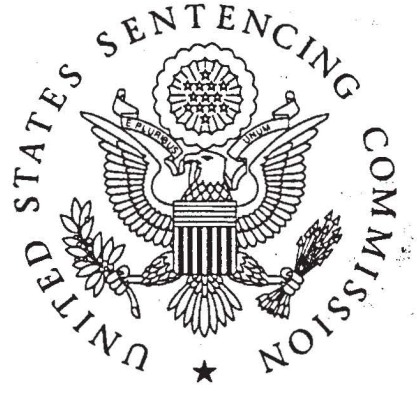
Public Comment

Proposed Amendments

1996

PUBLIC COMMENT

1996 AMENDMENT CYCLE



United States Sentencing Commission *March 1996*

UNITED STATES SENTENCING COMMISSION
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April 3, 1996

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
Phyllis Newton
Paul Martin
Office Directors
Judy Sheon

FROM: Mike Courlander

SUBJECT: Public Comment

Attached are notebooks containing all the formal public comment coming into the Communications Office during this last comment period. **The few pieces of comment on money laundering and child sex offenses were forwarded to you earlier.** They are included here again along with the comment on food & drug offenses and cocaine so that you will have a complete set all in one place.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

MAR 6 1996

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

Dear Judge Conaboy:

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

Food and Drug Offenses

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

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

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

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

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

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

933 F.2d at 756.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Child Sex Offenses

Amendment 1

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

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

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

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

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

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

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

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

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

Amendment 2

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

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

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

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider
Counsel to the
Assistant Attorney General

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J. Robert Cooper, Esquire

January 31, 1996

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

Re: **2S1.2 (Money Laundering)**

Dear Mr. Chairman:

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

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

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

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

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

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

Very truly yours,

J. Robert Cooper

JRC/mg

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

April 9, 1996

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

Dear Judge Conaboy:

I am pleased to submit, on behalf of the Federal Public and Community Defenders, our views on the proposed amendments to the Guidelines Manual. We appreciate the opportunity to respond to the amendments published for comment this cycle.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington

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Statement of

Federal Public and Community Defenders

on

Proposed Amendments to Sentencing Guidelines

April 9, 1996

Amendment Relating to Crack Cocaine

This amendment, in response to Public Law No. 104-38, seeks comment on the appropriate penalties for crack and powder cocaine offenses. In the legislation rejecting the amendment proposed last year to revise the penalties for crack cocaine offenses, Congress directed the Commission to revisit the issue and consider a number of factors, including a presumption that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." The directive contains no deadline by which the Commission must respond, and in its request for comment, the Commission states that it may or may not act upon any proposed amendments this amendment cycle.

We commend the Commission for its efforts last year to bring about greater fairness in sentencing defendants convicted of crack offenses. It is unfortunate that Congress rejected the Commission's amendment. We hope that the Commission will continue to work toward achieving a fair sentencing system, despite any pressures to substitute political expediency for objectivity.

Amendment Relating to Money Laundering

This amendment seeks comment on revisions to the money laundering guidelines. The Commission has republished the amendment it promulgated last year, as well as a proposal drafted by the Department of Justice. After receiving public comment on the proposals, the Commission proposed an alternative amendment that "reflects the most recent discussions between Commission staff

and the staff of the Department of Justice on appropriate revisions of the 1995 amendment."

Last year, we supported the amendment promulgated by the Commission, and we continue to do so. That amendment, the result of three years of work by the Commission staff, would have tied the offense level of a money laundering conviction more closely to the underlying offense that was the source of the illegal proceeds. The Commission's working group on money laundering offenses found that prosecutions under 18 U.S.C. §§ 1956 and 1957 were being pursued increasingly to address offenses that traditionally would not be considered "money laundering." This practice results in prosecutions of offenses under the money laundering statute, even when the underlying offense is indistinguishable from the conduct alleged to constitute the money laundering offense. The Commission's amendment would better reflect the relative seriousness of the offense conduct. The Department of Justice proposal and the latest compromise proposal would do nothing to address the inequities and abuses that prompted the Commission's attempt to improve the current guideline.

