already suffering under extreme socio-economic and psychological stress. The consequences of continuing on this path are dire -- not only for the women involved but for future generations. The multiple negative effects of parental arrest and incarceration on children, particularly if that parent is the primary caretaker, are well-documented, and include traumatic stress, loss of self-confidence, aggression, withdrawal, depression, gang activity, and interpersonal violence.⁶² As more and more inner-city children lose not only their fathers but their mothers, most often the primary caretakers, to the criminal justice system, their own risks for future involvement in crime and incarceration increase dramatically.

In recent testimony before the U.S. Senate Judiciary Committee, Elaine Lord, the warden of New York State's maximum security prison for women, suggests a very different course:

We need to be more honest with ourselves that the vast majority of women receiving prison sentences are not the business operatives of the drug networks. The glass ceiling seems to operate for women whether we are talking about legitimate or illegitimate business. They (women) are very small cogs in a very large system, not the organizers or backers of illegal drug empires. This, coupled with a growing mood among the American public reportedly concerned about early intervention for troubled kids and more drug treatment in preference to more prisons, should give us the opening we need to look at better and more cost-effective ways of dealing with women offenders.⁶³

PROJECTIONS FOR THE FUTURE

The criminal justice system has experienced unprecedented growth for more than twenty years. Since 1973, the number of inmates in prisons and jails nationally has quadrupled, and the United States is now second in the world only to Russia in its rate of incarceration.⁶⁴ Probation and parole populations have increased dramatically as well, rising by 173% in the period 1980-94.

These dramatic increases, along with the fiscal and human costs entailed, might make one think that the end of this cycle might be in sight. A look at recent policy changes, though, shows that, if anything, these problems may be exacerbated in coming years.

In recent years, the federal government and many states have adopted a variety of harsh sentencing policies. Among the most prominent of these have been the "Three Strikes and You're Out" policies, adopted by the federal system and fourteen states. These laws generally provide for a sentence of life without parole upon a third conviction for a violent felony.

While it is too early to assess the full consequences of these laws, it is already clear that there will be a broad variation in their impact on prison populations. In Washington state, for example, the first state to adopt such a policy in 1993, fewer than two dozen offenders were sentenced under its provisions during the first year of implementation.

In California, though, the law has already had a substantial impact on courts, jails and prisons during its first year of operation. The California law, the broadest of any state, requires a sentence of 25 years to life for an offender with two prior violent felony convictions who commits any third subsequent felony. Thus, in the well-publicized case of Jerry Williams, his third "strike" for stealing a slice of pizza from children at a boardwalk brought the same sentence as would a rape or armed robbery. The California Legislative Analyst's Office has estimated that the state prison population will rise from 125,000 in 1994 to 211,000 by 1999, largely as a result of the "Three Strikes" law.⁶⁵

Other policy changes are expected to have similarly large impacts. In Virginia, for example, parole has been abolished and violent offenders are now expected to serve up to 500% more time in prison than in the past. The combined impact of this policy along with other changes is projected to almost double the prison population from 27,000 in 1995 to 51,000 by 2005.⁶⁶

A 1995 survey of corrections officials by Corrections Compendium confirmed this anticipated rise in the prison population. State corrections officials estimated that their 1994 inmate populations would rise 51% by the year 2000.⁶⁷

The rise in prison populations is likely to be exacerbated as well by the impact of federal crime legislation passed by Congress in 1994 and another bill proposed in 1995. Under the

prison funding provisions of these bills, "Truth in Sentencing" grants will be made available to states that enact sentencing policies that require violent offenders to serve 85% of their sentence before release. Currently, violent offenders serve an average of 48% of their sentence.⁶⁸ One analysis of the 1995 legislation estimated that for every dollar states receive under the six-year funding cycle of the bill, they would spend \$2-7 due to higher costs of incarceration.⁶⁹

An additional sobering factor that does not portend well for controlling the growth of the criminal justice system regards the demographics of crime. Since young males are responsible for a disproportionate amount of crime, the age distribution of the population has a significant effect on overall crime rates. Over the course of the next decade, the number of 15-19 year olds in the population will increase by 25%; for Hispanics, there will be a 47% rise in this group.⁷⁰ Unless we see substantial changes both in criminal justice and social policy, we can anticipate increases in crime generated by the rise in the numbers of young males.

Disturbing as these anticipated increases appear, even more so is the potential impact on African American and Hispanic communities. A number of factors suggest that the rise in criminal justice populations may affect minority communities even more so than the population as a whole. For example, the initial impact of the "Three Strikes" law in California appears to be having a disproportionate impact on African Americans. An analysis of the first six months experience with the law in Los Angeles County found that African Americans constituted 57% of the third "strike" cases charged, compared to 31% of all felony cases.⁷¹

As we have also seen, the impact of the "war on drugs" has fallen disproportionately on low-income African Americans. To the extent that current policies remain in place, change in these disparities in the coming years is unlikely.

RECOMMENDATIONS

Addressing the racial disparities in the criminal justice system documented in this report requires both a political will and a comprehensive strategy. Unfortunately, it is far from clear that the political will to do so exists to any significant extent in the current climate. Unless these disparities are confronted, high crime rates will continue, the urban economy will decay further, and social divisions will deepen.

Although much of the necessary response to these problems is obviously within the realm of family, community, and the economy, we do not address them here because this report is primarily concerned with the ways in which the criminal justice system affects the racial disparities we have highlighted. Our recommendations for public policy in this area are as follows:

1. Drug Policies.

As we have demonstrated, drug policies of the past decade have been the single most significant factor contributing to the rise in criminal justice control rates for African Americans. In order to reverse this trend and to have a more significant impact on drug abuse, national policy should reflect the following:

A. Revise national spending priorities. Since the mid-1980s, both Republican and Democratic administrations have directed about two-thirds of federal drug funding toward law enforcement and only one-third toward prevention and treatment. The lack of available treatment has been documented by the Department of Health and Human Services which reports that of the 2.4 million drug users who could benefit from treatment, 1 million can not have access to treatment each year.⁷²

Despite candidate Clinton's pledge to support increased treatment efforts, the Administration's requests to increase substantially treatment for hard core addicts received little support in Congress. These policies continue even as comprehensive studies document the positive results of drug treatment. A 1994 study by RAND researchers, for example, found that treatment is seven times more cost-effective in reducing cocaine consumption than supply-control programs. The study calculated that increasing cocaine treatment funding in the \$13 billion federal budget from \$1 billion to \$4 billion would provide enough funding to treat all heavy users once each year (vs. 30% at present), and cause a one-third reduction in annual cocaine consumption.⁷³

Another study conducted for the state of California provides the most comprehensive cost-benefit examination to date on the effectiveness of substance abuse treatment. Looking at all treatment programs in the state, researchers concluded that every dollar spent on treatment resulted in \$7 in savings on reduced crime and health care costs.⁷⁴

Given what is known about the effectiveness of treatment when compared to law enforcement and interdiction efforts, it is imperative to begin to reverse these funding

priorities. Unless demand-for drugs is reduced, the lure of the drug trade will continue to attract young entrepreneurs seeking to make quick profits.

B. Expand drug treatment within the criminal justice system. Criminal justice personnel throughout the country uniformly cite the need for expanded treatment options. New programs such as drug courts and prosecutorial diversion to treatment have met with widespread professional and community support. With the exception of treatment in prison, efforts to expand funding for drug courts and other treatment options have been folded into block grant funding where they are not likely to receive a high level of support.

C. Provide treatment programs which address the multiple and specific needs of women. Despite the fact that women involved with the criminal justice system are more likely than men to use drugs, and use more serious drugs, existing treatment models have not always been designed to incorporate the particular circumstances and multiple needs of women. Programs that accommodate children and address the range of economic, social and psychological stressors that contribute to substance abuse and drug-related crime among women should be developed and made available to women.

D. Promote a renewed dialogue on drug policy. While drug policy discussions of the 1980s were often heated and contentious, they nonetheless served to explore the range of options available to respond to substance abuse. Little such discussion exists today, as seen by the low priority given by the Justice Department to its 1994 report on mandatory sentencing or the disciplining of former Surgeon General Joycelyn Elders for advocating a discussion of drug policy. It is unconscionable to inhibit a broad discussion of a range of policy alternatives, particularly as we continue to be confronted by the tragic consequences of current policies.

2. Sentencing Options.

A long-term goal clearly should be to reduce crime and the numbers of people entering the criminal justice system. An intermediate strategy, though, could reduce the severity of criminal justice control without compromising public safety by creating a broader array of sentencing options for non-violent offenders who would otherwise be sentenced to prison.

Criminologist Joan Petersilia has estimated the potential for this type of a strategy in California.⁷⁵ She concludes that as many as a quarter of offenders sentenced to prison in that state could be appropriate candidates for structured alternatives. This group consists of offenders who are being sent to prison for technical violations of probation and parole, minor drug use, and nonviolent property offenses, and who currently serve four to eight months in prison. Diverting such offenders would enable corrections officials to reallocate 17-20 percent of their budget to community-based treatment, supervision, and other programs.

3. Sentencing Policies.

A variety of sentencing policies adopted nationally since 1980 have exacerbated the problems faced by women and minorities in the criminal justice system. The injustices caused by mandatory sentencing and its failure to have an impact on crime have been well documented. Of particular concern here is the disparity in sentencing between crack cocaine and powder cocaine that is present in the federal courts and many states. In addition to the racial disparities that have been demonstrated, eliminating this disparity in the federal system would lead to a long-term reduction of about 15,000 person-years in the federal prisons.⁷⁶

While sentencing guidelines systems have been adopted with a goal of reducing sentencing disparity, their "gender-neutral" policies have often worked to the disadvantage of women. Factors which are often directly relevant to women -- child care responsibilities, histories of abuse, etc. -- are often not considered to be relevant at sentencing. While reduction of sentencing disparity is a laudatory goal, so is an individualized approach to sentencing that incorporates an analysis of offender responsibility and appropriate sentencing options.

4. Legislative Racial/Ethnic Impact Statements.

In recent years the federal government and some state legislatures have adopted policies requiring a fiscal impact statement prior to consideration of any sentencing legislation in an effort to help legislators assess the long-term costs of any changes.

Similarly, legislatures should be required to prepare racial/ethnic impact statements for any sentencing policy legislation and to consider any adverse or unanticipated consequences that would affect minorities disproportionately. If a proposed policy were shown to have this type of impact, then policymakers would be free to decide if the impact was warranted or if an alternative policy might accomplish the same objective without creating such a disparity. Had such a policy been in effect in the 1980s when Congress enacted crack cocaine legislation, perhaps current penalties would be less severe.

5. Long-range Crime Control Policies and Strategies.

Criminal justice policy is often short-sighted and formulated in response to emotional appeals. The political power of the crime issue, the media sensationalism around atypical crimes, and the persistence of high crime rates join to limit discussion and planning. Unfortunately, we have seen the consequences of more than two decades of heavy investment in the criminal justice system to the detriment of other social programs.

Those who suggest that high rates of crime and drug abuse demand immediate solutions need only look back a decade to the inception of the current "drug war." Despite an enormous increase in the number of drug offenders in prison since then, little progress can be claimed for the law enforcement approach. Had a different set of choices been made at that time, the country might have been the beneficiary of more humane and effective solutions.

CONCLUSION

"I came here to make a better America. And, by the way we measure a better America, it is better. There are more people working than on the day I took office. There are more people in prison cells than on the day I took office...." [emphasis added]

-- Democratic political consultant James Carville, suggesting Clinton campaign themes for 1996. The New Yorker, April 3, 1995.

"I wonder if because it is blacks getting shot down, because it is blacks who are going to jail in massive numbers, whether we -- the total we, black and white -- care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?"

-- Former Atlanta Police Chief Eldrin Bell. Legal Times, October 10, 1994.

If the goal of public policy in recent years had been to incarcerate record numbers of black Americans, then that policy would have been a tremendous success. But if the goal was to make our streets safer and to build strong families and communities, then public policy has been a dramatic failure.

Former Police Chief Bell's question is the appropriate place to begin our discussion of public policy. If nearly one in three young white men were under some form of criminal justice control, how would the nation react?

We can only speculate, of course, but there are some historical examples to inform us. In the 1960s and 1970s, for example, the country experienced substantial changes in both marijuana use and public policy regarding its use. As white middle class Americans began to use marijuana in large numbers, public attitudes and policy changed, generally becoming much more tolerant. In some jurisdictions, personal possession of marijuana was either decriminalized or essentially ignored by the police. Nothing about the drug itself had changed, only the composition of the "offenders" using it.

The intent of this report has not been to deny the reality of crime or the harm it imposes on all our communities. We are also not unaware of the individual's responsibility to

respect the reasonable norms of a society. What we have been concerned with, though, are the broader social forces and criminal justice policies that have served to marginalize increasing numbers of African Americans and to impose severe constraints on their life prospects.

Rescuing a generation of young black men and women from the various social ills that confront them will not be easy, quick, or accomplished without many pitfalls along the way. But if the task is to be eventually completed it would behoove us to learn from the mistakes of recent years and to begin implementing a strategy that will insure that the next generation of children will face a future filled with greater opportunity and promise.

NOTES

1. Marc Mauer, "Young Black Men and the Criminal Justice System: A Growing National Problem," The Sentencing Project, February 1990.
2. Data are based on estimates derived from reports of the Bureau of Justice Statistics on corrections populations, and population data from the Bureau of the Census. Because data on race, sex, and age were not available for all components of the criminal justice system, the total rates of control should not be considered exact, but rather reasonable estimates of the population within each category. See "Methodology" section for a discussion of this process and the assumptions used in the calculations.
3. Robert Tillman, "The Size of the 'Criminal Population': The Prevalence and Incidence of Adult Arrests," Criminology, Vol. 25, No. 3, August 1987.
4. John J. Donohue III and Peter Siegelman, "Is the United States at the Optimal Rate of Crime?" Northwestern University School of Law, October 24, 1994 draft, p. 22.
5. Kids Count Data Book, The Annie E. Casey Foundation, 1995, p. 6.
6. Douglas S. Massey and Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass, Harvard University Press, 1993.
7. Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America, Oxford University Press, 1995, p. 49.
8. Alfred Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," University of Colorado Law Review, Vol. 64, No. 3, 1993.
9. Tonry, p. 49
10. Understanding and Preventing Violence, National Research Council, Washington, 1993.
11. See, for example, Martin Killias, Andre Kuhn, and Simone Ronez, "Sentencing in Switzerland," Overcrowded Times, June 1995.
12. "Drugs and Crime Facts, 1990," Bureau of Justice Statistics, 1991.
13. FBI, Uniform Crime Reports, various years.
14. As a *household* survey of drug abuse, the NIDA data do not include institutionalized persons, homeless people not living in a shelter, and people with less stable residences generally. Therefore, low-income African Americans may be undercounted in these surveys.
15. James P. Lynch and William J. Sabol, "The Use of Coercive Social Control and Changes in the Race and Class Composition of U.S. Prison Populations," paper presented at the American Society of Criminology, November 9, 1994.
16. Dan Weikel, "War on Crack Targets Minorities Over Whites," Los Angeles Times, May 21, 1995.

