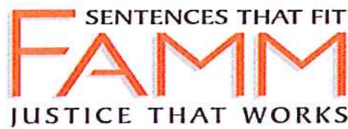

July 23, 2012

Hon. Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Request for public comment, notice of proposed priorities.

Dear Judge Saris:

FAMM welcomes this opportunity to comment on the United States Sentencing Commission's proposed priorities for the 2013 amendment cycle.

Priority (1): Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, and to develop appropriate guideline amendments in response to any related legislation.

FAMM generally supports the Commission's proposal to promote the reforms to statutory mandatory minimums set out in the Commission's 2011 report to Congress. The Commission's 1991 critical report on mandatory minimums spurred some reforms including passage of the statutory safety valve.[1] As the Commission's latest report demonstrates, reform is now more than ever necessary. The report concluded that mandatory minimums by virtue of their structure and severity cannot result in a reasonable sentence in every case.[2] We could not agree more.

However, we take exception with several recommendations, especially one that seeks legislation that would impair the ability of judges to exercise their discretion at sentencing. And we are disappointed that the Commission believes that mandatory minimums should be improved rather than eliminated. The Commission urges Congress, should it choose to enact new mandatory minimums, to ensure they are "narrowly tailored," not "excessively severe," and "applied consistently." This conclusion is striking, given its inherent unenforceability and the widespread disapproval of mandatory minimums by numerous stakeholders in the criminal justice system. We are sorely disappointed that the Commission has backed off its well-known condemnation of mandatory minimums.

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[1] *See* 18 U.S.C. § 3553(f) (2006).
[2] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 346 (Oct. 2011). ("2011 MANDATORY MINIMUM REPORT").

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Despite our concerns, we feel that many of the Commission's proposals to reform mandatory minimums would result in positive outcomes, lowering the number of people sent to prison by judges without discretion.

Expanding the Safety Valve.

1. *To more offenses.*

As the Commission argued before to Congress, the safety valve reflected a desire to allow flexibility in sentencing for the least culpable drug offenders.[3] This logic should be applied more broadly, as other nonviolent and low-level offenders continue to face unduly harsh mandatory minimums, and long guideline sentences.[4] Therefore, we applaud the Commission's recommendation to Congress to "consider whether a statutory 'safety valve' mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent drug offenders convicted of other offenses carrying mandatory minimum penalties."[5]

The Commission found that some mandatory minimums are set too high or apply too broadly or both, leading to inconsistencies in their application.[6] They have led to "charging and plea practices . . . in various districts that result in the disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length."[7] While the Commission might be more concerned about disparity, our concern has to do with what the disparity tells us. Their severity and rigidity prompt different responses from the government, some to ameliorate and others to exploit the severity of mandatory minimum sentences.

The Commission's found that the safety valve has countered the rigidity of mandatory minimums which otherwise apply with equal force to defendants with widely varying roles in the offense. "While the current mandatory minimum penalties for drug offenses may apply more broadly than originally intended by Congress, the impact of such penalties on certain drug offenders who performed lower-level functions is significantly ameliorated by the combined effect of the safety valve and downward guideline adjustments."[8]

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[3] *Mandatory Minimum Sentencing Laws: The Issues, Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 6-7 (2007) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission).
[4] In its survey of federal judges, the Commission reported that a majority of federal judges were concerned about unduly long sentences for crimes like receipt of child pornography. U. S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES 5, 11 (2010). When asked about expanding the safety valve to all mandatory minimums, 69 percent agreed with such a reform. *Id.* at tbl. 2.
[5] *Id.* at 346.
[6] *Id.* at 345.
[7] *Id.* at 345-46.
[8] 2011 MANDATORY MINIMUM REPORT at 351.

Because all mandatory minimums potentially suffer the same defects, we support the Commission's call for more safety valves.[9]

FAMM also supports the Commission's call for an expansion of the current drug safety valve, but we think the recommendation does not go far enough and offer suggestions below about how to make the proposal better.

