



July 27, 2015

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

Re: Proposed Priorities for the Amendment Cycle

Dear Judge Saris:

FAMM welcomes this opportunity to comment on the proposed priorities announced by the Sentencing Commission for the 2016 amendment cycle. While we generally support the Commission's suggested priorities, we write to comment more fully on several of them.

(1) Mandatory Minimums (*proposed priority 1*).

We are pleased that the Commission plans to continue its work to support reform of mandatory minimum penalties. The Commission's position in favor of the Smarter Sentencing Act has given stakeholders and advocates much needed support as we work for the legislation's passage. We also appreciate the Commission's proposal to renew efforts to expand the safety valve to other than drug offenses and eliminate the stacking of penalties under 18 U.S.C. § 924(c). While the Smarter Sentencing Act does not address those provisions, we applaud the Commission's proposal to keep those priorities in its sights as it promotes reforms with Congress.

In that vein, we commend to the Commission another bill which would have a dramatic impact on how mandatory minimum sentences are used. The SAFE Justice Act, H.R. 2944,¹ would limit mandatory sentencing to the offenders Congress meant to target. It would also make other important modifications to mandatory minimum sentencing.

This bipartisan bill would, among many other improvements:

- Limit the use of **mandatory minimum drug sentences** to offenders who were leaders, organizers, managers or supervisors of operations of five or more people and who handled the mandatory minimum triggering drug amounts stated in 21 U.S.C. §§ 841(b) and 960 (b).

¹ The full text of the bill can be found at <http://famm.org/wp-content/uploads/2015/06/SAFE-Justice-Act-of-2015-BILL-TEXT-FINAL.pdf>.

- **Expand the existing safety valve for drug crimes** to offenders who plead guilty; are in Criminal History Category I; non-violent; not convicted of a Continuing Criminal Enterprise under 21 U.S.C. § 848; and whose offense did not result in serious bodily injury or death.
- Create a **new safety valve for gun offenses under 18 U.S.C. § 924 (c)** and for drug offenders not eligible for the above safety valve, whose crime was the result of, *inter alia*, mental or emotional illness or distress, cognitive defects or substance abuse; service-related trauma; or victimization if under the direction of a more culpable participant or subject to coercion involving physical or emotional abuse or threats, and the offender meets other criteria for the safety valve outlined above.
- Correct the **stacking provision of 18 U.S.C. § 924 (c)** to ensure that the 25-year mandatory minimum for second and subsequent violations only count as prior offenses those 924(c) offenses where the conviction has been finalized.
- **Redefine convictions that can serve as predicates** for drug, ACCA and other enhanced sentence provisions.
- **Eliminate mandatory life sentences for drug offenses** by reducing them to 35 years.

We urge the Commission to support this important legislation. Some of the changes mirror those recommended by the Commission in its 2011 report on mandatory minimum sentencing.² For example, the Commission recommended that Congress amend 18 U.S.C. § 924(c) to make it a “true recidivist” statute by providing that the enhanced penalties for a “second or subsequent” offense apply only to *prior* convictions.”³ This legislation does that. *See* H.R. 2944, Sec. 421. The Commission also urged that the safety valve be expanded to crimes other than drug crimes. The SAFE Act would extend the use of mandatory minimum waivers for qualifying offenders who possess a weapon in connection with a drug trafficking offense. *See* H.R. 2944, Sec. 402.

Other reforms in H.R. 2944 are responsive to observations made by the mandatory minimum report. For example, limiting mandatory minimum application to offenders with certain aggravating role adjustments was foreshadowed by the report’s discussion of the overbearing influence of drug quantity in triggering mandatory minimum sentences. The report recounted congressional intent:

² U. S. SENTENCING COMM’N, *Report to the Congress: Mandatory Minimum Penalties in the Criminal Justice System* (Mandatory Minimum Report) (Oct. 2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

³ *Id.* at 364 (emphasis in original).

The available legislative history indicates that Congress intended to create a two-tiered penalty structure under which “serious” traffickers would be subject to five-year mandatory minimum penalties and “major” traffickers would be subject to ten-year mandatory minimum penalties. Congress determined that drug quantity would serve as the proxy to identify those categories of traffickers. . . . Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress intended.⁴

The mandatory minimum report went on to note that people who receive the safety valve are often those with mitigating role adjustments or who filled lower functions in a drug operation while those who received aggravating role adjustments did not get such relief from the statutory mandatory minimum.⁵ The SAFE Act ties mandatory minimums to drug quantity *and* aggravated role, as the Commission’s report suggests is appropriate. *See* H.R. 2944, Sec. 401.