17. Allen J. Beck and Peter M. Brien, "Trends in U.S. Correctional Populations: Recent Findings from the Bureau of Justice Statistics," in Kenneth C. Haas and Geoffrey P. Alpert, The Dilemmas of Corrections, Waveland Press, 1995.
18. United States Sentencing Commission, Cocaine and Federal Sentencing Policy, February 1995, pp. 129-134.
19. Ibid., p. 156.
20. Ibid., p. 175.
21. Since Hispanics as an ethnic group can be of any race, there is a slight overlap between African-Americans and Hispanics. The Census Bureau reports that in the overall population, about 6% of Hispanics are identified as African-American. Assuming a similar proportion among drug offenders would reduce the total by about 1%.
22. Tonry, p. 39.
23. Beck and Brien, p. 55.
24. FBI, Crime in the United States 1993, Uniform Crime Reports.
25. Alfred Blumstein, "Youth Violence, Guns and the Illicit-Drug Industry," H. John Heinz III School of Public Policy and Management, July 1994.
26. United States Sentencing Commission, pp. 122-123.
27. Peter Reuter, Robert MacCoun, and Patrick Murphy, "Money from Crime: A Study of the Economics of Drug Dealing in Washington, D.C.," RAND, June 1990.
28. Samuel L. Myers, Jr., "Crime, Entrepreneurship, and Labor Force Withdrawal," Contemporary Policy Issues, Vol. X, No. 2, April 1992.
29. Ibid., p. 96.
30. John M. Hagedorn, "Homeboys, Dope Fiends, Legits, and New Jacks," Criminology, Vol. 32, No. 2, May 1994.
31. Ibid., p. 209.
32. Reuter et al., p. xiii.
33. Ibid.
34. Hagedorn, p. 215
35. Hagedorn, p. 216
36. These issues are explored in an insightful paper by Joan Moore, "How Has Increased Incarceration Affected Inner-City Communities," prepared for a conference on the "Unintended Consequences of Incarceration," sponsored by the Vera Institute of Justice, June 19-21, 1995.

37. Michael L. Prendergast, Jean Wellisch, and Gregory P. Falkin, "Assessment of and Service for Substance-Abusing Women Offenders in Community and Correctional Settings," The Prison Journal, Vol. 75, No. 2, June 1995.
38. National Institute of Justice, 1993 Drug Use Forecasting. Annual Report, 1994.
39. FBI, Uniform Crime Reports 1991.
40. Bureau of Justice Statistics, "Survey of State Prison Inmates, 1991," March 1993.
41. Bureau of Justice Statistics, "Women in Prison", 1994.
42. Barbara Bloom, Meda Chesney-Lind, and Barbara Owen, "Women in California Prisons: The Hidden Victims of the War on Drugs," Center for Juvenile and Criminal Justice, 1994.
43. Darrell Steffensmeier, et al., "Gender and Imprisonment Decisions," Criminology, Vol. 31, No. 3, 1993; Kathleen Daly, Gender, Crime and Punishment, Yale University Press, 1994.
44. "Women in Prison."
45. Myrna Raeder, "Gender and Sentencing: Single Moms, Battered Women, and other Sex-Based Anomalies in the Gender-free World of the Federal Sentencing Guidelines," Pepperdine Law Review, Vol. 20, No. 3, 1993.
46. Department of Justice, "An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories," February 4, 1994.
47. Raeder
48. Lisa Maher and R. Curtis, "Women on the Edge of Crime: Crack Cocaine and the Changing Contexts of Street-level Sex Work in New York City," Crime, Law and Social Change, Vol. 18, 1992.
49. DEA cited in United States Sentencing Commission.
50. Data provided by United States Sentencing Commission, July 27, 1995.
51. "Survey of State Prison Inmates, 1991."
52. Albert Reiss and Michael Tonry, Communities and Crime, University of Chicago Press, 1986; Wesley Skogan, "Disorder and Community Decline," Center for Urban Affairs and Policy Research, Northwestern University, 1987.
53. Brenda A. Miller, W. Downs and K. Joyce, "Victimization of Drug Women," paper presented at the Fourth International Conference on the Reduction of Drug-Related Harm, The Netherlands, March 1993; G.B. Ladwig and M.D. Anderson, "Substance Abuse in Women: Relationship between chemical dependency of women and past reports of physical and/or sexual abuse," in C.M. Simpselle (ed.) Violence Against Women, Hemisphere, 1992.
54. Mindy T. Fullilove and Robert Fullilove, "Violence, Trauma and Post-Traumatic Stress Disorder Among Women Drug Users," Journal of Traumatic Stress, Vol. 6, No. 4, 1993; Angela Browne and Mary Harvey, "Mental Health Consequences of Interpersonal and Family Violence," Report of the Council of Scientific Affairs, American Medical Association, June 1993.

55. Mindy T. Fullilove et al., "Crack Ho's and Skeezer: Traumatic Experiences of Women Crack Users", Journal of Sex Research, Vol. 29, No. 2, May 1992.
56. "Women, Babies and Drugs: Family-Centered Treatment Options" in Network Briefs, National Conference of State Legislatures Women's Network, July 1990.
57. Bureau of Justice Assistance, "Implications of the Drug Use Forecasting Data for TASC Programs: Female Arrestees," 1991.
58. Jean Wellisch, Michael L. Prendergast, and M. Douglas Anglin, "Drug-Abusing Women Offenders: Results of a National Survey," National Institute of Justice, 1994.
59. Prendergast et al.
60. Gene Kassebaum and Susan Chandler, "Polydrug Use and Self-Control Among Men and Women in Prison," paper presented at American Society of Criminology, San Francisco, 1991.
61. Barbara Owen and Barbara Bloom, "Profiling Women Prisoners: Findings from National Surveys and a California Sample," The Prison Journal, June 1995.
62. Dr. Denise Johnston, "Report No. 13: Effects of Parental Incarceration", The Center For Children of Incarcerated Parents, Pacific Oaks College, 1993.
63. Testimony before the Senate Judiciary Committee, June 1993.
64. The U.S. rate of incarceration was 519 per 100,000 population in 1993, compared to 558 per 100,000 in Russia. Marc Mauer, "Americans Behind Bars: The International Use of Incarceration, 1992-93," The Sentencing Project, September 1994.
65. "Accommodating Prison Population Growth," Legislative Analyst's Office, Sacramento, January 6, 1995.
66. Peter Baker and Donald P. Baker, "Va. Prisons Swamped by Inmate Rise," Washington Post, February 20, 1995.
67. Amanda Wunder, "Prison Population Projections," Corrections Compendium, March 1995.
68. Lawrence A. Greenfeld, "Prison Sentences and Time Served for Violence," Bureau of Justice Statistics, April 1995.
69. Marc Mauer, "A Crime Bill to Bust Budgets," State Government News, April 1995.
70. "Malcolm Gladwell, "Baby Boom's Urban Cradle Braces for Future Rocked by Crime," 11 Washington Post, February 26, 1994.
71. Vincent Schiraldi with Michael Godfrey, "Racial Disparities in the Charging of Los Angeles County's Third 'Strike' Cases," Center on Juvenile and Criminal Justice, October 1994.
72. National Drug Control Strategy, Office of National Drug Control Policy, February 1995, pp., 38-39.
73. "Treatment: Effective (But Unpopular) Weapon Against Drugs," RAND Research Review, Spring 1995.

74. Sheryl Stolberg, "Study Shows Drug Abuse Programs Are Cost-Effective," Los Angeles Times, August 29, 1994.
75. Joan Petersilia, "How California Could Divert Nonviolent Prisoners to Intermediate Sanctions," Overcrowded Times, June 1995.
76. Letter from Richard Conaboy, Chair, U.S. Sentencing Commission, to Senator Orrin Hatch, May 1, 1995.

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METHODOLOGY

Data for this report were generated using statistics provided by the Bureau of Justice Statistics (BJS), and using a similar methodology to that of our 1990 report, "Young Black Men and the Criminal Justice System: A Growing National Problem."

Total prison and jail populations were taken from BJS reports for mid-year 1994. The most recent data for probation and parole populations are for year-end 1994.

To obtain estimates of the number of each demographic group in the age range 20-29 under criminal justice supervision we used the 1992 BJS figures for state and federal inmates (Correctional Populations in the United States, 1992), and for the jail population, data from the 1989 inmate survey. Probation and parole data for 1994 were used for gender distribution, and for 1992 for racial breakdowns (due to problems with the 1994 data). Since no age distribution was available for probationers and parolees, we used proportions of each demographic group in prison or jail for the age range 20-29 as an estimate of the probation and parole age distributions as well. We view this as a conservative estimate for the following reason: the median prison inmate (representing about two-thirds of the total inmate population) is about 30 years old and the median jail inmate is in the late 20s; probationers are likely to be younger on average than inmates, and parolees older, but probationers far outnumber parolees.

These data were used to produce the following estimates of the proportion of the criminal justice population for each demographic group that was in the 20-29 age range: white males - 41.5%; African American males - 45.5%; Hispanic males - 47.8%; white females - 43.2%; African American females - 47%; Hispanic females - 46.8%. Data for Native Americans, Asian Americans and other groups are too small to allow for meaningful analysis.

After estimating the total number of persons under criminal justice supervision, we calculated the average rate of increase for the period 1989-94 (5.3%) and used this figure to estimate the 1995 total criminal justice population. Since African American males in the age group 20-29 represented 15.3% of the total criminal justice population in 1994, we used this proportion for 1995 as well to estimate the number of young African American males in the criminal justice system. Then, using Census Bureau estimates, we derived a criminal justice control rate for 1995. Since the estimated number of African American males in this age group declined slightly from 1994 to 1995, it is possible that the proportion of 15.3% represents a slight overcount. It is unlikely, though, to be of any significant magnitude.

Data for Hispanics are somewhat unreliable and should be interpreted with caution. For state and federal inmates, we utilized inmate self-report data for 1991 on ethnicity. The jail data rely on the 1989 inmate survey. The most current figures for the Hispanic proportion of the probation caseload are 7% for 1992 and 9% for 1994. These are almost certainly low figures, though, since the figures for prior years are significantly higher. Much of the difference can be explained by the absence of 1992 data on ethnicity from Texas, a state with a high proportion of Hispanics on probation and one which had previously reported these figures. In order to account for this, we estimated the number of Hispanics on probation in Texas for 1992 using the proportion for 1990 (the most immediate prior figure), and therefore derived a national figure of 12.4%. We also note that the complete absence of reporting on ethnicity of probationers in California and the large fluctuations in the Florida data from year to year, two states with large numbers of Hispanics, make these figures less reliable than for racial groups.

The overall rates of criminal justice control include a small degree of overlap. The most significant instance of this involves individuals on probation or parole who are jailed for a new offense and remain on probation or parole caseloads for a period of time while incarcerated. BJS has derived estimates of this doublecounting as ranging from 3.4% - 10.8%, with the higher figure being described as "an extreme assumption." Offsetting this, we note that in our examination of criminal justice control rates we have not attempted to account for persons awaiting trial but not incarcerated in jail. These persons are clearly under criminal justice control and often subject to supervision as extensive as probationers.

Estimated costs of criminal justice control were obtained by using the BJS estimate of the annual cost of incarceration for jail inmates for 1993 (\$14,667) and 1994 estimates published by the Criminal Justice Institute for prisons (\$19,119), probation (\$850), and parole (\$1080). No distinction is made here between capital and operating costs of incarceration.

Data for Table 4 (Hispanic Inmates in State and Federal Prisons) are taken from Correctional Populations in the United States, 1992. Data for Table 5 (Drug Offenders in Prison and Jail) are derived from BJS estimates of drug offenders in state prisons for 1993 and jails for 1989, along with Department of Justice estimates for federal prisons for 1993. Overall state prison figures are jurisdiction totals, and therefore do not account for a slight overlap of state prisoners held in local jails. Data for Table 6 (Sentences to State Prison for Drug Possession, 1992) are taken from the BJS report, "National Corrections Reporting Program 1992." Data for Table 7 (State Prisoners Incarcerated for Drug Offenses) are taken from state prisoner data for 1986 and 1991 from the Bureau of Justice Statistics. Data for Figure 1 (African Americans and Drug Possession) are derived from the National Institute on Drug Abuse, the Uniform Crime Reports and BJS reports on felony sentencing and corrections for 1992.

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028-96

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March 6, 1996

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

Re: Proposed Amendments to Sentencing Guidelines

Dear Sir/Madam:

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 The Snack Food Association (SFA), a national not-for-profit trade association whose members produce a wide variety of snack food products, has strong reservations about the proposed amendments to Sections 2N2.1 and 2F1.1 and welcomes this opportunity to comment.

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

¹

61 Fed. Reg. 79-83 (Jan. 2, 1996).



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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. Section 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. Section 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.

Laws governing foods, drugs, and cosmetics are characterized as "public welfare" statutes and, as such, the government need not prove awareness of

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. Section 2N2.1 (Application Note 1).

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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. SFA 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, SFA urges the Commission to include commentary that would allow prosecutors and judges more discretion in sentencing purely negligent regulatory violations.

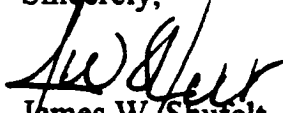
⁴ United States v. Park, 421 U.S. 658, 673-74 (1975). See also United States v. Dotterweich, 320 U.S. 277 (1943).

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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SFA 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,


James W. Shufelt
President

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March 14, 1996

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Attention: Public Information

RE: Comment on Proposed Guideline Amendments

To the Commissioners:

I am submitting this letter of comment in response to the Commission's Federal Register notice of January 2, 1996, 61 Fed. Reg. 79, with specific reference to the proposed Guideline amendments concerning food and drug offenses, id. at 83. I believe that these proposed amendments are unwise in the extreme, inconsistent with some of the central features of the federal Guidelines system as it has been known since its original promulgation in 1987, and potentially disruptive to the fair administration of criminal justice in the federal courts. Accordingly, I recommend that the proposed amendments be withdrawn pending further study by the Commission and its staff, which obviously has failed to consider some of the broad-ranging implications of this proposal.

My interest in this matter is two-fold. First, the amendments in question were brought to my attention quite recently by the Pharmaceutical Research and Manufacturers of America ("PhRMA"), which engaged me, as an expert in sentencing law and policy, to analyze and comment to you on the proposed amendment.¹ Second, I have a longstanding interest in the success of the Commission's work, having served as Deputy Chief Counsel (1987-88) and Consulting Counsel (1988-89) to the Commission, in both capacities primarily engaged in the development of sentencing guidelines for

¹Although I am to receive my ordinary hourly consulting fee for this work, no one associated with PhRMA has suggested the substance of my comments or reviewed or approved the contents of this letter. Therefore, I am not "representing" PhRMA in the usual use, and my comments do not necessarily represent the views of PhRMA or any of its members. I have no other affiliation with PhRMA, and have done no other work for them.

organizations and white-collar offenses, and, as an academic,² having published several papers on federal sentencing law and policy and substantive criminal law, with the same emphases.³

As a participant in and observer of the Commission's process for some years now, I am not unmindful of the complexities involved in developing and refining sentencing guidelines, which I believe has a subtlety unmatched by almost any other aspect of governmental policymaking, given the variety of different actors who are affected by sentencing guidelines in different ways--including prosecutors, judges, probation officers, defendants, and potential defendants--which includes all of us in some capacity. Furthermore, the Commission itself must walk a tightrope narrowly drawn by the Commission's unique position within the governmental structure and its delicate mandate to develop sentencing policy without encroaching upon legislative or substantive legal policy, surrounded by potential critics from the Executive, the Congress, the courts, the legal community, regulated industries, and the public at large. Accordingly, I am quite aware of how much easier it is to be an external critic than an internal guidelines-maker, and my critical comments should be taken in this light.

Notwithstanding my empathy for the Commission's difficult situation, I believe that the Commission is slipping off of its tightrope in this particular instance, and it should catch itself before it falls into the void. This proposed amendment not only is unjustified on its own narrow terms, but also is likely to have very profound consequences for all guidelines sentencing that the Commission does not appear even to perceive, much less to have considered adequately.

As I understand the Federal Register notice, the proposal is to withdraw the current food and drug offense guideline, §2N2.1, and henceforth to sentence all offenses formerly covered by that guideline under §2F1.1, as if they were all offenses involving fraud or deceit. The only amendment proposed to §2F1.1 to accommodate its new coverage would be a guided upward departure suggested by the application notes in cases where "a large number of persons" were affected by a risk of serious bodily injury. In addition, the notice proposes to add food and drug offenses to the organizational sentencing guidelines of current Chapter 8, which as promulgated in 1991 excluded those offenses from its coverage. Finally, the notice seeks comment on an entirely new concept of using gain rather than loss as a measure of offense severity "when the essence of the offense is fraud against regulatory authorities with no economic loss." This last point does not appear explicitly to

² Currently, I am Professor of Law and Associate Dean for Academic Affairs at the George Mason University School of Law. Of course, my comments here also do not represent the policy or views of George Mason University or the School of Law.

³ Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 Am. Crim. L. Rev. 513-604 (1989); Jeffrey S. Parker & Michael K. Block, *the Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289-329 (1989); Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 Wash. U.L.Q. 397-442 (1993); Jeffrey S. Parker, *The Economics of Mens Rea*, 79 Va. L. Rev. 741-811 (1993).

be limited to food and drug offenses only.

The announced basis for the proposal is the February 1995 Final Report of the Commission Staff's Food and Drug Working Group (hereinafter the "Staff Report"). I recently have reviewed the Staff Report, and I must say that I am surprised to find it cited as the basis for the proposed amendment, as that Report does not recommend--nor even contemplate--the principal action now proposed by the Commission, which is to abolish §2N2.1 in its entirety. Rather, the Staff Report had raised the question of consistency in the application of a pre-existing cross-reference between §2N2.1 and §2F1.1. Even on its own terms, I believe that the Staff Report is based upon an unwarranted inference from the case files. But in any event, it focuses on a very different consideration from the radical measure now proposed in the Commission's notice.⁴

A. Abolition of § 2N2.1

Focusing first on the principal proposal to abolish §2N2.1, I see three major objections, all of which create serious problems of either substantive legal policy or consistent sentencing policy, or both, as that proposal would: (1) obliterate important culpability distinctions both within the underlying food and drug statutes and between those statutes and the very different statutes currently covered by the fraud guideline; (2) undermine a basic feature of the sentencing guidelines overall as being primarily a "charge offense" rather than a "real offense" sentencing system; and (3) deviate fundamentally from the guidelines' overall approach to regulatory offenses. These would all be profound changes to the federal sentencing guidelines' structure as it has existed since 1987, and yet none of them is even recognized as a consequence of the proposal in either the Staff Report or the Commission's notice.

1. Culpability Distinctions. There appears to be no recognition by the Staff Report that the principal statutes now covered by §2N2.1 do not require *any* proof of mens rea or criminal culpability in the usual sense for a conviction. In fact, they are the leading examples of "strict liability" criminal offenses. By the general standards of criminal law, they are not "crimes" at all;⁵ and they are often

⁴ Aside from the Staff Report, the only other background of which I am aware is a meeting that was held in February 1996 between Commission staff members and Messrs. John Fleder and James Fletcher, representing pharmaceutical and food industry groups, at which the staff is said to have indicated that the proposal was a "simplification" measure based in part on the small number of sentencings each year under §2N2.1. I discount that information somewhat, given that I have received it informally and it does not appear in a Commission or staff document. It is troubling, however, that such a rationale should be suggested, even informally, as it is obviously fallacious: a small volume of sentencings tells us virtually nothing about the usefulness of a particular guideline. For example, there are very few homicide prosecutions in the federal courts, but no one would rely upon that fact as a basis for abolishing the homicide guidelines.

⁵ For example, the American Law Institute's Model Penal Code, which has been widely emulated in state criminal codes and also used as a model for federal criminal code reform over the

referred to as "public welfare offenses"⁶ or "regulatory offenses"--terms that are used in contradistinction to "true" crime, based upon a finding of moral culpability.⁷

More significantly for present purposes, the entire rationale for accepting such "public welfare offenses" into our federal criminal law rests heavily on the assumption that "public welfare offenses" would involve relatively low and non-stigmatizing penalties, generally modest monetary fines based upon misdemeanor conviction, rather than imprisonment and the "infamy" associated with felony conviction.⁸ The distinction can be seen by comparing the two leading Supreme Court cases on each side of the divide, *United States v. Dotterweich*, 320 U.S. 277 (1943), which recognized the "public welfare offense" category specifically in the context of 21 U.S.C. § 331--one of the principal statutes now covered by Guideline §2N2.1--and *Morrisette v. United States*, 342 U.S. 246 (1952), which refused to extend the *Dotterweich* analysis to a statute prohibiting theft of government property--an offense that is cognate with the statutes now covered by Guideline §2F1.1. Justice Jackson's opinion for the Court in *Morrisette* is one of the most famous statements of the rationale for the requirement of mens rea for a criminal conviction:

"[T]hat an injury can amount to crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . .

* * *

"Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved,

years, makes what the Code's comments describe as "a frontal attack on absolute or strict liability in the penal law," *Model Penal Code and Commentaries* § 2.05, Comment 1. Under the Model Penal Code, strict liability offenses are defined as "violations," which are not "crimes." *Id.* § 2.05.

⁶ See Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

⁷ Supreme Court has endorsed this distinction. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

⁸ This point is developed in depth, together with the associated moral and economic objections to strict liability in crime, by my 1993 article entitled *The Economics of Mens Rea*, 79 Va. L. Rev. 741, 785-804 (1993). Since that article, the Supreme Court has decided *Staples v. United States*, -- U.S. --, 114 S. Ct. 1793 (1994), which reaffirms the traditional presumption that all elements of all crimes require proof of criminal mens rea, unless a contrary indication plainly appears on the face of the legislation.

the infamy is that of a felony, which, says Maitland, is '... as bad a word as you can give to man or thing.'⁹

Thus, as the general principles are laid down by the Supreme Court, whether strict liability will be accepted as an adequate basis for criminal conviction depends in part upon the level and type of penalty imposed.¹⁰ Partly because of the relatively low and non-stigmatizing nature of the penalty for "regulatory" offenses, *Dotterweich*--as further developed in the later Supreme Court decision in *United States v. Park*, 421 U.S. 658 (1975)--accepted the reduced culpability standard of "responsible relation" to the violation in question. Even this standard does not completely dispense with all concept of fault, and its precise scope remains a subject of dispute in the lower federal courts.¹¹ But it is the lowest standard of culpability that has ever been accepted in federal criminal law.

In contrast, most of the statutes now covered by Guideline §2F1.1 are at the completely opposite end of the culpability spectrum; they require, as a prerequisite to conviction, proof beyond a reasonable doubt of what is called in criminal law a "specific intent"--a purpose not only to engage in the prohibited conduct, but to bring about a forbidden result. In most of those statutes--certainly all of the leading federal criminal fraud statutes, such as the mail fraud, wire fraud, travel fraud, and conspiracy to defraud--the requisite mens rea is "intent to defraud," which is a type of specific intent, and specific intent is the *highest* culpability level known to our criminal law.¹² Unlike the "regulatory" offenses, these offenses are almost inevitably felony convictions carrying substantial statutory imprisonment sentences. They are also an outgrowth of the same background of the common law of larceny, as consolidated in modern criminal codes in the law of "theft."¹³ Accordingly, they are essentially the same offense as was charged in *Morissette*.

⁹ 342 U.S. at 260.

¹⁰ This was an explicit part of the Supreme Court's rationale in its recent address to the mens rea doctrine in *Staples v. United States*, --- U.S. ---, 114 S. Ct. 1793 (1994), in which the Court relied, *inter alia*, on the severity of the prescribed penalty in ruling that a conviction for possession of an automatic weapon required proof of the defendant's knowledge that he possessed a weapon of the prohibited characteristics, and not merely a dangerous device.

¹¹ See generally John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193 (1991).

¹² See 1 W. LaFare & A. Scott, *Substantive Criminal Law* § 3.5, at 315 (1986).

¹³ At common law, there was no crime of "fraud," as distinguished from "larceny by trick." The crime of "false pretenses" was added by Parliamentary statute in 1757. In most modern criminal codes, the common law crime of larceny is merged with the statutory crimes of false pretenses and embezzlement to comprise the consolidated offense of "theft." See 2 W. LaFare & A. Scott, *Substantive Criminal Law* §§ 8.1, 8.8 (1986).

Therefore, to consolidate offenses now covered by Guideline §2N2.1 with those now covered by §2F1.1 is to mix apples and oranges; it is to treat the *most* culpable defendants under exactly the same standards as the *least* culpable ones, with nothing that I can see in the resulting guideline to distinguish between the two. In doing so, the Commission would be obliterating important distinctions in culpability that have formed the moral foundations of our criminal law, and thereby, in my judgment, the Commission would be overreaching its limited mandate to rationalize sentencing policy without disturbing substantive standards of criminal liability, which are matters for the Congress, not the Commission.

This would be true even under the general principles I have stated. But in this particular context, the Commission also would be overstepping the bounds of distinctions made by the Congress itself in the very statutes under consideration here, primarily 21 U.S.C. §§ 610 and 676 in the case of meat products, and 21 U.S.C. §§ 331 and 333 under the federal Food, Drug and Cosmetic Act. In both instances, the statutes draw a distinction between a misdemeanor violation --the paradigmatic "public welfare offense"--and a more serious felony violation, in part on precisely the same mens rea distinction of "intent to defraud."¹⁴ That distinction--explicitly and specifically made by the Congress in the statutes in question--also would be obliterated by the consolidation of all offenses into the fraud guideline, which in my opinion would be a failure by the Commission to observe and apply the culpability and penalty distinctions made by the Congress, and therefore noncompliance with substantive statute law.

The specific statutory distinctions made by Congress provide an obvious and complete solution to the issue noted by the Staff Report (pages 12-13, 20, 22) of consistency in applying §2N2.1's pre-existing cross-reference to §2F1.1: that cross-reference should be applied only when the offense of conviction is the felony offense predicated on proof (or formal admission) or intent to defraud,¹⁵ and not to the misdemeanor violations. This solution follows the substantive statute more closely, and also is more consistent with the overall "charge offense" approach of the guidelines (see Section A.2, below). Moreover, it would avoid the undoubtedly controversial--and arguably unconstitutional--practice of sentencing misdemeanants as if they were felons, without proof beyond reasonable doubt, by admissible evidence, that in fact they had the requisite culpability to be considered felons. That is an unnecessary constitutional problem that the Commission should not foment.

¹⁴ The Staff Report notes this feature in describing the underlying statutes (*see* Staff Report, at 3-5), but then strangely ignores the distinctions in the remainder of its report. With all due respect to the staff, one is left with the impression that the authors of the report did not know what "intent to defraud" means in criminal law.

¹⁵ The other case of a felony conviction under these statutes is the repeat offender situation, which might call for a specific offense characteristic in §2N2.1, to the extent that the Commission determined that the matter was not adequately dealt with by the existing criminal history guidelines.

It appears from the Staff Report that the staff drew an undue inference from its examination of the reports of cases previously sentenced under §2N2.1. In a section of the Staff Report entitled "culpability," the staff purports to find that a high percentage of the cases "involved conduct that was purposeful or intentional" (page 9), and that this was based on "defendant admissions" (page 9). Apparently, this discussion is intended to suggest that most of the cases actually involved the higher level of culpability required for felony conviction. Even if this were true, it would not justify the abolition of the food and drug guideline, so long as there were even one case--or a potential case--of conviction without mens rea. But the staff's apparent conclusion does not follow from the data it examines, because the staff's analysis fails to distinguish "intent to defraud" from other forms of purposeful conduct, and, more importantly, it fails to account for the actual features of plea bargaining and guideline application in practice.

As against the staff's finding of "purposeful or intentional conduct," I would say "purposeful or intentional" as to what? A defendant might "purposefully" intend to violate a regulatory reporting or recordkeeping requirement, and that feature might call for a distinction in sentencing, but it says nothing about the formation of a specific intent to defraud, which is required under the fraud statutes and should be required before applying the fraud guideline, as the fraud guideline is predicated upon the assumption of such an intent, which is not the same as a generalized finding of intentional or purposeful behavior.

More fundamentally, I believe that the staff overemphasizes the significance of "defendant admissions" of culpability, which are very probably artifacts of plea bargaining in the shadow of the existing guidelines. As the Staff Report also notes, nearly all of these sentencings were plea bargains. The application notes to existing §2N2.1 indicate that "[t]he guideline assumes knowing or reckless conduct" (Application Note 1); otherwise, a downward departure may be warranted. Similarly, here as throughout the guidelines, "acceptance of responsibility" earns the defendant a 2-level reduction, and conventionally requires an acknowledgement of "guilt" in some sense. Thus, the typical structure of plea bargains under this guideline is obvious: the defendant admits "guilt," and thereby both gets the 2-level reduction and protects the prosecution against a downward departure; while the prosecution contents itself with a misdemeanor conviction--albeit with culpability "admitted"--while at the same time avoiding the expense and difficulty of proving the violation at trial. Similarly, in the more severe case of a potential felony conviction, the same basic bargain can be made, which presumably should be at a higher sentencing level.

Under the existing guideline structure, there is no incremental penalty for "admitting" purposeful or knowing conduct, and indeed there may be a discount through "acceptance." Under these conditions, we should not be surprised to find a high incidence of "admission." But that may have little to do with reality--especially the reality of proof at trial--if the guidelines structure is changed. It is a truism of guidelines sentencing that if the guidelines structure is changed, then the pattern of charges, defenses, and "admissions" also changes.

I understand that the regulatory agencies, and especially the FDA, generally defer criminal enforcement until there has been a previous warning or some other indication that the conduct in question is deliberate. But that sensible enforcement policy is a far cry from what state of mind actually can be proved beyond a reasonable doubt at a criminal trial. Indeed, that distinction accounts

for the entire category of "public welfare offenses," for which strict proof of criminal mens rea is dispensed with, in exchange for low, nonstigmatizing penalties. If the current proposal is approved, the practical result may well be to deprive the FDA and other agencies of that enforcement option, by driving potential penalties so far out of proportion to *provable* liability as to dramatically raise the rate of trials. In any case, it will largely destroy any incentive for the enforcement authorities to distinguish misdemeanor from felony violations, as the Congress intended them to do.

2. The General Approach of "Charge" Offense Sentencing. As indicated in my discussion of the culpability distinctions made by Congress in the underlying food and drug statutes, the Commission's current proposal appears to be inconsistent with the overall approach of "charge offense" sentencing that has been a basic feature of the federal sentencing guidelines since they were first promulgated in 1987. As has been noted in Chapter 1, Part A of the Guidelines since their inception, one of the fundamental policy choices made by the Commission was between a "real offense" and a "charge offense" sentencing system. The Commission initially attempted a "real offense" system that totally separates sentencing factors from the elements of charging statutes, but ultimately abandoned that system as impracticable and potentially unfair. As the Guidelines continue to state, "[i]n the Commission's view, such a [real offense] system risked return to wide disparity in sentencing practice" (*id.* at 5). This is a particularly troublesome consequence, as one of the fundamental objectives of the Sentencing Reform Act of 1984, which established the Commission, was to reduce unwarranted disparities and restore fairness and certainty to the federal sentencing process.

To avoid frustrating that objective, the Commission turned to a "modified charge offense" system of sentencing guidelines. Necessarily, such a system entails some degree of complexity in distinguishing among the many charge offenses involved in the federal system and occasional ambiguities in selecting among applicable guidelines. As experience is accumulated under the guidelines, monitoring data will call the Commission's attention to unanticipated application ambiguities, and the natural reaction will be to add still more application notes and cross-references, resulting in an even more complex structure. At some point, attention will be drawn to the problem of complexity itself, and there will be a natural tendency to "cut through" the complexities of choosing applicable guidelines by consolidating a larger range of charging offenses under a smaller number of guideline sections. In the extreme, all applicability problems can be solved easily by having only one guideline for all offenses, but that would transform the guidelines back into a "real offense" system, and thus reverse the fundamental policy choice. Short of the extreme, all proposals to consolidate previously separate guideline sections have the same tendency to reverse the fundamental policy choice in a piecemeal fashion, essential through a process of erosion. The danger is that, in reviewing each of the "simplification" proposals separately, the Commission inadvertently may back into a fundamental reversal of policy without full consideration of the policy choice itself.

Something like this process may be occurring in the case of the current proposal, which provides a particularly good illustration of the loss of refinement that can occur with "simplification" for its own sake. As I have indicated above, the particular application issue of applying the pre-existing cross-reference between § 2N2.1 and §2F1.1 can be solved very simply by closer attention to the distinctions among charging offenses that already have been made by the Congress in the

underlying food and drug statutes themselves: all that is required is an application note clarifying that cross-reference for an offense that "involved fraud" should be applied only where the offense of conviction was one the rested upon proof (or formal admission) of an intent to defraud. And yet, that obvious and straightforward solution, which is fully consistent with the "charge offense" approach, apparently was not even considered. An observer might conclude that the Commission had made a basic policy shift toward "real offense" sentencing, but I am aware that anything like that had been decided or even discussed. The more likely explanation is "simplification" for its own sake, without considering the broader policy issue.

In either case, the practical result is equivalent to a basic shift of policy. By consolidating §2N2.1 into §2F1.1, we would mix a wide range of offenders and offenses under the same guideline: misdemeanants with felons, the least with the most culpable, purely commercial harms with personal injuries or risks to public health or safety, and widely disparate underlying statutory policies. As can be seen, ultimately this does not reduce overall complexity; it simply shifts the complexity from guideline selection to the application of increasingly complex and broad-ranging individual guideline sections. I would predict that many observers would find it unseemly that offenses against statutes motivated by considerations of public health and safety would be sentenced under a guideline designed initially for commercial frauds; they will demand modifications to put health and safety risks into the guideline text itself. The beginnings of this process already can be seen in the Commission's own proposal of a departure consideration for injury risks, and its request for comments on an attenuation of the economic loss concept that heretofore has been central to the fraud and theft guidelines, focused as they are on property crimes. Once that process develops, the "fraud" guideline becomes less focused on fraud; it becomes, in effect, a generic guideline tending toward the "real offense" system that the Commission rejected ab initio.

By raising this point, I do not mean to comment on the overall merits of "real offense" versus "charge offense" sentencing. The Commission may wish to re-examine that fundamental policy choice. But I see no indication in the record that the Commission has done so, or intends this current proposal as a basic policy shift. That is a very large subject that deserves separate and complete consideration in its own right. My concern is that the Commission unintentionally may be backing into a major policy shift without ever having considered the subject at all.

3. The General Approach to "Regulatory" Offenses. I have a similar concern regarding the implications of the current proposal as indicating yet another deviation from the fundamental policy choices on which the existing guidelines' structure rests, which is the overall approach to "regulatory" offenses. Current §2N2.1 is only one of several guidelines based on the same overall approach, which was first formulated in 1987 and continues to be stated in Chapter 1, Part A of the current Guidelines (pages 8-9). That approach describes a four-tiered structure for dealing with regulatory offenses, in order to distinguish differing levels of harm and culpability in a way that parallels the substantive law's distinction of "public welfare offenses" from more serious crimes. As food and drug offenses are the widely-recognized paradigm for "regulatory offenses," the withdrawal of §2N2.1 may be interpreted as a signal that the Commission intends to dismantle the guidelines' overall approach to "regulatory offenses" more generally. As in the case of "charge offense" sentencing, that may or may be the Commission's intent. But from what I have seen, I am unaware

of any general policy decision by the Commission on this subject, and, once again, I do not believe that the Commission should place itself in the position of backing into a major policy shift on an ad hoc, piecemeal basis.

If the Commission wishes to re-examine its overall approach to regulatory offenses, I believe that the appropriate way to proceed is to begin with the general principles stated in §4(f) of Chapter 1.A of the existing Guidelines. As a matter of law, that provision is a "policy statement" that the courts are required to consider--and all participants have a right to rely upon as being an accurate statement of Commission policy--until it is explicitly modified. The current proposal is inconsistent with that statement, because it proposes to remove the purely technical level of offense from the sentencing structure. That move would have very profound implications for the law enforcement options available to regulatory officials, even within the immediate context of food and drug offenses, but especially if it were generalized to such matters as currency reporting, environmental recordkeeping offenses, and the like. I see no indication that any of those implications have been considered by the Commission or its staff, or discussed with the regulators or the regulated industries. From this perspective, the current proposal is precipitous and ill-considered simply as a matter of orderly procedure, quite aside from its underlying merit, which, as I have indicated above, is questionable.

In any case, I believe that any changes to specific guidelines implicating the overall approach to regulatory offenses would be premature unless and until proposed modifications to the general principles are exposed for public comment and debate, and full consideration and approval by the Commission.

B. Organizational Sentencing

The Commission's notice also proposes to extend the provisions of Chapter 8 to food and drug offenses, which were omitted from Chapter 8 as promulgated in 1991. Obviously, the wisdom of this change will depend to a large extent upon the resolution of the issues concerning the survival of §2N2.1, as Chapter 8 employs Chapter 2 offense levels as a factor in determining organizational sanctions. If the Commission decides to defer consideration of the Chapter 2 changes--as I believe it should--then a deferral of any related Chapter 8 changes also would be in order.

It is difficult to comment on this subject, as I am unfamiliar with the rationale for excluding food and drug offenses from the original Chapter 8. The Staff Report suggests that the application of Chapter 8 guidelines to food and drug offenses would produce essentially the same results as non-guideline law, for the small number of cases that the staff examined (Staff Report, at 19-20). However, given the small number of cases available, I am not sure that this is a good argument for extending Chapter 8 at this time. If the rationale for excluding food and drug offenses initially was the unpredictability of consequences, then we still do not have enough information to make confident predictions. Moreover, the Staff Report does not provide even anecdotal evidence of serious problems with non-guideline sentencing. In this context, the Commission might be best advised to let well enough alone, as compared with the unpredictable alternative.

One of the possible adverse effects of Chapter 8 as applied to food and drug offenses is that its concepts of compliance programs may or may be compatible with the regulatory compliance standards and procedures already imposed by the Food and Drug Administration and other regulatory agencies. However, I see nothing in the Staff Report to indicate that this issue was reviewed with the appropriate regulatory officials. At a minimum, and aside from all other issues, that reviewed should be completed before the Commission considers applying Chapter 8 standards in this heavily regulated environment, as the application of the sentencing guidelines' incentives to these firms may have the unintended consequence of undermining the regulatory agencies' efforts.

C. Loss, Gain, and "Regulatory Fraud"

Finally, the Commission's notice calls for "comment as to whether 'gain' should be a substitute for 'loss' when the essence of the offense is fraud against regulatory authorities with no economic loss," 61 Fed. Reg. 83. No specific guideline language or context is proposed. The issue was raised in the specific context of food and drug offenses by the Staff Report (pages 13-15), but the Commission's notice appears to contemplate application to all offense sentenced under §2F1.1, which itself would give the concept a very broad application, and the concept would have the tendency to migrate—I am inclined to use the term metastasize, given its destructive potential-- elsewhere in the guidelines. I would strongly urge the Commission to take no action on this concept during the 1996 amendment cycle, because this is potentially the most far-reaching aspect of the current proposal, and I do not believe that the Commission has begun to consider its true consequences.

Like some of the other issues, this question may seem at first to be a technical matter of guideline application. But it is not. To adopt such a concept would be a radical shift in the entire focus of our sentencing system, both before and during the guidelines era. I am aware that "gain" is referred to in some portions of the existing guidelines, but always as a proxy for "loss." The current proposal would totally disconnect the two, by contemplating a situation of no economic loss (or even a risk of loss). That is a radical change, and a potentially destructive one, especially in the suggested context of "regulatory fraud," which is probably the worst imaginable context in which to adopt such a concept.

Even as a general proposition, sentencing on "gain" rather than "loss" is wrong as a matter of theory and infeasible as a matter of practice. I have made these points many times, in my published articles,¹⁶ in Congressional testimony,¹⁷ and in internal memoranda to the Commissioners when I was

¹⁶ See Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 Am. Crim. L. Rev. 514, 554-70 (1989); Parker, *Rules Without: . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 B.U.L. Rev. 397, 408-10 (1993); Parker, *The Economics of Mens Rea*, 79 Va. L. Rev. 741, 754-62 (1993).

¹⁷ The clearest statement of the point from the perspective of practical policy formulation can be found in my post-hearing statement submitted in connection with my 1990 testimony before the

counsel to the Commission. The fundamental point is that criminal prohibitions are never intended to outlaw "gains." They are always intended to prevent harms, which is another name for "loss." Thus, focusing sentencing policy on "gain" turns substantive legal policy upside down, by punishing something that the legislature did not mean to punish, and failing to punish what the legislature did mean to punish. While it is superficially tempting to believe that the deterrent policy of sentencing is served by focusing on offenders' gains, that is always the wrong focus. At the extreme, the logic implies that we impose the death penalty for a parking violation, if the offender saved a life by overtime parking. Even short of the extreme, that is not very good logic, and it is not the logic of criminal prohibitions, which set the penalty for overtime parking based on the social harm of overtime parking, and not on the basis of what offenders may "gain" from overtime parking.

As troublesome as the focus on "gain" is in general, it is all the more pernicious as applied to the concept of "fraud against regulatory authorities with no economic loss." Assuming that "gain" would in essence be "cost saved" by noncompliance with regulations, notice the incentive effects on regulatory and enforcement authorities: higher penalties, which presumably are what enforcers will seek in our adversarial system, will follow from more and more burdensome regulatory requirements. In an era when we already have an uproar over the burden of government regulation, we would have the Sentencing Commission giving regulators a very explicit incentive to impose even more burdensome regulations--not as necessary to insure public health and safety, but solely to raise the threatened penalty level. Now consider the incentives of potential violators: adopting this concept would tell them that if they are going to violate, they should make sure that they hurt someone economically; that way, they avoid the "no economic loss" condition. Once again, the incentive structure is upside down, in much the same way as it would be if the penalty for robbery were the same as--or, to make the analogy more direct-- more than the penalty for murder. Obviously, sentencing law should give a differential incentive for regulatory violators not to hurt anyone, by giving a lower sentence if no one is hurt.

Finally, this aspect of the proposal, more so than the others, threatens to involve the Commission in what is, in effect, the legislation of an entirely new offense of "regulatory fraud," which again would overstep the bounds of the Commission's limited powers. If there is to be such an offense, it should be legislated by the Congress, not the Commission. And if it were legislated, its rationale would rest on the harm to the governmental program involved--in other words, the "loss," whether conventionally "economic" or not--and not on violators' "gains."

D. Summary

Overall, the current proposal on food and drug offenses is insufficiently developed to be considered for approval by the Commission. The proposal rests on staff work that failed to recognize

House Subcommittee on Criminal Justice. *See Oversight on the United States Sentencing Commission and Guidelines for Organizational Sanctions: Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 101st Cong., 2d Sess. 488-51 (1990).*

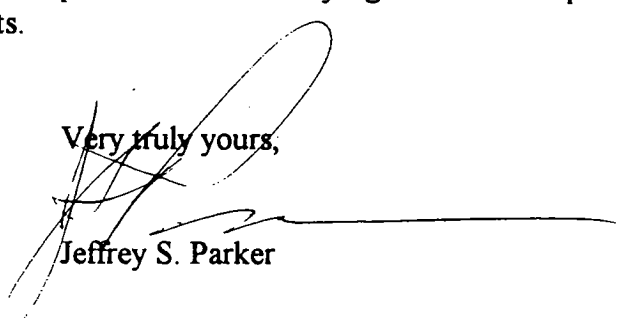
the fundamental nature of the underlying offenses as strict liability and regulatory crimes, and failed to observe the culpability and grading distinctions established by the Congress in the statutory provisions. The staff's analysis also fails to account for the effects of the plea bargaining process on observed culpability "admissions" by defendants. Furthermore, the staff's analysis does not support or recommend the current proposal to abolish the separate food and drug guideline. Rather, the staff focused only on a cross-referencing issue that can be resolved easily by a minor amendment to the text or commentary of §2N2.1.

More generally, the proposal has profound implications for the broader structure created by the Guidelines' basic approach of "charge offense" sentencing and the Guidelines' basic approach to regulatory offenses. There is no indication that either the staff or the Commission has perceived or considered these implications. In particular, the current proposal is inconsistent with the Commission's existing statement of policy regarding regulatory offenses, to which no amendment has been proposed. In both instances, the broader issues deserve full and separate consideration in their own right.

A similar situation exists with respect to the request for comment on the question of using "gain" rather than "loss" in cases of "fraud against regulatory authorities with no economic loss." Adopting such a concept would again be a profound and potentially disastrous shift in basic sentencing policy that deserves far more extensive consideration than it apparently has received to date.

For these reasons, the Commission should not proceed with the proposed food and drug amendments during the 1996 cycle. Instead, the Commission should withdraw its notice of proposed amendment, and direct further study of the subject both in detail and in the broader context of overall guidelines structure, in order to insure that future amendments, if any, to the food and drug guidelines are both consistent with the Commission's explicit and considered judgment on basic policy questions and well-supported on their own merits.

Very truly yours,


Jeffrey S. Parker

cc: Pharmaceutical Research and Manufacturers of America

030-96

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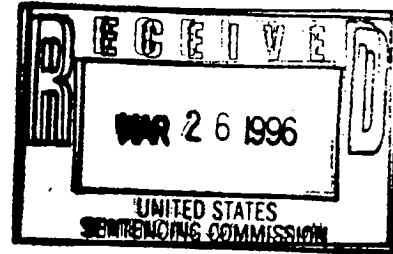
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RICKY W. CHAMPION

March 8, 1996



Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
One Columbus Circle, Northeast
Suite 2-500, South Lobby
WASHINGTON DC 20002-80002

Dear Chairman Conaboy and Commissioners:

The Executive Council of the Criminal Justice Section of the North Carolina Bar Association has carefully studied the proposed Amendments to the Guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the Federal Register for the 1996 Amendment Cycle. The Bar Association has also established a dialogue with your Practitioner's Advisory Group and has studied the group's responses to the Amendments for this cycle.

The North Carolina Bar Association fully endorses the positions taken on each of the proposed amendments by the Practitioner's Advisory Group. The Bar especially urges the adoption of those amendments and modifications endorsed by the Practitioner's Advisory Group in regards to money laundering and controlled substances.

With regards to crack cocaine, the Bar believes a 5 to 1 ratio is the best substitute for our preferred 1 to 1 ratio which was rejected by Congress last year. We endorse 5 to 1 because it is consistent with other ratios established in the drug tables and would establish the same penalty for crack as currently exists for heroine, PCP and methamphetamine and their equivalents.

The North Carolina Bar Association thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely yours,

D. Thomas Lambeth, Jr., Vice-Chair
Criminal Justice Section
North Carolina Bar Association

DTL,jr/kd

[202]

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031-96

March 11, 1996

Mr. Michael Courlander
U.S. Sentencing Commission
Washington, D.C.

Dear Mr. Courlander:

I am writing this letter to express my support of badly needed reforms to the federal sentencing guidelines as they apply to money laundering. I am familiar with the present draconian guidelines because my husband and the father of our two children (ages 7 & 12) is currently serving the 51st month of a 121-month prison sentence for money laundering. He is a non-violent, first-time offender.

To briefly state the background of the case -- In September of 1991 my husband, Tim Woiner, former president of L.U. Kustom, Inc. (a wholesale jewelry business in Pittsburgh) was convicted of money laundering and sentenced to 121 months in prison under 18 U.S.C. Section 1957. The statute states, as interpreted to me by various legal professionals, that an individual may be found guilty if he engages in a monetary transaction in excess of \$10,000 that the government believes was generated by unlawful activity. The most disturbing part of this statute is that it states the government need not prove the individual had any knowledge that the money was generated by unlawful activity.

My husband attempted on numerous occasions to establish the legitimacy of the New York jeweler with whom he was dealing. He was a legitimate businessman who was convicted based upon mere association with an alleged money launderer. The government, by their own admission, had no direct evidence that my husband knew of any illegal activity, it was strictly a circumstantial case. (The government conducted over 700 hours of surveillance prior to arresting my husband, and could not use one second of it in trial because it contained nothing incriminating.)

