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**Executive Director**

Norman L. Reimer Washington, DC

March 21, 2011

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

**Re: NACDL Comments on Proposed Permanent Amendments**

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) submits this response to the Commission's January 19, 2011, request for comment on the proposed permanent amendments to the United States Sentencing Guidelines.<sup>1</sup> NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. We appreciate the opportunity to provide these comments to the Commission and respectfully urge your utmost consideration.

**I. DRUGS**

In October 2010, the Commission promulgated a temporary, Emergency Amendment to implement the emergency directive in section 8 of the Fair

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<sup>1</sup> NACDL wishes to acknowledge the Chairs of the Sentencing Committee, Mark H. Allenbaugh and Mark P. Rankin, the Chairs of the White Collar Crime Committee, Blair G. Brown and Jon May, and the following members of its Sentencing and White Collar Crime Committees for their assistance with this letter: Richard Blake, Kevin Collins, Christopher R. Hall, David Isaak, Stephen Ross Johnson, Richard G. Lillie, Joseph D. Mancano, Tracy A. Miner, and Benson Weintraub.

Sentencing Act of 2010<sup>2</sup> (the “Act”). Prior to this promulgation, the Commission requested public comment with respect to implementation of the Act and congressional directives to review and amend the Guidelines to —~~d~~crease penalties involving cocaine base (~~crack cocaine~~)” and to ~~a~~ccount for certain aggravating and mitigating circumstances in drug trafficking cases.”

The Commission now proposes the re-promulgation of the temporary Emergency Amendment as a permanent amendment without change and the further amendment of the Commentary to USSG §2D1.1 in response to the Secure and Responsible Drug Disposal Act of 2010<sup>3</sup> (the ~~D~~rug Disposal Act”). The Commission has set forth several issues for comment, which are addressed herein. It is important, however, to acknowledge the context of this amendment.

The Fair Sentencing Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses, jointly established by the federal criminal code and the Sentencing Guidelines.

The congressionally mandated 100:1 ratio proved unfair largely due to the fact that the more severe crack cocaine penalties had a noticeably disparate racial impact on sentencing outcomes.<sup>4</sup> African Americans and other minorities received significantly greater sentences than their white (powder cocaine-involved) counterparts.<sup>5</sup> Eighth Circuit Judge Gerald Heaney —~~blames~~ race-based disparity on discretionary decisions by the legislative and executive branches.”<sup>6</sup> NACDL urges the Commission to equalize the manner in which cocaine offenders are sentenced.

NACDL’s recommendations flow from the association’s commitment to parity in cocaine sentencing and from the principle of parsimony, the —~~over~~arching instruction” of 18 U.S.C. § 3553(a) that a sentence must be —sufficient, but not greater than necessary” to achieve statutory sentencing purposes.<sup>7</sup> When addressing the directives in the Act, we encourage the Commission to assess its proposed amendments through this lens and with serious consideration of the direct implications these amendments have for the most vulnerable in our society.

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<sup>2</sup> Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010).

<sup>3</sup> Pub. L. No. 111-273, 124 Stat. 2858 (Oct. 12, 2010).

<sup>4</sup> See Paul J. Hofer, Kevin R. Blackwell, and Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 249 (1999).

<sup>5</sup> Benson Weintraub, *Hidden Disparity Under the Sentencing Guidelines*, 4 FED. SENTENCING REP. 148, 149 (1991), citing Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 188 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> See *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 563, 169 L.Ed.2d 481 (2007).

## Issues for Comment

### **A. Re-Promulgation of the Fair Sentencing Act**

The Commission seeks comment on whether it should make any changes in re-promulgating the Emergency Amendment as a permanent amendment. While the Fair Sentencing Act of 2010 represents a major step forward in the effort to reduce unwarranted sentencing disparities and promote “certainty and fairness,”<sup>8</sup> the 18:1 ratio created by the Act will not eliminate unwarranted disparity. To achieve that goal, NACDL urges that the Guidelines for all cocaine offenses be equalized.

While we realize this goes further than the dictates of the Fair Sentencing Act, it remains the most principled approach. Powder cocaine and crack cocaine are part of the same supply chain, the dangers of crack are inherent in powder, and any distinct aggravating circumstances are adequately punished by enhancements, adjustments, and guided departures.

The Commission has specifically requested comment on whether it should amend the Drug Quantity Table for crack cocaine so that the base offense levels 24 and 30, rather than 26 and 32, correspond to the Act’s new mandatory minimum penalties. In 2007, NACDL fully supported the Commission’s two-level decrease in the base offense level. We continue to support that decrease today and encourage the Commission to anchor the 28-gram threshold to offense level 24, rather than 26. Although we urge the Commission to consider implementing a two-level decrease for all drugs in the Drug Quantity Table, there is no need to revert to the pre-2007 base offense level for crack cocaine.

NACDL joined many other organizations in opposing this step backward when initially proposed by the Commission in the Emergency Amendment. There is no statutory basis for anchoring the Guidelines above, or even to, the mandatory minimums, and doing so is contrary to the bipartisan legislative intent behind the Act. With the Act’s passage, a nearly unanimous Congress made it clear that 28 grams trigger the 60-month sentence for a person subject to a statutory mandatory minimum. Setting the base offense level at 26, and therefore assigning a higher 63-month sentence to 28 grams, is an affront to the core objectives of the Act.

Congress was keenly aware of the Commission’s decision to lower the base offense level to 24 in 2007 when it passed the Act. Had there been intent to revert to the pre-2007 level, Congress would have directed the Commission to do so. The fact that Congress chose not to, combined with the Commission’s own admission that there is no statutory basis for anchoring the Guidelines to mandatory minimums, strongly counsels a base offense level of 24. NACDL

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<sup>8</sup> 28 U.S.C. § 991(b)(1)(B).

supports an amendment to the Drug Quantity Table for crack cocaine that returns the base offense levels to 24 and 30, rather than 26 and 32.

