become so prevalent, and the benefits of doing so have become so tempting, that corporate counsel are now encouraged to convince their clients to forsake the protections of the Privilege so as to obtain the benefit of being seen as cooperative. The amendment itself, by being included as part of the Guidelines, thus codifies a trend that has accelerated in the last several years. The inevitable effect has been that corporations that do not hasten to waive the Privilege are quickly viewed as hiding something of value behind the Privilege; thus, in practice, there has been an *in terrorem* effect on counsel and their clients who want to cooperate with authorities – they must waive or be deemed uncooperative and engaged in a conspiracy of silence.

The Task Force recognizes that the Department of Justice and SEC pronouncements on cooperation list numerous factors, only one of which is waiver of the Privilege. Moreover, there are times when it may be appropriate for the government, in the interests of justice and in the search for the truth, to request that the Privilege be waived. Target corporations may also sometimes hide behind the Privilege, either improperly or by an over expansive interpretation of its parameters. However, there is no empirical study known to us which proves that law enforcement today is any more effective than, say 20 or 40 years ago—when waiver of the Privilege was rarely done or considered.

High profile cases such as Enron, Adelphia and WorldCom have produced a more diligent and aggressive enforcement program for criminal and civil authorities alike. Now, more than at any other time, there is a coordination of activities by prosecutors and regulators, and parallel investigations and proceedings. This development is expected. The Task Force recognizes the value and need for such programs.

However, the parallel investigations present difficult choices for clients and counsel. Each agency and authority has its own view and guidelines on whether cooperation is expected by a client, how to gauge that cooperation, and whether waiver of the Privilege is a factor considered for cooperation and resolution of the matter. For example, the SEC will consider waiver as a factor of cooperation, but agree in writing that disclosure of privileged communications and work product is only selective and will not be deemed a general waiver as to others. The CFTC has on occasion demanded waiver of privileged communications immediately at the commencement of an investigation, and has refused to give any written comfort that the waiver would be deemed limited. The Guidelines Commentary, however, trumps any nuances of these civil regulators when there are parallel investigations. This is an unfortunate result, and we believe an unintended consequence of the 2004 amendment. An attorney may counsel a client not to waive the Privilege for a civil regulator. However, with the Holder and Thompson memoranda, and the language of the 2004 amendment, with the possibility of criminal charges and sentencing, there is an overriding, almost compulsive, urge to waive. This should not be so, and is exactly the opposite of what the language of the Commentary suggests.

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approximately 50% of in-house counsel have had to do so. Over 50% of both groups confirmed that they believed there has been a marked increase in waiver requests by prosecutors. 55% of outside counsel who have represented clients under investigation said that prosecutors had requested waiver, directly or indirectly, as part of cooperation. *The Decline of the Attorney-client Privilege in the Corporate Context* available at http://www.acca.com/Surveys/attyclient2.pdf.

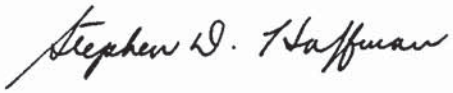
Conclusion

The attorney-client privilege has served the true administration of justice for centuries by protecting confidentiality and promoting the candor that results in accurate fact-finding and effective legal advice. The 2004 amendment language, together with the Holder and Thompson Memoranda and their regulatory progeny, threaten to seriously compromise this ancient privilege to the detriment of the legal system and the society it serves. The exception in the amendment has become the norm.

For this and the reasons cited herein, we urge the Commission to eliminate the 2004 amendment language that encourages a corporation to waive the attorney-client privilege and work product protections to obtain a reduction in sentence under the Guidelines. There should instead be an express statement that waiver of the attorney-client and work product protections is not to be considered in evaluating the level of cooperation of the defendant and its culpability score.

Respectfully submitted,

New York State Bar Association
Task Force on the Attorney-Client Privilege [10]



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[10] While an Assistant U.S. Attorney from the U.S. Attorney's Office for the Eastern District of New York is on the Task Force, she did not participate in drafting the position set forth in this letter, and the letter does not represent her views, the views of her Office or the views of the Department of Justice.

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March 31, 2006

Office of Public Affairs,
U.S. Sentencing Commission,
One Columbus Circle,
Washington, DC., 20002-8002.

Dear Members of the United States Sentencing Commission,

I am writing on behalf of the San Antonio Bar Association, to express our sincere and adamant opposition to the recent amendment of the Commentary for Chapter 8, Section 8C2.5 of the Sentencing Guidelines, and application note 12, authorizing and encouraging the government to require companies, associations, and other entities to waive their attorney-client privilege and work-product protections in the course of investigations in order to qualify as cooperative under the Guidelines. This commentary finds its origins in the Thompson Memorandum and its implementing procedures, a memo suggesting the procedure which general counsel must follow in order to earn a corporate client the benefit of having cooperated with the Department of Justice. While the amendment to the Guidelines is intended to sufficiently punish organizations, what it actually does is create a policy that makes corporate counsel an arm of the Department of Justice rather than a steward to their client entities. Thus, this amendment represents a serious and disturbing erosion of the attorney-client relationship and threatens the fundamental principles of our adversarial system of justice. Moreover, the amendment will have the practical effect of deterring self-governance, compliance, internal investigations, and reporting of violations by business entities and the individuals who comprise them.

Attorney-client confidentiality and the work product privilege not only provide sacred protections that facilitate effective and meaningful representation to one under investigation or indictment; the protections also create a confidence in consultation with counsel that allows individuals and entities to seek advice regarding lawful compliance and

the conducting of internal investigations. When these communications and investigative reports are routinely exposed and turned against individuals and organizations, entities will be disinclined to govern themselves or even seek advice on prospective compliance with laws.

Moreover, the course of conduct suggested by the commentary as informed by the Thompson Memorandum[1] is not consistent with the procedures prescribed by the Sarbanes-Oxley Act. It seems to render the Act a nullity. Thus, the Sentencing Commission may be seen as acting outside of Congress' direction. At the time of the Sentencing Guidelines Amendment, Congress' asked the Commission to review the guidelines as a response to the Sarbanes-Oxley Act. 2002, Public Law 107-204.

In addition, asking general counsel to perform a waiver of the attorney-client privilege for a corporation, as the Thompson Memo suggests, fails to recognize that officers and directors of corporate entities are presumed to be acting for the corporation so long as they are acting in their capacities as officers, and directors. Therefore, the decision whether to waive any privilege on behalf of the corporation rests with its offices and directors and the suggestion that general counsel may waive the privilege on behalf of the client is not correct.

Furthermore, by making waiver of essential protections a consideration at sentencing, we are forcing persons and entities to choose between their rights and their liberty. This Hobson's Choice runs contrary to American ideals of justice and the structure by which we seek to perfect them.

On behalf of the over 3,300 attorneys of the San Antonio Bar Association, we urge the Commission to take a stand for the protection the attorney-client relationship and the essential rights of individuals and non-natural citizens by abandoning these amendments.

Sincerely,

Mary Belan Doggett
SABA President

[1]Memorandum Issued Deputy Attorney General Larry D. Thompson, "Principles of Federal Prosecution of Business Organizations," U.S. Dep't of Justice (Jan. 20, 2003), available at www.usdoj.gov/dag/cftf/business_organizations.pdf.

Steroids and Human Growth Hormone (HGH)

U.S. Department of Justice (DOJ)

- Michael J. Elston, Senior Counsel to the Assistant Attorney General

The Department Of Justice (DOJ) commends the Commission's staff for their efforts in preparing the proposed amendments.

Options One & Two of the Proposed Amendment

The DOJ respectfully requests that the Commission adopt Option Two of its proposed amendment because treating anabolic steroids in the same manner as all other Schedule III controlled substances is consistent with the basic construct of the drug sentencing provisions of the USSG and the Controlled Substances Act (CSA). The DOJ also suggests that Option One may have unintended consequences of decreasing the number of steroids-related prosecutions and slowing the prosecution of all federal drug offenses.

Additionally, the DOJ notes that purity is irrelevant to the sentencing of the overwhelming majority of controlled-substance offenses under both existing statutory and guideline provisions. The DOJ asserts that of the hundreds of controlled substances, the guidelines provide for the use of purity in connection with only four, all of which are Schedule II controlled substances. All other controlled-substance offenses are sentenced based on "a mixture or substance containing a detectable amount." The DOJ is not aware of a compelling reason to create an exception from this definition for the class of over 50 controlled substances that fall under the category of anabolic steroids. The DOJ further asserts that a purity-based system under Option One would approximate the result achieved by the unit-based system while requiring increased forensic analysis and creating another issue for litigation at sentencing, both of which have additional costs. These additional costs imposed on the entire criminal justice system substantially outweigh any small benefits that may be offered by a purity-based system, according to the DOJ.

The DOJ endorses the recommended new enhancements regarding masking agents, distribution to athletes, and distribution by coaches. Furthermore, the DOJ believes that placing the enhancements in already established categories, as Option Two provides, is preferable to creating new enhancements.

According to the DOJ, extending the proposed enhancements to all controlled substances in appropriate circumstances would serve the goals of the sentencing scheme to provide fair and just punishment and deterrence, and is therefore appropriate.

Issue for Comment 2 - Possible New Levels for Mid/High Level Dealers

The DOJ asserts that it is not necessary to set levels for mid-level or high-level traffickers

because the range of base offense levels under the guidelines is rather limited for Schedule III controlled substances. The DOJ believes that in order to achieve the goal of high-level traffickers earning an offense level at or near level 20, the maximum base offense level in the guidelines for Schedule III substances, the Commission should select Option Two, treating anabolic steroids as other Schedule III controlled substances. According to the DOJ, selecting this option would make it more likely that high-level traffickers receive the most appropriate sentence.

In closing, the DOJ thanks the Commission for the opportunity to provide this comment.

Food and Drug Administration (FDA)
Terrell L. Vermillion,
Director, Office of Criminal Investigations

Options One & Two of the Proposed Amendment

Terrell L. Vermillion, Director, writing on behalf of the Office of Criminal Investigations, expresses the Food and Drug Administration's (FDA) concern with Option One set forth in the proposed temporary, emergency amendment to increase penalties for offenses involving anabolic steroids.

According to the FDA, Option One requires a base offense level to be determined by the actual amount of steroids involved in the offense, with a rebuttable presumption that the label, shipping manifest, or other documentation describing the steroid accurately reflects the potency of the drug. The FDA expresses concern that this rebuttable presumption would provide an incentive for offenders to distribute steroids without labeling, with labeling that does not indicate the potency of the steroid, or with labeling that intentionally understates the potency of the steroid. The FDA asserts that this would allow the offenders to essentially force the government to perform costly and time-consuming analyses of the drugs to determine the potency for the purposes of sentencing.

Additionally, the FDA is concerned about the public health implications of Option One. The FDA hypothesizes that incomplete or inaccurate labeling may result in end users unknowingly taking incorrect or excessive amounts of steroids, thereby subjecting themselves to increased risk of adverse side effects.

In light of these concerns, the FDA believes that Option Two is much preferable to Option One.

Food and Drug Administration (FDA)
Sarah Hawkins,
Associate Chief Counsel

Sarah Hawkins, Associate Chief Counsel, writing on behalf of the Office of the Chief Counsel of the FDA, addresses the issue of whether Human Growth Hormone (HGH) is more appropriately addressed under §2D1.1, under §2B1.1, or in some other manner.