2. *To drug offenders with more criminal history.*

The fact that the safety valve is only available to individuals who do not have more than one criminal history point leads to some unwelcome results. The Mandatory Minimum Report devotes a section to discussing the "disproportionate and excessively severe cumulative sentencing impact on certain drug offenders" of criminal history scoring.[10] One of those, of course, is ineligibility for the safety valve.[11]

The Commission suggests permitting defendants with 2 or 3 criminal history points be safety valve eligible. More defendants could benefit.[12] There are also equitable reasons to further limit the impact of criminal history scoring on access to the safety valve. Criminal history calculations are frequently overblown as vividly illustrated by the fact that criminal history issues were cited as the reason in 43.8 percent of downward departures/variances in 2010. This far outstripped any other ground for departure.[13] In 2011, criminal history again led the field, making up over 50 percent of all departures/variances.[14]

We endorse the Commission's recognition of the unwelcome impact of criminal history on safety valve eligibility. Criminal history points quickly accumulate for tediously minor kinds of offenses, including gambling, check bouncing and the like. But we think the Commission's proposal does not go far enough. We urge the Commission to recommend that Congress extend

[9] We did find puzzling the Commission's invocation of 28 U.S.C. § 994(j), which directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." The Commission made the point that more safety valves would be consistent with congressional intent expressed in 994(j). This is a directive to the Commission that we have often noted has not been followed by the Commission. While mandatory minimums prevent most defendants subject to them from benefitting from a 994(j) compliant guideline system, the current guideline system does not comply with 994(j). For example, the safety valve exists for drug defendants but in 2011, a mere 2.3 percent of the 24,760 drug offenders received a sentence to probation alone, despite the fact that 13,079 (52.8 percent) of them scored in Criminal History Category I and only 6 percent of all drug offenders had an aggravating role adjustment. We do not understand how the Commission can urge Congress to legislate consistent with 994(j), when the Commission itself has not complied with it.

[10] 2011 MANDATORY MINIMUM REPORT at 352.

[11] *Id.* at 353 and 355-56.

[12] *Id.* at 355.

[13] U. S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 67 (2011).

[14] U.S. SENT'G COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2012) ("2011 SOURCEBOOK"), tbls. 25, 25A & 26.

eligibility to individuals with more than one criminal history point or better, use criminal history categories rather than points to define eligibility.

The points versus categories distinction is an important one. Courts find in over 50 percent of cases that a defendant's criminal history category overstates culpability and so depart to a lower criminal history category when calculating the guidelines. The courts may not, however, use the Safety Valve in such cases, even where they have departed to Criminal History Category I.[15] There is no principled reason to deny courts the ability to give effect to their reasoned determination that the criminal history score overstates a defendant's criminal history and then, based on that, be able apply the statutory safety valve to defendants who meet the other criteria. Changing the eligibility from points to categories, and expanding eligibility to Criminal History Category II, will allow the courts to credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

Recidivist Provisions.

FAMM supports the Commission's promotion of legislation to lessen the impact of recidivism provisions in the law, including by refining the definition of "felony drug offense" and by addressing the undue harshness of the recidivism and stacking provisions in federal gun laws.

1. *Recidivist provisions at 21 U.S.C. §§ 841 and 960.*

We have been particularly disturbed by the impact of 18 U.S.C. § 841 two- and three-strike sentences that compel courts to double sentences or impose life sentences for drug trafficking offenses. FAMM is compiling the stories of "lifers," and many have been sentenced under § 841.[16]

We can think of no reason why a drug offender should be sentenced to life in prison, absent exceptional aggravating circumstances, which are currently not required. The Commission should counsel Congress to eliminate life without parole sentences for non-violent offenders. Tinkering with underlying definitions of "felony drug offense" and aligning state

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[15] *See e.g., U.S. v. Resto,* 74 F.3d 22 (2d Cir. 1996) (defendant ineligible for safety valve despite departure from CH III to CH I); *U.S. v. Boddie,* 318 F.3d 491 (3d Cir. 2003) (criminal history departure does not make defendant safety valve eligible); *U.S. v. Barrera,* 562 f.3d 899 (8th Cir. 2009) (criminal history calculation not advisory for safety valve purposes post *Booker*).

[16] See for example, the story of Stephanie George, a mother of three, sentenced to life in prison due to two prior drug offenses, http://famm.org/FacesofFAMM/FederalProfiles/StephanieGeorge.aspx. The judge in her case said at sentencing: "There's no question that Ms. George deserved to be punished. The only question is whether it should be a mandatory life sentence ... I wish I had another alternative." He told Stephanie, "Even though you have been involved in drugs and drug dealing for a number of years ... your role has basically been as a girlfriend and bag holder and money holder. So certainly, in my judgment, it doesn't warrant a life sentence." Of course, he had no alternative and she will almost certainly die in prison.

definitions of "felony" are certainly useful but won't get at the problem of condemning non-violent offenders to prison for life. Congress can do better, and the Commission should encourage it to act boldly in this area or provide a safety valve to ensure that only truly deserving offenders are sent away for life.

