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March 21, 2011

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

Re: Proposed Amendments for 2011

Dear Judge Saris:

I write on behalf of the American Bar Association to submit comments regarding the United States Sentencing Commission's notice of proposed amendment to re-promulgate as a permanent amendment the emergency, temporary amendment in response to the Fair Sentencing Act of 2010, and regarding the Commission's possible consideration of whether to give retroactive effect to a permanent amendment. The ABA, with almost 400,000 members nationwide, applauds the Commission's efforts to remedy the sentencing disparities between crack and powder cocaine offenses. However, the ABA strongly opposes the permanent adoption of the temporary, emergency amendment; we believe that it effectively undermines the intended reforms of the Fair Sentencing Act of 2010 and ABA policy. The ABA does support retroactive application of the permanent amendment.

The Fair Sentencing Act of 2010 (FSA) was enacted in August 2010 after decades of efforts to reform the sentencing disparity between crack and powder cocaine offenses. FSA reforms include (i) Guidelines revisions to reduce the disparity between crack and powder cocaine offenses, (ii) increases to the amount of crack cocaine required to trigger imposition of a mandatory minimum sentence, (iii) elimination of the five year mandatory minimum sentence for first time possession, and (iv) incorporation of aggravating and mitigating factors for drug trafficking offenses. This legislation was strongly supported by the ABA as a significant step toward remedying a sentencing disparity that has been denounced by the legal community, including the Commission, for decades.

ABA Policy has consistently followed that of the Commission. In 1995, the Commission issued the first of four reports to Congress stating that the sentencing disparity between crack and powder cocaine offenses had led to draconian sentences for a population of offenders who were overwhelmingly "low-level" offenders rather than "serious and major" drug traffickers. The sentencing disparity was also associated with highly disproportionate concentration of African-American individuals sentenced for crack offenses – 93% as of 1995. In response to this report, the ABA House of Delegates

adopted a resolution supporting the Commission report and advocating similar treatment for crack and powder cocaine offenders. The 1995 ABA policy recognized that the sentencing disparity between crack and powder cocaine offenses has a “clearly discriminatory effect on minority defendants convicted of crack offenses.”

This discriminatory effect has also been recognized by the Commission in each of its subsequent reports, including a 2007 report finding that African Americans constituted 82% of offenders sentenced under federal crack cocaine laws, despite that 66% of those who use crack cocaine are Caucasian or Hispanic. This discriminatory effect was the driving force behind the FSA. According to the FSA’s author, Senator Richard Durbin, “reducing racial disparities in drug sentencing” and “increasing trust in the criminal justice system, especially in minority communities” were part of “Congress’s clearly stated goals in passing the Fair Sentencing Act.”

Apparently ignoring these goals, the Commission in October 2010 adopted an emergency, temporary amendment to implement the new legislation that circumscribed the remedial effects of the FSA by reducing the number of eligible defendants and decreasing the amount of the sentencing reduction for qualifying individuals. This temporary amendment raised the base offense levels for crack and powder cocaine offenses from 24 and 30, the levels set by the Commission in 2007, to 26 and 32, thereby assigning a range that begins at 63 months to offenders who meet the 28-gram threshold (which triggers the 60 month statutory minimum). The ABA strongly opposes this amendment as contrary to the reforms instituted by the FSA. Setting the base levels at 26 and 32 runs counter to the stated objectives of the FSA, further burdens a federal prison system that is already at 36% over its capacity, and does not purport to advance any benefit to public safety. To maintain consistency with the goals of the FSA and ABA policy, the ABA advocates implementation of the FSA with the base offense levels set to the 2007 levels of 24 and 30. We strongly believe that this is consistent with congressional intent; there is no evidence in the legislative history of the FSA to support the temporary amendment level changes.

Although the ABA opposes the permanent implementation of the temporary emergency amendment, we do support retroactive application of the permanent amendment to the drug quantity tables. Under U.S.S.G. § 1B1.10, to determine an amended guideline range the Commission should select amendments for retroactivity in consideration of (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively. Retroactive application of the permanent amendment to drug quantity tables satisfies each of these factors.

The amendment’s purpose, to remedy sentencing disparities and remove low level offenders from the federal prison system, supports retroactive application. The Commission has for years advocated legislation to raise the quantity thresholds that trigger five- and ten-year statutory minimums. ABA policy, since 1995, has also supported this position. Imposition of mandatory minimum sentences at pre-FSA threshold levels, as noted above, led to drastic racial sentencing disparities, severe sentences for low level offenders, and an overburdened federal prison system. The

Commission estimates that 15,227 offenders would be eligible for sentence reductions under retroactive application. These sentencing reductions would both reduce racial sentencing disparities and provide relief to the prison system. Retroactive application would also yield substantial results by reducing the average sentences of those currently incarcerated. Retroactive application is estimated to reduce current sentences for crack cocaine defendants by 48 months. This reduction would provide tremendous relief to the federal prison system and further advance the goals of the FSA. Finally, even if there are some additional resources required by retroactive application, this is a small price to pay for the more important goal of achieving justice and fairness within the federal sentencing system. In addition, of course, substantial resources would be saved by the anticipated reduction in the federal prison population.

We believe that adherence to Congress' intent in enacting the FSA and longstanding ABA policy compels (i) rejection of permanent implementation of the temporary amendment and (ii) support for retroactive application of the permanent amendment. We urge the Commission to consider the purpose of the long-awaited reforms called for by the FSA when adopting its proposed amendments.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman