SEC. 425. EVALUATIONS BY INSPECTOR GENERAL AND ADMINISTRATIVE REMEDIES. 42 USC 14163d.

(a) EVALUATION BY INSPECTOR GENERAL.—

(1) IN GENERAL.—As soon as practicable after the end of the first fiscal year for which a State receives funds under a grant made under this subtitle, the Inspector General of the Department of Justice (in this section referred to as the "Inspector General") shall—

(A) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report evaluating the compliance by the State with the terms and conditions of the grant; and Reports.

(B) if the Inspector General concludes that the State is not in compliance with the terms and conditions of the grant, specify any deficiencies and make recommendations to the Attorney General for corrective action.

(2) PRIORITY.—In conducting evaluations under this subsection, the Inspector General shall give priority to States that the Inspector General determines, based on information submitted by the State and other comments provided by any other person, to be at the highest risk of noncompliance.

(3) DETERMINATION FOR STATUTORY PROCEDURE STATES.— Deadline. For each State that employs a statutory procedure described in section 421(e)(1)(C), the Inspector General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, not later than the end of the first fiscal year for which such State receives funds, a determination as to whether the State is in substantial compliance with the requirements of the applicable State statute.

(4) COMMENTS FROM PUBLIC.—The Inspector General shall receive and consider comments from any member of the public regarding any State's compliance with the terms and conditions of a grant made under this subtitle. To facilitate the receipt of such comments, the Inspector General shall maintain on its website a form that any member of the public may submit, either electronically or otherwise, providing comments. The Inspector General shall give appropriate consideration to all such public comments in reviewing reports submitted under section 424 or in establishing the priority for conducting evaluations under this section.

(b) ADMINISTRATIVE REVIEW.—

(1) COMMENT.—Upon the submission of a report under subsection (a)(1) or a determination under subsection (a)(3), the Attorney General shall provide the State with an opportunity to comment regarding the findings and conclusions of the report or the determination.

(2) CORRECTIVE ACTION PLAN.—If the Attorney General, after reviewing a report under subsection (a)(1) or a determination under subsection (a)(3), determines that a State is not in compliance with the terms and conditions of the grant, the Attorney General shall consult with the appropriate State authorities to enter into a plan for corrective action. If the Deadline. State does not agree to a plan for corrective action that has been approved by the Attorney General within 90 days after the submission of the report under subsection (a)(1) or the

determination under subsection (a)(3), the Attorney General shall, within 30 days, issue guidance to the State regarding corrective action to bring the State into compliance.

(3) REPORT TO CONGRESS.—Not later than 90 days after the earlier of the implementation of a corrective action plan or the issuance of guidance under paragraph (2), the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate as to whether the State has taken corrective action and is in compliance with the terms and conditions of the grant.

(c) PENALTIES FOR NONCOMPLIANCE.—If the State fails to take the prescribed corrective action under subsection (b) and is not in compliance with the terms and conditions of the grant, the Attorney General shall discontinue all further funding under sections 421 and 422 and require the State to return the funds granted under such sections for that fiscal year. Nothing in this paragraph shall prevent a State which has been subject to penalties for noncompliance from reapplying for a grant under this subtitle in another fiscal year.

(d) PERIODIC REPORTS.—During the grant period, the Inspector General shall periodically review the compliance of each State with the terms and conditions of the grant.

(e) ADMINISTRATIVE COSTS.—Not less than 2.5 percent of the funds appropriated to carry out this subtitle for each of fiscal years 2005 through 2009 shall be made available to the Inspector General for purposes of carrying out this section. Such sums shall remain available until expended.

(f) SPECIAL RULE FOR "STATUTORY PROCEDURE" STATES NOT IN SUBSTANTIAL COMPLIANCE WITH STATUTORY PROCEDURES.—

(1) IN GENERAL.—In the case of a State that employs a statutory procedure described in section 421(e)(1)(C), if the Inspector General submits a determination under subsection (a)(3) that the State is not in substantial compliance with the requirements of the applicable State statute, then for the period beginning with the date on which that determination was submitted and ending on the date on which the Inspector General determines that the State is in substantial compliance with the requirements of that statute, the funds awarded under this subtitle shall be allocated solely for the uses described in section 421.

(2) RULE OF CONSTRUCTION.—The requirements of this subsection apply in addition to, and not instead of, the other requirements of this section.

42 USC 14163e.

SEC. 426. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION FOR GRANTS.—There are authorized to be appropriated $75,000,000 for each of fiscal years 2005 through 2009 to carry out this subtitle.

(b) RESTRICTION ON USE OF FUNDS TO ENSURE EQUAL ALLOCATION.—Each State receiving a grant under this subtitle shall allocate the funds equally between the uses described in section 421 and the uses described in section 422, except as provided in section 425(f).

Subtitle C—Compensation for the Wrongfully Convicted

SEC. 431. INCREASED COMPENSATION IN FEDERAL CASES FOR THE WRONGFULLY CONVICTED.

Section 2513(e) of title 28, United States Code, is amended by striking "exceed the sum of $5,000" and inserting "exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff".

SEC. 432. SENSE OF CONGRESS REGARDING COMPENSATION IN STATE DEATH PENALTY CASES.

It is the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death.

Approved October 30, 2004.

LEGISLATIVE HISTORY—H.R. 5107 (H.R. 3214):

HOUSE REPORTS: No. 108–711 (Comm. on the Judiciary).
SENATE REPORTS: No. 108–321, Pt. 1 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 150 (2004):
Oct. 6, considered and passed House.
Oct. 9, considered and passed Senate.

○

From: Charles Tetzlaff
To: Beryl Howell; Deborah Rhodes; Edward Reilly; John Steer; michael.horowitz@cwt.com; Ricardo Hinojosa; Ruben_Castillo@ilnd.uscourts.gov; William Sessions
Subject: Late Public Comment

I am faxing the attached two pieces of Public Comment received today. One from the Probation Officers Advisory Group and the other from the Federal Public and Community Defenders. Copies will be available for insertion into your notebooks at the meeting next week.

FEDERAL PUBLIC DEFENDER

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August 16, 2005

Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Suite 2500
One Columbus Circle NE
Washington, DC 20002-8002

RE: Commission's Proposed Priority Policy Issues for Cycle Ending May 1, 2006

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the Commission's proposed priorities for the upcoming 2005-2006 cycle. As you know, we represent the vast majority of criminal defendants in federal court, and Congress has directed us to submit observations, comments or questions pertinent to the Commission's work. As always, we look forward to working with the Commission and the opportunity to provide specific information and analysis one these issues in the months ahead.

I. Implementation of Crime Legislation

While we provided substantial input earlier this month on the intellectual property directives contained in recent legislation, a number of other legislative matters, specifically, steroids and intelligence and terrorism reform, still await Commission action.

Our chief concern with the treatment of anabolic steroids under the Guidelines is the dosage unit. The Department of Justice is recommending uniformity of treatment of anabolic steroids with other Schedule III drugs, so that one tablet, or 0.5 milliliters of liquid, would be a dosage unit. We think this is wholly misguided. This proposal does not reflect the numerous differences between steroids and other controlled substances: 1) steroids are the only hormone, a substance naturally occurring in every human being, on the Schedule III list of controlled substances; 2) unlike stimulants, depressants and hallucinogens, steroids are not taken for any psychoactive effect; 3) studies by FDA and other groups indicate that steroids are not addictive and lack potential for abuse and dependency; 4) the major societal harms from unfair professional sports competition and the risk of teenagers emulating professional athletes, constitute a negligible

fraction of the criminal prosecutions for steroid use; 5) the potential for overdose toxicity from steroids is virtually non-existent, much less than aspirin; 6) unlike typical drug users who often have other law enforcement contacts such as theft to support their habits, average steroid users are health conscious males between 25 and 45 years of age with no other criminal connection; and 7) unlike typical drug users who tend to purchase in single doses, patterns of steroid purchase by users tend to be in bulk, giving a false impression of an intent to distribute. Careful analyses of studies performed on dosage units and the differentiation between various types of steroids is required before any amendment to the Guidelines should be considered on equivalency.

II. Consultation on Appropriate Responses to *United States v. Booker*

We reiterate our position that a legislative response is not only unnecessary but would actually serve to further complicate and frustrate the underlying goals of fair and just sentencing. We urge the Commission to take a reform-minded approach which involves adopting more rigorous sentencing procedures. Setting forth a particular set of procedures which sets the bar higher than some "indicia of reliability" when accepting evidence which increases a defendant's sentence is but one example. Such reforms would create a more accurate sentencing process.

III. Policy Work Regarding Immigration Offenses

Our Committee worked with the Commission's Immigration Working Group last cycle and submitted a specific proposal for amendments. We look forward to continuing our work on this issue.

IV. Resolution of Circuit Conflicts

We understand the Commission has not decided what, if any, guideline amendments will be proposed for the purpose of resolving conflicts among the circuit courts. Should the Commission identify circuit conflicts it wishes to address this amendment cycle, the Federal Defenders request notice of the Commission's intent so that we may evaluate those proposals and provide effective commentary to the Commission.

V. Addressing "Cliff-like" Effect and Related Structural Issues

This is an important structural defect in the Guidelines as it sweeps in unintended defendants into a mandatory life sentence. One example is the young first offender who gets caught up in a large drug conspiracy with a high drug amount. Again, we have ideas on different options for addressing this problem and look forward to exploring them with you.

Thank you for considering our comments and please let us know to whom we can address our specific input and analyses.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Cathy A. Battistelli
Chair, 1st Circuit

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August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on August 10 and 11, 2005 to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. We are submitting comments relating to three issues which appear on the Commissioner's list of priorities, as well as other issues which POAG believes should be addressed.

Implementation of Crime Legislation regarding the Family Entertainment and Copyright Act of 2005 and the Intellectual Property Protection and Courts Amendment Act of 2004

POAG recognizes there is a broad category of offenses which could be captured in USSG §2B5.3. The group believes a separate prerelease specific office characteristic should be added to this guideline as it is viewed as a distinct harm to the victim. POAG realizes conduct involving the prerelease of movies varies. An individual could digitally record the movie while watching it in a theater and then release it, or obtain a pirated copy of the movie and release it prior to the premier. This problem is similar to "zero-day release" of protected copyrighted video games where the harm to the industry is not ordinarily covered in the existing guideline. POAG also noted that computer technology involved in these types of offenses changes very quickly which makes it almost impossible to capture the correct terminology to be used in the guidelines. For example, would peer-to-peer sharing of information via networked computers be considered under the current definition of uploading? Another problematic area in this guideline is determining the dollar amount associated with the crime. If an individual is found with 100

Calvin Klein labels, how is the dollar amount to be determined as the Calvin Klein label can be found on underwear or jeans? Or, in the case of an individual who has pirated copyrighted materials, including multiple high end items of computer software, should the dollar amount be based on what is found on the defendant's computer during a search or should it be determined on the number of times the items were uploaded or downloaded? Depending on how the dollar amount is determined, sentencing disparity can result throughout the system with some individuals receiving probationary sentences and others receiving significant prison sentences.

Immigration

Regarding the immigration guidelines, POAG urges the Commission to continue its work in this area. It is believed that the Commission should continue to simplify the guidelines by clarifying definitions, such as the crime of violence definition, for ease of application. The definition in this guideline differs from the definition contained in 8 U.S.C. § 1101. Moreover, the group suggests the Commission address whether a sentence of 13 months or less as noted in USSG §2L1.2(b)(1)(B), includes a sentence of probation. The definition for "sentence imposed" as included in this particular guideline, conflicts with the definition contained in USSG §4A1.2(b)(1). When the user refers to §4A1.2(b)(1) as the application note suggests, this guideline notes a "sentence of incarceration," and to many users, probation does not qualify under the provision for a twelve-level increase. Another issue associated with this guideline is whether it is appropriate to impose a threshold quantity for a defendant who is convicted of possession of a large quantity of drugs which are clearly intended for distribution purposes; however, under the various state laws, the defendant is charged with (and convicted of) a straight possession offense. In other districts, if a defendant had the same quantity of drugs, it would be a distribution offense. This clarification would hold defendants accountable for possession of large amounts of drugs, regardless of where they are convicted. This issue appears to be very problematic among the "border states." Lastly, the group would like the Commission to clarify the commentary contained in USSG §2L1.2, comment. (n.1[A][i] and [ii]) as to the timing of when the defendant incurs the predicate conviction and his immigration status at the time the conviction occurs.

Circuit Conflicts

POAG encourages the Commission to resolve circuit conflicts whenever possible which gives greater guidance to the field and ensures consistency in the application process.

Other Issues

Issues Relating to USSG § 2B1.1

There are four particular areas noted by Commission Staff regarding this guideline which POAG wishes to address: the number of victims, the intended loss determination in a blank check case, the definition of "means of identification," and the cross references.

Regarding the determination of the number of victims, the group agrees that at times, determination of the number of victims is problematic. For example, how do you count the number of victims in a theft from twelve different stores with the same parent company? Are there twelve victims as twelve stores were victimized or only one victim that being the parent company?

The determination of intended loss in a blank check case is also problematic, and perhaps some clarification in the commentary notes would be of assistance.

The group also finds that use of the statutory definition "means of identification" has caused problems with application, especially if the identification involves a deceased individual.

Lastly, USSG §2B1.1 contains a number of cross references in subsection (c) which present challenging application problems. The provisions found in §§2B1.1(c)(2) and (c)(4) specify that the cross reference application is to be applied only if the resulting offense level is greater, however, this direction is lacking in (c)(1) and (c)(3). Is this the intent of the Commission?

Drug Issues

POAG agrees with Commission staff regarding suggested technical and conforming changes in USSG §2D1.1 with respect to the parenthetical statement "or the equivalent amount" which is found in the Drug Quantity Table. The group discussed this parenthetical statement and discovered that application errors have occurred due to misinterpretation of the phrase. Application Note 10 clearly outlines the procedure for drug conversion/equivalency when a specific controlled substance is not included in the Drug Quantity Table. POAG believes the elimination of the confusing phrase would ensure proper application of Note 10.

Commission of Offense While on Release - USSG § 2J1.7 and 18 U.S.C. § 3147

POAG recommends reconsideration of guideline application of the statutory enhancement set forth in 18 U.S.C. § 3147. This statute requires a sentence of imprisonment be imposed in addition to the sentence for the underlying offense; furthermore, the sentence of imprisonment under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.

Currently, in calculating an offense level for an offense committed while on federal release, §2J1.7 provides for a three-level enhancement as a specific offense characteristic. POAG observes this enhancement could easily be missed because users are not accustomed to accessing enhancements through Chapter Two sections. POAG supports converting §2J1.7 into a Chapter Three adjustment.

POAG requests clarification as to whether the government must actually file an enhancement pursuant to 18 U.S.C. § 3147. Also, POAG recommends that a circuit split be resolved regarding whether the three-level increase can be imposed on a defendant who was not notified of the specific enhancement at the time of his release.

Clarification in two other areas is suggested to avoid possible confusion. Currently, *Background* notes remind the user that this enhancement only applies in the case of a conviction for a federal offense committed while on release for another federal charge. Perhaps that important caveat could be highlighted. Additionally, guidance is requested regarding the interplay between this enhancement and acceptance of responsibility and/or obstruction of justice. Confusion could arise, especially in cases where both offenses (i.e., the offense for which the defendant was on pretrial release and the offense committed by the defendant while he was on pretrial release) are consolidated for sentencing. POAG recommends adding language in one or more of these sections (i.e., §2J1.7 or its successor; §3E1.1; or §3C1.1) to address any confusion that could arise. There is also concern about double counting. For example, if the two cases were consolidated

for sentencing, the defendant could lose the reduction for acceptance of responsibility because the conduct, which has been charged as the second offense, is inconsistent with acceptance of responsibility. Furthermore, such conduct could, in some cases, constitute obstruction of justice.

Firearms

Felon in possession of firearm prosecutions have been a priority in all districts, while at the same time the guideline applications in this section have become problematic. POAG strongly encourages the Commission to resolve several circuit conflicts found at USSG §2K2.1(b)(5).

With respect to "Possession of a Firearm In Connection With Another Felony Offense," POAG has concluded that applying this four-level increase has become problematic due to the circuit conflicts involving the "in connection with" standard. POAG suggests the Commission provide better definitions for the "in connection with" standard and also recommends that the Commission resolve the circuit conflicts in the cross reference section under USSG §2K2.1.

The expiration of the Firearms Sunset Provision with respect to the type of firearms defined in 18 U.S.C. § 921(a)(30) has resulted in numerous application problems for the field. POAG urges the Commission to make a determination as to whether the types of firearms identified in this statute are more dangerous than other types of weapons and should still be considered in determining the higher guideline offense level or, because they are now legally allowed to be possessed by nonfelons, this requirement should be deleted from the guideline.

POAG is cognizant that there have been cases where the definition of a destructive device has excluded a sawed-off shotgun, while in other districts this type of weapon is considered to be a destructive device. A clearer definition would be helpful and avoid inconsistent application.

Chapter Four

There are a number of Chapter Four issues which concern POAG that parallel help line phone calls frequently received by Commission staff.

Crime of Violence

There are a plethora of definitions for crimes of violence found in different criminal statutes, as well as within the Sentencing Guidelines, for example §2L1.2 and §4B1.2. It would simplify the guideline application process and eliminate current inconsistencies to adopt one guideline definition. POAG recognizes adopting one guideline definition for crime of violence will not rectify the problem between statutory and guideline differences for crime of violence; however, one definition can begin to develop better uniformity and consistency of guideline application and reduce confusion.

Simplification

POAG recognizes "Guideline Simplification" has been an ongoing debate throughout the last several years and believes it is an issue that the Commission consider placing on it's long term agenda. While there are several problematic areas in the guidelines, many on the group believe that through ongoing training and

daily use of the guidelines, practitioners are able to master the vast majority of the manual. However, the application of cross references is problematic to the experienced user of the guidelines and is worthy of the Commission's review. As noted in an earlier POAG position paper, cross reference provisions in the guidelines are generally thought to be confusing and appear to result in numerous objections by counsel, especially, if the application results in "jumping" from guideline to guideline. The Accessory After the Fact and Misprision of a Felony guidelines are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments.

Addressing the "Career Fraudster"

Finally, POAG believes there is a need to address the white collar defendant who is not always at the high end of the fraud table and repeatedly engages in a pattern of fraudulent behavior. This topic has been an ongoing concern of POAG and was discussed during the Probation Officers' session at the recent national training in San Francisco. POAG believes there is a distinction between the career confidence man/"career fraudster" and other white collar offenders which should be specifically addressed in the guidelines. During our discussions, it was recognized that state prosecutors have limited access to criminal history information in other states; therefore, the defendant's multiple arrests and/or convictions for similar misconduct may not be available to the state courts when imposing sentence. As a result, this individual may receive a number of lenient sentences. While an upward departure pursuant to USSG §4A1.3 may be part of the answer, POAG believes an enhancement should be determined based on the defendant's pattern of behavior rather than prior convictions alone. POAG has submitted additional information relative to this issue to Commission staff for their review.

Closing

We trust you will find our comments and suggestions beneficial during your discussion and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli /RDM

Cathy A. Battistelli
Chair

PUBLIC COMMENT

2005 AMENDMENT CYCLE

Proposed priority policy issues for the amendment cycle ending May 1, 2006

United States Sentencing Commission August 2005

PUBLIC COMMENT SUMMARIES

August 15, 2005

Issue No. 1(A) - Family Entertainment and Copyright Act of 2005

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) states that it looks forward to working with the Commission to appropriately amend the guidelines as part of the implementation of the congressional directives to implement crime legislation such as the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9; the Intellectual Property Protection and Courts Amendment Act of 2004, Pub. L. 108–482; the Intelligence Reform and Terrorism Reform Act of 2004, Pub. L. 108–458; and the CAN-SPAM Act of 2003.