In another example, the Commission addressed the inconsistencies in the application of enhanced mandatory minimum based on predicate “felony drug” offenses. The report noted that

[t]he structure of the recidivist provisions in 21 U.S.C. §§ 841 and 960 fosters inconsistent application, in part, because their applicability turns on the varying statutory maximum penalties for state drug offenses. . . . States have adopted differing punishments for drug offenses, so that conduct qualifying as a ‘felony drug offense’ in one state may not qualify as such an offense in another state. Furthermore, the recidivist provisions apply to a broad range of offenders, which vary depending on the state in which the prior conviction occurred.⁶

The SAFE Act carefully defines felony drug offense and felony trafficking offense in a way designed to eliminate unwarranted disparities in mandatory minimum sentencing that stem from the unevenness and variety of state criminal code provisions. *See* H.R. 2944, Sec. 403.

The SAFE Act also reflects the observation made in the Commission’s mandatory minimum report about the inconsistent application of the Armed Career Criminal Act enhancement found at 18 U.S.C. § 922(e), also stemming from problems with the

⁴ Mandatory Minimum Report at 349, 350.

⁵ *Id.* at 351.

⁶ *Id.* at 353.

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statutory definitions of “serious drug offense.”⁷ It does so by referencing its rewrite of felony drug offense discussed above. See H.R. 2944, Sec. 403 (c).

Finally, H.R. 2944 takes a page from the Commission and makes some, but not all, of the reforms that would result in lower sentences retroactive and provides a mechanism by which prisoners can apply for the benefit of the lower sentence.

While the bill has not yet been scored, no one can doubt it will result in a significant reduction in the federal prison population. In light of the Commission’s ongoing commitment to abide by the congressional directive in 28 U.S.C. § 994(g), by drafting and amending guidelines with an eye to reducing overcapacity in prisoners and the costs of incarceration, it strikes us that H.R. 2944 bears serious examination and the Commission’s support.

For these and a variety of other salutary reforms in the bill, we urge the Commission to support H.R. 2944, the SAFE Act.

(2) Post-Booker Guidelines (*proposed priority 2*).

FAMM generally supports the Commission’s proposal to study simplifying the guidelines and redrafting them so that they promote proportionality and guard against *unwarranted* sentencing disparities while accounting for the defendant’s role and culpability. That said, we remain keenly opposed to any measure that would invite Congress to impose mandatory or presumptive restraints on judicial discretion. In particular, we are reminded the Commission sought legislation in October, 2011 to do just that.⁸ FAMM testified against the proposals at a subsequent public hearing before the Commission and our position with respect to such legislation remains unchanged.⁹ Quite a few others share our views and testified against the concept.¹⁰ We will pay close attention to how the Commission approaches this task as we are justifiably concerned about where this inquiry could lead.

⁷ *Id.* at 362.

⁸ Testimony of Patti B. Saris, Chair, United States Sentencing Comm’n Before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives (Oct. 12, 2011), available at <http://judiciary.house.gov/hearings/pdf/Saris%2010122011.pdf>,

⁹ See Statement of Mary Price, Vice President and General Counsel, FAMM, Before the United States Sentencing Comm’n Public Hearing on Federal Sentencing Options After Booker (Feb. 16, 2012), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120216/Testimony_16_FAMM.pdf.

¹⁰ See U.S. SENTENCING COMM’N, Agenda from Feb. 16, 2012, Hearing on Federal Sentencing Options After Booker (including statements against mandatory guidelines from witnesses including judges,

At the same time, we believe that the Commission could do worse than examine the approach to a new guideline that FAMM and other organizations, practitioners, academics, judges and law professors, produced to reimagine fraud sentencing. We formed the Task Force on the Reform of Sentencing for Economic Crimes under the auspices of the American Bar Association.¹¹ We did so in response to the Commission's interest in reviewing and possibly amending U.S.S.G. § 2B1.1. Over a number of months and numerous drafts we drafted a way out of the box. While loss remained, in our draft, an important concept and in fact our starting point, it was by no means the chief driver of sentencing. We were determined that such single factors should not bear the weight of culpability at sentencing.

Instead we worked to assess real (not intended) loss and address gain. We dramatically simplified the table and stripped away many of the multiple and overlapping enhancements that encumber the process and the sentence. And most radically, but most sensibly, we tried to give back to judges some measure of their essential function, guided discretion. We did so by asking judges to assess and then weigh factors that indicate blameworthiness. As our rapporteur, James Felman, explained to the Commission earlier this year, this approach frees judges from the grid and directs them to consider what makes a crime more or less serious and an offender more or less blameworthy:

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial, the guideline should attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in mid-stream under coercive circumstances? Did the offense risk or cause some significant non-monetary harm? Was the offense committed because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?¹²

practitioners, law professors, and community groups), *available at* <http://www.ussc.gov/amendment-process/public-hearings-and-meetings/20120216/agenda-february-16-2012> .