The FDA suggests that an amendment to §2N2.1, with a cross-reference to the loss table at §2B1.1 and other enhancements, would provide appropriate penalties for the offense conduct without upsetting the internal consistency of the USSG. Additionally, the FDA recommends that §2N2.1 be amended to include specific offense characteristics for trafficking in HGH in violation of 21 U.S.C. § 333(e), including:

- A cross-reference to the loss table at §2B1.1(b)(1) for violations of 21 U.S.C. § 333(e), whether or not the offense involved fraud, and commentary providing that the loss should be calculated based on the estimated street value of the HGH or the actual amount paid by the end user for the HGH, consistent with the existing Commentary to §2B1.1;

- A minimum base offense level of 26 for violations of 21 U.S.C. § 333(e) that involve individuals under 18 years of age, consistent with §2D1.2;

- A cross-reference to §2B1.1(b)(2) to provide enhancements for mass-marketing and the number of victims;

- An enhancement of 2 levels, with a minimum offense level of 14, for offenses that involve the conscious or reckless risk of death or serious bodily injury, consistent with §2B1.1(b)(12).

The FDA understands that the Commission's decision regarding HGH trafficking penalties may depend on what amendments, if any, the Commission promulgates for steroid trafficking offenses. The FDA's primary concern is that the conduct is punished in a manner that reflects the seriousness of the offense and promotes deterrence. As such, the FDA is not opposed to other ways to achieve this goal, including addressing HGH offenses in §2D1.1.

In closing, the FDA offers to provide any additional information or assistance that the Commission may desire.

Practitioners' Advisory Group (PAG)
Washington, D.C.

The Practitioners' Advisory Group (PAG) notes that the Congressional directive on steroids

instructed the Commission to merely "consider" amending the guidelines and argues the Act's legislative history confirms the Commission has full discretion whether to alter penalties based on its findings. The PAG finds it "unfortunate that the Commission's recommendations include penalty increases that are not supported by any of the 'findings' that Congress requested," repeating its belief that it is of critical importance for the Commission to document and explain its amendment processes in light of *Booker*. In its opinion, "the guidelines are least likely to be followed in situations where the Commission suddenly reverses course with no explanation other than a reference to Congressional 'directives' that do not truly exist."

Reminding the Commission that when it added steroids to the drug guideline in 1991, it noted a distinction between steroids and other Schedule III substances, and that the variety of covered steroids has since increased, the PAG wonders why the Commission has suggested that an across-the-board equivalency is just. It its opinion, putting all steroids in the same category would contravene congressional expectation that the Commission should ensure penalties are appropriately proportional, and it strongly believes steroids parity with other Schedule III substances would be inappropriate. The PAG also reminds the Commission that in hearings leading up to the scheduling of steroids as Schedule III substances, representatives of the FDA, Drug Enforcement Agency (DEA), and National Institute on Drug Abuse (NIDA) opposed the law, maintaining that the abuse of such hormones did not lead to the physical or psychological dependence found in other controlled substances. The PAG encourages the Commission to not ignore this science and argues that it should not equate sex hormones with the addictive and serious codeine derivatives, central nervous system depressants, and stimulants that form the rest of Schedule III.

The PAG states that too often, Congress' directives in the wake of increased media findings of new "evil" controlled substances result in sharp and unwarranted increases in the guidelines, as has happened with crack cocaine, GHB, and oxycontin. The PAG takes issue with the Commission considering guideline increases for steroids on an emergency basis even though, as it asserts, legislative history of the Act shows that steroid use has declined in recent years, citing the NIDA-sponsored Monitoring the Future survey which found that twelfth graders reported a 1.1 percent decline of steroid use this year. The PAG avers that once penalties have been increased by Congress or the Commission, it becomes "politically difficult, if not impossible, to lower the penalties to reflect even well-established scientific data" and asks the Commission to take note of this "political reality." Instead, the PAG believes the Commission should adopt conservatism as a guidepost of a responsible policy maker, especially when there is uncertainty or disagreement about the dangerousness of a substance or the harm it causes.

The PAG believes the Commission should base controlled substance penalties on an analysis of both direct and societal harms caused by the substance, and that lower penalties should be considered for the least harmful, and higher penalties considered for the most dangerous substances. The direct harms associated with steroids are different from other controlled substances, the PAG argues, including the lack of an immediate "buzz" and the fact that any direct harms (such as a decrease in libido and sperm production in males, damage to the heart,

changes in blood proteins and anatomy in women, and interruptions in the normal growth cycles for teens) come from long-term continued use more than from a specific unit dose. Additionally, the PAG states in comparison to cocaine and heroin, it is difficult to call steroids addictive. With respect to the societal harms, the PAG states illegal steroid use appears to present few of the collateral harms associated with other controlled substances. For example, no violent distribution organizations have been identified. The PAG does acknowledge societal harms such as young persons being attracted to steroids and the claim that such use interferes with the purity of amateur and professional sporting activities, but believes these harms "pale in comparison to the societal harms often associated with most controlled substances."

Options One & Two of the Proposed Amendment

The PAG argues that Option One, which it characterizes as focusing exclusively on gross weight, is a step backward because it would increase the existing unit equivalency rate by 2 ½ to 10 times. The PAG further asserts that Option One, which would increase typical offense levels by 4-6 levels for a 50 mg unit or 6-8 levels for a 25 mg unit, would effect an unduly severe change. For example, the PAG states for a first offender with a current offense level of 10, adding 5 levels would eliminate the possibility of a split sentence and would triple the defendant's prison exposure even before application of any proposed specific offense characteristics. Additionally, the PAG expresses concern about the issue of proportionality; because no maximum penalties are being altered, the PAG opines that a 25 mg or 50 mg unit equivalency would bring the sentences of lower-end dealers closer to those of higher-end dealers. In the PAG's view, a rational system of punishment would give mid and high-end dealers proportionately higher penalties than those at or near the bottom.

Additionally, the PAG believes that Option Two, which would change the existing unit equivalency rate of 10 cc to only 0.5 ml, multiplying the existing liquid steroid ratio by 20 times, is no better. In its opinion, if the overall unit equivalency is modified at all, the change should be limited to increases only for those steroids identified as the most potent, "which the Commission should specifically identify in a way that would explain its substantial change from 1991." Alternatively, the PAG suggests the Commission leave the base offense levels where they stand and establish encouraged departures for any steroid that a sentencing judge finds to be unusually harmful, and for those a judge finds to be less dangerous than most. If the Commission does adopt a generalized increase to the drug quantity table, the PAG believes it should select the least punitive choice.

The PAG recommends a better approach to raising the base offense levels is for the Commission to directly address congressional concern through the use of specific offense characteristics only. A specific offense characteristic which focuses on an increase for distribution to high school students, for example, would best address Congress' specific concerns. In its view, the Commission's proposed increases to the drug quantity table advances congressional goals indirectly in ways which would create inequities in the process. Therefore, the PAG recommends the Commission adopt an SOC for distribution to high school athletes and eliminate

any proposed "across-the-board" steroid increases.

Finally, the PAG recommends that for Option One, the drug quantity table should be changed so that one unit equals 100 mgs and Option Two should be rejected.

§2D1.1(b)(6) - Masking Agent

The PAG argues the proposed SOC involving a masking agent goes too far in that it adds a penalty without any mens rea requirement. It believes the SOC should be changed to add a knowledge requirement to avoid punishment for the distribution of chemical agents which have a masking capacity but were not distributed for such a purpose. In its view, a defendant who never requested steroids with a masking agent nor knew of its existence should not be punished in the same manner as one who did.

The PAG suggests the SOC should be re-written as follows:

> If the offense involved the distribution of (A) an anabolic steroid and (B) a masking agent by which the defendant intended to avoid detection of the use of the anabolic steroid, increase by 2 levels.

With respect to the Commission's request for comment on whether to apply the masking agent SOC generally, the PAG states it is unaware of any reports that distribution of a masking agent occurs with any degree of frequency in the distribution of other controlled substances. Therefore, the PAG believes a general SOC is not necessary, and that an upward departure could easily address the situation if needed.

§2D1.1(b)(7) - Athlete/Coach

The PAG does not believe the athlete/coach adjustment is warranted. Instead, it believes the Commission should amend §2D1.2. Specifically, the PAG asserts that the Act established a potential doubling of the maximum punishment for steroid distribution within 1,000 feet of a sports facility. Thus, the PAG states it had "expected the Commission to add a steroids 'sports facility' proximity example to §2D1.2."

The PAG argues that the proposed SOC would represent an unwarranted double-punishment if a §2D1.2 adjustment is also applied. Any distribution in or near a "sports facility" will almost certainly, it opines, involve "athletes." Second, the PAG has concerns about certain definitions in the SOC and the lack of others. Specifically, the term "athlete" includes any person participating in "an amateur athletic organization" and the term "coach" is never defined. The PAG asserts these ambiguities create application problems. An example it gives is whether this adjustment would apply to a fraternity brother engaged in intramural sports who shares his steroids, and believes this type of defendant should not be placed in the same category as a paid high school or professional coach. The PAG also wonders whether there is a need for a specific

"coach" guideline, stating there are few, if any, reports of coaches who distribute steroids. If this provision is included anywhere, however, the PAG suggests the appropriate place would be in §3B1.3 to avoid double-punishment through application of §2D1.1(b)(7) and §3B1.3.

Further, the PAG is concerned that there is an elevated status for professional and college athletes, stating "these are, after all, consenting adults, who may seek controlled substances in a variety of different contexts" and, if a distributor shares steroids with someone without knowing that person is an athlete, he or she "should not be punished the same as someone who understands that his actions may be violating the purity of an official sport." Therefore, the PAG recommends that a mens rea requirement be added to the SOC such that the SOC will only apply if there is an intent to sell or distribute steroids to an official athlete whose status is known.

Proposed SOC - Body Wasting

The PAG proposes the inclusion of a new SOC which adjusts downward where a defendant may have provided the steroid to an AIDS patient or other person to help relieve body wasting or severe physical suffering. In the alternative, the PAG requests the Commission list an encouraged downward departure. Additionally, it believes an intent element would be required in the proposed SOC.

Issue for Comment 1 - Expansion of Proposed§2D1.1(b)(6)

The PAG does not believe a need exists for a broader application of the proposed SOC and suggests the Commission refrain from any expansion since the possibility of masking agents being taken with other controlled substances is theoretical in nature. At most, it suggests any concerns could be better addressed through a suggested upward departure or an SOC on masking only, with an intent requirement.

Issue for Comment 2 - Possible New Levels for Mid/High Level Dealers

Although the PAG states it is not opposed to mid and high-level dealers receiving harsher punishment, it strongly opposes this issue for comment, stating it "surprisingly seems to hold out, by analogy, and as a potential 'model,' the mandatory minimum-guided structure that the Commission has so long joined us in criticizing." However, it argues that the current system already takes the quantity of distribution into account.