I cannot believe it was the intention of the lawmakers in 1986 to author legislation that would be used to snare unwary businessmen, but that is exactly what has happened in this case.

In addition, it has come to our attention that the New York jeweler the government contends was the initiator of this illegal activity has never even been sentenced as he continues to testify against others all over the United States. Interestingly enough, he was never brought by the government to testify against my husband, and, in fact, made a statement to the government (provided to us prior to trial as exculpatory evidence) that my husband and his co-defendant had no knowledge of any illegality.

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032-96

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March 6, 1996

Michael Courlander
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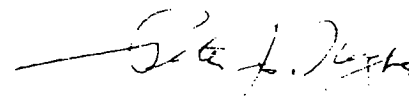
RE: Federal Sentencing Guidelines/MONEY LAUNDERING

Dear Mr. Courlander:

I am writing to respond to the request for public opinion on the Money Laundering guideline.

I urge that, as the Commission has recommended, in cases where there is a money-laundering conviction but money-laundering is not the prime objective of the activity (e.g., interstate transportation of stolen property), the sentence be tied to the underlying offense rather than to the money-laundering statute. The lengthy sentences which have resulted from the current application of the Guidelines are not only unfair but in my opinion a misuse of scarce resources which would be better used to incarcerate more violent or repeat offenders.

Very truly yours,



Peter J. Hughes

PJH/maj

[205]

033-96

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LAWS AND JUSTICE (AACLJ)
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Honolulu, Hawaii, 96824

United States Sentencing Commission
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Attention: Public Information

February 22, 1996

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Commentary on: (a) The U.S. Sentencing Commission's Proposed Guidelines on Laundering Monetary Instruments; (b) The need for offense levels to comport with the seriousness of the defendant's offense conduct; (c) The consistency and appropriateness in the use of the money laundering statute (RE: P.L. 104-38); (d) The charging and plea practices of Federal prosecutors with respect to the offense of money laundering (RE: P.L. 104-38); (e) The Disparities in Sentencing for Money Laundering Offenses. (f) Conclusions and recommendations. (g) APPENDIX.

Dear Commissioners:

We are responding to the U.S. Sentencing Commission's request for public comment on proposed sentencing guidelines for money laundering offenses as announced in the Federal Register (Jan. 2, 1996, vol 61, No 1, pp 79-83) and, specifically, on pending alternative proposals or on some variation of them that appropriately addresses the goals of: (1) Assuring that offense levels comport with the seriousness of the defendant's offense conduct; and (2) avoiding unwarranted sentencing disparities as a result of charging practices.

Unequivocally, we support the U.S. Sentencing Commission's resubmission of its 1995 proposed guidelines, which were the result of a three year study, and reflect common sense. We recommend slight clarification of the due process requirement related to sentencing resulting from "sting" application of the money laundering statute, particularly as it relates to the representation of an "underlying unlawful activity", and the sentencing level of such underlying

activity which often cannot be determined or if a defendant had no part in it.

We oppose the Department of Justice alternative proposals as being excessive and unwarranted. We will qualify our statements further in our commentary. Also we are presenting commentary on P.L. 104-38 and on the extreme disparities of the sentencing guidelines which exist at the present time which, regrettably, this law has permitted to continue. Furthermore, we comment on the inconsistencies, inappropriateness and the lack of proper guidelines in the use of this statute, which has resulted in charging excesses, coercive tactics and outrageous plea practices by Federal prosecutors with respect to the offense of money laundering. Finally, we provide, in the body of this commentary and in the Appendix, specific examples of abuses of the due process requirement of the statute, of violations of the Fifth and Sixth Amendment of the Constitution, of sentencing disparities, some within the same Federal Judicial Circuit. Our commentary on these issues is not based on opinions or vague perceptions but on careful, documented research of facts, caselaw, literature review, testimony of experts, and the Commission's own reports and proceedings of public hearings.

The issues addressed in our commentary are obviously of concern to Congress since P.L. 104-38, included a directive for a report on "the charging and plea practices of Federal prosecutors with respect to the offense of money laundering", a report which must include "an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute".

Since the Sentencing Commission has been charged with the responsibility of commenting on the study to be prepared by the Department of Justice, we sincerely hope that the documentation provided in the present commentary will be of some usefulness to the

Commission. Furthermore, we are prepared to provide additional documentation and references, as needed.

(a) The U.S. Sentencing Commission's Proposed Guidelines on Laundering Monetary Instruments.

We wholeheartedly support the Commission's proposed amendments to the sentencing guidelines. We believe that these amendments should not be compromised or changed as they have been promulgated by the Commission after a long and careful review. However, we recommend that a clarification be made, or a separate section be included, in the proposed amendments for offenses sentenced under 1956(a)(3), the "sting" provision of the money laundering statute. For such "sting" offenses where the money laundering activity is based on a government-staged, hypothetical, underlying unlawful activity, the amended sentencing guideline should include more specific language pertinent to the underlying offense which led to the sentencing for money laundering; specifically, that the Fifth Amendment, due process requirement of proper representation of the "underlying unlawful activity" was indeed met by the undercover government agents in a "sting" that resulted in a money laundering conviction; furthermore that the charging indictment issued by federal prosecutors which resulted in conviction and sentencing included the proper notification requirement of the Sixth Amendment in that the defendant was indeed accountable for the underlying offense in the indictment and that the specific State or Federal law were cited in supporting proper charges of the violation of the underlying unlawful activity along with money laundering charges.

Such clarification to the sentencing guidelines would serve the additional purpose of limiting excesses and overzealousness by government attorneys in charging improperly defendants with money laundering counts in government-staged "stings". It would make it harder for federal prosecutors to circumvent the Fifth amendment requirement of proper representation of the underlying unlawful

activity or to interpret improperly the statute that "some form of unlawful activity" means that such activity does not have to be represented in a "sting" but that representation can be peripherally and indirectly established through "circumstantial" evidence of their own fabrication. It would alleviate the use of the underlying unlawful activity as being simply "definitional" in escalating any alleged offense or financial transaction to a money laundering offense, with guaranteed conviction and inappropriate high sentencing level. Finally, it would require federal prosecutors to charge a defendant properly for money laundering in an indictment by citing the specific federal or state statute that applies to the underlying unlawful activity and whether the defendant (not a government entity staging a "sting") has or could have violated the underlying unlawful activity. Without an actual or even hypothetical violation of a specific underlying unlawful activity, which must be a felony under State or Federal law, there should be no money laundering offense.

Such provisions in the amended sentencing guidelines (and hopefully in the money laundering statute) would restrict federal prosecutors from abusing the statute and its high sentencing levels in "sting" prosecutions where the only evidence of a defendant's "guilt" is the one fabricated by government attorneys. It would require federal prosecutors to prove at trial to a jury the elements of the underlying offense as a prerequisite of a money laundering conviction and not mislead juries that the underlying offense can be merely "definitional".

Thus, for 1956(a)(3) sentencing we propose the following changes to Section 2S1.1, as marked in bold lettering:

(A) Proposed Amendment

Sections 2S1.1 and 2S1.2 are deleted and the following inserted in lieu thereof:

Sec. 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the Greatest)

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise was accountable, notified, and properly charged for the commission of the underlying offense under Sec. 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined, or, for 1956(a)(3) offenses, if the underlying offense was properly represented and the defendant committed or was a participant in the underlying offense (or otherwise was accountable, notified and properly charged for the commission of the underlying offense under Sec. 1B1.3 (Relevant Conduct) and the offense level for that offense can be determined; or

(2) 12 plus the number of offense levels from the table in Sec. 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of, or were to be used to promote, an offense involving the manufacture, importation, or distribution of controlled substances or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism; or

(3) 8 plus the number of offense levels from the table in Sec. 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed (through proper representation of an underlying unlawful activity) that (A) the financial or monetary transactions, transfers, transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct , or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

(b) The need for offense levels to comport with the seriousness of the defendant's offense conduct.

The Commission's proposed sentencing amendments for money laundering offenses are the result of a three-year effort directly resulting from a continuous ongoing guideline review, in-house studies, public hearings, testimonies of experts, and a thorough and diligent revision process. Congress, as one of the fundamental goals of the Sentencing Reform Act, specifically directed the Commission to

undertake this review of the sentencing guidelines so that offense levels comport with the seriousness of a defendant's offense conduct and thus unwarranted sentencing disparities for similar offense conduct are avoided.

Passage of P.L. 104-38 and disregard of the Commission's recommendations for these well justified amendments negates previous Congressional directives and is contrary to the spirit of the law - the Sentencing Reform Act. Furthermore, without proper justification or proper hearings, Congress, through its passage of P.L. 104-38, continues the disparities of sentencing and contradicts its own goal of balancing the federal budget by allocating close to \$4 billion for the building of additional prisons which, to a large extent, will house "marginal offenders" serving longer and undeserved sentences for offenses which do not comport with the seriousness of the offense conduct. Such contradictory policy is counterproductive to the U.S. economy and is not in the best interest of our country.

Because the Money Laundering statute was new, the Commission did not have much caselaw on which to base guideline penalties for money laundering offenses. The Commission based its original guidelines on representations made to Congress by the Department of Justice when it enacted the 1986 Anti-drug legislation believing, as Congress did, that the money laundering statute and its high sentencing levels would apply to professional money launderers, principally those associated with narcotics and organized crime. Accordingly, the U.S. Sentencing Commission promulgated appropriate guidelines that addressed the seriousness of such crimes by setting relatively high "base offense levels". These base levels were much higher than the base levels for other relatively serious offenses such as robbery, extortion, and aggravated assault.

These guidelines still remain in effect, even though in 1988 and in subsequent years, and through vigorous Department of Justice lobbying, Congress passed amendments to the money laundering laws,

including a "sting" provision. These new money laundering amendments created new classes of "offenders", some of them marginal and not involved with drugs or organized crime. The Department of Justice failed to provide guidelines to its attorneys on proper application of the amended money laundering statute. Thus, misapplication of the "sting" provision of the money laundering statute with a low threshold of "proof" and "evidence" often fabricated by overzealous government prosecutors created still another class of offenders subjected to the same sentencing guidelines as the more serious offenders. Further misapplication of the money laundering statute, charging excesses, and manipulation of the high sentencing levels of the statute in plea-bargaining by federal prosecutors, resulted in proliferation of offenders for underlying conduct which did not warrant such extreme punishment. Through such abuses in charging and plea-bargaining, disparities in sentencing levels became more common and received the attention of the U.S. Sentencing Commission and of the legal profession.

To alleviate these obvious disparities, the Commission conducted appropriate studies, held hearings and finally promulgated amendments to the guidelines which were commensurate with the seriousness of the underlying offenses. These are the well-justified amendments that P.L. 104-38 prevented from taking effect on November 1, 1995.

Contrary to Department of Justice claims, the Sentencing Commission's proposed amendments will not substantially lower penalties for serious money laundering offenses. In fact the amendments provide that the enhancement in sentencing for money laundering offenses will be tied to the underlying offense. However, the Commission's amendments provide that offenders will be punished in a manner which is more commensurate with the actual seriousness of the offense, thus eliminating the prosecutors' temptation to charge money laundering so frequently, which often leads to vast and disproportionately increased sentencing.

Finally, in the interest of justice and fundamental fairness, it is paramount that the U.S. Sentencing Commission's proposed amendments to the guidelines for money laundering be implemented by Congress as these amendments will be more effective, and will serve better our criminal justice system as they tie sentencing penalties more closely to the underlying offense from which the funds were derived.

(c) The consistency and appropriateness in the use of the money laundering statute

The Department of Justice had ample opportunities in the past to provide guidelines to its attorneys thus assuring consistency and appropriateness in the use of the money laundering statute. They have not done so. Neither have they addressed the issue of charging and plea practices of Federal prosecutors and the extreme sentencing disparities with respect to the offense of money laundering. As the Washington Post pointed out in a series of articles to be referenced in this commentary, and as Federal Judge Ideman in California and the 6th Circuit in Tennessee have suggested, prosecutorial misconduct is not being dealt honestly or effectively by the Department of Justice. It will be interesting to see if abusive charging and plea practices of its attorneys will be addressed honestly and effectively in the Department of Justice report that Congress has required in P.L. 104-38 or whether they will be whitewashed.

The disparities in sentencing and the charging excesses of federal prosecutors became vividly clear at the U.S. Sentencing Commission's public hearings on the proposed sentencing amendments to the guidelines for money laundering offenses, held in the last three years. There was an overwhelming support for the Commission's proposed amendments from those who testified at the public hearings. There was also severe criticism about the lack of consistency and appropriateness in the use of the money laundering statutes. To

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illustrate the problem we will reiterate for the record only some of the comments made at some of these hearings

One of the principal authors of the money laundering statutes, was Mr. Charles W. Blau (U.S. Sentencing Commission's Public Hearing on Proposed Sentencing Guideline Amendments, March 22, 1993, Washington DC. Transcripts of the hearing p.256-261). Mr. Blau had worked for the Department of Justice in different capacities, including Chief of Narcotics, Associate Deputy Attorney General and Associate Attorney General. He played an active role in drafting the money laundering statutes and the memorandum of understanding between the various law enforcement agencies in using these statutes. He was extremely critical of the lack of consistency and appropriateness in the use of the money laundering statute. At the hearing, among other comments, he stated:

"In looking at these statutes,and I think basically the people that were in the process with me felt, that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.

In retrospect, I think there are probably two mistakes that we made....I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.

Secondly, I think I would have required the Department (Justice) to have exercised some central control over the use of this statute much more so than we did. The Department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.

Similar views on the lack of consistency and appropriateness in the use of the money laundering statutes were additionally supported by testimony at public hearings held in 1994 and 1995. These reports are in the public record and in the Commission's archives.

(d) The charging and plea practices of Federal prosecutors with respect to the offense of money laundering.

The money laundering statutes and the high sentencing levels have been grossly abused by Federal prosecutors in charging and plea practices. This is especially true of the "sting" money laundering statute where prosecutors have "carte blanche" to fabricate the low threshold "evidence" and conditions that will guarantee a conviction. In the absence of guidelines from the Justice Department, overzealous prosecutors, anxious to obtain convictions, stretch both the law and the due process requirements in charging targeted individuals. The vagueness in the wording of the law and its definitions provides prosecutors with an excuse to circumvent the due process requirement of representation of an unlawful activity in sting operations. The same federal prosecutors control the fabrication of the evidence which may even be subsequently tampered to make a "sting" work every time. (See Example in the Appendix: The "Sting Money Laundering Conviction" of Dr. George Pararas-Carayannis in Hawaii - Gross Violation of His Due Process Right to a Fair Jury Trial under the Fifth Constitutional Amendment).

Charging abuses are often followed by plea-bargain abuses. The high sentencing level of the money laundering statute gives federal prosecutors a formidable weapon with which they can coerce defendants into "plea-bargaining". Plea bargaining essentially becomes threatening and blackmail tempered with promises of leniency at sentencing if defendants "cooperate". Those who succumb to the pressure, often receive sentences which are substantially lower than the guidelines. For those who refuse to plea bargain, the same federal prosecutors will serve them with superseding indictments that often charge frivolous, unsupported "offenses". Even if these coercive tactics still fail to coerce a defendant into "plea-bargaining", the benefit to prosecutors is that a defendant is stretched emotionally and financially to a breaking point so he cannot effectively put a defense. The charges in these superseding

or collateral indictments often are dismissed by federal prosecutors just before trial but only after they have taken their toll on a defendant and he has been rendered financially destitute. Finally, when a case makes it to trial and the defendant is convicted, as prearranged, not only the mandatory minimums are applied in sentencing in such defendant's case but the prosecutors ask for enhancements for "obstruction of justice" and for "not accepting responsibility for the crime".

At the 1993 Commission's hearing Mr. Bleau had the following comments pertaining to the charging and plea practices of Federal prosecutors with respect to the offense of money laundering:

"....What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases."