In addition, NACDL strongly opposes amendment of Application Note 3 to §2D1.1, providing cumulative punishment for weapon possession under subsection (b)(1) and “violence” under subsection (b)(2). We acknowledge that the amendment to Note 3 exempts the application of (b)(2) “in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence.” Despite this exemption, this change will often yield sentences “greater than necessary” to achieve the purposes of sentencing and, in many cases, will result in unwarranted double counting. NACDL urges the Commission to amend Application Note 3 to §2D1.1 to prohibit the cumulative application of the enhancements in subsections (b)(1) and (b)(2) and, instead, provide that in cases in which both (b)(1) and (b)(2) apply, the enhancements merge.

NACDL further encourages the Commission to reconsider the manner in which it has implemented the directives contained in the Act. The Act directs the Commission to “review and amend the Federal Sentencing Guidelines to ensure that the Guidelines provide an additional” increase (or reduction) for various factors. Rather than implementing these directives via Chapter 2 enhancements and Chapter 3 adjustments, NACDL suggests that they be implemented through Chapter 5K.

Congress did not specify that its mandate must be effectuated through Chapters Two or Three to the exclusion of any other element of the sentencing calculus under the advisory Guidelines. In contrast, the pre-*Booker* Sarbanes-Oxley Act of 2002 (SOX) expressly directed the Commission to promulgate “a specific offense characteristic enhancing... [Section] 2B1.1... for a fraud offense that endangers the solvency or financial security of a substantial number of victims.”<sup>9</sup> SOX also directed the Commission to amend the “base offense level and existing enhancements contained in...[Section] 2J1.2....”<sup>10</sup> The Fair Sentencing Act lacks this specificity and leaves the manner of implementation of the directives fully in the Commission’s “expert” hands.

NACDL proposes that the “violence” enhancement—and the myriad other enhancements/mitigators and adjustments subject to public comment—be incorporated into Chapter 5K as potential grounds for guided departure. This would ensure that in appropriate

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<sup>9</sup> Pub. L. No. 107-204, 116 Stat. 745 at § 805(a)(4). Other mandates in the Sarbanes-Oxley Act contain broader language similar to that used in the FSA but which fail to specify under which Chapter of the *Guideline Manual* the amendments should be placed. *Id.* at § 905(a) (“[T]he United States Sentencing Commission shall review and, as appropriate, amend the Federal sentencing Guidelines and policy statements to implement the provisions of this Act.”).

<sup>10</sup> Pub. L. No. 107-204, 116 Stat. 745 at §805(a)(1).

cases the enhancement or mitigation will incrementally increase/decrease a guideline without bearing the imprimatur of general application associated with an SOC or adjustment. Thus, as the last step in the *Booker* consultative process, the sentencing judge must find that the conduct in question is present to an extraordinary degree before departing on that basis.

Rather than having Congress micromanage the Guidelines, the Commission has the independent responsibility to implement the Act so as not to interfere with the integrity and smooth operation of the Guidelines. That goal would best be accomplished, as to each of the factors, irrespective of whether they enhance or mitigate the offense level, by amending Chapter 5K as opposed to Chapters 2 or 3.<sup>11</sup> The factors significantly overlap with other guidelines sections and unnecessarily complicate sentencing. The terms of the Act are met by including the statutory increases/decreases under Chapter Five since they must be consulted by the sentencing judge in keeping with *Booker* and its progeny.

### **B. Possible Retroactivity of Permanent Amendment or Any Part Thereof**

NACDL strongly supports the retroactive application of the proposed permanent amendment. As discussed earlier, the Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses. While NACDL believes the Act did not go far enough in equalizing this disparity, there is overwhelming consensus, from all sides, that the 100:1 ratio was unfair, unjustified, and in need of remedy. There is no question that the congressional intent behind the Act was to fix a part of this notoriously flawed scheme. Not only is retroactive application within the Commission's authority, but history dictates that it is unquestionably the right thing to do.

While past amendments reducing sentences in drug trafficking cases are few, the Commission has made those amendments retroactive, including the “crack minus 2” amendment. To deviate from this past practice for the proposed permanent amendment would be patently unfair. The crack cocaine sentencing scheme is perhaps the most publicized and controversial aspect of the federal sentencing system. A decision to deny retroactivity would likely undermine public confidence in the Sentencing Commission and the federal criminal justice system as a whole. Moreover, the Commission has recognized that reducing crack cocaine sentences is key to reducing the sentencing gap between blacks and whites. As the amendment contributes to that goal, there is no reason to give it purely prospective application, ignoring racial disparities among sentences currently being served.

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<sup>11</sup> See Cynthia Cotts, *Judges Call on U.S. to Simplify Sentencing Guidelines* (July 8, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a>; see also Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing Report (2003) (draft) (suggesting that the federal system requires simplification, decreased rigidity, and a reduction of the Guidelines' current emphasis on quantifiable factors); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, reprinted in 17 FED. SENTENCING REP. 341 (2005).

Just like the “back minus 2” amendment, the proposed permanent amendment merely recalibrates the guidelines levels and would not be unduly difficult for judges to apply retroactively. No additional fact finding would be necessary. While the number of 3582 would admittedly be large, history shows that the federal courts are fully capable of temporary influx of cases requiring a similar type of review. Regardless, we firmly believe any temporary burden is vastly outweighed by the reasons supporting retroactivity. The permanent amendment corrects a long-standing error, and it should be used to achieve greater fairness for those currently serving sentences. NACDL therefore urges the Commission to make the proposed permanent amendment retroactive without further limitations regarding the circumstances in which, and the amount by which, sentences may be reduced.

Retroactivity is also warranted for the mitigating adjustments, which address overreliance on drug quantity for less culpable participants by capping the Guidelines and implementing a new reduction based on offender characteristics neglected by the Guidelines. Retroactive application of these amendments would be consistent with the intent of the Fair Sentencing Act and the language and remedial purpose of 28 U.S.C. § 994(u) (“If the Commission *reduces* the term of imprisonment . . .”).

NACDL does not support retroactive application of the enhancements contained in the proposed permanent amendment. While this may appear inconsistent, there is ample justification for treating the enhancements differently. These enhancements address factors likely to have been considered in determining the initial sentence under the advisory Guidelines. Moreover, even when the amended guidelines range does not exceed the original term of imprisonment, retroactive application of the enhancements would, at the very least, result in unnecessary litigation regarding Commission authority and Ex Post Facto limitations.