¹¹ AMERICAN BAR ASS'N, Criminal Justice Section Task Force on the Reform of Economic Crime Sentencing, *available at*

http://www.americanbar.org/groups/criminal_justice/economic_crimes_taskforce.html.

¹² Testimony of James E. Felman on Behalf of the American Bar Ass'n Before the United States Sentencing Comm'n for the Hearing on Proposed Amendments to the Fed'l Sentencing Guidelines Regarding Economic Crimes 11 (March 2015), *available at*

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015mar12_usseconcrimetestimony.athcheckdam.pdf.

These are not just interesting questions, they were intended to get to the heart of this thorny problem of how a judge assesses culpability and assigns punishment. At the end of the day,

[T]he Task Force proposal reduces the weight placed on loss, eliminates the use of loss that is purely “intended” rather than actual, and introduces the concept of “culpability” as a measure of offense severity working in conjunction with loss. Through the culpability factor, the Task Force proposal would permit consideration of numerous matters ignored by the current guideline, including the defendant’s motive (including the general nature of the offense), the correlation between the amount of the loss and the amount of the defendant’s gain, the degree to which the offense and the defendant’s contribution to it was sophisticated or organized, the duration of the offense and the defendant’s participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense.¹³

The proposal is not perfect and of course the Commission declined to adopt it. But it strikes us that the approach we took is a good one and can provide a starting point or framework for assessing the guidelines overall. What factors matter so much they need to anchor the base offense levels? How should the impact on victims be counted? How do we use motive to measure culpability? It is a richer and more nuanced approach that is far superior to the factor and enhancement laden one we currently have.

It is a conversation starter and we invite the Commission to see it as such should the study of the guidelines writ large go forward.

(3) Prior Convictions (*proposed priority 3*).

FAMM is happy to endorse the Commission’s continued work on studying statutory and guideline definitions relating to prior convictions that have an impact on statutory and guideline sentencing provisions. We discussed above and again recommend the good model presented in the SAFE Act for defining predicate drug offenses.

We wrote to the Commission earlier this year about the human impact of and disparities caused by the many versions of drug and felony drug offenses that serve as predicates for career offenders.¹⁴ This issue remains of chief concern to our members who have been sentenced as career offenders, as Armed Career Criminals and for other offenses.

¹³ *Id.* at 12.

¹⁴ *See* Letter from Julie Stewart and Mary Price to Honorable Patti B. Saris (May 29, 2015).

In addition we encourage the Commission to eliminate the guideline version of the so-called residual clause that was struck down by the Supreme Court as unconstitutionally vague in *Johnson v. United States* (No. 13-720, June 26, 2015) just last month. The “crime of violence” definition for career offenders contains an identical provision to the one struck down by the Supreme Court. U.S.S.G. § 4B1.2(a)(2). The vagueness that pervaded and ultimately doomed the statutory residual clause is just as damaging, indeed more so, in the career offender context and should be removed from the guidelines. Those exposed to the sharply severe career offender enhancement deserve the same protections of notice and clarity that those facing mandatory minimum enhancements under ACCA.

(4) Child Pornography Offenses (*proposed amendment 8*).

Some of the most heartbreaking letters and phone calls we take are from family member of prisoners sentenced for non-contact child pornography offenses or from the prisoners themselves. The Commission has had this priority on its agenda for years. We hope this is the year some action might be taken.

FAMM endorses the Commission’s call to Congress to address the disturbing outcomes of the sentencing guidelines for child pornography receipt and possession. We strongly urge that the Commission adopt no more enhancements or SOCs, until the guideline for these offenses has had the airing the Commission believes it deserves. Among the findings of greatest concern in the Commission’s December 2012 report is the fact that enhancements, originally slated to proportion sentences based on targeted aggravated conduct, routinely aggravate sentences for the vast majority of offenders.¹⁵ These increases have in turn been prompted by changes made either directly by Congress or directed or encouraged by Congress.¹⁶

The Commission rightly identifies the non-production guideline as one in need of substantial revision and asks Congress to revisit the current penalty structure in federal distribution offenses to better account for new technology and its impact on the ease of image and file sharing. We endorse this proposal.

We note that even first-time offenders who do not receive a mandatory minimum can receive “substantially identical sentences as hardcore offenders.”¹⁷ In addition to increasing the

¹⁵ U.S. SENTENCING COMM’N, *Report to the Congress: Federal Child Pornography Offenses* 316 (Dec. 2012).