Federal Public and Community Defenders (FPD)
Phoenix, Arizona

Federal Public Defender Jon Sands submits comments on behalf of the Federal Public and Community Defenders (FPD) on the Family Entertainment and Copyright Act of 2005 (FECA) The FPD notes that FECA adds offenses for unauthorized recording of motion pictures (18 U.S.C. §2319B), and pre-release of copyrighted work (17 U.S.C. § 506(a)(1)(C)), and observes that each provision was already a crime subject to the same or higher statutory maximums. The new provisions do not target new conduct for prosecution, the FPD concludes. Regarding the four directives to the Sentencing Commission contained in the Act, the FPD posits that the current guidelines adequately address FECA's provisions.

The FPD states that §2B5.3 is "sufficiently stringent" to "deter, and adequately reflect the nature of" intellectual property offenses. Section 2B5.3 was amended in 2000 in response to the No Electronic Theft Act of 1997 (NET) and the case of *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), a case where the defendant operated an Internet bulletin board where games were uploaded and then downloaded free of charge. The district court dismissed the indictment because, absent a commercial motive, the conduct was not punishable under wire fraud or copyright laws.

Congress responded to *LaMacchia* by expanding 17 U.S.C § 506 to include the reproduction or distribution of copyrighted material not motivated by a commercial motive, the FPD recounted. After extensive study, the Commission increased the base offense level from six to eight and added an enhancement for the manufacture, importation or uploading of copyrighted materials;

provided for the use of special skills under §3B1.3 where the defendant circumvented a technological security measure; added an encouraged enhancement for substantial harm to the copyright owner's reputation, and for commission of the offense in furtherance of a national or international enterprise; a two-level decrease was also provided if the offense was not committed for personal gain. The decrease would not apply in most, if any, on-line file sharing cases, the FPD concluded.

The Commission also provided for the use of the value of the *infringed* item when calculating the amount of loss involved in the offense, the FPD stated, where before, the value of the *infringing* item was used. It is the FPD's position that this substantially overstates the loss involved. No matter how perfect the quality of the infringing item, the FPD observed, many people who illegally acquire it cannot afford to buy it at its retail value. As contained in the NET Act Policy Development Team Report, economists and even industry representatives agreed that the vast number of infringements do not result in one-for-one displacement of sales, the FPD added. In fact, the FPD observed, economists believe that infringement can benefit the copyright holders, consumers and the economy as a whole.

The FPD also calls attention to the fact that the NET Act contains a provision allowing victims to submit loss statements directly to the Probation Officer. In all other cases, the FPD notes, the prosecutor is required to make a determination concerning loss and has an ethical duty of candor to the court, while the Corporate victim does not have this ethical duty and is motivated by profit. The FPD raises this issue as a reason not only to not increase the offense level for intellectual property offenses, but also as a reason for stronger procedural protections in Chapter 6 and Fed. R. Crim. P. 32.

The FPD points out a statistical study concluding that the impact of downloads of music files is small and statistically indistinguishable to zero, which is inconsistent with music industry claims. The study indicates that it takes about 5,000 downloads to reduce record sales by one album and in fact downloading may have a positive effect on sales by allowing consumers the chance to sample an album before buying it.

Based on Commission statistics, downward departures for intellectual property offenses run from a low of 22% in 1997, to a high of 41% in 2002, with 36% reported in 2003, the year of the PROTECT Act. These statistics seem to indicate, the FPD conjectures, that judges and prosecutors consider sentences for these offenses too high. It also notes that recidivism for intellectual property offenses is likely low because offenders are generally employed and relatively highly educated; factors that the Commission has identified with reduced rates of recidivism. In light of the above, the FPD suggests the following encouraged departure be added to the Application Notes under §2B5.3:

> Downward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

The FPD does not believe that the Act's second directive, an enhancement for pre-release infringement, is appropriate, as the current guidelines already takes this conduct into consideration. The FPD notes that if the pre-release of a movie is of high quality and popular, the conduct will be captured in the offense level by the value of the infringed item, and if the infringed item is of inferior quality, the conduct will be captured by an upward departure for harm to the copyright holder's reputation.

The third directive for the Commission is to determine if the scope of "uploading" in §2B5.3 adequately addresses loss when people "broadly distribute copyrighted works over the Internet." Defendants committing this type of offense already receive a two-level enhancement for uploading, with a minimum offense level of 12, and are liable for the retail value of all resulting downloads. Two further enhancements are possible for extensive, national or international enterprises and for cracking copyright infringement systems. It is FPD's position that the uploading enhancement is more than adequate.

The final directive of FECA calls on the Commission to determine whether the existing guidelines adequately reflect "any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed." The FPD expresses its concern that an enhancement explicitly based on a *lack* of evidence is likely to be unconstitutional. It also notes that the defendant already receives a four-level enhancement where law enforcement cannot prove a download occurred. Moreover, recent cases prove that infringements can be proved as systems used to share files keep detailed logs of their activities. As result, it is the FPD's position that there is no need for this enhancement provision.

James Gibson
Intellectual Property Institute
Richmond, Virginia

Professor Gibson, Director of the University of Richmond School of Law's Intellectual Property Institute and member of the Sentencing Commission's Practitioner Advisory Group (PAG), writes to offer his personal views on the Family Entertainment and Copyright Act of 2005 (FECA). Professor Gibson notes that the recent Congressional directives should be read in light of the major amendments the Commission made to §2B5.3 for intellectual property offenses five years ago. The Commission spent more than two years researching the topic, Professor Gibson recollected, as a result of the No Electronic Theft Act of 1997 (NET) and *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

In Professor Gibson's opinion, the most significant aspect of the 2000 amendment was the change from use of the value of the *infringing* item to the use of the value of the *infringed* item when determining the amount of loss involved. As a result, dramatic, and arguably, disproportionate increases in punishment for online infringement resulted, Professor Gibson

asserts. Professor Gibson believes that §2B5.3 is more than adequate in its current form and nothing in the last five years has occurred to call into question the decisions made by the Commission on this topic.

In Professor Gibson's view, FECA is a modest piece of legislation meant to fill some minor statutory holes; specifically, holes related to the movie bootlegging statute (18 U.S.C. § 2319B) and the pre-release statute (17 U.S.C. § 506(a)(1)(c)) and requires only a modest response by the Commission. FECA contains four directives to the Commission and in Professor Gibson's opinion, the directives have been and are adequately addressed by the Commission's 2000 amendments and §2B5.3. In Professor Gibson's view, the guidelines address the first Directive because they are sufficiently stringent to deter intellectual property offenses and adequate to punish an offender. Secondly, pre-release offenses, mentioned in the second Directive are addressed because (i) pre-release works are likely to be popular, resulting in a higher number of infringements, thereby resulting in higher loss amount and a correspondingly higher offense level, and (ii) pre-release works not ready for the market (e.g., "buggy" software) can harm the copyright owner's reputation and invite an upward departure for "substantial harm" to the victim's reputation. Professor Gibson further believes the third Directive has already been addressed, because §2B5.3 adequately defines the meaning of "uploading" and that offending uploaders of copyrighted material will be adequately punished. Finally, Internet service providers (ISPs) maintain activity logs, file-sharing software also maintains logs and many file-sharers are motivated by bragging rights, not profit, and are unlikely to destroy evidence of infringement, making the scale of an infringement determinable, thus addressing the fourth Directive. He adds that even if evidence of scale is not available, merely uploading a copyrighted work will result in a two-level enhancement even in the absence of evidence that one download of the work occurred.

Expressing no sympathy for copyright infringers, Professor Gibson restates his opinion that the 2000 amendments to §2B5.3 more than adequately addresses the issues raised in FECA. The Professor closes his comments by offering to discuss further these issues with any staff or Commissioners interested in doing so.

Issue No. 1(B) - Intellectual Property Protection and Courts Amendment Act of 2004

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) states that it looks forward to working with the Commission to appropriately amend the guidelines as part of the implementation of the congressional directives to implement crime legislation such as the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9; the Intellectual Property Protection and Courts Amendment Act of 2004, Pub. L. 108–482; the Intelligence Reform and Terrorism Reform Act of 2004, Pub. L. 108–458; and the CAN-SPAM Act of 2003.

Federal Public and Community Defenders (FPD)
Phoenix, Arizona

Federal Public Defender Jon Sands submits comments on behalf of the Federal Public and Community Defenders (FPD) on the Intellectual Property Protection and Courts Amendment Act of 2004. The Act directed the Commission to provide a sentencing enhancement for anyone convicted of a felony offense furthered through knowingly providing, or knowingly causing to be provided, materially false contact information to a domain name registration authority, the FPD provided. The FPD suggests a one-level enhancement for inclusion at §2B1.1(b)(16):

> §2B1.1(b)(16) If a felony offense was furthered through knowingly providing or knowingly causing to be provided materially false information to a domain name registrar, domain registry or other domain name registration authority **add 1 offense level.**
>
> Application Notes
>
> (20) Use of a Falsely Registered Domain Name under Subsection (b)(16) -
>
> (A) Definition of Materially False. - For purposes of subsection (b)(16), "materially false" means to knowingly provide registration information in a manner that prevents the effective identification of or contact with the person who registers.
>
> (B) Non-Applicability of Enhancement.- If the conduct that forms the basis for an enhancement under subsection (b)(16) is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

The FPD believes that a one-level enhancement is adequate, especially when compared to other enhancements for offenses representing greater harms, such as possession of a dangerous weapon during a controlled substance purchase (§2D1.1(b)(1)) or causing bodily injury during a robbery (§2B3.1(b)(3)(A)). The FPD further suggests adding a definition to an application note for "materially false" that tracks the Act's language exactly. Finally, the FPD believes it would be impermissible double counting to allow an increase for Use of a Falsely Registered Domain Name and Obstruction of Justice to apply, which is reflected above in its suggested §2B1.1(b)(16) Application Note B.

Issue No. 1(C) - Anabolic Steroid Control Act of 2004

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

To best respond to the congressional directive, the Department of Justice (DOJ) believes the Notes to the Drug Quantity Table should be amended so that anabolic steroids are treated the same as other Schedule III controlled substances. It reports that recent congressional hearings and the subsequent attention brought to this issue by the Anabolic Steroid Control Act of 2004 highlighted the dangers associated with illicit use, and in the DOJ's opinion, the current dosage equivalency is inadequate to address the problem. The DOJ argues that a dosage unit under the guidelines for anabolic steroids should be equal to one tablet, which constitutes a therapeutic dose, and points out that the Physician's Desk Reference indicates that therapeutic doses of anabolic steroids are consistent with the therapeutic doses of other Schedule III controlled substances. Further, the DOJ states that Drug Enforcement Administration seizure data suggests that a modification of the dose equivalencies as advocated by the DOJ would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities.

Additionally, the DOJ urges the Commission to include guidance in the guideline on how to compute dosage unit equivalencies for anabolic steroids that are in non-pill form. As examples, the DOJ reports that steroid creams can be packaged and dispensed in a tube, and that some designer steroids are ingested in liquid form by eye dropper under the tongue. It suggests that for steroid creams, the Commentary should instruct the courts to determine the typical number of applications in each tube and use that as the basis for computing the number of dosage units. Similarly, for liquids, the DOJ suggests the court should determine the typical quantity injected at a certain point in time (divide the total volume of liquid by the number of milliliters per dose) to determine the number of doses. In its view, this would substitute for the current "unit" measure of 10 cc as a unit regardless of the steroid involved.

Practitioners' Advisory Group (PAG)
Co-Chairs Mark Flanagan and Gregory S. Smith
Washington, D.C.

Recognizing the Commission's legislative direction to address sentencing issues for anabolic steroid convictions, the Practitioners' Advisory Group (PAG) suggests that the Commission begin by surveying and collecting additional data before deciding whether, how, or to what extent these guidelines might be changed. PAG emphasizes that the legislative history of the recent steroid legislation calls for imposing appropriately proportional penalties. PAG also suggests that mitigating factors for patients with debilitating diseases, such as AIDS, who use

steroids, would warrant either a guideline adjustment or authority to depart. PAG requests access to proposals submitted to the Commission by the Department of Justice and others, so it can make more effective recommendations in this area.

Food and Drug Administration/
Department of Health & Human Services (FDA)
Rockville, MD

Strengthening Guidelines Applicable to Federal Food, Drug, and Cosmetic Act Violations

The Food and Drug Administration/Department of Health and Human Services (FDA) reminds the Commission of its request last amendment cycle to amend the guideline for violations of the Federal Food, Drug, and Cosmetic Act (FDCA), and states it is aware the Commission had considered, but postponed, this request due to the *Booker* decision. The FDA, however, remains concerned that the guidelines are too lenient, and in its view, are hampering FDA's efforts to effectively combat the criminal conduct associated with this Act. Rather than restating its position from the previous amendment cycle, the FDA attached a copy of the letter as part of its current submission. The summary of that letter is repeated below for reference.

The FDA states that during the past year, its Office of Criminal Investigations has seen a significant increase in the number of investigations which relate to counterfeit drugs, prescription drug diversion, and human growth hormone (HDH), among others. In its view, the trend is likely to continue unless the guideline is amended, and it therefore requests that the Commission add to its list of priorities a review and possible amendment of the guidelines for certain FDCA offenses.

Additionally, the FDA understands that the Commission is considering increasing the penalties for offenses involving anabolic steroids, and it believes increasing the penalties without simultaneously promulgating a guideline to address HDH violations would significantly undermine the congressional effort to crack down on the use of dangerous performance enhancing drugs. In the FDA's experience, the illegal use of anabolic steroids is often accompanied by the illegal use of HGH, and at the Commission's request, it is willing to provide additional information regarding this frequent association, the dangers associated with the illegal use of HGH and anabolic steroids, and any other information that would assist the Commission in this regard.

(The following is from FDA's public comment received March 2004):

Amendments to the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act (FDCA).

The Department of Health and Human Services (DHHS) requests the Commission consider amending the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act

(FDCA). The DHHS believes that the current guidelines do not treat criminal violations of the FDCA as significant threats to the public health and are ineffectual to deter such conduct. According to the DHHS, convictions under the FDCA typically result in little, if any, prison time.

The DHHS notes that FDCA crimes are governed by two sections of the guidelines, §§2B1.1 and 2N2.1. Section 2N2.1 applies to FDCA violations that do not involve fraud. The base offense level in §2N2.1 is 6, and there are no enhancements for specific offense characteristics. Accordingly, most sentences calculated under §2N2.1 are very low. Section 2N2.1 provides that, if the offense involved fraud, §2B1.1 applies. Like §2N2.1, §2B1.1 provides for a base offense level of 6. Section 2B1.1 includes various enhancements for specific offense characteristics. However, the DHHS argues that FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. In these cases, the sentence will be governed by §2N2.1, and prosecutors are likely to decline the case because the base offense level is 6 and there are no enhancements for specific offense characteristics. The DHHS also states that the cross-reference in §2N2.1 to §2B1.1 is not satisfactory in all cases because the latter section is intended to address economic fraud crimes. The DHHS believes that application of §2B1.1 is sufficient for crimes where the major offense conduct involves only pecuniary harm. The DHHS notes that, although FDCA offenses often cause pecuniary harm, the major factor in determining the sentencing range should be the degree of risk to the public health involved in the offense, not the pecuniary harm.

I. Counterfeiting

The DHHS notes that the Food and Drug Administration (FDA), a subsidiary of the DHHS, has seen a recent increase in counterfeit drug activity. According to the FDA, the distribution of counterfeit drugs creates a significant public health risk. Because of the difficulties in locating the actual counterfeiters, the FDA states that its ability to prosecute those who facilitate the distribution of counterfeit drugs by turning a blind eye to the source of their drugs is critical to their success in combating the counterfeit drug problem. The FDA notes that it is often difficult to prove that criminals, who acted as purveyors rather than manufacturers of counterfeit drugs, knew that the drugs were counterfeit and, therefore to demonstrate that the offenses involved the intent to defraud or mislead. Without proof of fraud, the base offense level for distributing counterfeit drugs in violation of 21 U.S.C. § 331(I)(3) is 6. The FDA believes that the guidelines should be amended to provide for more significant sentences for those offenders who claim ignorance that the prescription drugs they were distributing are counterfeit but who are, nevertheless, highly culpable because they failed to verify the legitimacy of the drugs.

II. Prescription Drug Diversion

The FDA also believes that strengthening the guidelines for offenses involving prescription drug diversions should be a priority. The FDA notes that illegal diversion of prescription drugs threatens the integrity of the nation's drug supply in several ways. In its view, many secondary

wholesalers operate outside the legitimate distribution system, do not have a license to engage in wholesale distribution of prescription drugs, and lack the training, facilities, and motivation to store and handle prescription drugs properly. The FDA also notes that the very existence of an unregulated wholesale submarket provides a ready path by which counterfeit, adulterated and expired drugs can enter the distribution chain.

The FDA notes that Congress recognized the dangers of prescription drug diversion and the secondary wholesale market when it enacted the Prescription Drug Marketing Act of 1987 (PDMA) to deter prescription drug diversion. The FDA believes that the current guidelines do not carry out the intention of Congress to provide for significant penalties without requiring a showing of fraud. Despite Congress's express mandate that these PDMA violations be punished more severely than other FDCA violations, the FDA argues that the guidelines treat all FDCA violations the same and provide for a base offense level of 6. The higher maximum penalties for these PDMA offenses come into play only when there is evidence of fraud and significant pecuniary loss under Section 2B1.1(b)(1). The FDA notes that these guidelines would not be problematic if these PDMA offenses frequently involved both fraud and significant pecuniary loss. However, the FDA's experience has shown otherwise. Therefore, the FDA urges the Commission to amend the guidelines to treat these PDMA offenses as serious offenses warranting prison time.

III. Other FDCA Violations

The FDA has noticed an increase in the distribution of human growth hormone for unapproved uses and requests that the Commission promulgate a guideline to address such offenses. The FDA notes that under 21 U.S.C. § 333(e), it is unlawful to knowingly distribute, or to possess with intent to distribute, human growth hormone for any use not approved by the FDA. The FDA further notes that the Commission has not yet promulgated a guideline to cover these human growth hormone offenses. The FDA believes that, as a result, the United States Attorney's Offices are reluctant to prosecute these offenses, because it is unclear how the offenses will be treated under the guidelines.

IV. Proposals for a New Sentencing Regime

The DHHS proposes the following suggestions to be considered in amending the guidelines:

1. provide a base offense level of 10 for felony offenses with a three year statutory maximum (those governed by 21 U.S.C. § 333(a)(2));

2. provide a base offense level of 12 for PDMA offenses with a ten year statutory maximum (those governed by 21 U.S.C. § 333(b)(1));

3. add specific offense characteristics to §2N2.1;

4. revise the enhancement at §2B1.1(b)(11) for offenses involving conscious or reckless risk of serious bodily injury to provide that the enhancement applies to defendants who knowingly divert prescription drugs in violation of the PDMA or distribute counterfeit drugs in violation of 21 U.S.C. § 331(I)(3);

5. revise §2B1.1 to provide an increase in the offense level to a minimum of 12 for FDCA offenses that involve fraud but do not involve significant monetary harm;

6. revise the application notes to §2B1.1 to provide that, for the purposes of calculating loss for offenses involving FDA-regulated products that are adulterated or misbranded within the meaning of the FDCA, loss includes the amount paid for the product, with no credit provided for the purported value of the product;

7. promulgate a guideline to address human growth hormone offenses in violation of 21 U.S.C. § 333(e), with a base offense level of 10, with incremental enhancements based on the amount of human growth hormone involved in the offense, and an additional enhancement for offenses that involve a person under 18 years of age;

8. provide enhancements for terrorism-related offenses, including the use of select agents to adulterate FDA-regulated products or the use of proceeds from FDCA offenses to finance terrorist organizations or criminal enterprises.

Issue No. 1(D) - Intelligence Reform and Terrorism Reform Act of 2004

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) states that it looks forward to working with the Commission to appropriately amend the guidelines as part of the implementation of the congressional directives to implement crime legislation such as the Intelligence Reform and Terrorism Reform Act of 2004, Pub. L. 108–458.

The DOJ urges the Commission to amend §3A1.4 to clarify the scope of cases where the enhancement is applicable and to therefore settle a circuit split. Section 3A1.4 provides an enhancement where a felony promoted a crime of terrorism. Citing several decisions where the courts arrive at different conclusions, the DOJ asks specifically that the Commission amend §3A1.4 to clarify that the defendant need not be convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offense of conviction or his relevant conduct to promote such a terrorism crime. By citing the case of *United States v. Jordi*, ___ F.3d ___, 2005 WL 1798055 (11th Cir. 2005), the DOJ

suggests a need for the Commission to clarify that §3A1.4 also applies to domestic terrorism cases.

Citing *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005), the DOJ further asks the Commission amend §3A1.4 to include attempts to obstruct terrorism investigations to the already proscribed conduct of actually obstructing a terrorism investigation.

Issue No. 1(E) - Other Legislation Requiring Incorporation into the Guidelines

No Comment Received for this Issue

Issue No. 2 - *United States v. Booker*

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) notes the Sentencing Commission's invaluable work in response to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and states that it looks forward to working with the Commission on this important matter, expressing its hope that the sentencing system that emerges from *Booker* preserves the protections and principles of the federal sentencing guidelines.

Practitioners' Advisory Group (PAG)
Co-Chairs Mark Flanagan and Gregory S. Smith
Washington, D.C.

The Practitioners' Advisory Group (PAG) asserts that federal legislation is not required to make sentencing procedures and standards consistent with the *Booker* court's remedial majority opinion. PAG contends that the advisory system should be given a chance to work before Congress initiates legislation proposing a *Booker* fix. PAG therefore concludes that this is an ideal opportunity for the Commission to collect and analyze sentencing data and other relevant information.

Timothy Demitri Brown
Prisoner

Mr. Brown comments that, in his opinion, the *Booker* ruling was erroneous. He believes that the Constitutional problem lies not with the mandatory nature of the sentencing guidelines, but rather with judicial fact finding by a preponderance of the evidence. Mr. Brown urges the Commission to "reinstate the guidelines as mandatory, but remove any rules that allow[] a Judge to find facts by any standard of evidence." Mr. Brown recognizes that *Booker* is not retroactive, but he requests that the Commission promulgate an amendment to allow sentences to be corrected under 18 U.S.C. § 3582.

Issue No. 3 - Immigration Offenses

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

Regarding immigration offenses, the Department of Justice (DOJ) is aware the Commission intends to continue its work, and it looks forward to working with the Commission to ensure appropriate immigration guidelines. Specifically, it urges the Commission to increase the applicable base offense levels for all passport offenses so that the penalties, in its view, more properly reflect the seriousness of the offense and their potential threat to national security.

Federal Public and Community Defenders (FPD)
Washington, D.C.

The Federal Public and Community Defenders (FPD) supports the Commission's proposed formation of an Ad Hoc Advisory Group on Immigration issues because it believes the group will provide the Commission expertise and insight into how the guidelines should treat such offenses. The FPD asserts it is critical that federal public defenders be represented on the advisory group because, as it states, the public defenders handle the overwhelming majority of immigration offenses. Further, in its view, the participation of public defenders on the advisory group will further the Commission's stated position to involve the FPD and other members of the defense bar in the Commission's work. Additionally, the FPD suggests the perspectives of public defenders from both "fast-track" and non "fast-track" districts should be included. Therefore, both Jon Sands, from the District of Arizona, and Margie Meyers, from the Southern District of Texas, would welcome the opportunity to work on the advisory group.

Issue No. 4 - Cocaine Sentencing Policy

Practitioners' Advisory Group (PAG)
Co-Chairs Mark Flanagan and Gregory S. Smith
Washington, D.C.

The Practitioners' Advisory Group (PAG) expresses continuing concern over the disproportionately long sentences for drug offenders, including those involving so-called "crack" cocaine, or "cocaine base." PAG argues that the current drug guidelines place undue emphasis on the quantity of drugs involved to the exclusion of situational and offender characteristics that are better indicators of culpability.

Kelby R. Franklin
Prisoner
Mr. Franklin requests that the Commission address the 100:1 sentencing ratio between crack cocaine and powder cocaine. He suggests that there are other, more effective, indicators of the seriousness of a crime, such as gun possession and career offender status. Mr. Franklin believes that, although courts should not "go easy" on drug offenders, justice is not served when first-time, non-violent drug offenders receive prison terms greater than many convicted murders and sex offenders. He observes that, "a society can be tough on crime without being cruel and unjust."

Issue No. 5 - Chapter Eight Attorney-Client Waiver and Work-Product Protections

American Bar Association (ABA)
Robert D. Evans

The American Bar Association (ABA) urges the Commission to retain the proposed priority to "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections" in the current amendment cycle. The ABA requests that the Commission amend the applicable language in the Commentary to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA notes that it has long supported the use of sentencing guidelines as an important part of our criminal justice system. To that end, in February 2005, the ABA House of Delegates met and reexamined the overall guidelines system in light of the recent *Booker* decision. At the conclusion of the process, the ABA adopted new policy recommending that Congress take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad

legislation is both necessary and likely to be beneficial.

At the same time, the ABA continues to have serious concerns regarding the recent amendments to Chapter Eight which took effect November 1, 2004. The most serious of these concerns involves the amendment to the Commentary to §8C2.5 that authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show "thorough" cooperation with the government and thereby qualify for a reduction in the culpability score – and a more lenient sentence – under the guidelines. Since this amendment has taken effect, the ABA reports it has evaluated the substantive and practical impact of the amendment on the business and legal communities, and has concluded that the new privilege waiver amendment will have a number of profoundly negative consequences.

The ABA believes that under the current language in the Commentary to §8C2.5 as a result of the privilege waiver amendment, companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis. From a practical standpoint, the ABA believes that companies will have no choice but to waive these privileges whenever the government demands it because the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

The ABA further argues that the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers, resulting in great harm to both companies and the investing public. In its view, in order for lawyers to help organizations comply with the law, they must enjoy the trust and confidence of the managers, boards and other key personnel of the entity and must be provided with all relevant information. The ABA contends that by authorizing routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within organizations from consulting their lawyers. The ABA believes that this seriously impedes the lawyers' ability to effectively counsel compliance with the law.

Additionally, the ABA asserts that the actual effect of the privilege waiver is to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures because the effectiveness of these internal investigations depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation. Therefore, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early.

Further, the ABA believes that the privilege waiver amendment unfairly harms employees by placing employees of an organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and run the risk that statements made to the organization's lawyers will be turned over to the government by the organization, or they can decline to cooperate and risk their employment. The ABA stresses that it is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

The ABA also notes that in a letter to the Commission on March 3, 2005, a remarkably politically and philosophically diverse coalition of organizations have expressed similar concerns. The ABA believes that this is indicative of just how widespread these concerns have become in the business, legal, and public policy communities.

In conclusion, the ABA recommends that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known to the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below. If its recommendations were adopted, the ABA suggests the relevant portion of the Commentary would read as follows:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether ~~a prerequisite to~~ a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted ~~unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.~~"*

American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, The U.S. Chamber of Commerce, Washington Legal Foundation (The "Coalition")

Similar to the American Bar Association, the above Coalition urges the Commission to retain the proposed priority to "review, and possible amendment, of commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections"

for this amendment cycle. It further requests that at the end of this process, the applicable language in the Commentary be amended to clarify that waiver of the attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The Coalition indicates that since the adoption of the work product and attorney-client privilege waiver language in the §8C2.5 Commentary, a broad cross-section of organizations has evaluated the substantive and practical impact of the waiver provision on their operations. According to the Coalition, this evaluation shows profoundly negative unintended consequences. The Coalition argues that removing the protections of privilege from the organizational context make it far more difficult for companies to detect employee wrongdoing when it occurs and correct it early. The Coalition believes that the Justice Department will contend that the change in the Commentary provides Congressional ratification of the Department's policy of routinely requiring privilege waivers. Practically speaking, the Coalition thinks that organizations will have no choice but to waive privileges whenever the government demands it.

Additionally, the Coalition argues that the amendment unfairly harms companies in the following ways: (1) the amendment weakens the attorney-client privilege between companies and their lawyers and impedes the lawyers' ability to effectively counsel compliance with the law, (2) the amendment undermines internal compliance programs which rely on ability of individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, and (3) the amendment unfairly harms employees by forcing them to either cooperate with an investigation and risk having their statements to the company's lawyer turned over to the government or they can decline to cooperate and risk their employment.

The Coalition points out that *Booker* did not alleviate the problems caused by the privilege waiver amendment because the courts still must consider the guidelines. Therefore, the Coalition contends that the privilege waiver amendment will continue to cause adverse consequences as long as it remains in place.

The Coalition requests that the Commission amend the Commentary of §8C2.5 to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the guidelines is warranted for cooperation with the government. To accomplish this goal, the Coalition submits the following recommendation for the amendment of the Commentary:

12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be

measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not a factor in determining whether ~~a prerequisite to~~ a reduction in culpability score under subdivisions (1) and (2) of subsection (g) is warranted ~~unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.~~*

Former Department of Justice Officials
Griffin B. Bell, Attorney General 1977-1979
Carol E. Dinkins, Deputy Attorney General 1984-1985
Theodore B. Olson, Solicitor General 2001-2004
Stuart M. Gerson, Acting Attorney General 1993, Assistant Attorney General 1989-1993
George J. Terwilliger III, Deputy Attorney General 1991-1992
Kenneth W. Star, Solicitor General 1989-1993
Edwin Meese III, Attorney General 1985-1988
Seth P. Waxman, Solicitor General 1997-2001
Dick Thornburgh, Attorney General 1988-1991

The former Department of Justice (DOJ) officials are pleased that the Commission has included the recent amendment to the Commentary to §8C2.5 on its list of tentative priorities for the upcoming amendment cycle. The officials believe that this new amendment is eroding and weakening the attorney-client and work product protections afforded by the American system of justice, and they urge the Commission to address and remedy this amendment as soon as possible.

The former officials are concerned that the current Department of Justice is contending that this amendment to the Commentary of the guidelines provides Congressional ratification of the Department's policy of routinely asking that the privilege be waived. In practice, the former officials assert, companies are finding that they have no choice but to waive these privileges whenever the government demands it.