Additionally, steroid base offense levels currently top out at level 20, and the PAG states that cap is consistent with the guidelines' overall treatment of offenses generally. Additionally, it points out the cap at a level 20 already yields a sentencing range of 70-87 months for a Category VI offender, above the 60 month statutory maximum. Further, the PAG argues, the offense levels in the drug quantity table for heroin and other serious drugs were not selected based on any mid or high level dealer status but were chosen because they most closely correspond to the mandatory minimums for Category I offenders.

The PAG would welcome a proposal to eliminate the present quantity-driven offense level system and replace it with a system focused on the dealers' true roles. It also suggests that if the Commission kept the unit equivalencies as they currently stand and supplements that with a focus in which distributors are mid and high-level dealers, the PAG would find this system acceptable. However, the PAG does not believe an artificial label should be applied to mid or high-level dealers based on a quantity threshold because defendants would then be twice punished; once for quantity and then for quantity again.

Expressing concern, the PAG believes these labels should not be adopted in the context of steroids because of the hoarding characteristics of steroid use. Also, the PAG is concerned that the Commission does not provide the source of its information that a dealer who provides the equivalent of one complete cycle to 10 customers is considered to be a mid-level dealer.

Finally, the PAG avers that mid and high-level dealers can already be given higher penalties through a role adjustment and additionally, a high-level dealer can also be given the statutory maximum, even as a first offender, by distributing a high enough quantity for a level 20 combined with the role adjustment.

Federal Public and Community Defenders (FPD)
Jon M. Sands, Federal Public Defender
Anne Blanchard, Sentencing Resource Counsel
Amy Baron-Evans, Sentencing Resource Counsel

The Federal Public and Community Defenders (FPD) joins the PAG in it's concerns that (1) there are no legislative directives to raise these penalties as such, and (2) to ensure that the amendments reflect accurate analysis, and to ensure confidence in the amendments, arguing no guideline amendment should be promulgated without a full airing and examination of all underlying data.

Options One & Two of the Proposed Amendment

The FPD believes that a review of the guidelines governing anabolic steroids should lead the Commission to the conclusion that the current penalties do reflect the seriousness of such offenses and are sufficient to deter steroid trafficking and use.

According to the FPD, the steroid guideline is already structured to ensure that an offender with a significant prior record will receive a sentence at or near the statutory maximum. Therefore, the FPD asserts that there is absolutely no need to adjust the unit equivalency to ensure effective punishment for steroids offenses.

Even if an adjustment to the unit equivalency were needed at this time, the FPD believes that the proposed alternatives go too far. The FPD suggests that any scheme that is structured so that a

sentence at the lowest available offense level represents approximately one-half of the statutory maximum fails to distinguish effectively between types of dealers and appears to reject the well-settled notion that offenders with substantially different levels of culpability receive substantially different sentences. Furthermore, the FPD asserts that if the Commission adopts either a 25mg or 50mg unit equivalency, the penalties for anabolic steroids will fail a rationality test.

According to the FPD, while setting the unit equivalency at 100mg still more than doubles the milligram-to-unit ratio and increases penalties by approximately 2-4 levels, Option One is the only proposed change that will permit the Commission to maintain a rational penalty scheme for anabolic steroid offenses. The FPD further believes that the problems with a 25mg unit equivalency apply equally to Option Two, in that the Commission has indicated that a unit equivalency of 25mg most closely approximates a 1:1 ratio with other Schedule III substances.

The FPD asserts that both Option One and Option Two ignore the significant differences between steroids and other controlled substances. The FPD points out that, given these differences, it is not surprising that the most significant societal harms attributed to steroids are interference with the integrity of professional sports and concomitant risk that teenagers will seek to emulate professional athletes. While the FPD admits that these harms are not insignificant, it believes that the increases that would result from either proposed Option would be unwarranted and unwise. The FPD emphasizes that the Commission is not required to increase penalties for steroid offenses, and should not do so unless and until it can point to new/specific data that explains why anabolic steroids should be treated the same as other Schedule III substances.

§2D1.1(b)(6) - Masking Agent

The FPD asserts that although it may be appropriate to provide a specific offense characteristic relating to "masking agents," the current proposal should not be adopted unless it is changed to provide for an enhancement only in cases where a masking agent is knowingly distributed. Therefore, the FPD suggests that the proposed amendment be rewritten so that only those offenders who knowingly distributed steroids containing a masking agent be eligible for an enhancement:

> If the offense involved the knowing distribution of (A) an anabolic steroid; and (B) a masking agent, increase by 2 levels.

§2D1.1(b)(7) - Athlete/Coach

The FPD does not believe this adjustment is needed given that the Abuse of Trust enhancement in USSG §3B1.3 captures the conduct the proposed enhancement seeks to punish. Therefore, the FPD asserts that if the Commission adopts the proposed enhancement, it is possible that a coach who distributes steroids may face punishment for the same conduct under §§2D1.1(b)(7) and 3B1.3.

Furthermore, the FPD does not believe that the proposed commentary to U.S.S.G. §3B1.3, which provides definitions for "Athlete," "Athletic activity," and "College or high school athlete" is necessary to ensure that an individual who abuses a position of trust will receive the enhancement.

In addition, the FPD does not believe that expanding the enhancements under §2D1.1 to cover all controlled substances is warranted at this time. The FPD believes that without any data about the prevalence of masking agents in other controlled substances, and without a proposal for an expanded definition, it is impossible to comment further on the propriety of expanding the enhancement to any other controlled substance.

Finally, the FPD believes that because there are no mandatory minimum penalties for steroid offenses there is no need to structure the Drug Quantity Table at all. The quantity-driven guideline naturally results in higher penalties for individuals who distribute greater quantities of steroids and the adjustments for Role in the Offense under §§3B1.1 and 3B1.2 already provide the means to more severely punish mid- and high-level dealers, according to the FPD. The FPD believes that in order to ensure that mid- and high-level dealers are more severely punished than low-level dealers, the Commission should resist amending the unit equivalency for anabolic steroids because the proposed amendment will significantly reduce, if not nearly eliminate, the difference between a low-level dealer's sentence and a high-level dealer's sentence.

Index To Public Comment
March 15, 2006

Steroids and Human Growth Hormone Amendment

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 24, 2006

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

Dear Judge Hinojosa:

On behalf of the Department of Justice, I am pleased to submit the following comments regarding the proposed emergency amendments to the United States Sentencing Commission Guidelines on the penalties for anabolic steroid offenses. Additionally, I would like to commend the Commission's staff for their efforts in preparing the proposed amendments. I am aware that staff members spent significant amounts of time in consultation with various groups, and the proposed amendments reflect that work.

The United States Department of Justice respectfully requests that the Commission adopt Option Two of its proposed amendment. Option Two, treating anabolic steroids in the same manner as all other Schedule III controlled substances, is consistent with the basic construct of the drug sentencing provisions of the United States Sentencing Commission Guidelines (USSCG) and the Controlled Substances Act (CSA). Moreover, Option One may have the unintended consequences of decreasing the number of steroids-related prosecutions and slowing the prosecution of all federal drug offenses. This result would be inconsistent with the intent of Congress as expressed in its directive to the Commission in the Anabolic Steroid Control Act of 2004.

The current sentencing guideline penalties for anabolic steroids, a group of drugs listed in Schedule III of the CSA, are different from those of all other Schedule III controlled substances. Schedule III controlled substances are sentenced under the guidelines as units. All Schedule III controlled substances, except anabolic steroids, are sentenced based upon one unit being equivalent to one tablet, capsule or .5 milliliters of liquid, regardless of whether the substance is a narcotic, stimulant, depressant, or hallucinogenic substance. Anabolic steroids are sentenced based upon one unit being equivalent to 50 tablets or 10 milliliters of liquid. This results in significantly lower sentences of imprisonment for those

who traffic in anabolic steroids as opposed to those who traffic in other Schedule III controlled substances.

The statutory penalty for imprisonment for trafficking in any Schedule III controlled substance under the CSA is up to five years imprisonment. This sentencing range applies to all Schedule III controlled substances regardless of purity or amount. The statutory penalty has remained constant for over thirty years, and was at this level when Congress added anabolic steroids to Schedule III in 1990.

The result of the current sentencing guidelines is that even high-volume traffickers in anabolic steroids are receiving minimal sentences of imprisonment. Congress recognized this when it directed the Commission to consider increasing the penalties for trafficking in anabolic steroids as part of the Anabolic Steroid Control Act of 2004. While both of the Sentencing Commission's proposals would increase sentences, Option Two provides for sentencing that is compatible with the sentencing for all other controlled substances, both in the CSA and the sentencing guidelines.

Option One of the proposal for sentencing anabolic steroids under the guidelines would base the calculation of the offense level on the "actual"or pure amount of anabolic steroid contained in the tablet, capsule, liquid or other preparation. Purity is irrelevant to the sentencing of the overwhelming majority of controlled-substance offenses under both existing statutory and guideline provisions. Of the hundreds of controlled substances, the guidelines provide for the use of purity in connection with only four. These are the Schedule II controlled substances amphetamine, methamphetamine, phencyclidine (PCP), and oxycodone. Methamphetamine and PCP purity requirements were imposed by statute in the CSA. A reading of the trafficking penalty provisions of the CSA found in 21 U.S.C. § 841(b) demonstrates that sentencing for all substances except the two listed above is based on "a mixture or substance containing a detectable amount." That same language was adopted in the drug sentencing provisions of the USSCG in the Notes to Drug Quantity Table and the Application Notes to Section 2D1.1. This has been a consistent theme in the sentencing of controlled substance offenses for over thirty years, and for the last 18 years under the sentencing guidelines.

As noted above, the exceptions to the use of "mixture or substance containing a detectable amount" apply only to a few Schedule II controlled substances. Neither Congress nor the Commission has found it appropriate to consider purity or "actual" amount in connection with determining the sentence for offenses involving Schedule III, IV, or V controlled substances. The Department is not aware of a compelling reason to create such an exception for the class of over 50 controlled substances that fall under the category of anabolic steroids.

As the introduction to the proposed amendment notes, "At 25 mg, sentencing penalties would be increased approximately 6-8 levels above current offense levels, and would closely approximate a 1:1 ratio with other Schedule III substances." A purity-based system, however, would approximate the result achieved by the unit-based system while requiring increased forensic analysis to determine purity and creating another issue for litigation at sentencing (with the additional cost of separate defense testing of samples for purity which, in many cases, would be paid for by the court). This increased forensic analysis also would require a substantial increase in resources, both human and financial, for the DEA laboratory, or the present speed at which all drug samples are tested and analyzed could not be maintained. Thus, whatever small benefits may be offered by a purity-based system are substantially outweighed by the additional costs that would be imposed on the entire criminal justice system.

In short, the Department favors Option Two because it would provide the increase in sentencing for anabolic steroids that Congress suggested in the Anabolic Steroid Control Act of 2004 while being consistent with the principles of drug sentencing that exist in both the federal drug statutes and the sentencing guidelines. Option One does not. It would require larger quantities of substances containing steroids to achieve equivalent sentences and introduce an unnecessary and costly anomaly into the sentencing scheme for Schedule III controlled substances.

The Department of Justice endorses the recommended new enhancements regarding masking agents, distribution to athletes, and distribution by coaches. Option Two for the proposed enhancement for distribution by coaches, which would place this enhancement in §3B1.3 of the guidelines, Abuse of Position of Trust or Use of Special Skill, is consistent with the scheme of the guidelines. It seems unnecessary to create a new enhancement when it would fit well into an already established category.