¹⁶ *Id.*

¹⁷ 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

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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.¹⁸ The saturation of computer technology assures that nearly all child pornography offenders sentenced under this section receive this enhancement.¹⁹ As a result, a possession offender can easily receive a sentence longer than someone who sexually abuses a child.²⁰


Federal judges believe that many child pornography sentences are too long – 71 percent of poll 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.²¹

We urge the Commission to identify and propose any changes it can make on its own, without the need for legislation, to begin to fix this badly flawed area of sentencing.

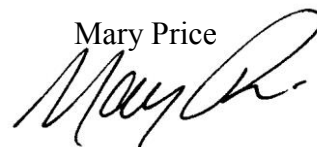
Conclusion

Thank you for considering our views. We look forward to working with the Commission this year

Sincerely,

Julie Stewart


President

Mary Price


General Counsel

¹⁸ U.S.S.G. § 2G2.2(b)(6) (2009).

¹⁹ *See, e.g.,* United States v. Durvee, 604 F.3d 84, 96 (2d Cir. 2010).

²⁰ *See* SpearIt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT. REP. 102, 103 (2011).

²¹ *Id.* at Question 8.



May 29, 2015

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Career Offender Guideline

Dear Judge Saris:

We write today on behalf of thousands of incarcerated FAMM members from whom we have heard regarding the sentences they received under USSG § 4B1.1 as career offenders. I know you and others on the Commission are concerned about this guideline. It calls for sentences well above the unenhanced guideline range in 95% of cases. Sometimes those sentences may be deserved. Too often, they are not.

The Commission has not reviewed this guideline in any depth in over 25 years. In light of the immense national interest in sentencing reform; the Commission's own commitment to honor the directive set out in 28 U.S.C. § 994 (g); and especially given the extreme injustice this guideline has and will continue to demand, we urge you to initiate a review of § 4B1.1. That study should include an examination into what the Commission can do to scale back exposure as a career offender. We understand that the Commission will address the issue of appropriate predicate offenses as part of the planned report on crimes of violence. This is commendable. Besides your work on how certain crimes of violence serve as predicates, we hope you would also explore how the Commission could limit the impact of the career offender guideline on drug offenders whose predicate offenses are non-violent in nature.

We understand that the guideline originated pursuant to a congressional directive.¹ But, we also know that the Commission has taken steps over the years to extend the career offender reach beyond those predicates contemplated by Congress.² The Career Offender guideline is disfavored by judges and prosecutors. It is followed today in only 25% of cases. Frankly, reading the stories of prisoners sentenced prior to *Booker* under the guideline, we are not at all surprised. Such draconian sentences should be reserved for the most recalcitrant offenders —

¹ See 28 U.S.C. § 994(h).

² See Amy Baron-Evans, et al., *Deconstructing the Career Offender Guideline* 8-15 (Apr. 1, 2011), available at: <http://www.fd.org/docs/select-topics---sentencing/Deconstructing-the-Career-Offender-Guideline-4-1-2011.pdf> (revealing how the Commission defined the class of career offenders "much more broadly than the statute requires"). See also *United States v. Newhouse*, 919 F. Supp.2d 955, 967-975 (N.D. Iowa, 2013) (exploring the addition of career offender predicates by the Commission beyond those required by Congress).

true career offenders. But too often bit players and repeat offenders are subject to sentences that cannot be justified. This is a problem this Commission can and should rectify.

Drug crimes account for the vast majority of offenses that convert defendants into “career offenders.” In 2014, 73% of defendants sentenced under 4B1.2 were drug offenders.³ You know also that drug offenders make up the largest single share of prisoners in our federal system.⁴ Their plight and that of the BOP has been the focus of a lot of reformist attention of late. Congress is considering the Smarter Sentencing Act (S. 502 and H.R. 920), largely based on reforms suggested by the Commission in its 2011 mandatory minimum report. The Department of Justice has changed drug mandatory charging practices in several ways⁵ and initiated an unprecedented clemency initiative,⁶ aimed especially at low level drug offenders. And, of course the Commission promulgated the so-called Drugs Minus Two reform in 2014 and made it retroactive. But, putting aside the clemency initiative, which is only retroactive, nothing has been done to change the way career offenders are identified and sentenced.

In response to a request to our incarcerated members, nearly 1,500 wrote to us about their experiences being sentenced as career offenders. Close to 1000 of them were sentenced based on state predicates alone. The stories they tell are alarming. We share a few with you because we think they illustrate just some of the problems with the guideline that the Commission could address.