### **C. Additional Revisions to the Drug Trafficking Guidelines**

The Commission seeks comment on what changes, if any, should be made to the guidelines applicable to drug trafficking cases (§2D1.1 and related guidelines). NACDL urges the Commission to adjust the drug trafficking guidelines so that the 5- and 10-year mandatory minimum penalties correspond with base offense levels 24 and 30, instead of 26 and 32. This would ameliorate the Commission’s formative decision to anchor the drug guidelines to the quantity thresholds set by Congress. While the Commission’s authority to adopt wholly distinct thresholds has been the subject of debate, the Commission adhered to its original interpretation in promulgating the “back minus 2” guidelines amendment, and we understand that a 2-level reduction is the effective limit absent congressional authorization.

While falling short of the wholesale guidelines reductions we believe are necessary to achieve proportionate sentences for federal drug offenders, this proposal would be a significant step in the right direction. We recognize that the proposal would heighten the cliff effect of the mandatory minimums, but the Commission's responsibility to ensure that sentences are no greater than necessary is paramount. For defendants who are not subject to a statutory minimum sentence, the role that sentencing factors other than drug quantity play in shaping the ultimate sentence will become more relevant.

In addition, the Commission has specifically set forth two possible revisions:

- (1) —a 2-level downward adjustment in drug trafficking cases if there are no aggravated circumstances involved in the case” and
- (2) —expanding the 2-level downward adjustment in subsection (b)(16)—which applies to defendants who meet the “safety valve” criteria—so that it applies to defendants who have more than 1 criminal history point but otherwise meet all other “safety valve” criteria, or providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense”.

NACDL fully supports both revisions. Assuming the various proposals are mutually exclusive, we strongly urge the Commission to reduce all drug sentences by two levels without regard to mitigating or aggravating factors or resort to the safety valve criteria. The problem of the drug guidelines is one of proportionality—and that is true for defendants at all levels of culpability. The only complete solution is to alleviate the overbearing effect of drug quantity on all sentences.

#### **D. Role Adjustments**

The Commission also has requested specific comment on what changes, if any, should be made to §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) as they apply to drug trafficking cases and whether additional application guidance is needed. NACDL believes the mitigating role adjustment is too narrow both in and of itself and as interpreted by federal courts. Too few defendants receive this adjustment and, as a result of some courts interpreting it more narrowly than others, there is a growing disparity in its application.

Specifically, the language used in the Application Notes to §3B1.2 expressly discourages its application. Note 4 explicitly provides that it should be applied infrequently. Meanwhile, Note 3 sets the bar for qualification high—requiring a defendant to be “*substantially* less culpable than the average participant”—and dissuades the court from relying on the “defendant’s bare assertion” when making its finding. This restrictive language and the lack of clarity result in disparate application of the adjustment, with some judges and courts using it quite infrequently.

In the 5<sup>th</sup> Circuit, for example, defendants who were simply mules—the very bottom of the drug trafficking enterprise—are frequently denied a minor role adjustment. In *U.S. v. Castillo-Salazar*,<sup>12</sup> the Court said the defendant was not entitled to the adjustment —simply because his role in the offense was limited to transporting drugs” since —such a role is an indispensable part of drug related offenses.” Similarly, in *U.S. v. Angel-Balderas*,<sup>13</sup> the Court explained that acting as a mule provides —an indispensable service to others involved in the drug-trafficking scheme” and is —essential to their success.” For these reasons, the Court held that the defendant failed to show —thahe was substantially less culpable than the average participant.”

These stories are not uncommon—there is a strong bias against the adjustment. And, even where judges are open to the adjustment, the most deserving defendants may still have difficulty climbing over these high hurdles. In order to resolve these inequities, remedy the overly restrictive reading, and expand application to more defendants, the Commission should amend the Application Notes to §3B1.2 and related guidelines. NACDL fully supports the specific recommendations set forth by the Federal Public and Community Defenders on this point and encourages the Commission to implement these changes.<sup>14</sup>

## **II. FIREARMS**

The Commission seeks comments on proposed amendments to cross-border offenses under §2M5.2. The Commission also seeks comments on what revisions, if any, to §2K2.1 and related guidelines may be appropriate this year in light of its consideration of a more comprehensive review of §2K2.1 that, given the complexity and scope of such a review, it could not complete in the amendment cycle ending May 1, 2011.

### **A. Section 2M5.2**

Regarding the proposed amendments to §2M5.2, NACDL objects to the lowering of the number of firearms needed to qualify for the alternative base offense level of 14 and the imposition of a vague —solely for personal use” requirement. Application Note 1 to §2M5.2 of the existing Guidelines, which will remain after the proposed revision, states that the —base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States.” The current limitation of 10 small arms already serves to adequately distinguish those offenses warranting the base offense level of 26

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<sup>12</sup> *U.S. v. Castillo-Salazar*, 307 Fed.Appx. 825 (5<sup>th</sup> Cir. 2009) (convicted of one charge of importing marijuana and one charge of possessing marijuana with intent to distribute; sentenced to 18 months in prison).

<sup>13</sup> *U.S. v. Angel-Balderas*, 136 Fed.Appx. 697, 698 (5<sup>th</sup> Cir. 2009) (convicted of two charges of possession with intent to distribute for marijuana and cocaine; convicted and sentenced based on drugs found in his tractor trailer).

<sup>14</sup> See Statement of James Skuthan Before the United States Sentencing Commission, Washington, D.C., at 29 (March 17, 2011).

from the less harmful conduct deserving the lower offense level of 14. The Commission cites no empirical evidence to show otherwise.

Moreover, the imposition of a vague “personal use” requirement with equally vague commentary will lead to uncertainty in the calculation of the guidelines range and potentially lead to disparate treatment among similarly situated offenders. The “for personal use” requirement is vague, the proposed Application Note 2 provides little additional guidance, and the guidance it would provide does not seem aimed at truly determining whether the firearms at issue were being held for “personal use.” For example, proposed Note 2 requires that courts look to the “number and type of small arms involved,” but the number of small arms is already taken into consideration in the guideline itself, and the Note provides no guidance as to which types of small arms should be considered for “personal use.” The other factors listed—criminal history, intended destination, and extent to which possession was restricted by local law—also do not seem targeted to address whether the firearms were “for personal use.” To the extent the factors derived from §2K2.1 in determining whether the downward adjustment at §2K2.1(b)(2) for “lawful sporting purposes or collection” apply, they are inappropriate for determining whether possession of a firearm is for “personal use.” A person may own a firearm for a “personal use” unrelated to “lawful sporting purposes or collection.” In short, the “for personal use” requirement is vague, and the proposed commentary does not provide meaningful guidance.