The former DOJ officials appreciate and support the Commission's ongoing efforts to amend and strengthen the guidelines in order to reduce corporate crime. However, they believe that the privilege waiver amendment, though well-intentioned, is undermining rather than strengthening compliance with the law.

The privilege waiver discourages corporate personnel at all levels from consulting with counsel on close issues, according to the former DOJ officials. They further assert that the privilege waiver makes detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures.

Finally, the former officials are concerned that the privilege waiver amendment will encourage excessive "follow-on" civil litigation, because in most jurisdictions, waiver of attorney-client or work product protections for one party constitutes waiver to all parties, including subsequent civil litigants.

Daniel E. Lungren
Member of Congress

Representative Daniel E. Lungren is a member of the House Judiciary Committee and its Subcommittee on Crime, Terrorism and Homeland Security, and he states that he played an active role in the adoption of the Sentencing Guidelines statute. He is also a former California Attorney General. Representative Lungren believes that the Commentary to §8C2.5 threatens to erode the long-standing attorney-client and work product protections afforded under our system of justice, and he is concerned that the amendment process does not provide a more timely remedy to the problem. Therefore, he requests hearing the Commission's thoughts about possible ways to address this problem more urgently.

Representative Lungren is concerned that the privilege waiver amendment might erroneously be viewed as Congressional ratification of the Justice Department's internal policy of requiring companies to waive privileges in certain cases as a sign of cooperation. He indicates that he has been informed that, in practice, companies are finding that they have no choice but to waive these privileges whenever the government demands it.

Representative Lungren appreciates the Commission's ongoing efforts to amend and strengthen the Sentencing Guidelines in order to reduce corporate crime. He emphasizes that creating incentives to increase the practice of corporate ethics and legal compliance is imperative. However, he asserts that the privilege waiver amendment is likely to undermine rather than strengthen compliance with the law.

According to Representative Lungren, the privilege waiver amendment seriously weakens the attorney-client privilege between companies and their lawyers and undermines their internal corporate compliance programs, resulting in great harm to the public. Further, he believes that the amendment authorizes the government to demand waiver of attorney-client and work product protections on a routine basis, and therefore discourages entities from consulting with their lawyers. In turn, the Representative contends, this impedes the lawyers' ability to effectively counsel compliance with the law or quickly detect and remedy misconduct.

Representative Lungren also expresses his concern that the privilege waiver amendment will encourage excessive civil litigation. He notes that in California and most other jurisdictions, waiver of attorney-client or work product protections in one case waives the protections for all future cases, including subsequent civil litigation matters. Therefore, Representative Lungren

indicates that forcing organizations to routinely waive their privileges during criminal investigations will result in the waiver of those privileges in subsequent civil litigation as well. As a result, the Representative asserts that companies are unfairly forced to choose between waiving their privileges and placing their employees and shareholders at an increased risk of costly civil litigation, or retaining their privileges and then facing the wrath of government prosecutors.

Representative Lungren notes that his concerns are shared by many former senior Justice Department officials, including former Attorneys General Ed Meese and Dick Thornburgh, former Deputy Attorneys General George Terwilliger and Carol Dinkins, former Solicitors General Ted Olson, Seth Waxman and Ken Starr, who he reports have submitted their own public comment.

Representative Lungren, therefore, requests that the Commission retain the possible amendment of the Commentary to §8C2.5 as a priority for this amendment cycle. He indicates that the new amendment should state affirmatively that waiver of attorney-client and work product protections should not be a mandatory factor for determining whether a sentencing reduction is warranted for cooperation with the government during investigations. Further, because he believes that the current privilege waiver language in the Commentary to the guidelines will continue to cause problems until it is removed and understands that no new amendments will become effective prior to November 1, 2006, in a regular amendment cycle process, Representative Lungren requests the Commission's thoughts regarding any additional remedies, legislative or otherwise, that could resolve the problem promptly.

New York State Bar Association
Michael J. Holliday
Chair, Committee on Securities Regulation
Albany, NY

Michael J. Holliday writes on behalf of the New York State Bar Association's Business Law Section's Committee on Securities Regulation, the Commercial and Federal Litigation Section's Executive Committee, and the Corporate Counsel Section's Executive Committee; (the "Committees").

The Committees write to express their concern about the commentary to §8C2.5 concerning waiver of the attorney-client privilege and work product protections. The Committees asserts that the purpose and value that the client-attorney privilege accords society outweighs the intended purpose and value of the privilege's waiver as contemplated by §8C2.5's Commentary. They remind the Commission that this privilege may date back to early Roman times and it was certainly recognized in legal decisions of the Elizabethan Era (1558-1603). The privilege benefits society, the Committees observe, because it helps create the trust that must exist between a client and attorney in order to encourage open and full discussion with counsel. Not only does

the privilege encourage open communication, but it may also lead to advice to avoid conduct that the client might have otherwise undertaken in possible violation of the law, the Committees add. The Committees note that while the language of the commentary is couched in terms of the waiver being required only if necessary to provide pertinent information, they believe the commentary offers no protections if a prosecutor feels obligated to press for waiver to assure they find out as much as possible. Accordingly, the Committees urge the Commission to eliminate the commentary and instead include an express statement that waiver of the attorney-client privilege and of the work product protection is not required for a reduction in culpability score.

In conclusion, the Committees express the belief that the requirement that a company waive the attorney-client privilege for a reduction of culpability is a mistake and notes the strong opposition to this requirement by the American Bar Association, the American Chemical Council, the Association of Corporate Counsel, Business Civil Liberties, Inc., Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the U.S. Chamber of Commerce, the Business Roundtable, the National Association of Manufactures, and the American Civil Liberties Union; (the "Coalition" submitted a separate comment to the Commission and it is included in this section).

Workplace Criminalistics and Defense International (WCDI)
L.A. Wright, Legal Criminalist/Consulting Expert

The Workplace Criminalistics and Defense International (WCDI) renews its belief, stated in a Public Comment to the Commission dated February 27, 2004, that internal detection and appropriate remedial action must be key components in any compliance program. Further, the WCDI goes on to assert that neither internal detection nor appropriate remedial action can function properly in the workplace when attorney-client privilege and work product protections are compromised at the expense of seeking a criminal conviction.

The WCDI commends the Commission on its efforts to elicit the corporate responsibility of organizations by promulgating more stringent guidelines. However, the WCDI emphasizes that without internal detection and appropriate remedial action utilizing attorney-client privilege and the work product privilege, the Commission injects criminal law into an otherwise civil law workplace that, in its view, pits employees against management, law enforcement against corporations and in-house/outside counsel against the officers of the corporations it represents. Therefore, the WCDI recommends that the Commission make the review and possible amendment to the commentary in Chapter Eight (Organizations) regarding waiver of the attorney-client privilege and work product protections a priority.

The WCDI offers suggestions of possible amendments to Chapter Eight which it believes foster internal detection and appropriate remedial action:

Introductory Commentary to Chapter 8:

Amend the end of the third general principle as follows:

> "Culpability generally will be determined by seven factors ... The three factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; (ii) the completion of an internal investigation as a component of appropriate remedial action once possible criminal conduct is detected; and (iii) self-reporting, cooperation, or acceptance of responsibility."

Insert Section 8B2.1(5)(D) as follows:

> "(D) to implement internal detection and appropriate remedial action measures that protect attorney-client and work product privileges until such time as it is determined that reportable criminal conduct has occurred."

Insert at the end of Section 8C2.5(f)(1) as follows:

> "... only if the organization conducted an internal investigation as a component of appropriate remedial action once the criminal offense was discovered."

Section 8C2.5 Commentary / Application Notes as follows:

Insert within Commentary 12 as follows:

> "A prime test ... is whether the organization conducted an internal investigation as a component of appropriate remedial action that detected reportable criminal conduct and the ...."

Amendment to the end of Commentary 12 as follows:

> "Waiver of attorney-client privilege and of work product protections shall not be a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) when the organization conducted an internal investigation as a component of appropriate remedial action."

Issue No. 6 - *Braxton v. United States* Circuit Conflict

No Comment Received for this Issue

Issue No. 7 - Sentencing Table Levels

No Comment Received for this Issue

POSSIBLE PRIORITY ISSUES

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

Gun Trafficking

Citing statistics showing the illegal diversion of firearms out of lawful commerce is frequently the source of firearms used in violent crimes, the Department of Justice (DOJ) believes that the guidelines do not currently treat firearms trafficking in a manner that recognizes the harm it causes. To address this, the DOJ recommends a new specific offense characteristic at §2K1.1 based on firearms trafficking conduct. Such a guideline, the DOJ continues, could provide for a new scale of enhancements specifically applicable to firearms trafficking. The DOJ suggests that the Commission should also consider increasing the enhancements at §2K2.1(b)(4) for stolen firearms and firearms with altered or obliterated serial numbers, as in its view these offenses are often committed in the furtherance of firearms trafficking.

Downward Departures in Gun Cases

The DOJ reiterates its request that the Commission address downward departures for felons who possess guns based on the court's findings that the defendant would not have done anything illegal with the gun. Further, the DOJ notes that the courts rely on §5K2.11 and United States v. *White Buffalo*, 10 F.3d 575, 576-577 (8th Cir. 1993), a case not involving a felon in possession, to make these downward departures. It is the DOJ's position that §5K2.11 and *White Buffalo* should not apply in cases involving felons who possess a gun and that such an application of a downward departures pursuant to §5K2.11 goes directly against the purpose of the prohibition of firearms possession by a felon: To prevent persons who have demonstrated an inability to conform their conduct to the law from having control of lethal weapons.

In addition, the DOJ asks the Commission to consider whether downward departures should be permitted on the basis of injuries sustained by a defendant after he threatens a police officer with

deadly force and is subsequently shot by such officer. Citing *United States v. Clough*, 360 F.3d 967 (9th Cir. 2004), where the defendant received a downward departure after assaulting officers with a sawed-off shotgun and being subsequently shot by the officers, the DOJ asks the Commission to clarify if a downward departure is permitted under such circumstances.