The Commission also requested comments on whether to extend the proposed enhancements to all controlled substances, and whether penalties for anabolic steroids should fall into the mid-level, high-level trafficker categories which have been used in the past amendments when determining sentences for specific controlled substances. Extending the proposed enhancements to all controlled substances in appropriate circumstances would serve the goals of the sentencing scheme to provide fair and just punishment and deterrence. When drug traffickers target specific groups of more vulnerable individuals or manufacture or distribute controlled substances in a manner that causes increased danger to the community, environment, or other public goals, those activities have been subject to enhancements. A generally applicable enhancement for using masking agents, in a society that uses drug testing to ensure safety, is appropriate. The Department of Justice supports extending the proposed enhancements to all controlled substances.

Because the range of base offense levels under the guidelines is rather limited for Schedule III controlled substances – from base offense level 6 to level 20 – it is not necessary to set levels for mid-level or high-level traffickers. I note that the statutory maximum penalty for trafficking in anabolic steroids or any other Schedule III controlled substance is five years, and the maximum base offense level in the guidelines for Schedule III substances is level 20. As a result, high-level traffickers should ordinarily earn an offense level at or near level 20. In order to achieve this goal, the Commission should select Option Two, treating anabolic steroids as other Schedule III controlled substances. This would make it more likely that high-level traffickers are receiving the most appropriate sentence.

Thank you for this opportunity to provide the Commission with the views, comments and suggestions of the Department of Justice regarding the proposed emergency amendments. I look forward to continuing to work with the Commission to improve the fairness and justice of sentences imposed in federal courts.

Sincerely,

Michael J. Elston
Senior Counsel to the
Assistant Attorney General

FOOD AND DRUG ADMINISTRATION

Headquarters

Office of Criminal Investigations
7500 Standish Place, Room 250N
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DIRECTOR

February 24, 2006

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs

Dear Mr. Courlander:

I am writing on behalf of the United States Food and Drug Administration (FDA) in response to the January 27, 2006, Federal Register notice in which the Sentencing Commission requested comment on a proposed temporary, emergency sentencing guideline amendment to increase the penalties for offenses involving anabolic steroids. Although FDA defers to the Drug Enforcement Agency (DEA) in matters involving enforcement of the Controlled Substances Act, including illegal distribution of anabolic steroids, I am writing to express FDA's concern with one of the options set forth in the proposed temporary, emergency amendment.

The Commission has proposed two options for determining the base offense level for steroid offenses. Under Option One, the base offense level would be determined by the actual amount of steroids involved in the offense, with a rebuttable presumption that the label, shipping manifest, or other documentation describing the steroid accurately reflects the potency of the drug. FDA is concerned that this rebuttable presumption would provide an incentive for offenders to distribute steroids without labeling, with labeling that does not indicate the potency of the steroid, or with labeling that intentionally understates the potency of the steroid. By distributing steroids without labeling that accurately states the drug's potency, offenders could avoid the rebuttable presumption and essentially force the government to perform costly and time-consuming analyses of the drugs to determine the potency for the purposes of sentencing.

In addition to putting an unnecessary burden on government resources, the effect of the rebuttable presumption in Option One raises public health risks of concern to FDA. If distributors of steroids either fail to label or mislabel steroids in order to reduce their

sentencing exposure or to force the government to conduct costly laboratory analyses to prove the actual potency of the drug, the incomplete or inaccurate labeling may result in end users unknowingly taking incorrect or excessive amounts of steroids, thereby subjecting themselves to increased risk of adverse side effects. For public health reasons and to avoid the significant expense and delay associated with testing steroids to determine potency, FDA believes that Option Two, which would eliminate the current sentencing distinctions between anabolic steroids and other Schedule III controlled substances, is much preferable to Option One.

If there is additional information or assistance that FDA can provide to assist the Commission in this matter, please contact Associate Chief Counsel Sarah Hawkins by phone at (301) 827-1130 or by e-mail at sarah.hawkins@fda.hhs.gov.

Sincerely,

Terrell L. Vermillion
Director
Office of Criminal Investigations

cc: Margaret O'K. Glavin, Associate Commissioner of Regulatory Affairs, FDA
Sarah Hawkins, Associate Chief Counsel, FDA
Michelle Morales, Office of Policy and Legislation, USDOJ

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

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November 14, 2005

Louis W. Reedt, Sc.D.
Acting Director, Office of Policy Analysis
U.S. Sentencing Commission
Thurgood Marshall Judiciary Building
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Washington, DC 20002-8002

Dear Dr. Reedt:

I am writing to follow up on the roundtable discussion on September 27, 2005, about anabolic steroid and human growth hormone (HGH) trafficking penalties. Following our discussion, you asked for additional input from FDA on amendments to address HGH. Specifically, you were interested in the agency's recommendation as to whether HGH is more appropriately addressed under Section 2D1.1, the guideline applicable to controlled substance offenses, Section 2B1.1, the guideline applicable to offenses involving fraud, or in some other manner.

As we discussed at the roundtable, HGH poses unique challenges to the Sentencing Commission. HGH is subject to tighter restrictions on its use and greater penalties for misuse than other non-controlled prescription drugs. However, because HGH is not scheduled, it does not fit cleanly in Section 2D1.1, which addresses controlled substances. On the other hand, some have expressed concern that addressing HGH offenses under Section 2B1.1, the fraud guideline, could result in HGH offenses being treated more harshly than offenses involving controlled substances with the same statutory maximum penalty as HGH.

FDA believes that an amendment to Section 2N2.1, the current guideline addressing food and drug offenses, with a cross-reference to the loss table at Section 2B1.1 and other enhancements, would provide appropriate penalties for the offense conduct without upsetting the internal consistency of the Sentencing Guidelines. Currently, Section 2N2.1 provides for a base offense level of 6, with no enhancements for specific offense characteristics. FDA recommends that Section 2N2.1 be amended to include specific offense characteristics for trafficking in HGH in violation of 21 U.S.C. § 333(e), including:

- A cross-reference to the loss table at Section 2B1.1(b)(1) for violations of 21 U.S.C. § 333(e), whether or not the offense involved fraud, and commentary providing that the loss should be calculated based on the estimated street value of the HGH or the actual amount paid by the end user for the HGH, consistent with the existing Commentary to Section 2B1.1. (See comment. 3(F)(v) and (vi) to Section 2B1.1);

- A minimum base offense level of 26 for violations of 21 U.S.C. § 333(e) that involve individuals under 18 years of age, consistent with Section 2D1.2;

- A cross-reference to Section 2B1.1(b)(2) to provide enhancements for mass-marketing and the number of victims;

- An enhancement of 2 levels, with a minimum offense level of 14, for offenses that involve the conscious or reckless risk of death or serious bodily injury, consistent with Section 2B1.1(b)(12).

We understand that the Commission's decision regarding HGH trafficking penalties may depend on what amendments, if any, the Commission promulgates for steroid trafficking offenses. FDA's primary concern is that the conduct - knowingly distributing or possessing with intent to distribute HGH for a use not approved by FDA - is punished in a manner that reflects the seriousness of the offense and promotes deterrence. Although FDA believes that an amendment to 2N2.1 may be the best approach to address HGH offenses, FDA is not opposed to other ways to achieve this goal, including addressing HGH offenses in Section 2D1.1.

If there is any additional information or assistance that FDA can provide to assist the Commission with its review of steroid and HGH offenses, please feel free to contact me by phone, (301) 827-1130, or by e-mail, sarah.hawkins@fda.gov.

Sincerely,

Sarah Hawkins
Associate Chief Counsel

cc: Michelle Morales, Office of Policy and Legislation, USDOJ
Terry Vermillion, Director, Office of Criminal Investigations, FDA
Eric Blumberg, Deputy Chief Counsel for Litigation, FDA
Kelley Land, Staff Attorney, U.S. Sentencing Commission
Bobby L. Evans, Jr., Education and Sentencing Specialist, U.S. Sentencing Commission

United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

February 23, 2006

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

Re: Comment on Proposed Emergency Steroids Amendments

Dear Judge Hinojosa:

The Practitioners' Advisory Group ("PAG") submits the following comments on the Commission's proposed emergency amendment to the Anabolic Steroids guidelines. As always, PAG appreciates the opportunity to formally participate in this process.

A. Background

On October 22, 2004, Congress passed the Anabolic Steroid Control Act of 2004. The ASC Act expanded the list of regulated anabolic steroids, and increased maximum penalties for steroid offenses occurring within 1,000 feet of a "sports facility." In Section 3, the ASC Act directed the Commission to "review" existing guidelines. Significantly, however, the legislation did not demand amendments, instead instructing the Commission only to "*consider* amending the Federal sentencing guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use." Pub. L. 108-358 (emphasis added). The Act's legislative history confirms the extent of the Commission's discretion to alter or not alter penalties. *See, e.g.*, H. Rep. No. 108-461 Part I, at 31 ("the penalties go to the Sentencing Commission ... this is not a mandatory minimum sentence."). Any proposed changes were to be based on Commission "findings." *Id.* at 32 ("it is sent to the Sentencing Commission to review and make the appropriate findings."). Even when Congress later passed, on September 29, 2005, a law calling for emergency implementation of Section 3 of the ASC Act, Congress reiterated its position that this Commission has full discretion in establishing guideline penalties:

> The "Anabolic Steroid Control Act of 2004," Pub. L. 108-358, directed the Commission to review and, *if necessary*, amend the Federal sentencing guidelines to reflect the seriousness of steroids offenses.

See H. Rep. No. 109-176, at 2 (emphasis added). *See also id.* (noting that the request for this emergency authority came from the Commission itself, rather than from Congress).

The introduction to the latest proposed amendment on steroids states that the Commission is "implement[ing] the directives [of Congress] by increasing the penalties for offenses involving anabolic steroids." U.S.S.G. Proposed Amendments (Jan. 25, 2006), at 1. While this Commission has received such "directives" to increase penalties from Congress in the past, this is not such a situation. As noted above, this ball is squarely in the Commission's court. Perhaps the Commission feels indirect pressure to enact some increases to the steroids increases in the wake of the ASC Act. But PAG finds unfortunate that the Commission's recommendations include penalty increases that are not supported by any of the "findings" that Congress requested.

It bears repeating that "PAG believes it is of critical importance for the Commission to document and explain its amendment processes and procedures to the fullest extent possible in light of *United States v. Booker*, [543 U.S. 220] (2005)." PAG Letter of March 25, 2005 at 6. In *Booker*, the Supreme Court refocused attention on the long-neglected sentencing statute, 18 U.S.C. § 3553(a), which begins with a command to impose sentences sufficient but not greater than necessary to achieve the sentencing goals set forth in paragraph (2). In a post-*Booker* world, district courts will be far more likely to respect and follow the guideline range calculated under paragraph (4) of the statute if they fully understand the Commission's underlying data, rationale, and consideration of sentencing purposes. Stated conversely, the guidelines are least likely to be followed in situations where the Commission suddenly reverses course with no explanation other than a reference to Congressional "directives" that do not truly exist.