2. *Firearm Offenses.*

The Commission makes an excellent case for reforming the widely despised stacking provisions at 18 U.S.C. § 924(c), which resulted in "the highest average sentences for any offenders convicted of a" mandatory minimum offense in 2010 – 351 months.[17] These averages are dwarfed by extremely long sentences required by the law. For example, the defendants in *United States v. Major*, ___ F.3d ____, 2012 WL 1001188 (9th Cir., Mar. 27, 2012) received sentences of 745 and 746 years, each reduced by a mere three years on appeal. Citing the case of Weldon Angelos, the Commission's report reserved some of its strongest language for these outcomes, explaining that there are cases "in which the offender received such a long sentence even though the offense did not involve any physical harm or threat of physical harm to a person. This severity mismatch can lead to sentences that are excessively severe and disproportionate to the offense committed." [18] The severity, in turn, leads to inconsistent application and disturbing racial disparity in outcomes.[19] It is no surprise that judges, defense attorneys, and even the Department of Justice would like to see this odious law changed.

FAMM supports the Commission's recommendation to Congress that it sharply reduce the sentence length associated with second or subsequent § 924(c) violations and ensure that these sentences do not apply to other than true recidivists: offenders who have truly separate and distinct prior convictions (as opposed to multiple convictions in a single proceeding). We also support the proposals that Congress eliminate the requirement that sentences under this section run consecutively and give judges the discretion to impose them concurrently. And, we endorse the effort to better define the underlying offenses that trigger the firearms mandatory minimums.

Representatives Bobby Scott (D-VA) and John Conyers (D-MI) have sponsored legislation this Congress to address the true recidivist issue. H.R. 2398, the Firearm Recidivist Sentencing Act of 2011, adopts language from 21 U.S.C. § 841 which ensures that priors count only if separated from the instant offense by a final conviction and inserts a notice requirement when the government plans to invoke the recidivist enhancement.

Priority (2) Continuation of its work with the congressional, executive, and judicial branches of government, and other interested parties, to study the manner in which *United States v. Booker*, 543 U.S. 220 (2005), and subsequent Supreme Court decisions have affected federal sentencing practices, the appellate review of those practices, and the role of

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[17] 2011 MANDATORY MINIMUM REPORT at 359.
[18] *Id.*
[19] *Id.* at 361-62

the federal sentencing guidelines. The Commission anticipates it will issue a report with respect to its findings and include recommendations for legislation, among other things.

FAMM welcomes data and analysis by the Commission regarding federal sentencing practices after *Booker*, as it will provide critical information for understanding the relevance, effectiveness, and appropriateness of the federal sentencing guidelines. However, the Commission should resist any temptation to further recommend that the guidelines be enforced more strictly or limit their advisory nature in any way.

While the Mandatory Minimum Report is not explicit about how it plans to ask Congress to "strengthen and improve" federal sentencing, the Commission's testimony to Congress last year set out five ways Congress could do so:

- Enact an appellate review standard that requires appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range;

- Require that the greater the variance from a guideline, the greater should be the sentencing court's justification for the variance;

- Create a heightened standard of review for sentences imposed as a result of a "policy disagreement" with the guidelines;

- Clarify statutory directives that the Commission believes are currently in tension; and

- Require that sentencing courts give substantial weight to the guidelines at sentencing, and codify the Commission's three-step guideline (i.e., calculate the guideline range, consider all policy statements and commentary that "might warrant consideration," including restrictions on departures and restrictions on consideration of mitigating offender characteristics in sentencing, and consider any grounds for a variance).[20]

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[20]*See, Prepared Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission, before the Subcomm. on Crime, Terrorism and Homeland Security, Comm. on the Judiciary , United States House of Representatives* (Oct. 12, 2011) (Saris Testimony), *available at*:
http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_*Saris*_Testimony.pdf

As we testified earlier this year, we think such calls are both unnecessary and unsubstantiated.[21] The Commission's last request to Congress was accompanied by raw data that the Commission characterized as showing "an increase in the numbers of variances from the guidelines in the wake of the Supreme Court's recent jurisprudence,"[22] and as demonstrating "troubling trends in sentencing, including growing disparities among districts and circuits."[23] The Commission did not, with a couple of tantalizing exceptions, analyze the possible causes of variances and disparities. Such analysis could shed light on underlying problems (if any) and point to potential solutions, if any are needed.