We recommend that the Commission delay acting on any money laundering amendments until the Commission has had an opportunity to assess and receive public comment on the Justice Department report.

Amendment 1
Sexual Offenses Against Children

In response to the Sexual Crimes Against Children Prevention

Act of 1995, the Commission proposed amendments to the guidelines in Chapter 2, Part G. After receiving comment on these amendments, the Commission proposed substitute amendments. Section 2 of the Act directs the Commission to increase by at least two levels the base offense level for a violation of either 18 U.S.C. § 2251 or 18 U.S.C. § 2252. Section 3 of the Act directs the Commission to provide at least a two-level increase for an offense under 18 U.S.C. § 2251(c)(1)(A) or 2252(a) by at least three levels "if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction." Section 4 directs the Commission to increase by at least three levels the base offense level for an offense under 18 U.S.C. § 2423(a).

In addition to specific guideline changes, the legislation directs the Commission to submit to Congress, by June 1996, a report "concerning child pornography and other sex offenses against children." Section 6 of the Act requires the report to include an analysis of sentences and recommendations for appropriate amendments to the guidelines applicable to offenses under 18 U.S.C. § 2251, 2252, and 2243 and offenses involving juvenile victims under 18 U.S.C. § 2241, 2242, 2243, and 2244. The legislation also directs the Commission to provide an analysis of substantial assistance departures for offenses under 18 U.S.C. §§ 2251 or 2252 and an analysis of recidivism by offenders convicted of sex crimes.

We recommend that, until the report is completed, the Commission refrain from making any more changes than necessary to

comply with the specific directives in the Act. Once the report is completed, the Commission will be in a better position to determine whether any further amendments are necessary. In addition, before we urge the Commission, before it makes any significant changes to the guidelines in Chapter 2, Part G, to clarify the heartland of offenses covered by those guidelines.

Amendment 2
Prostitution Offenses

In response to section 4 of the Sex Crimes Against Children Prevention Act of 1995 and the Telecommunications Act of 1996, the Commission published for comment amendments to § 2G1.1 and § 2G1.2. After receiving comment, the Commission has proposed substitute amendments to these guidelines.

Section 4 directs the Commission to provide at least a three-level enhancement for offenses involving the transportation of minors with intent to engage in prostitution or other prohibited sexual conduct under 18 U.S.C. § 2423(a). The Telecommunications Act of 1996 created a new offense prohibiting use of interstate or foreign commerce to persuade, induce, entice, or coerce an individual under age 18 to engage in prostitution or any other criminal sexual act.

We agree with the Department of Justice that until the report is completed, the Commission should "just follow [the] legislation directive." We suggest that any additional changes, such as consolidation of guidelines, can best be addressed after review of the report and as part of the guideline simplification project.

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001-96

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J. Robert Cooper, Esquire

January 31, 1996

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

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

Requested Application Change

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

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

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

I appreciate your thoughts and consideration.

Very truly yours,

J. Robert Cooper

JRC/mg

002-96

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J. Robert Cooper, Esquire

January 31, 1996

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

Re: **2S1.2 (Money Laundering)**

Dear Mr. Chairman:

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

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

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

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

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

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

Very truly yours,

J. Robert Cooper

JRC/mg

003-96

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Δ ADMITTED IN MARYLAND ONLY

OF COUNSEL
MICHELE F. CROWN

February 20, 1996

BY HAND DELIVERY

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

Re: Proposed Amendment To Sentencing Guideline 2N2.1

Dear Judge Conaboy:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We appreciate this additional opportunity to present our views.