Finally, the Commission invites comment on whether §2M5.2 should be amended to take into account any additional aggravating or mitigating factors. Given the already high base offense level of 26 for most offenses under §2M5.2, further enhancements are unnecessary; courts may depart or vary upward in truly egregious cases.

## **B. Section 2K1.1**

First, the Commission states that it is engaging in a review of firearms offenses to determine if changes to §2K2.1 may be appropriate to address concerns about firearms crossing an international border and offenses committed by “straw purchasers.” The Commission has not finished this review, but nonetheless asks for comments on whether changes to the §2K2.1 may be appropriate. NACDL objects to any amendments to §2K2.1 until the Commission has finished its review and has properly made an empirical study of the relevant issues.<sup>15</sup>

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<sup>15</sup> See *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007). NACDL also adopts the position set forth in the testimony of Assistant Public Defender Kyle Welch wherein he cites to a recent GAO report indicating that the lack of reliable data on “straw purchasers, trafficking by unlicensed sellers, and gun shows because the agency does not systematically track this information.” Testimony of Asst. Pub. Def. Kyle Welch before U.S. Sentencing Comm’n at 2 (Mar. 17, 2011) (quoting from Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges* 39-40 (2009)) (hereinafter “GAO Firearms Report”). As Defender Welch correctly notes, “Without such information, it is difficult to understand the nature of the problem and to help plan and assess ways to address it.” Testimony at 2 (quoting *GAO Firearms Report* at 38).

If the Commission nevertheless considers changes to the firearms guidelines this year, NACDL would respond as follows:

*i. Firearms Crossing the Border*

NACDL objects to any further enhancement to §2K2.1 based on firearms crossing the border. Such an enhancement is unnecessary and, indeed, may constitute double counting, as §2K2.1 already includes enhancements for number of firearms (§2K2.1(b)(1)), firearms trafficking (§2K2.1(b)(5)), and possessing or transferring a firearm or ammunition with knowledge, intent, or reason to believe that it would be used in connection with another felony offense (§2K.2(b)(6)). Moreover, §2K2.1 already dramatically increases the base offense level for firearms with high rates of fire.<sup>16</sup> All of these provisions may apply in arms-trafficking situations. Adding an additional enhancement for border-crossing situations is thus unnecessary and may lead to sentences that are greater than necessary to achieve the statutory aims of 18 U.S.C. § 3553(a).

Furthermore, §2M2.5 specifically addresses violations of the arms exportation statutes. Adding an enhancement for arms exportation to §2K2.1 may lead prosecutors to charge more general violations of the gun laws, potentially in violation of the Sixth Amendment, instead of charging violations of the specific export provisions.

*ii. Straw Purchasers*

NACDL maintains that §2K2.1 adequately deals with the issue of “~~straw~~ purchasers.” Further amendments are not necessary, particularly without a full study of the relevant issues.<sup>17</sup>

As discussed in the Commission’s request for comment, §2K2.1 already increases the base offense level for defendants convicted of violating 18 U.S.C. § 922(d), which criminalizes transferring a firearm to someone whom the defendant knows or has reason to believe is a “~~prohibited~~ person.” The Guidelines also raise the base offense level when the defendant is a “~~prohibited~~ person.”

As with the border crossing exception, §2K2.1 already contains numerous enhancements that will ensure appropriately high guidelines calculations in the most egregious situations, regardless of whether a straw buyer is involved.<sup>18</sup> In the rare situation where a straw buyer is involved and

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<sup>16</sup> See USSG § 2K2.1(a)(1)-(6).

<sup>17</sup> See *GAO Firearms Report*, *supra* n. 15.

<sup>18</sup> See USSG §§2K.2(b)(6) (knowledge, intent, or reason to believe that firearm would be used in connection with another felony); 2K2.1(b)(5) (firearms trafficking).

the existing guidelines range does not adequately punish the offense, the judge already has authority to depart or vary upward. Thus, a specific enhancement for “strawbuyers” is not necessary.

### **III. DODD-FRANK ACT**

The Commission seeks comments on two directives to the Commission contained in the Dodd-Frank Wall Street Reform and Protection Act (the “Act”).<sup>19</sup> The Commission also seeks comments on whether it should respond to the directives this year in light of its consideration of a more comprehensive review of USSG §2B1.1 that, given the complexity and scope of such a review, it could not complete in the amendment cycle ending May 1, 2011.

#### **A. Comment on Possible Multi-Year Review**

NACDL supports a comprehensive review of §2B1.1, and urges the Commission not to respond to the directives before the current amendment cycle ends on May 1, 2011. This delayed response is entirely appropriate here because the current SOCs, on their face, already address the objectives set forth in the directives at §§1079A(a)(1)(B) and (2)(B) of the Act. The Commission should not further complicate the Guidelines unless and until it obtains empirical evidence that suggests that the SOCs, in their current form, fail to comply with the goals expressed by Congress.

#### **B. Comments on Securities Fraud Directive**

The Commission requests comments on whether the Guidelines Manual penalties for securities fraud appropriately account for the potential and actual harm to the public and the financial markets and, if not, what changes the Commission should make to respond to §1079A(a)(1)(B) of the Act. The Commission has broken this question down into three major requests for comment:

- i. Do Guidelines §§2B1.1(a)(1), (b)(1), (b)(2), (b)(14), and (b)(17) adequately address offenses relating to securities fraud?*

Yes. These and other Guidelines Manual provisions already account for “the potential and actual harm to the public and the financial markets” from securities fraud offenses. Subsection (a)(1) increases the base offense level; subsection (b)(1) increases the offense level by up to 30 levels to reflect the actual or intended loss; subsection (b)(2) accounts for the number of victims; subsection (b)(14) accounts for large gross receipts even where there is no actual loss; subsection (b)(14) also accounts for conduct that jeopardizes the safety of a financial institution, a publicly traded company, or a large organization; and subsection (b)(17) accounts for abuse of trust by an

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<sup>19</sup> Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

officer or director of a publicly traded company, a registered broker or dealer, or an investment adviser.