B. <u>The Proposed Steroids Increases Would Deviate Without Explanation from Commission Policy and Skew Proportionate Sentencing</u>

In 1991, when this Commission established its original guidelines for steroids, it specifically noted that it had created a distinction between Anabolic Steroids and other Schedule III substances "[b]ecause of the variety of substances involved" with steroids. U.S.S.G. Amendment 369. Now, however, the Commission appears on the verge of completely reversing course, even suggesting at least one alternative (one unit = 25mg) that it describes, in seemingly favorable terms, as "closely approximat[ing] a 1:1 ratio with other Schedule III substances."

As noted, no "findings" explain why an across-the-board equivalency would suddenly now be just. If anything, the "variety" of steroid substances whose existence gave the Commission pause in 1991 has only increased and become more complex. As the ASC Act's legislative history noted, "[t]here are [now] more than 100 types of these drugs," H. Rep. No. 108-461 (Part I), at 4, with the ASC Act expanding the list of steroids even further, to include previously unscheduled steroid types and even precursor substances. Yet the Commission's latest proposal would lump all such steroids substances together, as if they were exactly the same drug. Doing so would contravene

Congress's expectation that the Commission should "make sure" that the penalties were "appropriately proportional." *Id.* at 31. Rather than ensuring appropriate proportionality, the emergency proposals would seemingly end it. At present, the "50 tablet" unit equivalency for steroids at least provides some comfort that a steroid's type will not be ignored, since it is logical to assume that many steroids are manufactured in tablets that bear some relation to their potency. The latest proposals, focusing exclusively on gross weight or volume, are thus a step backward.[1]

In examining the proposed increases, it is somewhat difficult for PAG to fully evaluate their impact, since the proposal asks respondents to compare old "apples" to new "oranges." Previously, a steroid "unit" was described as "a 10 cc vial of an injectible steroid or 50 tablets." Now, however, under Option One, instead of being based on volume, a steroid "unit" will be based on gross weight – using either a 25, 50 or 100 mg equivalency. Even if in liquid form, Option One would evaluate the steroid based on gross weight alone.[2]

During testimony before this Commission, NACDL representative Richard D. Collins noted how a common oral steroid, methandrostenolone, typically comes in 5mg tablets. *See* Written Testimony of Richard D. (Rick) Collins before the U.S. Sentencing Commission, at 3 (April 12, 2005) [hereinafter "Collins Written Testimony"]. Using the proposed conversion rate, the Commission's proposal would thus change the existing "unit" for this compound from 250mg to either 100mg, 50mg, or 25mg – increasing the existing unit equivalency rate by a dramatic 2½ to 10 times.

Proposed Option Two is no better. Oddly, Option Two does not even allow for the possibility of a 50mg or 100mg gross weight equivalent for steroids – raising concerns the Commission may have somehow already decided on a 25mg equivalency, even though it is asking for comment on the issue. And Option Two's proposed volume modification would change the existing unit equivalency rate of 10cc (equal to 10ml)[3] to only 0.5ml, multiplying the existing liquid steroids ratio by a whopping 20 times!

PAG is particularly troubled by the proposed changes that would lead to the highest offense level increases. The Commission itself acknowledges that these changes

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[1] Worse, under the ASC Act, the Government will soon prepare a report evaluating other substances not addressed in the legislation, H. Rep. No. 108-461 (Part I), at 3, with the ASC Act also "mak[ing] it easier for the DEA to add similar substances to th[e scheduled] list in the future." *Id.* at 26. An across-the-board steroids guideline thus not only would create inequities now, but also open the door, almost blindly, to even larger inequities that the DEA might unilaterally create in the future.

[2] The use of gross weight, even for liquids, raises well-known unfairness issues inherent in the inclusion of packaging weight – which in this context, may often dwarf the substance itself. Moreover, establishing steroids guidelines based only on gross weight may have the unintended consequence of encouraging increased purity levels, potentially creating potential dangers where they currently do not exist.

[3] A cubic centimeter and milliliter are equivalent, since a cube 1cm on each side has a volume of 1 ml.

to unit equivalencies would increase typical offense levels by 4-6 levels if it adopts a 50mg "unit," or by 6-8 levels for a 25mg "unit." Perhaps in some contexts, a 4-8 offense level increase may have less significance, but in this context, the change is unduly severe. For a first offender with a current offense level of 10, for example, adding just 5 offense levels not only eliminates the possibility of a split sentence, but also literally triples the defendant's prison exposure, even before any of the newly proposed specific offense characteristics are considered. The impact of a 4-8 level offense level (or more) increase on a 5-year statutory maximum offense like this is simply huge.[4]

PAG's concerns here are not limited to the severity of the proposed punishments, but also include issues of proportionality. Because no maximum penalties are being altered, a 25mg or 50mg unit equivalency would only bring the sentences of lower-end dealers closer to those of higher-end dealers. The Commission has asked for comment on the appropriateness of penalties for mid- and high-level steroids dealers. PAG responds that a rational system of punishment would give true mid- and high-end dealers proportionately higher penalties than those at or near the bottom. That distinction would be blurred in a system that establishes a steroids unit equivalency below 100mg.

PAG notes the Commission's comment that establishing a new, 25mg steroids unit "would closely approximate a 1:1 ratio with other Schedule III substances."[5] Congress did not direct the Commission to establish such a 1:1 ratio, however – even though it easily could have. PAG strongly believes that steroids parity with other Schedule III substances would be inappropriate. As the Commission appears to have recognized in 1991, anabolic steroids are fundamentally different from other Schedule III substances. Anabolic steroids are the only hormones listed in the entire Controlled Substances Act. Testosterone, the criminalized steroid by which all others are measured, is *naturally present* in the bodies of every man, woman and child. That cannot be said of any other controlled substance. Steroids, in fact, were not even regulated by the United States until 1990. In hearings leading up to that scheduling, representatives of the FDA, the DEA and the National Institute on Drug Abuse (NIDA) recommended *against* scheduling steroids. The American Medical Association also vigorously and repeatedly opposed the law, maintaining that the abuse of such hormones did not lead to the physical or psychological dependence found in other federally-controlled substances.

PAG recognizes that Congress made a policy decision to criminalize steroid use and distribution, but that policy decision does not mean the Sentencing Commission can or should ignore this science – especially when Congress, in the ASC Act, so explicitly has now placed the sentencing decision squarely in this Commission's hands. Even if one somehow accepts the notion that Congress wanted higher steroids guidelines, nowhere does the ASC Act's legislative history remotely suggest the idea that Congress

[4] Of course, if Option Two's "20x" increase for liquid steroids is used, the impact would be even higher.

[5] Unfortunately, the proposed amendment fails to explain the basis for this contention, making it difficult, if not impossible, for PAG to adequately test and evaluate its accuracy.

wanted most steroids penalties tripled or quadrupled, even without any connection to sports or America's youth.[6] Stated simply, the Commission should not equate sex hormones with the addictive and serious codeine derivatives, central nervous system depressants, and stimulants that form the rest of Schedule III. Assigning a harsh, "one size fits all" guideline level to all steroids also would conflict with the ASC Act's legislative history, which stressed how "the bill was drafted in such a way so as to leave sentencing determinations solely to the discretion of the judge – with the more egregious offenders being exposed to harsher sentences." H. Rep. No. 108-461 (Part I), at 26.

C. The Commission Should Take a Conservative, Targeted Approach When Increasing Guidelines for Controlled Substances Such As Steroids

The Sentencing Commission was established, in part, to bring a logical, scientific overlay to the criminal justice system's previous patchwork of laws, which too often had been enacted hastily in the wake of emotion and anecdotal evidence. *See* 28 U.S.C. §§ 991 & 994; *Booker*, 543 U.S. at 264 ("the Sentencing Commission remains in place, writing guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."). Unfortunately, in a pattern that has become too familiar, the media has continued to find a new "evil" controlled substance that is supposedly wreaking havoc, destroying lives and for which a political response is "immediate and necessary." Congress responds, either by establishing increased penalties itself or by requiring the Sentencing Commission to re-examine guideline penalties. All too often, these directives have resulted in sharp and unwarranted increases in the guidelines and federal sentences.

We have seen this with crack cocaine, GHB, oxycontin and now steroids. Indeed, guideline increases for steroids are now being considered on an "emergency" basis, even though the ASC Act's own legislative history showed that steroid use had actually *declined* in recent years. H. Rep. No. 108-461 (Part I), at 5 (noting declines through 2002). Since then, steroid use has only declined further, sometimes even dramatically. As noted in the NIDA-sponsored "Monitoring the Future" survey for 2005, steroids use – unlike certain other, more dangerous controlled substances – has actually been declining "since 2000 in the case of 8th graders, since 2002 among 10th graders, and now since 2004 among 12th graders. The 12th graders exhibited a highly significant decline this year of 1.1 percentage points, falling to 1.5 percent annual prevalence." Dec. 19, 2005 Press Release, at 4, www.monitoringthefuture.org.[7] Figure 15 of that survey in fact shows such annualized steroids use *approaching historical lows*. *See* Exhibit A, attached.

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[6] Indeed, it appears that Congress, in enacting the ASC Act, may have misunderstood the existing severity of steroids punishments. House Judiciary Chair Sensenbrenner appeared to suggest at one point – incorrectly – that the ASC Act's "sports facility" provision would double the steroids maximums from 3 years to 6 years. H. Rep. No. 108-461 (Part I), at 32. *Cf.* 21 U.S.C. § 841(c) (steroid distribution offenses have a 5-year, not 3-year, maximum penalty).

[7] From 2002-05, the number of students reporting they had tried steroids *at least once* also dropped, from 2.5% to 1.7% for 8th graders, from 3.5% to 2.0% for 10th graders, and from 4.0% to 3.4% for 12th graders.

In the past, new penalties have sometimes been hastily enacted based on anecdotal evidence, often provided exclusively by law enforcement, of harms caused by specified substances. Unfortunately, once penalties are established by Congress or the Commission at higher levels, it becomes politically difficult, if not impossible, to lower the penalties to reflect even well-established scientific data. The crack cocaine penalty scheme is the most dramatic illustration of this phenomenon. Despite repeated efforts, this Commission has been unable to convince Congress that the "cocaine base" penalty structure established in haste in 1988 should now be changed to reflect the later-established, empirical truths. The Commission should take note of this political reality: once new controlled substance penalties are enacted, as a practical matter it is highly unlikely that they can ever be reduced again.

PAG believes the Commission should adopt conservatism as the guidepost of a responsible policy maker in this context, particularly when considering new penalties for the possession and distribution of controlled substances. Recognizing the relative ease the Commission might face in later increasing such guidelines, and the difficulty, if not impossibility, of ever reducing them once enacted – even if such changes are warranted – the Commission should exercise caution and err on the side of less rather than more punishment in this context. Such conservatism is particularly appropriate when there is uncertainty or disagreement about the dangerousness of a substance or the harm it causes.

1. <u>The Commission Has Historically Based Controlled Substances Punishments on an Analysis of Both Direct and Societal Harms</u>

Controlled substance penalties should recognize that the use and distribution of substances in the underground market may lead to a variety of harms. First, there is the harm associated with the use and abuse of the substance itself. The types of used and abused substances in America range from drugs that are relatively benign in their addictive potential and long-term effects to drugs that are seriously addictive and can cause long-term physical and mental damage or even death. For the policymaker, these degrees of harmfulness to the abuser require a proportionate response, with lower penalties for the least harmful and higher punishments for the most dangerous substances.