Sincerely yours,

John R. Fleder

John R. Fleder

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

004-96

National Broiler Council

February 28, 1996

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

Re: Proposed Amendments to Sentencing Guidelines

Dear Sir/Madam:

On January 2, 1996, the United States Sentencing Commission (the Commission) announced in the *Federal Register* several proposed revisions to the federal *Sentencing Guidelines*, including amendments to Sections 2N2.1 and 2F1.1 governing the manner in which individuals and corporations are treated following convictions under the Federal Food, Drug, and Cosmetic Act, Poultry Products Inspection Act, and Federal Meat Inspection Act. 1/ The National Broiler Council (NBC), the national trade association representing the producers/processors of more than 95 percent of the broiler chickens consumed in the United States, has strong reservations about the proposed amendments to Sections 2N2.1 and 2F1.1 and welcomes this opportunity to comment.

SUMMARY

The *Sentencing Guidelines* already provide stiff sanctions -- in the form of imprisonment and fines -- for violations of the nation's food and drug laws. The proposed amendments to Sections 2N2.1 and 2F1.1 would treat all violations of these statutes as cases involving fraud, severely limiting the ability of federal prosecutors and courts to respond appropriately to the broad spectrum of conduct punishable under these laws.

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

The Madison Building-Suite 614/1155 Fifteenth Street, N.W./Washington, D. C. 20005/202 296-2622

BACKGROUND

Sentences in criminal cases involving violations of statutes and regulations dealing with any food, drug, biological product, device, cosmetic or agricultural product currently are governed by U.S.S.G. § 2N2.1. 2/ That section provides for a "base offense level" of six, assuming that the underlying regulatory offense involves "knowing or reckless" conduct. 3/ In the event of a merely negligent violation of a statute or regulation, the Guidelines permit a sentencing court discretion to grant a "downward departure" in order to more appropriately match a defendant's conduct and sentence.

In particularly egregious cases in which the regulatory violation involves fraud, Section 2N2.1 requires application of U.S.S.G. § 2F1.1, which governs crimes involving fraud and deceit. That section similarly begins with a base offense level of six, but provides for significant increases in offense level -- and, by extension, the possible range of any fine and/or jail term imposed -- based upon the amount of "loss" occasioned by a defendant's conduct.

DISCUSSION

Under the proposed amendments, Section 2N2.1 would be deleted in its entirety, and all food, drug, and related regulatory offenses, including violations by corporations and other organizations, would be sentenced under Section 2F1.1. Although an allowance would be made for an upward departure in a case involving conscious or reckless risk of serious bodily injury, the proposed commentary makes no reference to the appropriateness of a downward departure, even in cases involving mere negligence. This change would have a dramatic impact on the severity of sentences imposed in food and drug cases.

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

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

Laws governing foods, drugs, and cosmetics are characterized as "public welfare" statutes and, as such, the government need not prove awareness of wrongdoing. Mere proof that "the defendant has, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of and that he failed to do so" is sufficient. 4/ Grouping all violations of the food and drug laws under Section 2F1.1 would deprive federal prosecutors and sentencing judges of the flexibility they need to fashion appropriate sentences in those cases where the defendant's violative conduct amounts to no more than simple negligence or oversight.

The fact that enhanced penalties are already available in food and drug cases involving fraud further underscores the inadvisability of the proposed amendments. Current Section 2N2.1 imposes a flat base offense level for any regulatory violation but permits prosecutors to seek enhanced penalties under Section 2F1.1 for cases involving fraud or where the regulatory violations are part of a pervasive scheme. The proposed amendments, therefore, would have little, if any, impact on sentences in cases in which the conduct involved would have been charged as fraud or otherwise triggered application of Section 2F1.1. Instead, by making fraud the rule rather than the exception, the amendments would substantially increase the penalties in cases that otherwise do not warrant severe punishment. 5/

In sum, the proposed amendments would brand all violations pertaining to food, drugs, and agricultural products as fraud, eliminating any distinction between negligent, purposeful, and fraudulent acts, and impose, in cases involving mere negligence, penalties previously reserved for intentional and fraudulent conduct. NBC strongly opposes the proposed amendments to Sections

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

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

2N2.1 and 2F1.1 of the *Guidelines* for these reasons and urges the Commission to delete these provisions from any recommendations submitted to Congress. If the Commission nevertheless elects to submit the proposed changes for Congressional consideration, NBC urges the Commission to include commentary that would allow prosecutors and judges more discretion in sentencing purely negligent regulatory violations.