We strongly encourage the Commission, in its expected *Booker* report, to refrain from drawing negative inferences based on raw data. Rather, we hope the Commission will subject its raw data and trends to rigorous analysis to better explain what is happening in sentencing and why.

There are, for example, the well documented problems of unduly severe guidelines. Even the Department of Justice has noticed that excessive guideline sentencing recommendations in high-level fraud and child pornography cases have generated differences in sentences. Those guidelines generate such widespread variances that the Department of Justice recommended that "the Commission should conduct a review of – and consider amendments to – those guidelines that have lost the backing of a large part of the judiciary. Those reviews should begin with the guidelines for child pornography possession offenses and fraud offenses."[24]

Unusually harsh guidelines are not the entire story. Better accounting for the role of prosecutors in variances and disparity means that lawmakers will have more information to evaluate when deciding whether to upset the current balance of judicial discretion. For example, while the Commission appears to be troubled by growing inter-district disparities, how can it use other information it has uncovered to understand to what extent those disparities might be warranted?

As is well known, not only are no two federal districts alike; prosecutors treat their different caseloads differently. The Commission could make an important contribution to our

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[21] *See, Statement of Mary Price, Vice President and General Counsel, Families Against Mandatory Minimums Before the United States Sentencing Commission Public Hearing on Federal Sentencing Options After* Booker (Feb. 16, 2101), *available at:* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_FAMM.pdf

[22] Saris Testimony at 1.

[23] *Id.*

[24] Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, U.S. Department of Justice, Criminal Division to the Honorable William K. Sessions, III 3 (June 28, 2010) ("Wroblewski Letter").

understanding of inter-district disparity by examining not only judicial actions but those of prosecutors as well. Prosecutors generate inter-district disparity in how, where, and how often they seek below-guideline sentences. This would not require additional research on the Commission's part. For example, as Commission statistics demonstrate, in 2011, the government successfully asked courts to impose below guideline sentences in 60.6 percent of cases they prosecuted in the Southern District of California but in only 4.4 percent of cases in the District of South Dakota, a difference of 56.7 percent.[25]

Simply putting the two districts next to each other and saying there is a 15 percent disparity in judicially generated below guideline sentences does not help us understand whether this is a warranted or unwarranted disparity. Of course, Congress expects the Commission to guide judges so they avoid the unwarranted type.

It would be very useful to know why the caseloads and practices in Southern California and South Dakota are so very different. Given that the Department has requested that the Commission "explore new ways of analyzing federal sentencing data,"[26] they might be willing to share their insights and information about prosecutorial approaches that differ from district to district.

Of course, federal districts are different and judicial caseloads and sentencing outcomes reflect these differences. For example, the very low below-guideline rates in the Southern and Western Districts of Texas contrast sharply with below-guideline rates in the Southern District of New York, which had the highest in the country. The bulk of prosecutions in the Texas districts are for low-level immigration and marijuana smuggling. Guideline "rates are so low (typically 0-6 months and 10-16 months, respectively) that offenders have" served all or most of the guideline sentence by the time they appear for sentencing.[27] Meanwhile, in the very different Southern District of New York, high guideline ranges are the norm. They result from fraud cases, whose high recommended sentences derive from the loss table which routinely overstates offense seriousness; drug conspiracies where low level defendants are subject to high guideline sentences that should be reserved for more culpable defendants; and illegal reentry cases where

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[25] 2011 SOURCEBOOK App. B. This may also provide a clue about the disparity in non-government generated below guideline sentences between the two districts. The non-government rate in S.D. Cal. is a mere 10.7 (given that the government has occupied the field perhaps), while the non-government rate in South Dakota is 25.7 percent (a district where the government has been stingy with its recommendations).

[26] Wroblewski Letter at 3.

[27] Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PENN. L REV., 1631, 1706 (2012), *available at*: Available at SSRN: http://ssrn.com/abstract=1987041.

defendants routinely receive a 16-level enhancement.[28] Not surprisingly, there "correct for these often-criticized aspects of the guidelines."[29]

In light of the many ways to understand variances from guidelines and among districts, it strikes us that alterations to the guideline system that put more power in the hands of prosecutors by tying those of judges are both counterintuitive and counterproductive. Seeking a change to discretion without trying to fix problematic guidelines suggests that the guidelines are infallible. Were that true, then indeed variance from the guidelines should be better controlled. But the guidelines are not perfect, and not because they are now advisory. They are deeply flawed because they are and have been rife with recommended sentences that are unduly long, overly retributive, not proportionate, and based on little or no empirical evidence of their inherent validity.