There is also a second set of harms that is often considered in setting drug sentencing policy. The Commission has historically reported on associated societal harms, collateral to the degree of harmfulness of the substance itself, including (for example) the fact that profit and demand for some substances can create competition between organized groups engaged in trafficking, violence, use or possession of firearms,

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This 3.4% steroid reported-use number for 12th graders compared to 5.4% who reported using ecstacy, 8.0% for cocaine, and 13.1% who used amphetamines – as well as 57.5% who reported having been drunk.

and general deterioration of neighborhoods. Congress, the Commission and others have cited such collateral harms as justifying higher offense levels for controlled substances.[8]

2. Analyzing Steroids Under This Direct/Societal Harm Paradigm

The direct harms of steroids are different than other controlled substances. As noted by former NIDA Director Dr. Charles Schuster, "[t]estosterone and drugs that act like testosterone in the body are called anabolic steroids. The term 'steroid' refers to their chemical structure, and the term 'anabolic' refers to their ability to promote muscle growth." *See* C. Schuster, *Buzzed: The Straight Facts About the Most Used and Abused Drugs from Alcohol to Ecstasy*, at 204. Other steroids, such as estrogen, progesterone and cortisol, also exist naturally in humans, but anabolic steroids taken to supplement a body's natural testosterone levels are typically used by persons who want to increase muscle mass. *Id.* Normally, testosterone is released constantly in the body and when doctors treat patients with low production they will prescribe steadily low levels. Studies show that steady low-level steroid use has few harmful effects. In fact, female-to-male transsexuals are administered life-long steady doses of steroids. Even medically monitored dosages in excess of natural physiologic levels have not necessarily produced negative health consequences. A landmark 1996 study, for example, published in the prestigious *New England Journal of Medicine*, indicated that steroid use at a level of 600mg/week yielded virtually no adverse effects. S. Bhasin, T.W. Storer, N. Berman, *et al.*, *The Effects of Supraphysiologic Doses of Testosterone on Muscle Size and Strength in Normal Men*, 335 N. Eng. J. Med. 1-7 (July 4, 1996).

Steroids do not cause a "buzz" immediately when they are taken and do not even take action for hours. *Buzzed*, at 203. Persons who take steroids to build muscle mass usually take them in a "stacking" regimen, a "cycle" that lasts four to eighteen weeks starting with low dosage of several types of the drug, gradually increasing the dose over time until the dosage levels are significantly higher than normal. *Id.* at 206. Among steroid-using bodybuilders of all levels, it has long been accepted that use of 1 gram (1,000mg) of steroids per week is the "benchmark" for serious steroid effects. *See* Collins Written Testimony, at 4; *accord Buzzed*, at 206. Studies are mixed on the actual muscle mass increase by steroid users. Among average males, the use of normal (i.e., physiologic replacement) amounts of steroids had no effect on increasing muscle mass, although there is evidence that large dosages of steroids used by males who are optimally physically fit can cause some increase in muscle mass and a slight enhancement in

[8] PAG has long argued that that any "associated" harms are best addressed directly, through specific enhancements addressing, for example, firearm possession where it exists, rather than indirectly through the establishment of higher base offense levels for controlled substances believed to be associated with collateral harms. If the Commission considers collateral harms in establishing higher base offense levels for some controlled substances, however, that standard at least should be applied equally across the board.

performance.[9] For women, the use of large dosages can be more dramatic, with significant increases in upper body strength and stamina. *Id.* at 206.

While there is proof that large-dosage steroid use can have negative health consequences, many extravagant claims made in the media have not been scientifically validated. In males, large dosages can cause a decrease in libido and sperm production, and possibly even damage to the heart in isolated cases. *Id.* In women, the profile of blood proteins changes, so there is an increased risk of heart disease; steroids also can cause anatomical changes in women that may prove irreversible. *Id.* For adolescent males, large dosages of steroids can cause interruptions in the regular growth cycle, with growth in spurts that are not normal, so that when dosages are stopped, overall growth is not as significant as usually occurs. *Id.* at 207. PAG agrees that these health effects are real, but significantly, "[a]nabolic steroids do not cause death by acute overdose in the same way that opiates or other drugs that act on the brain do." *Id.* at 203. Instead, steroid misuse can "cause many changes in body function." which in turn may "cause serious injury or death." *Id.* In other words, direct harms come from long-term, continued steroid use more than unit doses. And evidence of the effect of steroids on aggression – so-called "roid rage" – is not supported by controlled studies, and appears to be largely anecdotal. *Id.* at 208 (such evidence is "hard to find in controlled studies in humans," and even in animal studies showing increased aggressive behavior, "[t]he behavior they describe is not the sort of irrational destructiveness that is so popular in the lay press.").

While steroid abusers may ingest steroids repeatedly, or even compulsively, "[i]n comparison to cocaine and heroin, it is difficult to call steroids addicting, as there is no evidence that they cause the kinds of changes in the brain caused by other addictive drugs." *Buzzed*, at 209. *See also id.* ("laboratory animals certainly don't self-administer them, and they don't provide the typical euphoric rush when an injection is given.").

This differing aspect of steroid use's "direct" impact also has a bearing on its "societal" harms. Illegal steroid use appears to present few of the collateral harms often associated with other controlled substances. No violent distribution organizations related to steroids have been identified. PAG acknowledges that there may be other, different societal harms attendant to steroids, such as young persons becoming attracted to steroid use in an effort to improve their physical appearance – although steroids are obviously not the first, or only, illegal drugs improperly glamorized in the media or by America's youth. Similarly, steroids are claimed to interfere with the purity of amateur and professional sporting activities – at least in the absence of adequate screening. PAG nevertheless believes that these types of societal harms resoundingly pale in comparison to the societal harms often associated with most controlled substances. No one, to our knowledge, has ever alleged, for example, that a neighborhood was destroyed, or that people live in fear, due to nearby steroid use.

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[9] Because most male bodies naturally produce optimal amounts of testosterone, some scientists speculate that this effect is due to a "spill over" effect of counteracting the steroid cortisol. In other words, instead of just muscle building, large use of anabolic steroids may also prevent muscle breakdown. *Buzzed*, at 206.

As stated by Richard Collins, testifying before this Commission last year:

> Steroid users are the virtual antithesis of the typical drug offender. Steroid users don't take these hormones for any immediate psychoactive effect, and these hormones don't have any immediate psychoactive effect. They are not stimulants, depressants or hallucinogens. By contrast, the person who uses crack buys it, smokes it, and gets high from that dose.... Not so with steroid users. Because they seek long-range effects, not an immediate high, their habits are very different from narcotics abusers....

Collins Written Testimony, at 3. In sum, both the direct and societal harms of steroids are dramatically different from those of other controlled substances. As Mr. Collins noted:

> I have known many former steroid users who have gone on to highly successful careers as lawyers and doctors. One of them went on to become the Governor of the State of California. These people don't bring the classic elements of the scourge of drugs to our society. Is it really in our interest to increase the possibility of imprisonment for these folks; to rob them of their futures, and ourselves of what constructive efforts they may offer our country?

Collins Written Testimony, at 5.

3. A Better Approach: The Commission Should Directly Address Congress' Steroids Concerns Through Specific Offense Characteristics Only

With these facts as a starting point, PAG believes that the most rational response to the ASC Act would be for the Commission to declare that, because steroids are not addictive and have far less serious collateral societal effects than other controlled substances, no generalized change in the base offense levels for anabolic steroids is necessary. Rather, the Commission should limit its proposed changes to the adoption of new specific offense characteristics, tailored to address Congress' specific concerns in the ASC Act, where warranted.

As noted in the ASC Act's legislative history, "[o]f course, the driving concern of the bill is the impact on children." H. Rep. No. 108-461 (Part I), at 25. *See also id.* at 26 ("Saving children is the ultimate goal of this legislation."). Specific offense characteristics – such as the increase for distribution to high school students that the Commission proposes – appropriately focus on this goal of discouraging steroid use by children. The Commission's generalized, across-the-board proposed increases to the

Drug Quantity Tables, by contrast, advance such goals only indirectly, through a blunt-instrument approach that would create inequities in the process. PAG believes the suggested approach inflates all steroid penalties far above where they should be, while adopting a far less serious differentiation (2 levels) between the penalties for those who sell to high school athletes, for example, and "gym rats." Frankly, PAG believes that it would be more consistent with Congress' goals for the Commission to adopt an even higher specific offense characteristic for those distributing to high school athletes in exchange for the elimination of the proposed across-the-board steroids increase.

If the overall steroids unit equivalency is to be modified at all, the change should be limited to increases only for the steroids identified as the most potent, which the Commission should specifically identify in a way that will explain its substantial change from 1991. Alternatively, the Commission could leave the base offense levels where they are, but establish an "encouraged" departure for any steroids substance that a sentencing judge finds is unusually harmful among the universe of steroids substances.

If the Commission decides instead to adopt a generalized increase to the Drug Quantity Table for anabolic steroids, the Commission should select the least punitive choice among its alternatives, for the reasons set forth above. Thus, for Option One, the drug quantity table should be changed so that one unit equals 100 milligrams of an anabolic steroid, and Option Two should be rejected. A 100mg equivalency ratio would at least establish a daily amount above the 600mg/week rate referenced in the 1996 *New England Journal of Medicine* study. Given the large number of different steroids, however, PAG also suggests that any such generalized increase must be accompanied by a provision that would "encourage" departures if the sentencing judge finds that steroids in a given case are less dangerous than most steroids.[10] It would be fundamentally wrong – as the currently proposed guideline suggests – to lump the vast array of steroids, openly acknowledged to be of varying types and potency levels, into a single sentencing pot, and then tie a judge's hands in this regard. An "encouraged" departure would also be more consistent with the original 1991 Commentary, and therefore should be adopted.

4. Additional Commentary on Other Specific Proposed Changes

PAG provides the following commentary on other, specific proposals:

a. U.S.S.G. § 2D1.1(b)(6): "Masking Agent" Adjustment

While a new specific offense characteristic may be appropriate in certain types of steroids cases involving "masking agents," the newly-proposed U.S.S.G. § 2D1.1(b)(6) goes too far, in that it adds the "masking agent" penalty without any *mens rea* or

[10] Downward departures, for example, may be appropriate for steroids applied as gels, creams and patches. These topically-applied steroids are typically manufactured in higher weights due to the fact that, for Androgel, as an example, only 10% is absorbed into the system. Equating the weights of topical steroids with all steroids tablets and injected steroids liquids could lead to grossly disproportionate punishments.

knowledge requirement. The proposed adjustment should be changed to add a knowledge requirement, to avoid punishment for the distribution of chemical agents which have a masking capacity but were not distributed for such a purpose. An example would be the sale of a dietary supplement which unknowingly could have a masking capacity.

A defendant who never requested steroids with a masking component, or did not even know of a masking agent's existence, should not be punished in the same manner as a person who intentionally sought a masking agent. U.S.S.G. § 2D1.1(6) should therefore be rewritten as follows:

> "If the offense involved the distribution of (A) an anabolic steroid and (B) a masking agent by which the defendant intended to avoid detection of the use of the anabolic steroid, increase by 2 levels."