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

Sincerely,

George Watts
President

005-96

March 5, 1996

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

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

Dear Sir/Madam:

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

SUMMARY

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

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

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

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

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

BACKGROUND

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

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2/ 21 U.S.C. §§ 301 et seq.

3/ 21 U.S.C. §§ 451 et seq.

4/ 21 U.S.C. §§ 601 et seq.

5/ Chapter 2 of the Guidelines governs sentences for individuals. Chapter 8, in turn, sets forth the organizational sentencing guidelines, pursuant to which a corporate offense level and, by extension, base fine, are determined. As currently worded, food, drug, and agricultural products offenses are specifically excluded from the organizational sentencing guidelines. As a result, fines for organizations convicted of offenses covered by Section 2N2.1 continue to be governed by pre-guidelines law. Under the proposed amendments, sentences in cases involving organizational defendants would similarly be calculated in all cases using the fraud guidelines.

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

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

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

DISCUSSION

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

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

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

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

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

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

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

As the Food and Drug Working Group Final Report acknowledges, the required application of the fraud guideline will have a dramatic impact on the severity of sentences imposed in food and drug cases. For example, in a case involving distribution of adulterated meat, and assuming the amount of "loss," by whatever calculation, exceeds $500,000, application of Section 2F1.1 will result in a base offense level, before adjustment, of not less than 16, subjecting a first-time offender to a minimum of 21 months incarceration. If the sentence is instead determined by application of Section 2N2.1, the resulting base offense level is six, with a corresponding sentencing range of 0-6 months. 11/ Criminal sanctions for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14/ See, e.g., 21 U.S.C. § 676(a).

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

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

Sincerely,

James D. Cope
President
Nonprescription Drug Manufacturers
Association

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

Gerald J. Mossinghoff
President
Pharmaceutical Research and
Manufacturers of America

006-96

AMERICAN BAKERS ASSOCIATION

March 5, 1996

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

Re: Proposed Deletion of USSG § 2N2.1

Dear Sir or Madam:

The American Bakers Association ("ABA") hereby submits the following comments in response to the United States Sentencing Commission's ("Commission") recent proposal to delete USSG section 2N2.1, which governs sentences for food and drug offenses. See 61 Fed. Reg. 79, 83 (Jan. 2, 1996).

The ABA is the trade association that represents the Nation's wholesale baking industry. It consists of more than 300 baker and allied member firms. The ABA's membership consists of companies of all sizes, ranging from family-owned enterprises to companies that are affiliated with Fortune 500 corporations. Together, these companies produce approximately 80 percent of the Nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their productions, sales, and distribution operations.

The ABA is particularly interested in the Commission's proposal to delete USSG section 2N2.1 because its members are regulated under (among other statutes) the Federal Food, Drug and Cosmetic Act ("Act"), 21 U.S.C. § 301 et seq., which authorizes criminal penalties for certain regulatory offenses. Specifically, because large-scale baking operations may involve changes in ingredients that may be subject to strict labelling and recordkeeping requirements under the Act, we are concerned that misdemeanor violations that result from application of "strict liability" doctrines or from mere negligent conduct will be unfairly punished, under the Commission's proposal, as felonies under the fraud provisions of the Sentencing Guidelines.

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The Commission proposes to delete USSG section 2N2.1 in its entirety and to amend the existing fraud guideline (USSG section 2F1.1) so that "food and drug cases for individuals and organizations could appropriately be sentenced under that guideline," 61 Fed. Reg. at 83. In other words, purely regulatory violations would be treated, for sentencing purposes, in the same manner as intentionally fraudulent conduct. We believe that such a change would create a significant anomaly in the sentencing scheme for food and drug offenses, would deprive the existing sentencing scheme of needed flexibility, and would result in unfairness in a very real class of cases.