The guidelines enumerated in the request for comment, moreover, are not the only provisions that respond to Congress' directive. Subsection 2B1.1(b)(9)(C) accounts for securities fraud committed by sophisticated means; §3B1.1 accounts for defendants who play an aggravating role; §3B1.3 accounts for defendants who abuse a position of trust (other than officers and directors already held to account by §2B1.1(b)(17)); and §3C1.1 accounts for defendants who obstruct the administration of justice. Finally, amendments to the Guidelines in 1989 (Savings & Loan), 2001 (Economic Crimes Package), and 2003 (Sarbanes-Oxley) have already tripled the advisory sentence for large-scale fraud offenses over the last two decades. No further increase is necessary.

*ii. Should the Commission amend the Commentary to the Guidelines Manual to provide new departure provisions, or review the scope of existing departure provisions, applicable to securities fraud offenses?*

No. The Commentary already provides sufficient guidance to ensure adequate punishment for securities fraud offenses, including offenses which disrupt financial markets to a debilitating effect. Indeed, the Department of Justice (DOJ) has expressed the view that across-the-board penalty increases are not warranted. In the experience of the DOJ, the Guidelines generally provide for commensurately stiff punishment in cases involving large-scale financial harm.<sup>20</sup>

*iii. Similarly, should the Commission amend the Commentary to the Guidelines Manual to provide additional guidance for securities fraud offenses?*

The Commission need not add additional Commentary to the 17 pages of Commentary already provided. For example, the Commission need not expand Application Note 12 to account for harm likely to result from an offense but for federal government intervention. Section 1348 of Title 18 of the United States Code, which is the principle securities fraud statute, criminalizes both executed and attempted crimes. Guideline §2X1.1 would apply in the event that the government intervened to prevent a securities fraud. The Commission has thus already addressed this concern and need do no more.

### **C. Comments on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions Directive**

The Commission has asked for comments regarding whether the Guidelines Manual penalties for bank, mortgage, and other frauds relating to financial institutions appropriately account for

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<sup>20</sup> See Statement of Preet Bharara, United States Attorney for the Southern District of New York, before the United States Sentencing Commission, at 4-5 (February 16, 2011).

the potential and actual harm to the public and the financial markets and ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions. If not, the Commission has asked for comments on what changes it should make in response to section 1079A(a)(2) of the Act. The Commission has broken this into three major requests for comment:

- i. *Are bank frauds, mortgage frauds, and other frauds relating to financial institutions adequately addressed by §§ 2B1.1(a)(1), (b)(1), (b)(2), (b)(14)?*

Yes. The base offense level and specific offense characteristics already present in the Guidelines adequately address Congress' concerns. With 16 SOCs and cross-references and with 19 application notes, all common forms of bank, mortgage, and financial institution fraud and their multiple variations are presently covered by §2B1.1. For example, the Commission need not amend the Guidelines to account for “the potential and actual harm to the public and the financial markets” from these offenses or to “ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.” After having added SOCs, increased the base offense level, and expanded loss levels in 1989 (Savings & Loan), 2001 (Economic Crimes Package), and 2003 (Sarbanes-Oxley)—and points in between—the Commission should not increase the amount or scope. The Guidelines' focus on loss does not necessarily correlate with harm, and the loss brackets are themselves non-correlative with culpability.

- ii. *Should the Commission amend the Commentary to the Guidelines Manual to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses?*

The Commission should only consider adding departures after a comprehensive review and only based on empirical data. If the Commission decides to include additional departure provisions to meet Congress' directive in the interim, we urge the Commission to adopt downward departure provisions to bring consistency and proportionality to the Guidelines covering frauds. Specifically, we recommend departures (or, at minimum, guidance in an application note) based on (a) the scope and duration of the offense conduct, (b) whether the defendant personally profited from the offense, (c) the defendant's motivation, and (d) whether the loss was increased or the offense exacerbated by factors beyond the defendant's control.<sup>21</sup> We do not recommend, however, that the Commission specify an upward departure for cases involving substantial financial frauds that disrupt and debilitate a financial market. The existing SOCs at §§2B1.1(a)(1), (b)(1), (b)(2), (b)(14), and (b)(14) already address this concern—they

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<sup>21</sup> See Alan Ellis, John R. Steer & Mark H. Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economics Offenses*, *Criminal Justice Magazine*, vol. 25, no. 4 (Winter 2011).

already operate to impose a life sentence for crimes that match this description. An upward departure in this context would constitute “~~fact~~ creep” and “~~double counting~~.”<sup>22</sup>

- iii. *Should the Commission amend the Commentary to the Guidelines Manual to provide additional guidance for such offenses? For example, Application Note 12 to §2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization.*

No. Application Note 12 already indicates that the factors are “~~not~~exhaustive.” If anything, the Commission should consider providing guidance regarding the importance of considering a defendant’s conduct in the context of the larger economic environment. The Commission should instruct that a defendant may not be held responsible for jeopardizing a financial institution if the defendant’s conduct merely coincides with the unsoundness of the institution or organization. In other words, for this SOC to apply, jeopardy to the financial institution must have been directly caused by the defendant’s conduct. The principle of proximate cause should also apply to crimes that result in no harm; a sentence should not be enhanced where intervening events prevent an offense from occurring.

An increased sentence for that circumstance would be inconsistent with the Sentencing Reform Act’s provision that the sentence provide just punishment for the offense.<sup>23</sup> Inchoate offenses are penalized differently from completed crimes, and if the offense was charged as an attempt, solicitation, or conspiracy, a defendant would not get the benefit of a §2X1.1 reduction if the harm was only avoided because of some intervening event, including but not limited to government intervention.<sup>24</sup> Where a reduction is unavailable because an intervening act prevented the commission of an offense, an enhancement should likewise be inapplicable. A specific enhancement for likely harm “~~bu~~for” Federal government intervention would unfairly double count the same fact; in calculating loss under §2B1.1(b)(1), the loss is calculated as greater of actual or intended loss.<sup>25</sup> Intended loss encompasses any loss that did not occur but for Federal government intervention, such as a government sting operation.<sup>26</sup>

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<sup>22</sup> See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 137 (Nov. 2004).