One such man, a 43-year-old father and former crack addict, became a low-level player in a Wisconsin heroin conspiracy during a financial crisis, but stopped after six months, when he saw a customer use the drug, and felt too guilty to continue. He was indicted for his role in the conspiracy, and sentenced as a career offender because of two decades-old state prior offenses for selling cocaine: both occurred while he was a 21-year-old crack addict, and one involved him assisting someone else with sales in exchange for crack and miniscule amounts of cash. Without the career offender classification, he would have paid for his mistake with 70-87 months in prison. The career offender guideline nearly doubled his sentencing range — he is currently serving 130 months.

³ U.S. Sentencing Comm’n, *2014 Sourcebook of Federal Sentencing Statistics*, Tbl. 22.

⁴ Fed. Bureau of Prisons, *Inmate Statistics*, available at:

http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited May 28, 2015).

⁵ See Memorandum from Eric Holder, Jr. to United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013) (limiting mandatory minimum charging and guiding the use of 18 U.S.C. § 851 noticed enhancements), available at:

<https://clemencyproject2014.org/ref/materials/documents/AG%20Holder%20Charging%20Policy%20August%2012%202013.pdf>. See also Memorandum from the Attorney General to Department of Justice Attorneys (Aug. 29, 2013) (disapproving the use of 18 U.S.C. § 851 noticed enhancements for the purposes of securing guilty pleas), available at

<https://clemencyproject2014.org/ref/materials/documents/Holder%20Memo%20Regarding%20851%20Enhancements%20and%20Pleas.pdf>.

⁶ See Dep’t of Justice, Justice News, *Remarks as Prepared for Delivery by Deputy Attorney General James M. Cole at the Press Conference Announcing the Clemency Initiative* (April 23, 2014), available at:

<http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-m-cole-press-conference>).

Many respondents reported their predicates had occurred so close together or arose from the same criminal conduct that their sentences had been consolidated. A large number reported they had spent less than a year in any form of confinement and many of them **had never spent a day incarcerated**. Their career offender sentences of 130 months, 262 months, and even life, in rare cases, was for them the first time they have ever set foot in a prison. A 50-year old Tennessee father serving 188 months for cultivating marijuana reported that he had spent just 60 days in jail for the two predicates used to sentence him as a career offender. He began growing the drug for profit in 2009 after, in the span of two months, his wife gave birth to his first child and he lost his job. The best man at his wedding, trying to avoid prison time for his own federal marijuana cultivation charge, tipped off law enforcement. Our correspondent's two career offender predicates were quite minor. One was a 10-year-old possession and preparation for sale of LSD conviction, for which he received five years' probation. The other was a state possession with intent to distribute marijuana offense, for which he was given a suspended sentence and spent two months in jail.

Among those who responded are prisoners whose priors were deemed misdemeanors by the states of conviction, notwithstanding the maximum sentence to which they were exposed. One of the two felonies used to sentence a Virginia man as a career offender for conspiracy to distribute 50 grams of crack is technically a misdemeanor. His two predicate offenses were both state marijuana charges: one for 20 grams, and the other for 7.5 grams. In Virginia, felony possession is 14 grams or more. Because our member pled guilty to felony possession with intent to distribute in that case, it was used as a career offender predicate even though he possessed less than the statutory weight to make the offense a felony.

Many were convicted based on inchoate priors. And hundreds of our correspondents reported instant offenses that mock the label "career offender," as they were convicted based on handling street level quantities of drugs trafficked to feed the defendant's own addiction. A 29-year-old Florida woman was sentenced under the career offender guideline for selling crack at the behest of her physically abusive, drug dealer husband. She was herself an addict, who developed a drug problem after taking prescription painkillers following a medical operation. She accepted responsibility for her role in the offense, and hoped she would receive both in-patient drug treatment and help escaping her abusive marriage rather than prison time. Instead, she was sentenced to federal prison for 126 months for participating in her husband's conspiracy under duress. The nonviolent felony drug convictions used as predicates were both state offenses for sale and delivery of a schedule II drug, and both were tied to her addiction.

We know you cannot fix all that is wrong with the career offender guideline but we believe there is a lot you can do to limit drug offenders' exposure to sentences well out of proportion to their instant offense and criminal history.

Accordingly, we urge you to include in your priority list a review of the guideline with an eye toward examining and correcting those aspects that exceed the four corners of the congressional directive.

Honorable Patti B. Saris
June 1, 2015
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Thank you for considering our request. We look forward to working with you during this amendment cycle.

Sincerely,

Julie Stewart


President

Mary Price


General Counsel