Insofar as the Commission's request for comment on applying this concept generally, PAG is unaware of any reports that masking agent distributions occur with any degree of frequency in the distributions of other controlled substance. Thus a general specific offense characteristics for masking agents is not necessary. If necessary, an upward departure could easily address this situation.

b. U.S.S.G. § 2D1.1(b)(7): Athlete/Coach Adjustment

PAG does not believe the athlete/coach adjustment is warranted at this time. Instead, the Commission should amend U.S.S.G. § 2D1.2.

The ASC Act explicitly established a potential doubling of the maximum punishments for steroids distributed within 1,000 feet of a sports facility. ASC Act, § 2. House Judiciary Chair Sensenbrenner made clear that "it is identical to the doubling of the maximum sentence, or the ceiling of the maximum sentence for sale of drugs in a drug-free school zone." H. Rep. No. 108-461 (Part I), at 33. *See also id.* (noting how change is "based on previous legislative interpretation").

Given this change, PAG expected the Commission to add a steroids "sports facility" proximity example to § 2D1.2. Instead, the Commission is proposing a broader § 2D1.1(b)(7) adjustment, about which we have a variety of concerns.

First, we believe the adjustment would often represent an unwarranted double-punishment if a § 2D1.2 adjustment is also applied. Any distribution in or near a "sports facility" will almost certainly involve "athletes."

Second, we have concerns about certain of the Commission's proposed definitions (or lack thereof). The term "athlete," for example, includes any person participating in "an amateur athletic organization." The crucial term "coach" is never

defined at all. These ambiguities would create troublesome problems in application. By way of example, PAG wonders if this adjustment would apply to a fraternity brother heading up college intramurals who shares his steroids. Surely that type of defendant should not be placed in the same category as a paid high school (or professional) football coach pumping up his players, but the adjustment as written would seem to raise them both to the same offense level.

PAG also wonders at the need for a highly specific "coach" guideline. Even the most sensational media expositions regarding the steroid "crisis" have reported on coaches who merely turn a "blind eye" to steroid use by athletes – there are few, if any, reports of coaches actually distributing steroids, and no studies quantifying such coach behavior. If this provision is included anywhere, however, the appropriate place to add it is in U.S.S.G. § 3B1.3, as an "Abuse of Position of Trust." Otherwise, a coach might face double-punishment through application of § 2D1.1(b)(7), and then a second sentencing bump under § 3B1.3.

Finally, we note concern with the special, elevated status being suggested for professional and college athletes. These are, after all, consenting adults, who may seek controlled substances in a variety of different contexts. A distributor who shares steroids at a party, for example, may be wholly unaware that a user is an "athlete" as defined, and should not be penalized the same as someone who consciously understands that his actions may be violating the purity of an official sport. Again, we suggest that the Commission add a *mens rea* requirement, with this adjustment applying only if there is intent to sell or distribute steroids to an official athlete whose status is known.

c. Request for New Specific Offense Characteristic: "Body Wasting"

When Congress adopted the ASC Act, it noted how steroids are often prescribed "to treat conditions that occur when the body produces abnormally low amounts of testosterone," including "to treat body wasting in patients with AIDS and other diseases." H. Rep. No. 108-461 (Part I), at 4. *See also id.* at 25 ("Many of these drugs and precursors could be legitimately made available by prescription by physicians to treat conditions such as body wasting with AIDS and other diseases that result in loss of lean muscle mass."). Given that certain AIDS patients may lack access to reliable health care, PAG believes that the Commission should adopt a specific offense characteristic that downwardly adjusts the guidelines in circumstances when, for example, a defendant may have provided steroids to an AIDS patient or other person to help relieve body wasting or severe physical suffering.[11] If the Commission does not adopt a specific offense characteristic, PAG asks that this situation be listed as an "encouraged" downward departure. To be consistent with our positions taken above, we believe an intent element should be applied here as well – a defendant should receive a downward adjustment or departure only if the distribution was for the purpose of relieving suffering.

[11] Anabolic steroids are also occasionally used to facilitate tissue regrowth in burn patients. *Buzzed,* at 205.

D. Responses to Commission's General Requests for Comment

The Commission has also requested comment on two additional issues:

1. Should the Proposed Specific Offense Characteristics Proposed for Steroids Be Expanded to Cover All Controlled Substances?

PAG does not see a need for a broader specific offense characteristic at this time. The Commission notes only a possibility that masking agents "can" be taken with other controlled substances, and an understanding that "there are" other non-steroids controlled substances that can enhance an individual's performance; nothing suggests that these theoretical concerns are widespread in practice. Consistent with PAG's view that the controlled substance guidelines should be expanded in a conservative manner, we suggest that the Commission refrain from any such expansion at this time, particularly since it might also have the effect of diminishing Congress' desired focus on the connection between steroids and America's youth and sports. At most, such concerns could be better addressed through a suggested upward departure, or a specific offense characteristic on masking only, which should also incorporate the "intent" requirement noted above.

2. Possible New Levels for "Mid-" or "High-Level" Steroids Dealers

PAG strongly opposes the Commission's second proposed issue for comment, which surprisingly seems to hold out, by analogy, and as a potential "model," the mandatory minimum-guided structure that the Commission has so long joined us in criticizing. As the Commission notes, steroids base offense levels currently "top out" at Level 20. That cap, however, is entirely consistent with the Guidelines' overall treatment of offenses generally, since Offense Levels are typically structured in a way so that recidivists in Category VI are likely to receive ranges at or near the statutory maximum. In the case of steroids, for example, an Offense Level 20 already yields a sentencing range of 70-87 months for a Category VI offender – well above the 60-month normal statutory maximum. Guideline Offense Level selections like this have always been carefully designed so that, for example, a Category VI offender in this range nevertheless may still have a limited incentive to plead guilty in the hope of getting an acceptance of responsibility adjustment that will put him in ranges below a statutory maximum.

As the Commission notes, for heroin and other serious drugs, the Drug Quantity Table provides offense levels of 26 and 32 at certain specified quantity amounts. Those numbers were not selected because of any Commission finding that persons distributing these amounts were in fact "mid-level" or "high-level" dealers, however. Rather, they were chosen solely and exclusively because these numbers most closely corresponded to the mandatory minimums for Category I offenders. By way of example, the Commission has never declared that a defendant distributing a mere 5 grams of "cocaine base" is a "mid-level" dealer. In fact, the Commission has told Congress that the opposite is true.

PAG certainly does not object to the idea that true mid- and high-end dealers generally deserve harsher punishments. Our concern instead is that the current system already takes the quantity of distributions into account. Suddenly declaring specified "mid-level" and "high-level" dealer amounts, based on information provided by law enforcement sources alone, and only at a given time (even though "typical" dealer sizes are likely to fluctuate, especially given Internet steroids trafficking) will ultimately prove arbitrary and add an overlay of additional complexity onto the existing system.

PAG would welcome a Commission proposal to eliminate the present, largely quantity-driven offense-level system and to replace it with one that is focused more on dealers' true roles. Similarly, if the Commission sought to keep the steroids unit equivalencies as they are and to supplement that number with a focus on which distributors are mid- or high-end dealers, PAG might find such a system acceptable. As we understand the proposal, however, the Commission is asking whether a new, artificial label should be applied to "mid" or "high-level" dealers who cross a certain quantity threshold. Even if that threshold could somehow be based on a number that is not arbitrarily selected, the answer is no. Such a system would mean defendants are unfairly being punished twice – once for quantity, and then (essentially) for quantity again.

It would be particularly troublesome to adopt such labels in the context of steroids – a drug well-known to involve "hoarding." The Commission claims it has been "informed" that a dealer who provides the "equivalent" of "one complete cycle to 10 customers is considered to be a mid-level dealer." The source of this information is never provided; nor are we told what is meant by "equivalent," a reference that raises serious concerns. If a dealer provides 10 cycles to a single customer over a period of years, for example, is he still a "mid-level dealer?" What if he provides the amount all at once to a single hoarder? What if he distributes nothing, but is only charged with possession with intent to distribute after being found with 10 cycles in a closet – is this still a "mid-level dealer"? And how is a typical steroids "cycle" amount even being defined?[12]

Mid- and high-level dealers can already be given higher punishments at present through a "Role in the Offense" adjustment. A "high-level" dealer also can already get the statutory maximum – even as a first offender – by distributing a Level 20 quantity and receiving a 4-level role in the offense adjustment. In sum, the steroids guidelines already are structured in ways that are properly tailored to the statutory maximum, by yielding guidelines near that number when persons dealing large quantities either have significant criminal histories or are found to have an aggravating role in the offense. There is no reason to disturb that balance, especially for steroids, the controlled substance that perhaps most involves "hoarding."

[12] If steroids "cycle" amounts are truly known, PAG suggests that they would represent a far better starting point for determining U.S.S.G. 2D1.1 "use" equivalency than the gross weights now being proposed.

E. Conclusion

Steroid use can cause adverse medical effects. However, when compared to other controlled substances, steroids are not truly addictive and their distribution does not result in the same types of collateral societal harms associated with most other controlled substances. The Commission's steroids penalties should be based on science, explained by findings, and should factor in these less harmful characteristics, to promote rationality and to prevent unwanted disparity. In finalizing its proposed changes to the Guidelines for anabolic steroids, "less is more" should be the appropriate Commission response.