We cannot support any Commission call for legislation that will hinder the courts' ability to correct for excessive sentences, address uneven prosecutorial practices, or comply with the mandate of 18 U.S.C. § 3553(a). Rather, we urge the Commission to use the tools and authorities at hand to improve troublesome sentencing rules. For example, it is highly likely that the current falling judicial variance rate (16.9 percent in the second quarter of 2012, compared to 18.7 percent at the end of FY 2010.[30]) stems from the fact that judges are complying with new, lower, FSA-compliant crack guidelines.

In other words: fix bad guidelines. Congress built in the means to revisit and improve sentencing guidelines in 28 U.S.C. § 994(o).

Priority (3): Continuation of its review of child pornography offenses and report to Congress as a result of such review.

We applaud the Commission for taking up this review, which is urgently needed in light of the extreme sentences that are called for in the guidelines. Possessing, receiving, and trafficking child pornography are serious federal crimes that deserve punishment. But federal penalties for child pornography have risen ever higher, driven by politics and revulsion rather than justice and empirical evidence. In short, "Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses."[31]

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[28] *Id.* at 1706-07
[29] *Id.* at 1708.
[30] U.S. SENT'G COMM'N, PRELIMINARY QUARTERLY DATA REPORT, SECOND QUARTER RELEASE, tbl. 4 (March 31, 2012).
[31] U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 (Oct. 2009) [hereinafter HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES], *available at*

In a critical article in *The Champion* magazine, former senator Arlen Specter and Assistant U.S. Attorney Linda Dale Hoffa noted that between 1987 and 2009 Congress prompted revisions of the guidelines nine times, and each time the changes resulted in longer sentences.[32]

Increasingly long sentences are designed more to make legislators feel better rather than to make us safer or promote rehabilitation. A review of the sentencing guidelines by Troy Stabenow, an Assistant Federal Public Defender in the Western District of Missouri, "reveals absurd differences – lower punishments for people who attempt to engage children in sex acts than for those who only possessed and swapped pictures."[33]

In 1997, federal child pornography offenders received a mean sentence of 20.59 months.[34] By the second quarter of 2012, the mean sentence had jumped 650 percent to 134 months.[35] The number of federal convictions has increased dramatically as well, rising from a few dozen each year in the 1990s[36] to 1,886 cases in fiscal year 2010. The vast majority of federal child pornography offenders in 2010 had no prior criminal record at the time they were sentenced.[37]

In 2010, just over 50 percent of federal child pornography offenders were convicted of offenses that carried a mandatory minimum sentence.[38] The vast majority of them were ultimately subject to the mandatory sentence; only 4.3 percent received a departure from the mandatory sentence due to their assistance to the government in the investigation or prosecution of other offenses.[39]

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http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.

[32] Senator Arlen Specter & Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion Against Harsh Sentences for Child Pornography Offenses – Should the laws be changed?*, THE CHAMPION MAGAZINE, Oct. 2011, at 12; *see also generally* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (describing the nine guideline alterations).

[33] Letter from Troy Stabenow, Assistant Federal Public Defender, to Edward A. Adams, Editor and Publisher, ABA Journal 2 (July 13, 2009), *available at* http://www.fd.org/pdf_lib/Stabenow%20Response%20to%20DOJ.pdf.

[34] This number includes offenders convicted of possessing, receiving or distributing child pornography, but not involved in the production of child pornography. Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* 2 (2009) *available at* http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

[35] U.S. Sent'g. Comm'n, Preliminary Quarterly Data Report, 2d Quarter Release, 2012, tbl. 19. This number includes the "sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors." U.S. SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 29 (2010) [hereinafter 2010 SOURCEBOOK].

[36] U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN, FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 4 (June 1996), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/199606_RtC_SCAC.PDF.

[37] 2010 SOURCEBOOK, at Table 3.

[38] MANDATORY MINIMUM REPORT, at 301.

[39] *Id.* at 309.

Defendants subject to mandatory minimums at sentencing received the longest sentences – 132 months compared to 121 months for defendants who received relief from the mandatory sentence, and 54 months for those convicted of an offense not carrying a mandatory minimum.[40] Even first-time offenders who do not receive a mandatory minimum can receive "substantially identical sentences as hardcore offenders."[41] In addition to increasing the base offense level, enhancements within the guidelines are frequently applied and can significantly increase the sentence.