Miscellaneous

The DOJ states although it understands the work in response to *Booker* will consume a great deal of time, it would like the Commission to consider other important issues that in its opinion warrant consideration either during this amendment cycle or in the future, such as: (1) creating a guideline for violations of the foreign agent notification offense found at 18 U.S.C. § 951, which has no direct or clearly analogous guideline provision, resulting in a disparity in the sentences received by defendants convicted of the offense; (2) adding an enhancement to §2T1.4 to address violations of 26 U.S.C. § 7206(2) (aiding and assisting in the filing of false returns, statements or other documents) in cases involving high volumes of tax returns, such as in abusive tax shelter programs or fraudulent tax return schemes; and (3) addressing the guidelines for trafficking of British Columbia or "B.C. Bud" marijuana, which is five times more potent than regular marijuana (based on THC levels), has a higher monetary value and, consequently, the DOJ asserts, should not be equated to marijuana for sentencing purposes.

Committee on Criminal Law (CLC)
Of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

Sentencing Guideline Simplification

The Committee on Criminal Law (CLC) comments that it has voted unanimously to reiterate its request from its testimony in November 2004 that the sentencing guidelines be simplified. According to the CLC, in 1995 the Commission began investigating how the guidelines could be streamlined or simplified. The CLC reminds the Commission that then-Commission Chair Judge John Conaboy determined a need for the Commission to take a hiatus from the amendment process in order to allow the Commission to focus on an extensive assessment of the sentencing guidelines. However, according to the CLC the review effort was never completed due to turnover in Commissioners.

The CLC notes that while the sentencing guidelines are now advisory, courts continue to calculate the guidelines, and it believes simplification would ease that calculation process. Further, the CLC remarks that simplification of the guidelines will "greatly assist judges in complying with *Booker*." Therefore the CLC concludes that it hopes that the Commission will consider simplification of the guidelines as a priority for this amendment cycle, and states it is ready to assist in this effort.

Federal Public and Community Defenders (FPD)
Phoenix, Arizona

CAN SPAM Act of 2003

Federal Public Defender Jon Sands submits comments on behalf of the Federal Public and Community Defenders (FPD) on the CAN SPAM Warning Label Offense. Section 5(d)(1) of the Act makes it a crime to send "sexually orientated" material without warnings or notices via electronic mail. It is the FPD's understanding that the only issue the Commission needs to resolve on this point is whether to incorporate this provision into an existing guideline or create a new one. The FPD states that this provision does not comfortably fit into any of the existing guidelines because it does not involve a "victim," does not involve material that is necessarily obscene or child pornography, and is essentially a regulatory offense. The FPD concludes that a new guideline should be promulgated and recommends it be placed at §2G4.1.

American Bar Association
Corrections and Sentencing Committee
James E. Felman, Co-Chair
Todd A. Bussert, Co-Chair

Compassionate Release

The American Bar Association's Corrections and Sentencing Committee ("Committee") urges the Commission to add compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) to its list of priorities for the current amendment cycle.

The Committee notes that the enclosed previous letters to the Commission illustrate the Committee's longstanding concern on this issue. Since its last letter, the Committee states that in August 2004, the ABA House of Delegates adopted a recommendation from the Justice Kennedy Commission supporting expanded use of sentence reductions pursuant to § 3582(c)(1)(A), and urging the Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances."

The Committee expresses its feeling of discouragement at the Commission's decision to remove this issue as a priority from this years list. The Committee believes that *Booker* does not obviate the need for continued attention to compassionate release.

According to the Committee, the federal prison population has more aged and infirm inmates vying for beds in chronically overcrowded institutions. The Committee further notes that the Bureau of Prisons is faced with mounting budget problems, yet it remains relatively reluctant to employ its § 3582(c) authority. The Committee argues that a lack of policy guidance from the Commission may account, in part, for the Bureau's conservative tack.

In closing, the Committee asserts that they are ready to assist the Commission in any way..

Margaret Colgate Love
15 Seventh Street, N.E.
Washington, D.C. 20002

Compassionate Release

Ms. Love, chair of the ABA Corrections and Sentencing Committee, writing in her personal capacity requests that the Commission add to its list of priorities the development of guidance for the issuance of sentencing reduction orders under the compassionate release provision at 18 U.S.C. § 3582(c)(1)(A)(i). Ms. Love states the Commission addressed her previous requests in 2004 and 2005 by adding the issue to its priorities list. Ms. Love hopes the work generated during the last two years will not be abandoned, but notes this issue is not listed as a priority on the current list.

Ms. Love appreciates that there is debate regarding whether this issue is one of sentencing or prison administration. She believes, however, the Commission has a responsibility to provide guidance on this issue under its original mandate in 28 U.S.C. § 994(t). Furthermore, Ms. Love asserts the issue implicates many concerns under 18 U.S.C. § 3553 which she believes puts it squarely in the Commission's domain. She warns that without guidance BOP is reluctant to expand the reach of "extraordinary and compelling reasons" beyond the clearly identifiable case of imminent death, and that BOP has become more reluctant to use its authority under this statute over the years. Ms. Love offers her services in an advisory role if a lack of resources is the reason for excluding the issue from among the Commission's priorities.

Stephanie Thomas
South Florida Municipal Clerk

Compassionate Release

Ms. Thomas believes that the Commission should continue work on cocaine sentencing policy as it pertains to first time offenders. Ms. Thomas believes that the sentencing for first time offenders should be less stringent and should concentrate more on rehabilitation, and questions why the guidelines continue to support differential treatment between cocaine and crack. Ms. Thomas further states that judges are a representative of the people and she hopes they impose adequate sentences that maintain a balance of all 18 U.S.C. § 3553(a) factors.

Practitioners' Advisory Group (PAG)
Co-Chairs Mark Flanagan and Gregory S. Smith
Washington, D.C.

1) Mandatory Minimums

Recalling the Commission's 1991 publication, Mandatory Minimum Penalties in the Criminal Justice System, the Practitioners' Advisory Group (PAG) asserts that it is time for the Commission to consider a fresh look at mandatory minimums. Noting that a new study of mandatory minimums would mirror the recently completed 15-year study of the Guidelines, PAG argues that an updated study and report is urgently needed to provide relevant empirical information and policy insights.

2) Extraordinary and Compelling Circumstances: Sentence Reduction Under 18 U.S.C. §3582(c)(1)(A) ("Compassionate Release")

The PAG calls on the Commission to develop policy guidance for courts and others considering sentence reduction motions under § 3582(c)(1)(A)(i), as provided in 28 U.S.C. § 994(t). The PAG urges the Commission to promulgate a policy statement that includes both medical and non-medical examples of "extraordinary and compelling reasons" that potentially justify a sentence reduction. Arguing that Congress granted broad authority for sentence reductions under § 35282(c)(1)(i), PAG states that the Bureau of Prison's (BOP) narrow interpretation of the statute would be better informed through policy guidance provided by the Commission. The PAG suggests that the Commission eschew rigid categories of eligibility, and instead promulgate criteria, content, and examples which the BOP may use in exercising its discretion.

3) Chapter 6, Recommendation to the Federal Rules Advisory Committee

The PAG believes that the existing Federal Rules of Criminal Procedure should better reflect and improve practice under the sentencing guidelines. While PAG recognizes that the Rules are not directly within the Commission's scope of authority, it contends the Commission should provide input within its own Judicial Branch and recommend that the Federal Rules Advisory Committee study and potentially revise rules which directly affect sentencing practice and procedure. The PAG further submits that the Commission suggest practice and policy matters through an amendment to its policy statements in Chapter 6.

a) Disclosure of Sentencing Facts

Sentencing practice and procedure, PAG contends, would benefit from greater disclosure of facts affecting guideline calculation between and among the defendants and the government. PAG is troubled by the fact that the government is not required to disclose to defendants any facts affecting the application of the guidelines, even after the entry of a guilty plea. The PAG states that the ex parte presentation of evidence relevant to guideline calculation is not consistent with

an appropriate adversarial system, and urges the Commission to consider making formal recommendations to change the Federal Rules of Criminal Procedure in this area.

b) Appeal Waivers

The PAG argues that the Commission should consider revising Chapter 6 to strongly discourage waivers of appeal. PAG contends that plea agreements with one-sided appeal waivers result in injustice and damages the system as a whole by skewing the case law in the government's favor, thwarting the rational development of the guidelines, and promoting unwarranted disparity.

4) Criminal History

While applauding the Commission on its ongoing review of criminal history, PAG expresses concerns that criminal history may be overstated through the inclusion of minor matters that do not serve the predictive or punitive functions of criminal history. Pointing to variations in state and local sentencing practices for minor offenses, PAG, echoing recommendations made by the Probation Officers' Advisory Group, argues that the offenses listed in §4A1.2(c)(1) should be excluded regardless of the sentence imposed to avoid uncertainty and unfairness in application of the criminal history guidelines. PAG also contends that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and, while reiterating a previously proposed expansion of Zones B and C, PAG further suggests the creation of a new criminal history category 0. PAG also states that the Commission should consider obtaining and reviewing data regarding recidivism by first-time offenders punished by alternatives to incarceration to determine the success of alternative punishment for first-time offenders. PAG believes that such data will demonstrate the success of alternative punishment, and cites studies that have refuted, in the white-collar context, the notion that long-term punishment has a general deterrent effect.

5) Relevant Conduct, Cross References

As suggested in an article published by the American College of Trial Lawyers, PAG recommends a number of reforms to the relevant conduct category: eliminating the consideration of acquitted conduct, limiting the increases for uncharged and dismissed conduct, eliminating the application of certain cross references, clarifying and narrowing the definition of liability for the conduct of others, utilizing at least a clear and convincing standard of proof, but preferably beyond a reasonable doubt, to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. PAG argues these reforms honor the due process concerns that informed the *Booker* opinion and restore the procedural safeguards previously absent under the mandatory guidelines system.

6) Drug Offenses

PAG also advocates applying retroactively the recent amendment replacing the role cap for low-level drug offenses. PAG contends that the rational for applying the amendment prospectively

hold especially true for those already imprisoned. PAG further states that a court can easily adjust the base offense level of an already sentenced defendant by using the sentencing record and simply reducing the sentence by the indicated number of levels.