First, eliminating USSG section 2N2.1 will create an anomaly in the sentencing of food and drug regulatory offenses. Under the existing guidelines scheme, the sentencing of food and drug regulatory offenses is covered by section 2N2.1, which contains not only a cross-reference to the fraud guideline for offenses involving intentionally fraudulent conduct (USSG section 2F1.1), but also a note permitting a downward departure where mere negligence is involved. See USSG § 2N2.1 comment note 1. This scheme is generally consistent with the Act's express distinction between felony offenses, which require proof of intent to defraud or mislead, see 21 U.S.C. § 333(a)(2), and misdemeanor regulatory offenses, which do not, see id. § 333(a)(1). Under the Commission's proposal, however, cases involving knowing, reckless, negligent or even non-negligent conduct will automatically be swept within the ambit of section 2F1.1, which is designed to cover intentional fraud and which contains more severe penalties (depending on, among other factors, the resulting "loss"). This result is anomalous because it means that an important category of cases (food and drug regulatory offenses) will be treated in a manner totally at odds with the mental state that underlies such offenses.

Second, the Commission's proposal deprives the existing sentencing scheme of needed flexibility to handle a broad spectrum of fact-specific situations. Although the Commission's proposal provides for the possibility of an upward departure under section 2F1.1 for circumstances in which the offense places a large number of persons at risk of serious bodily injury, see 61 Fed. Reg. at 83, there is no reciprocal provision for a downward departure for circumstances in which the offense results from mere negligence or recklessness. As noted above, section 2N2.1 incorporates a more fact-sensitive approach to determining appropriate sentences for regulatory offenses. By proposing to delete

section 2N2.1, the Commission seeks to purchase apparent simplification of the Guidelines at the expense of a false consistency in the treatment of food and drug offenses.

Finally, adoption of the Commission's proposal would result in unfairness in a very real class of cases. Because courts have treated food and drug offenses as strict liability "public welfare" offenses, responsible corporate officials may be subject to criminal liability even if they had no knowledge of any wrongdoing, much less intentionally commit wrongdoing. See, e.g., United States v. Park, 421 U.S. 658, 673-74 (1975) (finding a corporate officer criminally liable upon proof that "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of and that he failed to do so"); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (food and drug statute "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to the public danger"). The facts of the Park are instructive, because it involved the imposition of criminal liability on the president of a national food store chain who had no knowledge of the unsanitary warehouse conditions that led to the allegation of shipment of adulterated food in interstate commerce. The Commission's proposal would unfairly treat such offenders under the same rubric as someone who purposefully and fraudulently caused adulterated food to be shipped in interstate commerce.

The Commission's proposal appears to be an attempt to fix something that does not appear to be broken. For the foregoing reasons, we believe that the Commission should decline to adopt its proposal to delete USSG § 2N2.1. Thank you for your careful consideration of our views.

Very truly yours,

Robb MacKie

Robb MacKie
Vice President
Government Relations

The Business Roundtable

007-96

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Samuel L. Maury
President

Patricia Hanahan Engman
Executive Director

March 5, 1996

HAND DELIVERED

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

Ladies and Gentlemen:

Enclosed are comments submitted on behalf of The Business Roundtable in response to the Commission's request for public comment on proposed amendments to sentencing guidelines, published in the Federal Register on January 2, 1996.

If you have any questions about these comments, we will be pleased to respond.

Sincerely,

Samuel L. Maury

SLM/emc

Enclosure

March 5, 1996

COMMENTS OF THE BUSINESS ROUNDTABLE ON PROPOSED AMENDMENTS TO SENTENCING GUIDELINES FOR FOOD AND DRUG OFFENSES (U.S.S.G. §§ 2 F1.1; 2N2.1)

The Business Roundtable is pleased to comment on the recently proposed revisions to the federal Sentencing Guidelines, 1/ insofar as they apply to food, drug and cosmetic offenses.

The members of The Business Roundtable are approximately 200 chief executive officers of major corporations, engaged in a wide variety of businesses. Accordingly, its constituency includes many companies not directly affected by the changes under consideration. However, as the following comments make clear, the proposed changes involve important issues of general principle that are of concern to the entire Roundtable membership.