For example, one guideline enhancement is triggered if the defendant used a computer to receive or possess the material.[42] The saturation of computer technology assures that nearly all child pornography offenders sentenced under this section receive this enhancement.[43] As a result, a possession offender can easily receive a sentence longer than someone who sexually abuses a child.[44]

Federal judges believe that many child pornography sentences are too long – 71 percent of respondents believed that the mandatory minimum for receipt of child pornography was too high. The same holds true for guideline sentences, with 70 percent of the judges surveyed responding that the guideline ranges for possession were too high. Additionally, 69 percent believed that sentences for receipt of child pornography were excessive.[45]

Unsurprisingly, federal judges are responding to this excess by handing down sentences below the guideline range when they are able and when they believe it is appropriate. In 2011, 36.8 percent of child pornography sentences fell within or above the guideline range, while nearly 45 percent of offenders received non-government-sponsored below-range sentences. An additional 18.4 percent benefitted from a government sponsored departure.[46]

The Commission has already taken important steps to illuminate the problems presented by the child pornography guidelines, first in an initial report in 2009[47] and more recently at a day-long hearing in February that explored important topics including technology, treatment and to what extent people who view child pornography might be at risk of sexually abusing children.[48]

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[40] *Id.* at 310.
[41] Specter & Hoffa, *supra* note 2, at 2.
[42] U.S.S.G. § 2G2.2(b)(6) (2009).
[43] *See, e.g.*, United States v. Durvee, 604 F.3d 84, 96 (2d Cir. 2010).
[44] *See* SpearIt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT. REP. 102, 103 (2011).
[45] *Id.* at Question 8.
[46] 2011 SOURCEBOOK, at Table 27.
[47] HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES.
[48] Public Hearing Transcript, *U.S. Sent'g Comm'n, Public Hearing on Child Pornography Crimes*, February 15, 2012 (Washington, D.C.), *available at:* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Agenda_15.htm.

We look forward to the Commission's review and recommendations.

(4) Continuation of its work on economic crimes, including (A) a comprehensive, multi-year study of §2B1.1 . . . and related guidelines, including examination of the loss table and the definition of loss and (B) consideration of any amendments to such guidelines that may be appropriate.

FAMM endorses the Commission's commitment to make it a priority to conduct the much anticipated multi-year review of the financial fraud guidelines. We do so because of the negative attention that has been paid to variances in economic crime sentencing patterns. This attention is often accompanied by inferences or accusations that sentencing in this area is inappropriately lenient and may require congressional intervention and perhaps even mandatory minimums.

The Department of Justice has been the source of some of the criticism of economic crime sentencing patterns. In April 2010, Lanny A. Breuer, Assistant Attorney General for the Criminal Division, speaking to the American Bar Association, identified the Department's concern with "increased disparity in white-collar sentencing," and used several unidentified examples of below-guideline sentences to underscore the issue. He cited Sentencing Commission data that showed "that the percentage of defendants sentenced within the guidelines has decreased in the wake of the *Booker* line of cases. Although the full impact of recent trends in sentencing jurisprudence is still unclear, these developments must be monitored carefully." He promised that the then-recently created DOJ Sentencing and Corrections Working Group would be looking into the "reasons for the disparities."[49]

In June 2010, *ex officio* Commissioner Jonathan Wroblewski was even more pointed. He wrote to the Commission on its 2010 priorities that Sentencing Commission data and prosecutors' experience "suggest that federal sentencing practice is fragmenting into two distinct and very different sentencing regimes. On the one hand, there is the federal sentencing regime closely tied to the sentencing guidelines. . . . On the other hand there is a second regime that has largely lost its moorings to the sentencing guidelines." He went on to specifically identify sentences for high-loss fraud offenses as among those of concern.[50] The letter also identified the concern that the sentencing outcome depends on the judge assigned to the case, suggesting to some observers that he saw the problem as one caused by judges, rather than by guidelines that many find hard to impose.[51] In February 2011, the Department, represented by Preet Bharara, the U.S. Attorney from the Southern District of New York, suggested that variances in white

[49] Remarks by Lanny A. Breuer, Assistant Attorney General for the Criminal Division, at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf.
[50] Wroblewski Letter at 1-2.
[51] *See, e.g., United States v. Ovid*, 2010 WL 3940724, 1-2, E.D.N.Y. (Oct. 1, 2010) (stating that the DOJ complaints to the Commission about disparate sentencing regimes is misplaced, given that the Department appeals so few cases and fails to address s the problem inherent in unduly harsh fraud guideline sentences.)

collar sentencing might merit mandatory minimums.[52] In August of 2011, the Department reiterated its call for a review but appeared to have abandoned its concern that white collar sentencing practices were tending to disparity, calling rather for targeted enhancements in several key areas.[53]

These criticisms and calls for mandatory sentencing are based on an unspoken assumption that the sentencing guidelines in this area are unassailable. This is hardly a given.