Families Against Mandatory Minimums (FAMM)
Julie Stewart, President
Mary Price, General Counsel

Families Against Mandatory Minimums (FAMM) requests that the Commission consider adding two projects to the priorities for the current amendment cycle: an updated report on mandatory minimum sentencing and guidance for judges considering compassionate release.

Mandatory Minimums

FAMM notes that in its view, the Commission's report on mandatory minimums will be fifteen years old in 2006, and it remains the best and most comprehensive treatment of the subject. FAMM believes that both the report's age and the current state of sentencing suggest that an update is in order. Since the report's release, FAMM observes, many new mandatory sentences as well as the Safety Valve provision have been adopted, which it states are important new developments that warrant study. Further, FAMM comments that since *Booker*, some members of Congress have used mandatory minimum sentencing as a proxy for a "*Booker* fix." According to FAMM, it is widely understood that these mandatory minimum penalties are considered by many as necessary in light of the relaxed requirements on judges following *Booker*. On the other hand, FAMM points out that other members of Congress are now questioning mandatory minimum sentences. FAMM believes that this political climate calls for a fresh look at the issue of mandatory minimums.

Compassionate Release

FAMM additionally reminds the Commission that it has repeatedly requested that the Commission consider guidance for judges considering compassionate release. FAMM also notes that, aside from the fact that the Commission has been directed by the Sentencing Reform Act to consider this issue, it is particularly necessary at this time when the prison population is growing and aging. In FAMM's opinion, the Commission's contribution could have a significant impact on how the federal Bureau of Prisons treats petitions for compassionate release. FAMM asserts that the Commission's failure to speak on compassionate release sends a message that the practice is unimportant.

In closing, FAMM applauds the Commission's commitment to continued work on cocaine sentencing policy. FAMM notes that the 2002 hearings and reports were outstanding, and that it relies on both frequently in its work.

The Sentencing Project
Washington, D.C.

The Sentencing Project ("the Project") derives much of its comment from the Commission's Fifteen Years of Guideline Sentencing Report (the "Report") and believes that the Report brought to light the racial impact of four factors which merit further attention during this amendment cycle; mandatory minimums, plea bargaining, substantial assistance departures, and Criminal History and Career Offender Enhancements. Further, the Project urges the Commission to develop a process of analyzing the future racial and ethnic impact of all proposed changes and to include a "Racial/Ethnic Impact Statement" with all amendments to Congress.

Mandatory Minimums

The Project notes that in its belief, the inflexibility of mandatory minimums has had a particularly harsh impact on drug offenses, where factors such as individual criminal history and role in the offense, which would be considered under the guidelines, are ignored in determining sentences. Additionally, the Project points out that the Report shows mandatory minimums have been shown to have a disproportionate impact on African Americans. In its view, because 81% of those convicted of crack offenses in 2003 were African American, the high mandatory sentences which judges are required to impose in these cases have a racially disproportionate impact on sentencing. The Project also cites to the 2004 Sourcebook to the Annual Report to state that crack defendants are far less likely to be offered any safety valve relief and are less likely to receive mitigating role adjustments. Therefore, the Project states it joins Families Against Mandatory Minimums in urging Congress to undertake a new, comprehensive study of the effect of mandatory minimums, updating the work completed for the 1991 report, Mandatory Minimum Penalties in the Federal Criminal Justice System. In its view, a comprehensive study of mandatory minimums is timely because policymakers and legal authorities have suggested expanding the available mandatory minimums as a statutory fix to the *Booker* decision. Therefore, according to the Project, it is imperative that as much as possible be made known about the short- and long-term consequences of such an expansion.

Plea Bargaining

The Project states that there is a significant proportion of adjudications coming from guilty pleas, and cites to the 2004 Sourcebook to the Annual Report to note that the number of guilty pleas has fluctuated between 94.6 and 97 percent from 1999 to 2003. Therefore, it asserts that it is imperative that the Commission gain an intimate familiarity with the plea bargain process and to be able to identify and document the means by which the proceedings operate. The Project notes some variation in the rate of pleas by region and offense type, and cites to the Report, stating the plea bargaining is re-introducing disparity into the system. Because of the scarcity of studies on plea bargaining practices, and given that African Americans were more likely to receive a mandatory minimum and less likely to be offered a plea below the mandatory minimum, the Project believes it would be valuable for the Commission to collect and analyze the use of guilty pleas by race.

Use of Substantial Assistance Departures

The Project, again citing to the 2004 Sourcebook, states that the number of substantial assistance departures varies among circuits, and points out there is also a substantial inter-district variation. In its view, this variance indicates that the prosecutor's decision to recommend a §5K1.1 departure, as well as a judge's discretion to consider it at sentencing, introduces ample opportunity for disparatity which will impede the goals of the SRA to achieve uniformity at sentencing. Further, the Project points out that the Report noted the extent of these departures is more significant than other ways of varying sentences. The Project opines that as with the use of plea bargains, there is no understanding of any potential interaction between race and §5K1.1 departures. In its view, the complex issues involved are difficult to address based on available information, and thus it believes the Commission should develop a data collection protocol that will allow analysts to address the questions.

Criminal History and Career Offender Enhancements

Commenting that the Report notes that more than half those sentenced under §4B1.1 were African American, the Project posits that the guideline is having a disproportionate impact on Black defendants, primarily through policy decisions regarding law enforcement and arrest patterns, and that this impact creates variability in the racial distribution of sentencing. Further, it states that according to the Report, the majority of the impact of the Career Offender enhancement comes as a result of drug sales, but asserts that research suggests this is not an accurate reflection on use and sales rates. The Project relates a number of studies that it states suggest the decision of local law enforcement agents on where to best pursue the war on drugs is a far better predictor of arrest and incarceration patterns than it is on general drug use. As an example, the Project points to a study by the National Survey of Drug Use and Health which it states shows that African Americans represent approximately 14% of regular illicit drug users, which is nearly the same proportion they represent in the general population. Additionally, the Project suggests there is research indicating that people are more likely to purchase drugs from persons of the same racial background. However, according to the Project, arrest and incarceration figures are higher for African Americans, and the rate of Black federal drug defendants is more than double their representation in the population.

In its view, these law enforcement patterns will have a profound effect on racial disparity in sentencing, and therefore the Project recommends that the Commission evaluate the impact of these policies on criminal history scores and analyze the degree to which §4B1.1 has exacerbated racial disparity in the federal system.

Establishment of "Racial/Ethnic Impact Statements"

The Project urges the Commission to develop a standardized protocol in which it states regular "Racial/Ethnic Impact Statements" will be produced to evaluate the future impact of proposed modifications to sentencing law. It suggests that the impact statements would function similarly to a fiscal impact statement appended to state and federal legislation. The Project opines that had

the Commission prepared such an impact statement prior to the drug sentencing bills in 1986 and 1988, Congress might well have been prompted to engage in a close review of sentencing alternatives, that in its view, would not have produced the same degree of racial disparity.

Other Adjustments and Enhancements

Finally, the Project states the Commission should investigate the use of mitigating and aggravating factors that are eligible for judicial consideration during sentencing, and document any racially disparate effects.

Michael H. Marcus, Judge
Circuit Court of the State of Oregon

Revision of Sentencing Guidelines to Focus on the Reduction of Crime

Judge Marcus urges the Commission to revise the sentencing guidelines so that they focus on a reduction of crime. Judge Marcus explains that he is neither calling for more severe nor more lenient punishment, but rather a smarter approach to sentencing. He believes that the Commission can identify program characteristics that correlate with substantial reductions in recidivism, and use those in the sentencing scheme. Judge Marcus further explains that this is not merely a struggle between rehabilitation and incarceration. In his view, a responsible criminal justice system goes far beyond accepting a "just desserts" calculus for using the multitude of resources available (treatment, alternative sanctions, supervision, and incarceration). Rather, Judge Marcus continues, a responsible criminal justice system does its best to learn which responses are most likely to reduce the total risk of harm posed by an offender over the course of a potential criminal career, and applies that learning within the limits of proportionality and resources.

Judge Marcus points to Virginia's sentencing commission as a model for the focus he advocates. Judge Marcus states that Virginia's commission studied, refined, and validated a defendant's risk assessment for recidivism, and then incorporated that risk assessment into the guideline calculation. For example, Judge Marcus reports that Virginia now sentences sex offenders with a higher risk of recidivism to far longer sentences than sex offenders who pose a lesser risk. Without such efforts to consider risk, Judge Marcus believes that public safety is not being served, and that avoiding accountability for crime reduction is irresponsible. He opines that while there is social value to develop a metric for calculating "just desserts" based on present and past crimes, the actual range of "just punishment" is really quite wide. Therefore, Judge Marcus argues, the Commission should not rely on matrices that ignore the important variable of public safety. Judge Marcus further notes that Oregon has recently pledged to take similar steps to make crime reduction a focus of the sentencing guidelines.

In conclusion, Judge Marcus submits that the highest calling of sentencing commissions is to promote sentencing laws and practices that pursue best efforts at crime reduction with at least the

same vigor that they pursue adherence to a matrix of expected severity. Finally, Judge Marcus closes his comment with a list of sources where he expands on the foregoing points and offers to provide further information or assistance on these issues, including Oregon's statutory response to *Blakely*, in which he participated.

Kelby R. Franklin
Prisoner

Relevant Conduct/Aggregation Rule

Mr. Franklin indicates that he has been a federal prisoner for drug crimes for nearly ten years. He explains that his guideline range of 12-16 months was increased to life imprisonment by judicial fact finding under the preponderance of the evidence standard. Mr. Franklin urges the Commission to address the relevant conduct/aggregation rule, which he believes to be subject to much error and can increase a defendant's sentence a hundred-fold. Further, Mr. Franklin asserts that for too long, sentencing judges have been permitted to approximate uncharged drug amounts under the preponderance of the evidence standard, and use those amounts to increase sentences. Mr. Franklin requests that the Commission adopt a heightened standard of proof for facts used for sentence enhancements, and that this standard be retroactive. Although Mr. Franklin acknowledges that *Booker* has changed the sentencing system, he asserts that, if not properly restricted, the relevant conduct/aggregation rule "still has the potential of circumventing *Booker*'s substantive holding."