These comments will address the matters of principle rather than the specifics of food, drug and cosmetic sentencing. The Commission will receive detailed comments from other business groups, whose members are more concentrated in the industries directly affected, 2/ and there is no need to repeat or paraphrase them.

1/ See 61 Fed. Reg. 79 (Jan. 2, 1996).

2/ The Roundtable particularly calls attention to the comments submitted on behalf of the Grocery Manufacturers of America, Inc., the Nonprescription Drug Manufacturers Assoc., and the Pharmaceutical Research and Manufacturers of America.

The Roundtable has two general and inter-related objections to this draft proposal: one of substance and one of process. The proposal should be rejected because it is contrary to the basic mandate of the Sentencing Reform Act and because there is no adequate support for the change. In addition, this Comment will briefly address the issue of "gain" as a proxy for "loss" when calculating fines.

I. The Proposal Is Contrary to the Mandate of the Sentencing Reform Act.

The Commission's working group proposes to eliminate the existing guideline for food, drug and cosmetic offenses (U.S.S.G. § 2N2.1) and treat all of these offenses under the fraud guideline in U.S.S.G. § 2F1.1. The proposal is described only in cursory terms at the conclusion of a long register notice devoted to other matters. In fact, however, the proposal to treat all defendants as if they were guilty of fraud, whether they have committed fraud or not, would represent a sea change in sentencing policy and is dramatically opposed to the instructions that Congress has given the Commission.

The U.S. Sentencing Commission was created by Congress in 1984 to establish sentencing standards for federal crimes. The principal problem that Congress sought to address was the "shameful disparity" in the jail sentences imposed on individuals who had been convicted of similar offenses. 3/

3/ See 1984 U.S. Code & Admin. News, 98 Cong., 2d Sess. 3182, 3221, 3224-29, 3248.

Congress did not suggest that there was anything wrong with disparate jail sentences for different crimes. It is obviously just as perverse and "shameful" to treat differently situated defendants similarly as it is to treat similarly situated defendants differently. The Commission has recognized this fact by establishing no fewer than 43 basic offense levels (U.S.S.G. § 5A), with myriad mathematical adjustments up and down. It is absurd to propose that the issue of whether someone has committed fraud or not is less important than these other mathematical matters.

Congress has given the Commission guidance for the development of sentencing guidelines. In 18 U.S.C. § 3553(a), Congress listed the "[f]actors to be considered in imposing a sentence." Included in those factors are "the nature and circumstances of the offense," as well as "the need . . . to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense."

It is useful to remember the prolonged debate over the evolution of the guidelines for Sentencing of Organizations (U.S.S.G. § 8), which were ultimately adopted in 1991. The deepest divide in that debate was between those who believed that criminal sentences should be driven by purely economic calculations (analogous to the Working Group's proposal here) and those who believed that criminal sentences should take account of moral culpability (as mandated by the governing statute). The Commission was so torn over this issues that at one point

it even published for comment two alternative options that reflected the competing views. 4/

This battle was settled by a compromise, which tempered pure economic calculations by considerations of moral culpability. Thus, the alternative loss-based fine in U.S.S.G. § 8C2.4(a)(3) only applies to the extent "the loss was caused intentionally, knowingly, or recklessly." Moral culpability makes a big difference.

It should not be necessary to fight this battle all over again. Fraud is a serious offense in our legal system, characterized in common law by terms like "unconscionable," "venal," "corrupt" or a "willful intent to deceive." There is hardly a trivial difference between people who have committed fraud and those who have not, in terms of "the nature" or "the seriousness" of their offense and the deserved "just punishment." This is particularly true in a heavily regulated enterprise like the production and marketing of food, drugs and cosmetics -- where many of the "crimes" subject to the sentencing guidelines have no required element of intent or mens rea, but are in effect strict liability offenses which do not involve moral culpability.

4/ U.S. Sentencing Commission: Chapter Eight -- Sentencing of Organizations (Oct. 1989).

The working group's recommendation is therefore contrary to the Congressional mandate and to previous determinations of this Commission. Moreover, there is no demonstrated need for the change.