<sup>23</sup> See 18 U.S.C. § 3553(a)(2)(A).

<sup>24</sup> See §2X1.1(b)(1) and (b)(2), (b)(3)(A).

<sup>25</sup> See Application Note 3(A).

<sup>26</sup> See Application Note 3(A)(ii)(II).

#### IV. PATIENT PROTECTION ACT

The Proposed Amendments to the Sentencing Guidelines for health care fraud offenses are driven by the Patient Protection and Affordable Care Act of 2010<sup>27</sup> (“PPACA”), which provides a Congressional preference promoting “increased penalties for persons convicted of healthcare fraud offenses in appropriate circumstances.”<sup>28</sup> The Commission seeks comment on its proposal in general and specifically on the method of defining the term “Government healthcare program.”

As a preliminary matter, NACDL opposes Congressionally-mandated Sentencing Guidelines. The promulgation of Guidelines by Congress—albeit advisory Guidelines under *Booker*—is inconsistent with our vision of “fair and just” sentencing. Moreover, the use of Congressional mandates undermines confidence in the rulemaking authority of the Commission itself, which was established to be an independent rulemaking authority. On the merits, the proposed amendments implementing PPACA are inconsistent with the common law of sentencing and go well beyond even the Congressional mandate. Rather than provide for increased penalties in “appropriate circumstances,” the Proposed Amendments ignore individual circumstances and provide for increased penalties for most, if not all, health care fraud offenses. In light of the significant deficiencies in the enabling legislation, NACDL urges the Commission to re-assess its proposal and consider the concerns and possible revisions outlined below.

##### A. Proposed Special Rule in Application Note 3(F)

The PPACA’s conceptualization of “loss”—an elusive term of art under the Guidelines—undermines judicial authority by demanding a particular methodology for the determination of loss for healthcare fraud offenses, but not other frauds calculated under §2B1.1.<sup>29</sup> Traditionally, the Government must prove the amount of loss by a preponderance of the evidence. This amendment impermissibly shifts the burden of proof onto the defendant to prove the lack of loss. This is particularly troubling where the Government has unique access to and control over the underlying evidence that a defendant would often need to rebut the Guidelines’ imposed presumption of loss.

The congressional definition of loss for healthcare offenses alone ignores the common law of sentencing. —The guidelines do not present a single universal method for loss calculation under

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<sup>27</sup> Pub. L. No. 111-148, Title VI, §§ 10606, 6402, 124. Stat. 1008 (Mar. 23, 2010).

<sup>28</sup> *Id.* at §10606(b)(1)-(2). *See also* §10606(a)(3)(A)(i)(PPACA is designed to “reflect the serious harms associated with healthcare fraud and the need for aggressive enforcement action to prevent such fraud.”).

<sup>29</sup> The amendment supplants the traditional and fluid meaning of “loss” by stating: “[T]he aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant.” *Id.*

§2B1.1—nor could they—given the fact-intensive and individualized nature of the inquiry.”<sup>30</sup> This is particularly true in the complex arena of health care fraud offenses, where quite different conduct falls under the same rubric of false statements. For example, the loss for a health care provider who is convicted of false statements because he billed for services not provided may well be the aggregate dollar amount of the fraudulent bills; the result should be quite different if the provider were convicted of false statements by reason of upcoding for actual services provided. In the latter case, the appropriate loss calculation should be a fraction of the aggregate amount of the bills. Where the false statement is a certification that all laws have been complied with when there has been off-label promotion of the drug, there may be no loss. The Proposed Amendments do not take these differences into account.

To mitigate the disproportionate impact that the proposed amendment would have on defendants, we propose augmenting Application Note 3(F)(viii) of §2B1.1 with language that allows a defendant healthcare provider to rebut the government’s *prima facie* evidence of intended loss with evidence that services were actually rendered. Further, we propose adding language that such evidence from the defendant would then shift the burden onto the government to establish the actual loss that resulted from the offense.<sup>31</sup>

Our proposed language would not disrupt the loss calculation in those instances in which a provider bills for services not rendered, and where the aggregate dollar amount of the fraudulent bills may be the appropriate measure of loss. On the other hand, the proposed language would lead to a proper calculation of loss in cases where services were provided and the fraud relates to upcoding or another method of overbilling. Moreover, shifting the burden to the government to prove actual loss after the defendant comes forward with rebuttal evidence that services were provided does not contravene that Congressional directive.

## **B. Proposed Enhancements at §2B1.1**

There is no empirical data to support enhancement of the guidelines in healthcare fraud cases. The enabling legislation politicizes the sentencing process by singling out the —*à me du jour*” for more severe punishment than other frauds. The manipulation of specific offense characteristics under §2B1.1 to establish a new tier or —*loss*,” which would supplant subsection (b)(1), does violence to the structure and symmetry of the Guidelines. It is anomalous to single out healthcare offenses for different treatment than other crimes governed by §2B1.1, particularly by —*squeezing*” the mandate into a specific offense characteristic rather than as a separate guideline.

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<sup>30</sup> *United States v. Zolp*, 479 F.3d 715, 718 (9<sup>th</sup> Cir. 2007).

<sup>31</sup> We recommend adding the following language to proposed Application Note 3(F)(viii): —The defendant can rebut such *prima facie* evidence of intended loss with evidence that healthcare services were actually rendered. In such a case, the government would then be required to establish the actual loss that resulted from the offense.”

NACDL counsels the Commission to review this mandate judiciously and to develop a more suitable structure with which to implement the PPACA as it relates to sentencing.

### **C. Definition of Government Healthcare Program**

Regarding the definition of “Government healthcare program,” NACDL agrees with the Practitioners Advisory Group that the Commission should adopt proposed Option 1. Option 1 provides a definition consistent with the definition established by the Patient Protection Act. Moreover, Option 1 contains a definition that is narrower and more concrete than that provided in Option 2.