Scholars, judges, practitioners and even the Sentencing Commission have criticized the economic crime sentencing guidelines. And for good cause. A corporate executive found liable for participating in a large-scale fraud will face a draconian sentence. "[A] typical offender or director of a public company who is convicted of a securities fraud offense now faces an advisory Guideline sentence of life without parole in virtually every case . . . [and] the advisory guideline sentence will be life without parole for virtually any employee convicted of a serious securities fraud causing more than $100 million of loss."[54] Economic crime offenders can easily reach a prison term under the guidelines that once had been reserved for the worst of the worst violent and repeat offenders. This remains true even though fraud offenses carry the lowest level of recidivism when compared to crimes such as robbery, larceny, and firearms offenses.[55]

Former federal judge Paul Cassell and former federal prosecutor Brett Tolman have written, "[r]ather than resting on evidence of past, national sentencing practices, the white collar Guidelines are a product of the political environment in which they were promulgated, the Commission's desire that the Guidelines reflect perceived congressional policy, and the Commission's own independent policy determinations concerning the severity of a particular class of conduct."[56] University of Missouri Law Professor Frank Bowman, a former federal prosecutor, has concluded that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense."[57] Ellen Podgor, the Gary R. Trombley Family White-Collar Crime Research Professor of Law at Stetson University College of Law, has written, "The one-size-fits-all methodology of sentencing white collar offenders seriously diminishes consideration of the individual offender, the nature of the offense, and the level of protection needed to satisfy the public's interest." She said the current

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[52] Transcript of Public Hearing before the United States Sentencing Commission 60 (Feb. 16, 2011)
[53] Letter from Lanny A. Breuer and Jonathan J. Wroblewski to the Honorable Patti B. Saris, 6 (Sept. 2, 2011).
[54] James E. Felman , *The Need to Reform the Federal Sentencing Guidelines for High Loss Economic Crimes*, 23 *Federal Sentencing Reporter*, 138, 138 (December 2010) ; see also Alan Ellis, John R. Steer, and Mark H. Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 *Criminal Justice* (Winter 2011).

[55] Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97:3 J. OF CRIMINAL LAW AND CRIMINOLOGY, 758((2007).
[56] Letter from Brett Tolman, Esq. & Hon. Paul G. Cassell to Chief U.S. District Judge Linda Reade 5 (April 19, 2010).
[57] Frank O. Bowman, *Sentencing High-Loss Corporate Insider Fraud Post-Booker*, University of Missouri School of Law Legal Studies Research Paper Series, No. 2008-13, (November 3, 2008).

guideline subjects economic crime offenders "to draconian sentences that in some cases exceed their life expectancy."[58]

Judges have been equally scathing about these guidelines. In *United States v. Ovid*, Judge John Gleeson directly addressed the Department of Justice's assessment that variances from recommended sentences under the fraud guidelines were creating two sentencing regimes. Quoting from the Wroblewski letter cited earlier, he wrote:

> One "regime," the [Department] contends, "includes the cases sentenced by federal judges who continue to impose sentences within the applicable guideline range for most offenders and most offenses." This is apparently the good regime. The "second regime," by contrast, "has largely lost its moorings to the sentencing guidelines." This regime is a cause of concern for the Department. It consists of judges who sentence fraud offenders, especially in high-loss cases, "inconsistently and without regard to the federal sentencing guidelines." . . . The sentencing of Isaac Ovid on July 30, 2010 illustrates well the fact that, here in the trenches where fraud sentences are actually imposed, there is a more nuanced reality than the DOJ Letter suggests.[59]

In *United States v. Parris*, the court said that "the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense."[60] In *United States v. Adelson,* another judge (and former federal prosecutor) lamented "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[61]

Judge Gerald Lynch addressed the overbearing aspect of loss in an opinion in 2004.

> The guidelines provisions for theft and fraud place excessive weight on this single factor [loss], attempting — no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes — to assign precise weights to the theft of different dollar amounts. In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence. To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on Emmenegger's culpability. Had Emmenegger been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more.[62]

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[58] Podgor at 756

[59] *United States v. Ovid*, 2010 WL 3940725, slip op at 1, 2 (Oct. 1, 2010) (internal citations omitted).