II. There Is No Stated Justification for Such a Major Change.

The Food and Drug Working Group met privately, so outside commentators are not in a position to know all the factors they may have considered in making their proposal. In their published Report, 5/ however, the only reason stated for the recommendation is that in some cases there was an "inappropriate failure to cross reference" from the food and drug offense guideline (U.S.S.G. § 2N2.1) to the fraud guideline (U.S.S.G. § 2F1.1).

Without intimate knowledge of the factual background and the arguments made by counsel in these cases, it is not possible for a commentator to know whether the criticism is justified. Moreover, the Working Group does not disclose whether its criticism applies to a large or a small number of cases. 6/ But even if there had been a demonstration that a guideline revision is needed, the Working Group should have recognized that there are better ways to cure the problem than to abolish the distinction between conduct that is fraudulent and conduct that is not.

5/ Food and Drug Working Group, Final Report at pp. 12, 20 (February 1995).

6/ The Report merely refers to two unidentified cases and indicates "some" others did not appropriately cross reference the fraud guidelines. See Food and Drug Working Group, Final Report at p. 12 (Feb. 1995).

More focused revisions are available and would be more just. For example, the Commission could expand on the pertinent explanatory note (U.S.S.G. § 2N2.1, Note 2), to make it clear that the cross reference is mandated in fraud cases. The reference to "fraud" in the current note may not be sufficiently prominent. A prosecutor could also appeal a sentence that improperly deviates from the guidelines, and an appellate decision would presumably flag the issue for the future.

Either or both of these approaches could address the perceived problem of disparate sentences for similar crimes without the unjust imposition of similar sentences for vastly different crimes.

III. The Risks of Basing Fines on Gains

The Commission has asked for comment on whether it is desirable to substitute a calculation of "gain" for a calculation of "loss" in applying U.S.S.G. § 2F1.1 "when the essence of the offense is fraud against regulatory authorities with no economic loss."

The Roundtable's concern here is purely one of principle because the change would not affect the fines paid by an organization. (If an organization were convicted of fraud, it presumably would be subject to the alternative gain/loss fines set out in U.S.S.G. § 8C2.4(a). See also U.S.S.G. § 8C2.1(a)). Nevertheless, the

Roundtable is concerned about the risk of prosecutorial over-reaching if fine levels are determined by "gain."

The problem is illustrated by U.S. v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), a case that the Commission's Federal Register notice cites as problematic. Chatterji was written by former Commission chairman, Williams Wilkins. Judge Wilkins refused to allow gain to be used as a proxy for loss because there was no showing of any loss whatever. 7/ That determination may have been affected by the fact that the claimed loss to consumers was vastly overstated. The court below had found that the loss was measured by defendant's total sales of a product -- apparently on the unwarranted assumption that the products were totally worthless. The dissenting opinion makes a similar mistake when it suggests an alternate "gain" calculation measured by total sales -- apparently assuming that sales are the same thing as profit.

A problem of a different kind would be presented if a prosecutor decided that the unwarranted gain was measured by the costs avoided through a defendant's non-compliance. This could lead to the perverse result that the most severe punishments are reserved for non-compliance with regulations that are the

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

most difficult and burdensome with which to comply -- again without regard to the degree of moral culpability.

Judicial recognition of this concept would be of particular concern to the Roundtable if it found its way into the interpretation of the alternative fine provisions of U.S.S.G. § 8C2.4(a), which apply to organizational offenses generally. If a prosecutor claims that the "gain" was the difference in the cost of the existing compliance regime and the cost of a compliance regime that would have effectively prevented the offense in question, it could mean that the most statistically improbable offenses will carry the heaviest fines because it would require extraordinarily comprehensive and burdensome compliance programs to prevent them.

The Commission therefore should recognize the potential for abuse and misapplication of a gain measure, and also recognize that action it takes in this specific area could have broad application across the range of organizational sentences.

The Criminal Justice Policy Foundation

Received 3/7/96

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March 5, 1996

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

Dear Judge Conaboy:

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

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

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