"..... I think that it (the money laundering statute) has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or with organized drug activity. And the question with these guidelines has been, should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process

to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your amendments completely."

Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Lawyers, in his endorsement of the Commission's guideline amendments commented (page 75):

"We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of the concern to avoid manipulation of the guidelines in the plea-bargaining process, which in vast majority of cases, as you know, are resolved in plea negotiations."

Mr. James M. Becker, representing the Criminal law Committee of the Federal Bar Association, commented as follows (p. 157):

".....Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more culpable than if they were just charged with a fraud offense....."

Mr. Chuck Morley, an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act, having served with the Criminal Investigation Division of the IRS and as Chief investigator of the U.S. Senate Subcommittee on Investigations, stated (p. 224):

".....the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct." "....the staff (Sentencing Commission) found that, historically, prosecutors have been stretching these guidelines significantly,..."

"Offenses that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing.....The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not believe the funds were illegal......Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation. So do the guidelines work? I don't think they work, unless what we are trying to do is fill the jails up....." The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering....." ".....To continue under the current guidelines is to ignore the realities of money laundering totally, while continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants."

Mr. David Stewart of the law firm of Ropes and Gray, commented:

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense (money laundering) more closely to the underlying conduct that was the source of the illegal proceeds.....in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge.I would even report that prosecutors confirm that is why they add money laundering counts, because the guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.....Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem."

Mr. Paul B. Bergman, representing the New York Council of Defense Lawyers, had the following comments:

"I think that this proposed amendment on the guidelines for money laundering goes one way towards

eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering."

Misconduct and excesses by federal prosecutors pertaining to money laundering offenses as reported by the press and the courts: Prosecutorial misconduct pertaining to the charging and plea practices of Federal prosecutors with respect to the offense of money laundering has reached epidemic proportions in our country. From January 10-15, 1993, the Washington Post published a series of six stories about the growing number of cases involving prosecutorial misconduct at the federal level. The articles, under the general heading "The Appearance of Justice", dealt with prosecutorial misconduct involving, among other things, "stings" and money laundering cases. In one of the articles a decision by Federal Judge James Ideman was reported, who dismissed a major racketeering and money laundering case on grounds of prosecutorial misconduct. Judge Ideman charged that the U.S. Attorney in that case withheld exculpatory (Brady material) evidence completely exonerating all the defendants, while showing the government's main witness to be a perjurer. The appellate court characterized the prosecutor's conduct as "intolerable" and recommended that the Attorney General review the case and decide whether the prosecutor should be subjected to departmental discipline. Judge Ideman complained in strong terms that after three years he was still waiting for the Department of Justice to address his charges against the prosecutor. In fact, he suggested a whitewash.

In other articles the Washington Post cited many other cases and examples of prosecutorial abuse, numerous instances of failure to disclose favorable evidence, government intrusion into the relationship between defense attorneys and clients, intimidation of witnesses and overzealous tactics designed to force guilty pleas before trial. The Post pointed out, that the Justice Department has been slow to investigate its own lawyers and has refused to release the results of investigations when completed.

On a December 20, 1993 editorial entitled "A Reno Reform" (page A24), it was mentioned that the "Washington Post" had received a letter from Attorney General Janet Reno responding to the articles on prosecutorial misconduct. Attorney General Reno promised actions that could lead to important and much needed reforms within the Department of Justice. According to the "Post" more than a year later the proposed reforms by Attorney General Reno had not been implemented.

On April 30, 1994, the "Washington Post" reported on the 6th Circuit's appointment of a federal judge in Tennessee to investigate charges of federal prosecutorial misconduct in that state because the internal Department of Justice review could not be trusted. Also, the Washington Post cited the Supreme Court finding that federal prosecutors committed fraud in the Demianjak case as yet another example that prosecutorial misconduct of its attorneys is not being dealt honestly or effectively by the Department of Justice.

(e) Disparities in Sentencing for Money Laundering Offenses.

There are many disparities and inconsistencies in the application of sentencing guidelines for money laundering offenses which are well documented by caselaw. For defendants who agree to "plea-bargain", federal prosecutors and the courts are very lenient and deviate substantially from the guidelines. For defendants who refuse to "plea bargain" not only the mandatory minimums are imposed but additional enhancement is provided for "obstruction of justice". It is not uncommon to have disparities of ten points or more for the same type of money laundering offense. This is particularly true for offenses prosecuted via the "sting" money laundering statute. Sentencing disparities can be illustrated with the following examples within the 9th Circuit, both involving money laundering "sting" offenses.

Dr. Pararas-Carayannis's "conviction" for a "sting" money laundering offense involving the proceeds (a few hundred dollars in credit card slips deposited in his merchant account) of an unlawful activity (an escort service, represented only as such by government undercover agents) in Hawaii, resulted on two counts of alleged violation of 1956(a)(3). Under the mandatory sentencing guidelines, Pararas-Carayannis received 20 points and an enhancement of two additional points for "obstruction of justice". Under the guidelines, he was sentenced to 41 months of imprisonment and 24 additional months of supervised release, in spite of the fact that just prior to sentencing, he had suffered a third, acute and almost fatal, anterolateral myocardial infarction (heart attack) that required two angioplasties and had resulted in his total disability. Motions for a downward departure from the sentencing guidelines for aggravated circumstances as provided by the U.S. Sentencing Commission, were denied by the court.

Ironically, and in spite of the "mandatory sentencing guidelines", a similar 1956(a)(3) conviction (with explicit representation that the source of proceeds were drug money) in the U.S. District Court in Montana, resulted recently in only a ten-month "split sentence" for Defendant Nelson in the pre-release center in Great Falls, Montana, with five months in the custody component and five months in the pre-release component of the center. Under the same Mandatory Sentencing Guidelines and for a similar 1956(a)(3) "sting offense" (with the only representation being that the proceeds were those of an escort service), and in spite of his advanced age and dismal health, Dr. Pararas-Carayannis was sentenced to more than quadruple of Nelson's sentence.

(f) Conclusions and Recommendations

The present high sentencing levels of the money laundering statutes often violate the Eighth Amendment, because they impose excessive

bail, excessive fines, and cruel and unusual punishment totally out of proportion to the underlying offenses. Congress needs to revise the language of the money laundering laws to safeguard against misapplications of the statutes. There have been serious charging and plea-bargain abuses by federal prosecutors in money laundering prosecutions. Due process requirements of the money laundering statutes are often ignored by federal prosecutors. Congress should require the Department of Justice to provide proper charging and plea bargaining guidelines to its attorneys. Additional guidelines should be provided by the Department of Justice on how targets should be selected for deceptive government "sting" investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers seeking convictions by any means; and on how outrageous government invasion of privacy can be avoided.

Prosecution of money laundering offenses, particularly through 18 U.S. Code, Sections 1956 and 1957 have produced sentences that are anomalous and which have undermined the uniformity that Congress sought to achieve when it adopted sentencing guidelines. Present base offense sentencing levels for money laundering offenses are often disproportionately higher to those of the underlying conduct which often may be a minor offense. Often the offense level of the underlying conduct resulting in a "money laundering conviction" cannot even be determined. The U.S. Sentencing Commission's proposed amendments to the sentencing guidelines will introduce fairness in sentencing and should be implemented.

Respectfully Submitted,

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE

g) APPENDIX: The "Sting Money Laundering Conviction" of Dr. George Pararas-Carayannis in Hawaii - Gross Violation of His Due Process Right to a Fair Jury Trial under the Fifth Constitutional Amendment.

Dr. George Pararas-Carayannis, a prominent scientist with 25 years of Government Service was prosecuted for laundering a few hundred dollars of a hypothetical government "escort service" under 1956(a)(3). His conviction involved a serious constitutional violation which deprived him of a fair jury trial as required by the due process provision of the Fifth Amendment. Specifically, the U.S. District Court in Hawaii violated his Fifth Amendment right to a fair jury trial by preventing the jury from hearing testimony and weighing challenged videotaped evidence (as required by Rule 1008 (Article X) of the Federal Rules of Evidence) which would have clearly resulted in his acquittal.

After the closing of the case, outside the presence of the jury and while the jury was deliberating, the court took the testimony of government witnesses who admitted to the fact that the videotapes which had been previously challenged as tampered but had been introduced into evidence anyway, had been indeed removed improperly from the courtroom by the government attorney, during trial. These videotapes had been taken to a hotel room in Waikiki (Hilton Hawaiian Village, room 1362), registered to a government audiovisual expert brought in from the Washington D.C. area. Based on this damaging testimony the court ruled that this videotaped evidence could not be shown to the jury during their deliberations. However, the court failed to summon the jury and apprise them of these new facts and developments relating to the court's evidence, to give additional instructions, or to call for a mistrial. The jury was permitted to continue its deliberations unaware of the improprieties that had taken place.

On the third day of jury deliberations, the court reversed its ruling, reopened the case, and again in the absence of the jury, took additional testimony of government witnesses on the improper removal of the videotaped evidence. At that time these government witnesses testified that electronic equipment capable of tampering videotapes had been brought, also, into the government expert's room but that the

expert had since returned to Washington D.C. and could not testify as to what he was doing with the videotapes.

In spite of its own previous ruling and the testimony on the government attorney's misconduct and outrageous violations of the rules of evidence and procedure, the court held a cursory, in-camera viewing of the challenged videotapes and decided on both admissibility and weight of this videotaped evidence, even though the latter is clearly a jury function supported by Rule 1008 (Fed R.E.) and by caselaw. The jury was not allowed to learn of the improprieties with the handling of the evidence, about the electronic equipment in the expert's room, or the government's intent in taking the videotapes there without the court's knowledge or permission.

Furthermore, obvious discrepancies and alterations which were identified and pointed out during this cursory, in-camera review, were indicative that these videotapes were altered copies and not the alleged originals which had been shown to the jury during trial. Disregarding the testimony pointing out specifically to numerous discrepancies, erasures and alterations, the court ruled that there were no changes and, even if there were, they were not prejudicial to the case. This, simply, was not the case. The tapes had been tampered. The changes were prejudicial.

In spite of vigorous protests by the defense, the court re-authenticated these copies as originals, ruled on their admissibility and weight, then allowed the jury to view them without disclosing the damaging testimony that would have affected significantly the jury's confidence in their validity. In addition, the court allowed the jury to use as an "aid" in understanding the inaudible portions of the videotapes, the government attorney's edited transcripts which had also been improperly removed from the court during trial because, allegedly, the U.S. District Court in Hawaii did not have an "evidence storage facility". Jurors, unable to understand the still inaudible portions of the disputed videotapes, relied on the government attorney's edited transcripts and were seen taking written notes from these records.

In effect, the Court's actions in reversing its ruling and in reopening the trial without the jury's presence, then deciding on issues related to both admissibility and weight of challenged, tainted evidence, deprived Dr. Pararas-Carayannis of his due process right to a fair trial by jury that he was entitled to under the Fifth Amendment. This was clear, serious error and abuse of discretion which prejudiced and determined the outcome of the jury's verdict. If the jury had been apprised by the court of the government attorney's egregious misconduct with the handling of the court's evidence, during trial, and if they had heard the testimony of government witnesses that electronic equipment capable of tampering had been brought to the hotel room of the government audiovisual expert where the videotapes had been taken, Dr. Pararas-Carayannis would have been acquitted of all charges against him. Instead, after 11 days of deliberations, the jury had acquitted him on five counts and were "hung" on two counts. The court urged to continue deliberations and allowed them to view the last and most tampered of the videotapes. Immediately after viewing this tampered tape and the creative government transcript, the jury returned a guilty verdict on these two counts.

These two counts charged Dr. Pararas-Carayannis with a violation of 18 U.S. Code 1956(a)(3), the money laundering sting statute, a statute which is often abused and which has been widely characterized as an "instrument of oppression" because of its low threshold of proof in guaranteeing convictions by government prosecutors. In this particular case, these two counts charged Dr. Pararas-Carayannis with the "thought crime" of knowingly and intentionally "disguising and concealing monetary instruments", the proceeds (a few hundred dollars) of an unlawful activity. The unrepresented unlawful activity was a Travel Act violation, presumably a hypothetical government escort service which was involved in prostitution, even though the court transcripts and the testimony of government witnesses show clearly that such representation was never made. Dr. Pararas-Carayannis was never charged with a Travel Act violation or a State offense even peripherally connected with prostitution. A Travel Act conviction requires a substantive State felony offense. In his case, these alleged violations were used only

for "definitional" purposes in fabricating and sustaining via a circuitous statutory track, the money laundering charges. Finally, in the absence of a representation of an unlawful activity by the undercover agent, the court had allowed into evidence hearsay testimony that "all escort services are fronts from prostitution", thus creating the impression for the jury that the representation requirement of an unlawful activity had been made by the government undercover agent simply by telling Dr. Pararas-Carayannis that she needed his help in processing through his merchant American Express and Diners account a few charge card slips of her escort service, something that banks do routinely on a daily basis.

Ironically, most escort services in Hawaii and elsewhere, advertise readily, to this day, their acceptance of credit cards. Banks routinely issue them merchant accounts. The telephone company and the Yellow Pages collect funds and provide services that promote these business and their acceptance of credit cards. Both State and Federal Government collect proceeds of such businesses in the form of taxes. Neither a bank nor a single escort service in Hawaii was ever prosecuted for money laundering or closed down for alleged prostitution by the State or the Federal Government. If indeed the requirement for proving money laundering is the supposition that "all escort services are fronts for prostitution", then banks, telephone companies, Yellow Pages and State and Federal Agencies must be guilty of laundering millions in "monetary instruments".

Dr. Pararas-Carayannis's conviction and sentencing, obtained with such charging extrapolation of the money laundering statute, and through outrageous prosecutorial misconduct, are indeed hypocritical, ludicrous and represent a clear abuse of the money laundering laws and of the Criminal Justice System. Finally, more than \$3 million of taxpayer's money has been wasted thus far to "criminalize" and destroy Dr. George Pararas-Carayannis, an internationally-recognized, government scientist who has contributed significantly to his field of work and to society.

034-96

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE
P.O. Box 240147
Honolulu, Hawaii, 96824

February, 27, 1996

MEMBERS OF 104TH CONGRESS

SUBJECT: Public Law 104-38 disapproving amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences and sentences for money laundering and transactions in property derived from unlawful activity; Charging and plea practices of Federal prosecutors with respect to the offense of money laundering; Consistency and appropriateness in the use of the money laundering statute.

Dear Senator/Representative:

It is regrettable that Congress, without holding proper hearings or properly studying the issues, substituted its judgement for that of the U.S. Sentencing Commission's in preventing long-needed sentencing guideline changes from taking effect on November 1, 1995, by passing Public Law 104-38. The amended guidelines would have assured that offense levels comport with the seriousness of a defendant's offense conduct and would have prevented unwarranted sentencing disparities as a result of abusive charging and plea-bargain practices by federal prosecutors. Also, it is unfortunate that P.L. 104-38 grouped together drug related sentencing with sentencing which often involves minor underlying unlawful activity, unrelated to drugs but improperly and excessively charged as "money laundering" by federal prosecutors.

The Commission's proposed sentencing amendments for money laundering offenses were the result of a three-year effort directly resulting from a continuous ongoing guideline review, in-house studies, public hearings, testimonies of experts, and a thorough and diligent revision process. Congress, as one of the fundamental goals of the Sentencing Reform Act, specifically directed the Commission to undertake this review of the sentencing guidelines so that offense levels comport with the seriousness of a defendant's offense conduct and thus unwarranted sentencing disparities for similar offense conduct are avoided.

Passage of P.L. 104-38 and disregard of the Commission's recommendations for these well justified amendments negates previous Congressional directives and is contrary to the spirit of the law - the Sentencing Reform Act. Furthermore, through its passage of P.L. 104-38, Congress continues the disparities of sentencing and contradicts its own goal of balancing the federal budget by allocating close to \$4 billion for the building of additional prisons which, to a large extent, will house "marginal offenders" serving longer and undeserved sentences for offenses which do not

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comport with the seriousness of the offense conduct. Such contradictory Congressional policy is counterproductive to the U.S. economy and is not in the best interest of our country.