However, NACDL is concerned that the proposed amendments could result in misdemeanor strict liability violations of the Food, Drug, and Cosmetic Act (FDC Act) that did not involve fraud being subject to the fraud sentencing guidelines at §2B1.1, rather than the Food, Drugs, Agricultural and Consumer Products guidelines at §2N2.1.<sup>32</sup> The PPACA amended the definition of “federal health care offense” in §2B1.1 of the guidelines to have the same meaning as 18 U.S.C. § 24. The PPACA also amended 18 U.S.C. § 24 to include FDC Act “prohibited acts” under 21 U.S.C. § 331. As such, the proposed amendments *could* be interpreted to allow non-fraud, misdemeanor FDC violations to be punished under §2B1.1. In order to prevent any confusion, NACDL urges the Commission to add either a new subsection to the Cross References at §2B1.1(c) or a new Application Note to §2B1.1 that explicitly exempts these non-fraud misdemeanor FDC Act violations from the fraud guidelines and appropriately directs judges to the guidelines at §2N2.1.

### **V. SUPERVISED RELEASE**

NACDL agrees with the testimony on this issue submitted by the Practitioner’s Advisory Group at the Commission hearing on February 16, 2011. This testimony, in sum, recognized the fact that, based in part upon the Commission’s recent comprehensive study of supervised release,<sup>33</sup> terms of supervised release are being imposed far too often, and therefore urged the Commission to amend the Guidelines to allow for greater judicial discretion as to when and under what circumstances to impose supervised release.

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<sup>32</sup> 21 U.S.C. § 333 sets forth both a misdemeanor and a felony offense for FDC Act violations. Whereas the misdemeanor offense is strict liability, the felony requires “intent to defraud or mislead.” Under the current Guidelines, the misdemeanor is covered by §2N2.1 and the felony is covered by §2B1.1.

<sup>33</sup> See U.S. Sentencing Comm’n, *Federal Offenders Sentenced to Supervised Release* 69 (July 2010) (“Although supervised release is mandated by statute in less than half of all federal cases in which it is authorized, the sentencing guidelines provide for supervised release in the vast majority of remaining cases. Courts have followed USSG §5D1.1(a) in 99.1 percent of cases *in which a statute did not require imposition of a term of supervised release* but the guidelines provided for it.”) (footnote omitted; emphasis added).

NACDL takes this opportunity to briefly respond to the testimony of U.S. Attorney Sally Quillan Yates of the Northern District of Georgia. In particular, U.S. Attorney Yates suggested that supervised release —si a particularly important tool in combating immigration offenses”<sup>34</sup> because —[i]t is easier and more judicially economical simply to revoke [immigration offenders’] supervised release and sentence them, as opposed to instituting subsequent prosecutions (i.e., starting over at square one).”<sup>35</sup>

NACDL believes this is a misuse of supervised release. As expressly discussed in the Guidelines, the Commission considered, and ultimately rejected, using supervised release as means to, in effect, sentence offenders who violated its terms as if they had committed —new federal criminal conduct.”<sup>36</sup> Rather, the Commission decided that revocation of supervised release —wold be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision,” i.e., a —breach of trust,” —leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.”<sup>37</sup> Thus, the Commission expressly has rejected, and should continue to reject, the position urged by U.S. Attorney Yates that, especially in illegal reentry cases, supervised release be used as a —tool” to avoid actually prosecuting such offenders.

## **VI. ILLEGAL REENTRY**

The Commission has requested comment on proposed amendments to §2L1.2. Overall, the proposed amendments are a step in the right direction. However, the Commission has not gone far enough in reducing the draconian offense level enhancements contained within that section or in completely eliminating the double-counting of criminal history inherent in the structure of §2L1.2.

The Commission proposes amending §2L1.2(b)(1)(A) such that certain prior convictions that do not receive criminal history points under Chapter Four will result in an 8-level enhancement rather than the usual 16-level enhancement. Similarly, the Commission proposes amending §2L1.2(b)(1)(B) such that a prior drug trafficking conviction that does not receive criminal history points under Chapter Four will result in an 8-level enhancement rather than the usual 12-level enhancement. NACDL supports these amendments, for they are a step in the right direction toward significantly reducing the severe punishment scheme applicable to illegal reentry, a non-violent offense, and toward completely eliminating the double-counting of criminal history.

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<sup>34</sup> Statement of U.S. Attorney Sally Quillan Yates before the U.S. Sentencing Commission at 4 (Feb. 16, 2011).

<sup>35</sup> *Id.* at 4-5.

<sup>36</sup> USSG Ch.7, Pt.A(3)(b), intro. comment.

<sup>37</sup> *Id.*

Even under the amended scheme, a defendant who has a decades-old qualifying prior will receive a significant increase in offense level, even though the prior conviction is far too old to count under Chapter Four. And on the other hand, a defendant with more recent criminal history will be twice punished—once through an increase in offense level under §2L1.2 and again with an increase in criminal history category under Chapter Four. NACDL therefore urges the Commission to eventually eliminate completely the offense level enhancements in §2L1.2 which are based upon a defendant’s prior criminal record, and rather let Chapter Four do its job by increasing a defendant’s criminal history category according to the number of criminal history points applicable to that individual.

Furthermore, if the Commission insists on keeping the current structure of §2L1.2 in place, it should seriously consider further subdividing the offenses listed at §2L1.2(b)(1)(A), to better account for the varying levels of seriousness. Currently, this provision treats non-violent drug trafficking, firearms, and child pornography offenses as on par with violent crimes such as acts of terrorism, robbery, and human trafficking. Even if the Commission will not eliminate the double-counting problem altogether, it should at least further reduce the offense level increase associated with non-violent offenses.