[60] 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).

[61] 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).

[62] *United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

In the teeth of mounting evidence and criticism that the problem lies not with judges, but with the guidelines, we feel it imperative that the Commission conduct a truly thorough review. It should focus on two principle problems: first, that monetary loss has become the single most important factor driving sentence length and that redundant sentencing enhancements for ubiquitous conduct, such as for using "sophisticated means," quickly inflate sentences.

We offer four suggested reforms. First, reduce the current excessive emphasis on actual or intended monetary loss. Second, better account for whether and to what extent the defendant gained monetarily from the crime. Third, ensure more weight is placed on personal responsibility, intent, and other characteristics that should bear on punishment. Finally, eliminate double counting aspects of an offense by striking redundant enhancements.

Section 2D1.1.

We are distressed to learn that the Commission has decided to omit a review of the drug sentencing guideline in the 2013 amendment cycle. Surely last year's small amendments to the drug guideline cannot have been the wrap-up to the Commission's multi-year review of the guideline. We urge you in the strongest possible terms to add drug guideline review to your priorities, as so much remains to be done to make these guidelines fairer.

We once again urge you to consider adopting a two-level downward guideline adjustment across drug types. When Congress adopted mandatory minimum sentences for drug offenses in 1986, the Commission responded by placing guideline ranges above the mandatory minimum sentence, thereby creating unnecessarily long sentences.[63] This step was unnecessary, as the Commission has the authority to set the base offense level to the guideline range that is the first on the table to include the mandatory minimum (such as 51-63 months for a 60-month mandatory minimum), or to set the base offense level below the mandatory minimum and rely on specific offense characteristics and adjustments to reach the mandatory minimum, or to set the base offense level at an appropriate level based on careful study and permit the mandatory minimum to trump when it applies.[64] Utilizing the first option, the Commission temporarily adjusted crack sentences downward in 2007, placing the mandatory minimum penalty at the high end of the guideline range.

However, crack is not the only drug with overly harsh penalties. The Commission has acknowledged that many penalty ratios within the guidelines do not reflect the "relative harmfulness" of particular drugs.[65] For example, trafficking in 5 grams of pure methamphetamine carries a 60-month mandatory minimum penalty,[66] but is listed at offense

[63] U. S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING, 49 (2004) ("FIFTEEN YEARS OF GUIDELINE SENTENCING").
[64] HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 45-46. In the second scenario, the mandatory minimum would trump the guidelines if the adjustments failed to reach the minimum sentence required by statute.
[65] FIFTEEN YEARS OF GUIDELINE SENTENCING at vii.
[66] 21 U.S.C. § 841(b)(1)(B)(viii) (2006).

level 26, which carries a 63-78 month sentence under the guidelines.[67] FAMM receives calls often from frustrated inmates convicted of harsh methamphetamine penalties and their families. These penalties have contributed to a perception of unfairness within the criminal justice system.

Given that the Commission has consistently urged Congress to reform mandatory minimum sentences for drug offenses,[68] it makes little sense to maintain guideline ranges *above* these sentences. Instead, the Commission should utilize its acknowledged authority to place the minimum sentences within the guidelines, as it did in the 2007 crack adjustment, and should make such changes retroactive to benefit individuals who have suffered injustice as a result of these unduly harsh penalties.

Reducing all drug guideline ranges by two levels will, we expect, also affect below guideline rates in these sentences, which currently invite variances because they are set above the corresponding mandatory minimums.

We also renew our call on the Commission to take steps to expand the guideline safety valve, whether or not Congress acts to do so with the statutory safety valve, as discussed above and in our testimony to the Commission in the 2011 amendment cycle. Even if Congress fails to broaden the scope of the safety valve, the Commission could address this problem by allowing the guideline safety valve to be applied more broadly to low-level offenders convicted of crimes other than drug trafficking. The Commission can also use its own authority to make the guideline safety valve available to defendants with more than one criminal history point. By changing the eligibility to categories, as opposed to criminal history points, as discussed above, the courts can credit whether a person for whom the calculated criminal history in fact overstates the true criminal history should nonetheless be safety valve eligible.

Conclusion

Thank you for considering our views. We look forward to working with you in this amendment cycle.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel.

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[67] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(7) (2009).
[68] *See, e.g., Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Commission).