For your information, consideration, and possible support, we are attaching our Commentary on the U.S. Sentencing Commission's Proposed Guidelines on amendments for Laundering Monetary Instruments addressing the need for offense levels to comport with the seriousness of the defendant's offense conduct. The issues addressed in our commentary are obviously of concern to Congress since P.L. 104-38 included a directive for a report on "the charging and plea practices of Federal prosecutors with respect to the offense of money laundering", a report which must include "an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute".

Charging and "plea-bargain" practices, of federal prosecutors for alleged "money laundering offenses" have been excessive and abusive. They have reached epidemic proportions in our country. In some instances these practices have approached the level of human right violations, in spite of their disguised facade of "due process".

International law (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Resolution 3452 (XXX)) provide that:

"no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Torture is defined as:

"any means or any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

Dr. George Pararas-Carayannis's prosecution, "conviction" and "sentencing" in Hawaii, following a money laundering "sting" is an example of prosecutorial excess, and a human rights' violation. It is more fully documented in the attached Commentary to the U.S. Sentencing Commission and its Appendix. A circus arrest of Dr. Pararas-Carayannis and his character assassination by the media were carefully prearranged by government attorneys through a series

government expert had set up an electronic laboratory. The jury was not allowed to hear anything pertaining to these improprieties or to weigh the reliability of the tainted "evidence". The court reversed its previous ruling, and allowed the jury to view copies of the challenged videotapes even though significant alterations had been made. Unaware of the improprieties of the evidence, the jury acquitted Dr. Pararas-Carayannis on five counts but returned a guilty verdict on two counts and on the basis of hearsay evidence that "all escort services are fronts for prostitution". The two counts were for "disguising and concealing" monetary instruments of an unrepresented unlawful activity, when he deposited two checks from the credit card company into his business account.

As a result of this unprecedented psychological torture and inhumane stress he had been subjected, six weeks later Dr. Pararas-Carayannis suffered a nearly fatal heart attack which has resulted in his total disability and a progressing heart failure. In spite of his dire health condition and advanced age, he was subsequently sentenced to a total of 65 months for these two counts (41 months in prison and 24 months of supervisory release). This is in addition to four years of supervised release he has already served while waiting to be "processed", making his total punishment almost 10 years. Ironically, a similar 1956(a)(3) "sting" conviction in Montana, but with clear and explicit representation from an undercover government agent that the proceeds of the underlying unlawful activity were from drugs, resulted in only a ten month sentence for defendant Nelson, with half of it in a pre-release center.

In Dr. Pararas-Carayannis case, government attorneys have wasted thus far more than \$3 million of taxpayers' money for an unwarranted prosecution of fabricated "money laundering" amounting to a few hundred dollars. It is absurd that government prosecutors would involve themselves in such charging excesses, in such abusive plea bargaining practices, and in such waste of taxpayers' money when there is real crime and limited resources to fight it.

Abusive charging and plea practices of Federal prosecutors, as illustrated by the above example, must be stopped. Laws such as P.L. 104-38 disapproving amendments to the Federal Sentencing Guidelines are contradictory to the Sentencing Reform Act and prolong the disparities and injustices of both charging and sentencing. Congress needs to revise the language of the money laundering laws to safeguard against misapplications of the money laundering statutes and plea-bargain abuses by federal prosecutors. Congress should require the Department of Justice to provide proper charging and plea bargaining guidelines to its attorneys. Additional guidelines should be provided by the Department of Justice on how targets should be selected for deceptive government "sting" investigations using 18 U.S. Code, Section 1956 (a)(3); on how government confidential informants should be qualified, screened and monitored; on what is the effect of the statute on Fifth Amendment's injunction against self-incrimination; on how to safeguard against abuses by overzealous prosecutors and law enforcement officers

seeking convictions by any means; and on how outrageous government invasion of privacy can be avoided.

Prosecution of money laundering offenses, particularly through 18 U.S. Code, Sections 1956 and 1957 have produced sentences that are anomalous and which have undermined the uniformity Congress sought to achieve when it adopted sentencing guidelines. Our Criminal Justice System is often being subverted by those who have the responsibility to uphold it.

In conclusion, we encourage you to introduce or support legislation which will prevent further abuses of the money laundering laws. These laws need thorough review and revision to be adjudged constitutionally accurate in their intent and language so as to adhere strictly and hold true to the rules and principles of the Constitution of the United States of America and its Bill of Rights and subsequent Amendments.

We encourage you to revise, amend or repeal Public Law 104-38 because it contradicts the intent and spirit of the Sentencing Reform Act. We ask that you support proposed amendments promulgated by the U.S. Sentencing Commission which will eliminate abuses and disparities of the sentencing guidelines.

Sincerely,

ASSOCIATION OF AMERICANS FOR CONSTITUTIONAL LAWS AND JUSTICE (AACLJ)

Attachment: Commentary on the U.S. Sentencing Commission's Proposed Guidelines and Sentencing Amendments pertaining to Laundering Monetary Instruments.

035-96

COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

IMPLEMENTATION OF CONGRESSIONAL DIRECTIVE
ON COCAINE SENTENCING

submitted by

MARK KAPPELHOFF
LEGISLATIVE COUNSEL

MARCH 29, 1996

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INTRODUCTION

The American Civil Liberties Union (ACLU) appreciates this opportunity to comment on the congressional directive¹ regarding recommendations for changes in the federal sentencing of cocaine offenses. In particular, we intend to comment on whether the U.S. Sentencing Guidelines should be amended from the current 100-to-one quantity ratio between cocaine base [hereinafter "crack"] and powder cocaine, but still maintain a disparity. Last year, in an effort supported by the ACLU, this Commission proposed recommendations to Congress that would equalize the penalties between powder and crack cocaine possession and distribution. Notwithstanding this Commission's extensive study and consideration of the issue, Congress and the President disapproved the Commission's proposed amendments that would have eliminated the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and mandatory minimum sentences for simple possession of crack cocaine.

The ACLU, once again, reasserts its belief that the Commission's amendments proposed last year were correct and should not have been disapproved by Congress. We remain further resolved that the 100-to-one disparity in cocaine sentencing is unwarranted and racially discriminatory in effect. Accordingly, finding no justification for a contrary proposal, we strongly urge this Commission to stand by its previous findings and propose these same amendments to Congress this amendment cycle.

The ACLU is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at

¹See Pub. L. 104-38, 109 Stat. 334 (Oct. 30, 1995).

the core of our mission, we have a particular interest in ensuring that equal protection of the law and freedom from disproportionate punishment are upheld wherever threatened. The ACLU has previously submitted testimony before this Commission on the issue of the disparity in sentencing between crack and powder cocaine on October 25, 1993, March 18, 1994 and March 7, 1995. We wish to incorporate by reference those comments.

Our comments will be specifically directed in support of the Commission resubmitting to Congress the same amendments proposed last year that eliminate the 100-to-one quantity ratio between powder and crack cocaine and establish a one-to-one quantity ratio. We also will comment in opposition to any proposals to enhance penalties for violence and other harms associated with crack and powder cocaine.

II. UNITED STATES SENTENCING COMMISSION'S FINDINGS CONFIRM DISPARITY IN COCAINE SENTENCING IS UNWARRANTED

A. Commission's Findings:

Last year, the United States Sentencing Commission completed a very thorough study and review of the disparity in the sentencing of crack cocaine defendants and powder cocaine defendants.² The Commission issued its findings in a Special Report to Congress entitled "Cocaine and Federal Sentencing Policy." In the Report, the Commissioner's unanimously agreed that the present 100-to-one quantity ratio "is far too great and should be reconsidered."³

²U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy, (February 1995), (hereinafter, "Report."

³Id.

As a result of its findings in the Report, this Commission subsequently submitted to Congress recommendations for modifying the sentencing policy between differing forms of cocaine. When it submitted its recommendations, this Commission unanimously concluded that:

the current 100-to-1 ratio [between crack and powder cocaine] found in the mandatory minimum penalty statutes, and replicated in the current sentencing guidelines, cannot be recommended and should be changed. Further, the Commission unanimously believes that the current five-year mandatory minimum for simple possession of crack cocaine should be reconsidered.⁴

In addition to unanimously advocating the equalization of penalties between crack and powder cocaine possession in the U.S. Sentencing Guidelines, a majority of the Commissioners also voted to equalize the sentences of cocaine distribution.

B. Evidence Supports Commission's Findings:

This Commission relied on sound evidence to support its recommendations for equalizing cocaine sentencing. In addition to confirming that racial disparity exists in cocaine sentencing, this Commission discounted the reasons often cited for the distinction in sentencing between powder and crack cocaine: pharmacologically distinctive; violence; and accessibility due to low cost.

1. Disparate Racial Impact

With respect to the issue of racial disparity in cocaine sentencing, this Commission unequivocally stated that:

⁴Id. In addition to unanimously advocating the equalization between crack and powder cocaine possession in the U.S. Sentencing Commission Guidelines and in their recommendations to Congress, a majority of Commissioners also voted to equalize the sentences of cocaine distribution.

[f]ederal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine . . . [and that] the high percentage of Blacks convicted of crack cocaine offense is a matter of great concern to the Sentencing Commission.⁵

Among other troubling statistics, this Commission disclosed that in 1993, 88.3% of those sentenced federally for crack cocaine offenses were African American, while only 4.1% of the defendants were Caucasian, despite a finding that a majority of the nation's reported crack users are White.⁶ Consistent with this evidence, this Commission went on to conclude that:

When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require such an existence of sufficient policy bases to support such a sentencing scheme . . . [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population. . .⁷

2. Lack of Pharmacological Distinction

In addition to exposing the racial disparity found in cocaine sentencing, this Commission discounted the reasons often proffered in support of the gross distinction in sentencing between powder and crack cocaine. First of all, this Commission dismissed the notion that crack and powder cocaine are pharmacologically different substances. In powder or crack form, cocaine is cocaine. Indeed, this Commission noted that cocaine in any form produces the same physiological and psychological effects. It further found that both powder cocaine and crack cocaine carry a risk of addiction. Cocaine powder is easily transformed into crack. Thus, as the Commission majority ultimately concluded, "[i]n light of the fact that crack cocaine can easily be produced from powder

⁵Id.

⁶Id.

⁷Id.

cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use."⁸

3. **Violence Not Uniquely Associated With Crack Cocaine**

This Commission also rejected the assertion that there is more violence associated with the use of crack than with the use of powder cocaine. There is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Or, as this Commission stated:

We are aware that a host of maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to any of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.⁹

4. **Cost and Availability Do Not Justify Higher Penalties**

Finally, this Commission concluded that higher penalties for crack cocaine are not justified because of it is generally inexpensive and readily available. In fact, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. In rejecting this type of policy which disproportionately impacts on low income people, this Commission stated that:

[T]he fact that crack is typically sold in small amounts which may make it more readily available among lower income groups [does not] justify increased punishment compared to a form of the drug that is more commonly sold in amounts available only to the affluent.

⁸Letter From Richard A. Conaboy, Chairman, United States Sentencing Commission to The Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, (May 1, 1991); See also Special Report to Congress.

⁹Id.

The Commission does not believe that longer punishment can be justified solely because a particular form of a drug is more likely to be used by a disadvantaged population.¹⁰

III. CONGRESS AND PRESIDENT UNWISELY DISAPPROVE COMMISSION'S PROPOSED AMENDMENTS BASED ON "TOUGH ON CRIME" POLITICS

On May 1, 1995, acknowledging the overwhelming evidence against maintaining the inequitable sentencing guidelines for cocaine, this Commission submitted to Congress proposed amendments to the federal sentencing guidelines.¹¹ These amendments were drafted with the intention of eliminating the disparity between the penalties for crack and powder cocaine possession and distribution. Unless Congress acted to disapprove them, the amendments would have taken effect on November 1, 1995.

Unfortunately, Congress acted. Despite this Commission's comprehensive and exhaustive efforts analyzing the issue of the disparity in federal cocaine sentencing, Congress, in a highly political and divisive debate, disapproved the Commission's recommendations and sent the issue back for further study.¹² President Bill Clinton followed suit and signed the disapproving legislation into law on October 30, 1995. As a result, the disparity in cocaine sentencing continues unabated today.

¹⁰Id at 4.

¹¹See Letter to the Honorable Orrin Hatch, Chairman Judiciary Committee, from Richard Conaboy, Chairman, U.S. Sentencing Commission, May 1, 1995. See also Amendment No. 5, "Amendments to Sentencing Commission, 60 Fed. Reg. 25074 (May 10, 1995).

¹²See CONG. REC. H10,281 (daily ed. Oct. 18, 1995). It is interesting to note that, since its creation in 1984, this was the first time that Congress rejected a recommendation from the United States Sentencing Commission. See United States Sentencing Commission FY1994 Annual Report, Appendix C.

The ACLU, as well as other civil rights organizations, religious leaders and Members of Congress expressed outrage at the Congress' and the President's apparent indifference to the issue of racial disparity in federal cocaine sentencing. Congressman Mel Watt (D-NC) captured the essence of this frustration when he stated what many believed to be true:

We are going to discuss this to death. Let the Sentencing Commission go back and study it for ten years so we do not have to deal with it in the Congress of the United States. That is what this is all about. Justice delayed is justice denied, and we are delaying and denying justice to the very people who need it in our society.¹³

Moreover, several civil rights organizations expressed their disappointment by submitting a joint letter to President Clinton that stated in part:

Nothing undermines the racial fairness of the criminal justice system more than these crack laws; Mark Fuhrman and the beaters of Rodney King operate outside the system, but the racism of the crack laws is official, written, legislatively sanctioned part of the system. Rooting out the Mark Fuhrmans will take time, rooting out discriminatory crack sentencing is as easy as a stroke of a pen.¹⁴

Consistent with these comments, the ACLU believes that the Congress and the President were wrong to disapprove this Commission's proposed amendments. Further, we applaud this Commission's exhaustive efforts and demonstrated commitment to correcting the unjustified and irrational disparity in federal cocaine sentencing. This is a worthy goal today, just as it was last year. As such, we firmly believe that there is no persuasive reason for this Commission to abandon its previously proposed amendments.

¹³CONG. REC. H10,259 (daily ed. Oct. 18, 1995).

¹⁴See Letter to The President, October 25, 1995.

**IV. COMMISSION SHOULD REJECT POLITICAL PRESSURE AND RESUBMIT
SAME AMENDMENTS TO CONGRESS**

It is all too clear that political expediency remains the primary obstacle preventing this Commission from enacting amendments that eliminate racial disparity in cocaine sentencing. Congress and the President have substituted their own distorted "tough on crime" politics for that of this Commission's independent decision-making process. Ironically, Congress originally created the Commission as an independent agency so it could remain insulated and free from the traditional political pressures associated with criminal justice matters.¹⁵ In agreeing to create the United States Sentencing Commission, Congress essentially acknowledged that it, as a political branch of government, could not be trusted to fairly and neutrally address the politicized nature of federal sentencing policy. The Commission, on the other hand, as an independent agency in the judicial branch, could be trusted to objectively consider provocative criminal justice sentencing issues and render decisions unencumbered from political influences.

In fact, the politically independent design worked as intended when this Commission was asked to consider cocaine sentencing. This fact was made clear by the somewhat prophetic testimony of Commissioner Wayne A. Budd:

[I]n 1994 . . . Congress specifically directed the Commission to tackle the cocaine issue. Led by Chairman Conaboy the Commission did what it was asked to do: face head-on this type of political hot potato and provide the dispassionate, non-partisan leadership on the basis of hard facts and hard data."¹⁶

¹⁵See 18 U.S.C. 995.

¹⁶Testimony of Wayne A. Budd, United States Sentencing Commission, before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary (June 29, 1995) at 1-2.

To be sure, the ACLU commends this Commission for being true to its stated purpose of fairly and objectively analyzing the disparity in sentencing between crack and powder cocaine. We also appreciate and share in this Commission's disappointment that the Congress and the President rebuffed these efforts. However, we urge the Commission not to compromise its principles and independence by acquiescing to irrational political pressures. Simply stated: this Commission was absolutely correct in proposing amendments to the federal sentencing guidelines to equalize cocaine sentencing. No contrary evidence has emerged in the past several months to support a different result.

Indeed, we are cognizant that Congress is likely to reject the same amendments if they are offered again. This fact alone should not dissuade this Commission. Compromise in the name of political expediency cannot be condoned and should not be pursued. Rather, fundamental fairness and justice demands that this Commission continue to propose amendments that eliminate entirely the disparate impact of cocaine sentencing laws.

V. **DISPARITY IN SENTENCING GUIDELINES FURTHER CONTRIBUTES TO RACIAL DISPARITY THROUGHOUT THE CRIMINAL JUSTICE SYSTEM**

The disparate racial impact of the federal cocaine sentencing guidelines is further aggravated by race-based law enforcement and prosecutorial strategies. Racial bias begins with street level enforcement strategies, where African Americans are disproportionately targeted, stopped, arrested, prosecuted and then exposed to long mandatory minimum sentences under the federal sentencing

system.¹⁷ These discriminatory law enforcement strategies, such as selective prosecution and arrest initiatives, result in subjecting a disproportionate number of minorities to the racially disparate federal cocaine sentencing laws. Consequently, this combination further magnifies the already disproportionate impact of the unfair federal sentencing guidelines, resulting in a dramatic increase in the incarceration rates for African Americans and other minorities.

A. Selective Prosecution Strategies Contribute to Racial Disparity

Prosecutorial race-based decision-making results in exposing a disproportionate number of minorities to the disparate federal sentencing guidelines. A recent illustration of this procedure is found in Los Angeles where the U.S. Attorney's office openly admitted to targeting its resources towards minority communities.¹⁸ According to a Los Angeles Times article, not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since Congress enacted its mandatory sentences for crack in 1986. This occurred, despite the fact that whites account for a majority of crack users. During this same period, however, hundreds of white crack traffickers were prosecuted in state courts, where their sentences for the same offense were as much as eight years less than in federal courts.

This Commission found much the same results in other areas in the nation. A 1992 Commission survey shows that only minorities were prosecuted for crack cocaine offenses in more

¹⁷See Marc Mauer and Tracey Huling, Young Black Americans and the Criminal Justice System, Five Years Later, (1995). See also David Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659 (1994).

¹⁸Dan Weikel, "War on Crack Targets Minorities Over Whites," Los Angeles Times, May 21, 1995.

than half the federal court districts handling crack cases.¹⁹ No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania.

A case currently pending before the United States Supreme Court may prove instructive on the selective prosecution issue. On February 26, 1996, the United States Supreme Court heard oral arguments in United States v. Armstrong²⁰, a case in which indictments were dismissed against five Black defendants who alleged that the U.S. Attorney's Office selectively prosecuted them based on their race. Although the case involves a narrow discovery issue of whether federal prosecutors must disclose their charging criteria in crack cocaine cases, the Court's ruling could have far-reaching implications for defendant's prosecuted pursuant to the crack statutes.

The raw statistics cited in the Armstrong case that involve prosecutions in Los Angeles are troubling indeed. For example, the federal public defender's office in Los Angeles discovered that of the 24 crack cocaine cases closed out in 1991, all of the defendant's were African American. Whereas, from 1990 to 1992, 222 white defendants charged with crack cocaine offenses were prosecuted in state court; thus, effectively avoiding the harsh sentences required under the federal sentencing guidelines.

¹⁹Id.

²⁰United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1995), rev'd on rehearing en banc 48 F.3d (9th Cir. 1995), cert. granted No. 95-157 (Oct. 30, 1995).

B. Arrest Policies Contribute to Racial Disparity

Race-based arrest policies of law enforcement agencies have also disproportionately impacted on African Americans and other minorities. Drug arrests alone have increased dramatically in the 1980s, rising from 471,00 in 1980 to 1,247,000 by 1989.²¹ Just as these nationwide arrest rates increased dramatically, the proportion of African Americans arrested grew disproportionately, from 24% of all drug arrests in 1980 to 39% in 1993.²²

Claims are unfounded that African Americans are arrested in larger numbers because they tend to have higher rates of drug use and sales. African Americans, in fact, account for a disparate amount of those arrested for drug offenses. The best evidence supporting this conclusion comes from the National Institute on Drug Abuse in its annual household survey on drug possession. The most recent survey reveals that African Americans comprise 13% of monthly drug users, while accounting for 39% of the those arrested for drug offenses.²³

C. Racial Disparity Found in Incarceration Rates

Racial disparity throughout the criminal justice system, including selective law enforcement and prosecutorial strategies coupled with the federal sentencing guidelines, has ultimately resulted in a disproportionate explosion in the prison population. The United States recently surpassed the

²¹"Drugs and Crime Facts, 1990," Bureau of Justice Statistics, 1991.

²²Federal Bureau of Investigations, Uniform Crime Reports, various years, cited to in Young Black Men and the Criminal Justice System, Five Years Later.

²³Id. See also National Institute on Drug Abuse, National Household Survey on Drug Abuse: Main Findings (1991), (May 1994).

one million mark in its prison population. Although over half of the prison population is Black, African Americans comprise only 12% of the nation's population.²⁴ This leads to one of the most striking statistics: one out of every three young Black men are either imprisoned, on probation, or parole at any given time.²⁵

Our nation's harsh drug laws and enforcement policies have largely contributed to this dramatic rise in prison population. The number of adults imprisoned for drug offenses more than tripled from 1986 to 1991. Over 60 percent of federal prisoners are drug offenders and that figure is expected to rise throughout the decade.²⁶

African Americans pay the greatest price for these enforcement policies. A Department of Justice commissioned study on federal sentencing policies disclosed that between 1986 and 1990, both the rate and average length of imprisonment for federal offenders increased for Blacks in comparison to Whites. It further concluded that the highest proportion of Blacks charged with crack offenses was "[t]he single most important difference accounting for the overall longer sentences imposed on Blacks, relative to their racial groups."²⁷ The study's analysis concluded the following:

²⁴See U.S. Department of Justice Statistics Bulletin, "Prisoners in 1994 (Department of Justice, Washington, D.C. 1995).

²⁵See Young Black Americans and the Criminal Justice System: Five Years Later.

²⁶See David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," (CATO Institute, May 17, 1994)(relying on U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 1993, NCJ-141874 (Washington: U.S. Department of Justice, May 9, 1993)).

²⁷See U.S. Department of Justice Programs, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? (Nov. 1993). See also U.S. Sentencing Commission Special Report to Congress, p. 162.

If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.²⁸

VI. PROPOSED ENHANCEMENTS TO DRUG GUIDELINES ARE UNNECESSARY

The ACLU believe that it is unnecessary to promulgate additional guideline enhancements for cocaine penalties. The existing guideline enhancements sufficiently account for any additional harm that may be associated with crack (or any other drug). The federal sentencing guidelines already take into account additional harms such as involvement of firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, leadership role in the offense, prior criminal history, among other aggravating factors. These offenses are either treated as separate offenses or statutory enhancements to offenses. Therefore, there is no reason to render the statutes irrelevant by creating enhancements.

We are particularly troubled by the addition of systemic crime (crime related to the drug's marketing, distribution, and control) and social harms (harms associated with increased addictiveness, parental neglect, child and domestic abuse) as factors to be considered for guideline enhancement. No objective data exists to support a conclusion that certain offenses or societal harms are uniquely associate with crack cocaine. In fact, this Commission concluded that "pulling

²⁵Id.

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apart the systemic crime associated with crack cocaine versus powder cocaine is difficult if not impossible."²⁹

VII. RAISING PENALTIES FOR POWDER COCAINE WILL FURTHER CONTRIBUTE TO RACIAL DISPARITY

The ACLU believes that the Sentencing Commission should reject any proposal to increase the penalties for powder cocaine as an alternative to reducing the sentences for crack cocaine offenses. Chairman Conaboy already addressed this issue in his testimony by simply stating that "[t]he current sentencing guidelines [already] provide for severe and tough sentences for all drug offenses."

Moreover, employing this methodology will simply flood the courts and prisons with more nonviolent, unarmed first time drug offenders. It is estimated that sentencing powder cocaine defendants the same as crack defendants are currently sentenced will result in 41,000 person-years to federal prison population, at a cost of \$800 billion within ten years.³⁰

CONCLUSION

The ACLU maintains that the 100-to-one disparity in federal sentencing between powder and crack cocaine is irrational, unwarranted and discriminatory in fact. We maintain that the overwhelming weight of the evidence shows that the federal sentencing structure for crack cocaine

²⁹United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 95 (Feb. 1995).

³⁰See Bureau of Prisons, "State of the Bureau 1991" (Summer 1992).

has a disparate impact on African Americans and is not supportable on pharmacological, scientific or social grounds. Moreover, racially discriminatory prosecutorial and law enforcement strategies have further exacerbated the disparate impact of the cocaine sentencing scheme on African Americans.

Last year, this Commission, after thorough consideration, properly concluded that there was no justification for treating the two forms of the same drug differently. As such, it proposed amendments to the federal sentencing guidelines that would eliminate the 100-to-one disparity in base penalties for crack and powder cocaine trafficking offenses and the mandatory minimum sentences for simple cocaine possession. However, in a blatant, politically expedient act, Congress and President Clinton disapproved these amendments. While we appreciate the complication this situation presents, we urge the Commission not to be influenced or dissuaded by transparent "tough on crime" politics. We strongly urge the Commission to resubmit these same proposed amendments to Congress.

Our comments today reconfirm our commitment to the belief that justice and fairness demands that the only appropriate ratio between powder cocaine and crack cocaine is one-to-one. In light of the lack of evidence to support any other sentencing scheme, we believe that proposing a ratio other than one-to-one is simply an endorsement of racial discrimination in cocaine sentencing.

We thank the Commission for this opportunity to comment.

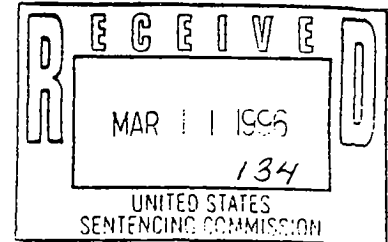
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March 7, 1996

Richard P. Conaboy, Chairman
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

The North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the Federal Register for the 1996 amendment cycle.

The Academy has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Academy especially urges the adoption of those amendments and modifications endorsed by the Practitioners Advisory Group in regards to money laundering and controlled substances.

With regard to crack cocaine, the Academy believes a five to one ratio is the best substitute for our preferred one to one ratio which was rejected by Congress last year. We endorse five to one because it is consistent with other ratios established in the drug table and would establish the same penalty for crack as currently exists for heroin, PCP and methamphetamine and their equivalents.

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FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

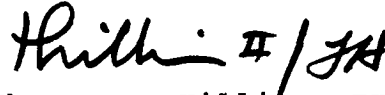
April 9, 1996

Honorable Richard P. Conaboy, Chair
United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

I am pleased to submit, on behalf of the Federal Public and Community Defenders, our views on the proposed amendments to the Guidelines Manual. We appreciate the opportunity to respond to the amendments published for comment this cycle.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hillier II / JH".

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington

Statement of

Federal Public and Community Defenders

on

Proposed Amendments to Sentencing Guidelines

April 9, 1996

Amendment Relating to Crack Cocaine

This amendment, in response to Public Law No. 104-38, seeks comment on the appropriate penalties for crack and powder cocaine offenses. In the legislation rejecting the amendment proposed last year to revise the penalties for crack cocaine offenses, Congress directed the Commission to revisit the issue and consider a number of factors, including a presumption that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." The directive contains no deadline by which the Commission must respond, and in its request for comment, the Commission states that it may or may not act upon any proposed amendments this amendment cycle.

We commend the Commission for its efforts last year to bring about greater fairness in sentencing defendants convicted of crack offenses. It is unfortunate that Congress rejected the Commission's amendment. We hope that the Commission will continue to work toward achieving a fair sentencing system, despite any pressures to substitute political expediency for objectivity.

Amendment Relating to Money Laundering

This amendment seeks comment on revisions to the money laundering guidelines. The Commission has republished the amendment it promulgated last year, as well as a proposal drafted by the Department of Justice. After receiving public comment on the proposals, the Commission proposed an alternative amendment that "reflects the most recent discussions between Commission staff

and the staff of the Department of Justice on appropriate revisions of the 1995 amendment."

Last year, we supported the amendment promulgated by the Commission, and we continue to do so. That amendment, the result of three years of work by the Commission staff, would have tied the offense level of a money laundering conviction more closely to the underlying offense that was the source of the illegal proceeds. The Commission's working group on money laundering offenses found that prosecutions under 18 U.S.C. §§ 1956 and 1957 were being pursued increasingly to address offenses that traditionally would not be considered "money laundering." This practice results in prosecutions of offenses under the money laundering statute, even when the underlying offense is indistinguishable from the conduct alleged to constitute the money laundering offense. The Commission's amendment would better reflect the relative seriousness of the offense conduct. The Department of Justice proposal and the latest compromise proposal would do nothing to address the inequities and abuses that prompted the Commission's attempt to improve the current guideline.

We recommend that the Commission delay acting on any money laundering amendments until the Commission has had an opportunity to assess and receive public comment on the Justice Department report.

Amendment 1
Sexual Offenses Against Children

In response to the Sexual Crimes Against Children Prevention

Act of 1995, the Commission proposed amendments to the guidelines in Chapter 2, Part G. After receiving comment on these amendments, the Commission proposed substitute amendments. Section 2 of the Act directs the Commission to increase by at least two levels the base offense level for a violation of either 18 U.S.C. § 2251 or 18 U.S.C. § 2252. Section 3 of the Act directs the Commission to provide at least a two-level increase for an offense under 18 U.S.C. § 2251(c)(1)(A) or 2252(a) by at least three levels "if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction." Section 4 directs the Commission to increase by at least three levels the base offense level for an offense under 18 U.S.C. § 2423(a).

In addition to specific guideline changes, the legislation directs the Commission to submit to Congress, by June 1996, a report "concerning child pornography and other sex offenses against children." Section 6 of the Act requires the report to include an analysis of sentences and recommendations for appropriate amendments to the guidelines applicable to offenses under 18 U.S.C. § 2251, 2252, and 2243 and offenses involving juvenile victims under 18 U.S.C. § 2241, 2242, 2243, and 2244. The legislation also directs the Commission to provide an analysis of substantial assistance departures for offenses under 18 U.S.C. §§ 2251 or 2252 and an analysis of recidivism by offenders convicted of sex crimes.

We recommend that, until the report is completed, the Commission refrain from making any more changes than necessary to

comply with the specific directives in the Act. Once the report is completed, the Commission will be in a better position to determine whether any further amendments are necessary. In addition, before we urge the Commission, before it makes any significant changes to the guidelines in Chapter 2, Part G, to clarify the heartland of offenses covered by those guidelines.

Amendment 2 Prostitution Offenses

In response to section 4 of the Sex Crimes Against Children Prevention Act of 1995 and the Telecommunications Act of 1996, the Commission published for comment amendments to § 2G1.1 and § 2G1.2. After receiving comment, the Commission has proposed substitute amendments to these guidelines.

Section 4 directs the Commission to provide at least a three-level enhancement for offenses involving the transportation of minors with intent to engage in prostitution or other prohibited sexual conduct under 18 U.S.C. § 2423(a). The Telecommunications Act of 1996 created a new offense prohibiting use of interstate or foreign commerce to persuade, induce, entice, or coerce an individual under age 18 to engage in prostitution or any other criminal sexual act.

We agree with the Department of Justice that until the report is completed, the Commission should "just follow [the] legislation directive." We suggest that any additional changes, such as consolidation of guidelines, can best be addressed after review of the report and as part of the guideline simplification project.