Sincerely,

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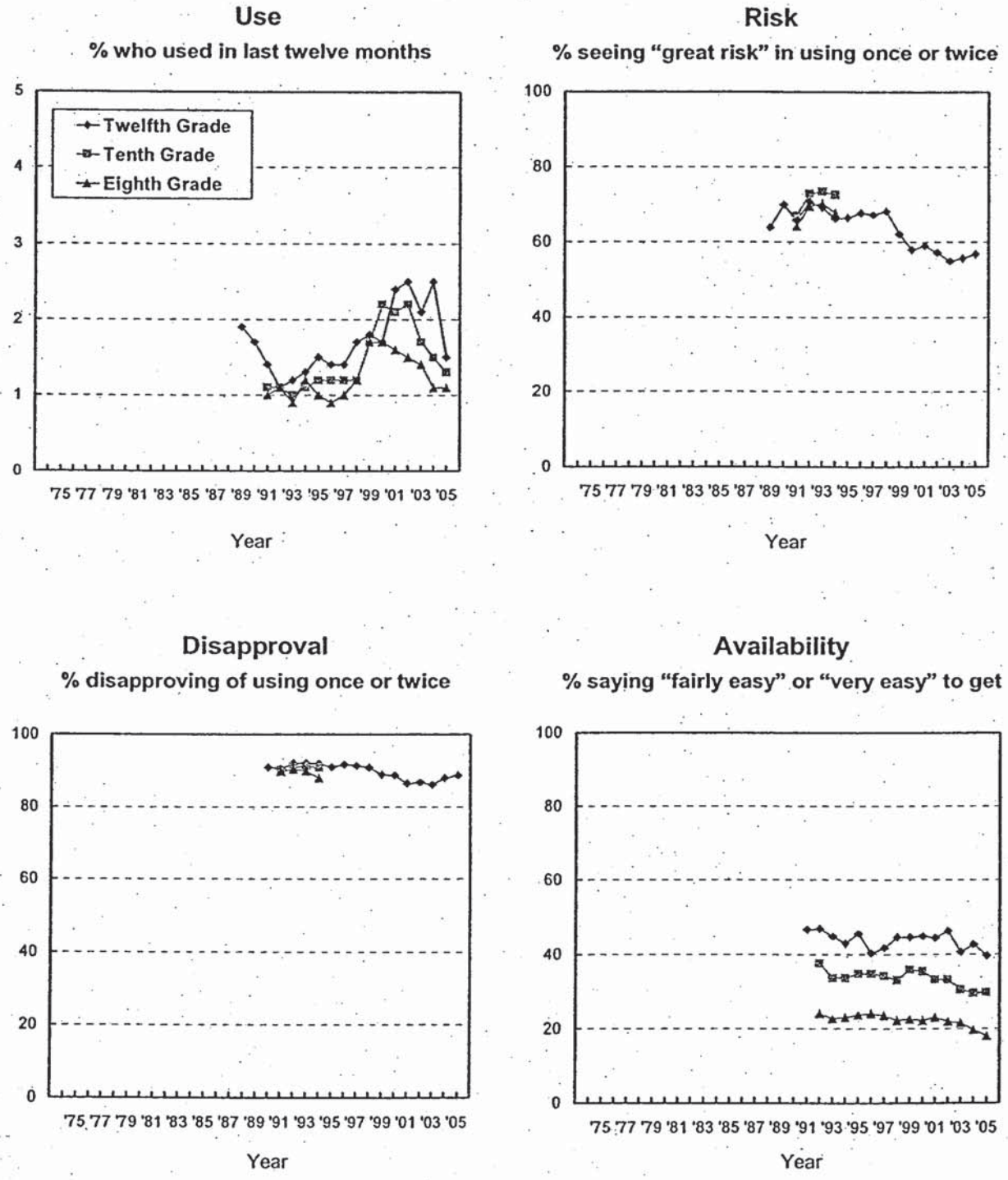
FIGURE 15
Steroids: Trends in Annual Use, Risk, Disapproval, and Availability
Eighth, Tenth, and Twelfth Graders



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February 28, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, DC 20002-8002

Re: Comment on Proposed Emergency Amendments to Anabolic Steroids Guidelines

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the Commission's proposed emergency amendments to the anabolic steroids guidelines. We also join the Practitioner's Advisory Group's ("PAG") concern that there is no legislative directive to raise these penalties as such. Moreover, as is also set forth in PAG's letter comment, to ensure that the amendments reflect accurate analysis, and to ensure confidence in the amendments, no guideline amendment should be promulgated without a full airing and examination of all underlying data. This has not yet been done.

Increases in Unit Equivalency - Options 1 & 2

Currently, one unit of anabolic steroid "means a 10cc vial of an injectable steroids or fifty tablets." The proposed amendment presents two options for increasing the penalties: Option 1 defines 1 unit of anabolic steroids as 25, 50, or 100 mg of steroids, regardless of the form involved. According to the Commission, a 25mg equivalency most closely approximates a 1:1 ratio with other Schedule III substances. Option 2 simply eliminates the sentencing distinction between anabolic steroids and other Schedule III substances and the base offense level would be based on the gross weight of the pill, tablet, capsule of liquid form. For anabolic steroids in other forms, Option 2 provides that 1 unit means 25 mg and allows the court to determine the base offense level using a reasonable estimate of the quantity of steroid involved.

Initially, the Anabolic Steroid Control Act of 2004 (the "ASC Act") simply directs the Commission "to review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the . . . guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use . . . ." We believe that a review of the

guidelines governing anabolic steroids should lead the Commission to the conclusion that the current penalties do reflect the seriousness of such offenses and are sufficient to deter steroid trafficking and use.

As the Commission notes, base offense levels for steroids offenses range from 6 up to 20. A base offense level of 20 results in a guideline sentencing range of 70-87 months for a Category VI offender, which exceeds the five-year statutory maximum set for steroids trafficking offenses by at least 10 months. The steroids guideline, therefore, already is structured to ensure that an offender with a significant prior record will receive a sentence at or near the statutory maximum. Given this reality, there is absolutely no need to adjust the unit equivalency to ensure effective punishment for steroids offenses.

Even if an adjustment to the unit equivalency were needed at this time, the proposed alternatives go too far. Option 1 proposes unit equivalency of 25, 50 or 100 mg. The Commission notes that at 25mg, sentencing penalties would increase approximately 6-8 levels and would closely approximate a 1:1 ratio with other Schedule III substances. At 50mg, sentencing penalties would increase approximately 4-6 levels and at 100mg, the increase would be approximately 2-4 levels.

If a 25mg unit equivalency is adopted, an offender whose base offense level currently would be set at 6 based on the number of units, could receive a base offense level of 14. If no other enhancements were assessed, a first time offender would face a sentence of 15-21 months imprisonment, which represents a threefold increase. At 25 mg, a first time offender at the lowest available offense level could receive a sentence that is approximately one-half of the statutory maximum and three times higher than a sentence under the current guideline.[1] At 50mg, the impact is similar. The base offense level would double – rising from 6 to 12 – and the penalties corresponding to the lowest available offense level would range from 10 months (Category I, low end) to 37 months (Category VI, high end). Any scheme that is structured so that a sentence at the lowest available offense level represents approximately one-half of the statutory maximum fails to distinguish effectively between types of dealers and appears to reject the well-settled notion that offenders with substantially different levels of culpability receive substantially different sentences. If the Commission adopts either a 25mg or 50mg unit equivalency, the penalties of anabolic steroids will fail a rationality test.

While setting the unit equivalency at 100mg still more than doubles the milligram-to-unit ratio and increases penalties by approximately 2-4 levels, of the Option 1 proposals, it is the only proposed change that will permit the Commission to maintain a rational penalty scheme for anabolic steroid offenses.

Option 2 seeks to eliminate the distinction between steroids and other Schedule III

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[1] Because level 14 is in Zone D, a sentence of imprisonment would be required.

substances, altogether, and proposes using gross weight to determine the base offense level for steroids offenses just as is done with other Schedule III substances. Insofar as the Commission has indicated that a unit equivalency of 25mg most closely approximates a 1:1 ratio with other Schedule III substances, the above-identified problems with a 25mg equivalency apply equally to Option 2.

Both the 25mg equivalency proposal and Option 2 seek to treat anabolic steroids the same as other Schedule III substances. Both proposals appear to ignore the significant differences between steroids and other controlled substances. Steroids are hormones, naturally occurring in every human being and, in that regard, are unique among controlled substances. Unlike other Schedule III substances such as stimulants, depressants and other hallucinogens, steroids are not taken for a psychoactive affect and, according to studies performed by the FDA and other groups, steroids also do not have the same addictive qualities and lack similar potential for abuse. Perhaps, for this reason, the typical steroid user is far less likely than other drug users to commit crimes to support a habit. While steroid use can have negative health effects when taken in large doses, the potential for overdose simply does not exist in the same way as opiates or other drugs that primarily effect the brain. Given these and other substantial differences between anabolic steroids and other Schedule III substances, it is not surprising that the most significant societal harms attributed to steroids are interference with the integrity of professional sports and the concomitant risk that teenagers will seek to emulate professional athletes.

Although these harms are not insignificant, the increases that would result from either Option 1 or Option 2, are unwarranted and unwise. Given the ASC Act's limited directive, the Commission is not required to increase penalties for steroids offenses and, indeed, should not do so unless and until it can point to new/specific data that explains why anabolic steroids, despite their many relevant differences, should be treated the same as other Schedule III substances.

U.S.S.G § 2D1.1(b)(6) - Masking Agent Enhancement

The Commission proposes amending § 2D1.1 to include a two-level enhancement "if the offense involved the distribution of (A) an anabolic steroid; and (B) a masking agent . . . ." Although it may be appropriate to provide a specific offense characteristic relating to "masking agents," the current proposal should not be adopted unless it is changed to provide for an enhancement only in cases where a masking agent is knowingly distributed. We suggest that the proposed amendment be rewritten so that only those offenders who knowingly distributed steroids containing a masking agent be eligible for an enhancement:

> If the offense involved the knowing distribution of (A) an anabolic steroid; and (B) a masking agent, increase by 2 levels.

U.S.S.G. § 2D1.1(b)(7) - Athlete/Coach Adjustment

The Commission proposes a two-level increase if "the defendant distributed an anabolic

steroid to a professional, college, or high school athlete; or . . . used the defendant's position as a coach of an athletic activity to influence a professional, college, or high school athlete to use an anabolic steroid . . . ."

We do not believe this adjustment is needed given that the Abuse of Trust enhancement provided for in U.S.S.G. § 3B1.3 captures the conduct the proposed enhancement seeks to punish. If the Commission adopts the proposed enhancement, it is possible that a coach who distributes steroids may face double punishment for the same conduct under §§ 2D1.1(b)(7) and § 3B1.3.

We also believe the proposed commentary to U.S.S.G. § 3B1.3, which provides definitions for "Athlete," "Athletic activity," and "College or high school athlete" is unnecessary to ensure that an individual who abuses a position of trust will receive the enhancement.

The Commission also sought comment on whether it should expand the scope of the proposed amendments to § 2D1.1 to cover all controlled substances. We do not believe expanding the enhancements to all controlled substances is warranted at this time. There is no indication that masking agents, as defined, are contained in other controlled substances and the Commission has not proposed an expanded definition of "masking agent" so that it would cover all controlled substances. Without any data about the prevalence of masking agents in other controlled substances, and without a proposal for an expanded definition, it is impossible to comment further on the propriety of expanding the enhancement to any other controlled substance.[2]

Finally, the Commission sought comment on whether the penalties for steroid offenses should be based on quantities typical of mid- and high-level dealers. It notes that, for more serious drug types, the Drug Quantity Table in § 2D1.1© provides an offense level of 26 for quantities typical of mid-level dealers and an offense level of 32 for quantities typical of high-level dealers. As the Commission knows, with respect to the more serious substances, base offense levels were selected because they corresponded to the statutory mandatory minimum penalties. There are no mandatory minimum penalties for steroids offenses and, as such, there is no need to structure the Drug Quantity Table at all. The quantity-driven guideline naturally results in higher penalties for individuals who distribute greater quantities of steroids and the adjustments in U.S.S.G. §§ 3B1.1 and 3B1.2 for Role in the Offense already provide the means to more severely punish mid- and high-level dealers.

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[2] The Commission suggests that there are other controlled substances with performance enhancing qualities; however, there is nothing on the public record to support the conclusion that there is a real harm to address at this time. The current emergency amendment proposals were made in response to the ASC Act which, as noted, does not even direct the Commission to increase penalties for steroids offenses. To expand the proposed enhancements to all controlled substances offenses at this time would exceed the Commission's limited directive and potentially diminish the effect of any increases to the steroids guidelines.

To the extent the Commission is concerned with restructuring § 2D1.1 to ensure that mid- and high-level dealers are more severely punished than low-level dealers, it should resist amending the unit equivalency for anabolic steroids. The proposed amendment will significantly reduce, if not nearly eliminate, the difference between a low-level dealer's sentence and a high-level dealer's sentence.

Sincerely,

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Sentencing Resource Counsel

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cc: Michael Courlander
Lou Reedt

JMS:mg