Finally, the Commission proposes amending Application Note 1(C) to make clear that the above-described amendments do not affect the criminal history-related enhancements found at §2L1.2(b)(1)(C), (D), and (E). This amendment is technically accurate. However, NACDL suggests that the Commission consider making similar changes to §2L1.2(b)(1)(C), (D), and (E), such that prior criminal convictions not be used to increase the base offense level where they do not result in criminal history points under Chapter Four. If it makes sense to make this change with respect to the offenses and enhancements found at §2L1.2(b)(1)(A) and (B), the same policy reasons are applicable to these subsequent sections. The Commission’s proposed amendments still permit not only double-counting with respect to §2L1.2(b)(1)(C), (D), and (E), but also permit a defendant’s offense level to be increased by decades-old misdemeanors or other relatively minor youthful offenses that may have no relation whatsoever to an appropriate punishment.

## **VII. CHILD SUPPORT**

In resolving the circuit split on this issue, NACDL respectfully urges the Commission to adopt the position of the Seventh Circuit in *United States v. Bell*,<sup>38</sup> such that it would be considered impermissible double-counting for a court to sentence an offender convicted of willful failure to pay child support (a violation of 18 U.S.C. § 228) under both the contempt and fraud guidelines, §2J1.1 and 2B1.1 respectively. NACDL urges the Commission to amend the commentary at §2J1.1 such that the cross reference to §2B1.1(b)(8)(C) would not apply.

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<sup>38</sup> 598 F.3d 366 (7<sup>th</sup> Cir. 2010).

It is notable that the two circuits taking the opposite position are pre-*Booker* cases: *States v. Maloney*<sup>39</sup> and *United States v. Phillips*<sup>40</sup>. Accordingly, the position urged by and adopted by the Seventh Circuit is consistent with the increased discretion now afforded courts at sentencing in the post-*Booker* era.

### VIII. MISCELLANEOUS: STANDARDS OF PROOF AT SENTENCING

The proposed amendments underscore the need for more reliable fact-finding at sentencing. As the Guidelines become more complex, so too the stakes increase with respect to the manner in which matters controverted by the defendant influences sentencing outcomes. The issue of appropriate standards of proof at sentencing has been neglected for far too long.

Accordingly, NACDL strongly urges the Commission to re-examine the Commentary to §6A1.3<sup>41</sup> because the preponderance standard is insufficient to ensure the reliability of material facts disputed by the defense under the Due Process Clause. Moreover, —The Sentencing Reform Act does not state a burden of proof for finding guideline facts.”<sup>42</sup>

The resolution of contested sentencing factors is outcome-determinative as to the applicable guideline for consultative *Booker* purposes.<sup>43</sup> Thus, the mere assumption by the Commission that the preponderance standard is constitutionally adequate has diminished validity in light of intervening case law and evolving notions of due process.

As two post-*Booker* sentencing commentators recently noted:

[I]f the guidelines are followed by a district court at sentencing, then any facts found that increase the guideline sentence must be proved by the government beyond a reasonable doubt. Merely because a district court has a choice whether to follow the guidelines is a separate issue.... If a district court fails to use the

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<sup>39</sup> 406 F.3d 149, 153-54 (2d Cir. 2005)

<sup>40</sup> 363 F.3d 1167, 1169 (11<sup>th</sup> Cir. 2004)

<sup>41</sup> —The Commission believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving application of the Guidelines to the facts of a case.” *Id.*

<sup>42</sup> Amy Baron-Evans and Jennifer Niles Coffin, *Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing* (Aug. 11, 2008) [http://www.fd.org/pdf\\_lib/relevant%20conduct3.pdf](http://www.fd.org/pdf_lib/relevant%20conduct3.pdf).

<sup>43</sup> —Relevant conduct— coupled with judicial fact-finding and the burden of proof— is the valve through which criminal sentences can be moderated. Relevant conduct and the burden of proof are instrumentalities through which judges can reacquire judicial control over the sentencing process.” Conference Summary, *Conference on the Federal Sentencing Guidelines*, 101 YALE L.J. 2053, 2057 (1992) (Statement by Benson Weintraub).

beyond a reasonable doubt standard, it has miscalculated the guidelines resulting in legal, reversible error and a remand for resentencing under this higher and arguably constitutionally required standard of proof.<sup>44</sup>

NACDL agrees with Justice Thomas's partial concurrence in the *Booker* constitutional opinion and his dissent in the remedial decision:

[T]he Court's holding today corrects the [Commission's] mistaken belief [that a preponderance of evidence standard is appropriate to meet due process requirements]. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.<sup>45</sup>

The preponderance standard of evidence is not a creature of statute;<sup>46</sup> nor was it included in the Guidelines Commentary until 1991.<sup>47</sup>

Due process demands application of the reasonable doubt standard at sentencing in the same manner that it is employed at trial. Punishment, as much as trial, implicates core due process concerns warranting this appreciably higher standard of evidence at sentencing.

[W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden ... of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.<sup>48</sup>

The standard should be no less stringent for achieving the purposes of sentencing.<sup>49</sup>

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<sup>44</sup> Alan Ellis and Mark H. Allenbaugh, *Standards of Proof at Sentencing*, 24 CRIMINAL JUSTICE, American Bar Association (Fall 2009) (original emphasis).

<sup>45</sup> *Booker*, 543 US at 319 n.6.

<sup>46</sup> In contrast, the Mandatory Victims and Restitution Act legislatively prescribes the preponderance standard for restitution purposes. 18 U.S.C. § 3664(e). There is no statutory standard of proof at sentencing.

<sup>47</sup> See USSG App. C, amend. 387.

<sup>48</sup> *Speiser v. Randall*, 357 U.S. 513, 525–526 (1958). See also *In re Winship*, 397 U.S. 358, 369–372 (1970) (concurring opinion by Harlan, J.).

<sup>49</sup> In *Pollard v. United States*, the Supreme Court assumed without deciding that “[t]he imposition of a] sentence is part of the trial for purposes of the [Speedy Trial Clause of the] Sixth Amendment.” 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957).

The Guidelines and case law recognize circumstances in which the reasonable doubt standard must apply at sentencing. For example, the Commission has determined that the reasonable doubt standard applies in determining the existence of multi-object conspiracies for relevant conduct purposes,<sup>50</sup> as well as in determining whether the offense constituted a hate crime.<sup>51</sup> So too, “[t]he admonition in Application Note 1 [to USSG §3C1.1] to evaluate the defendant’s testimony in a light most favorable to the defendant” apparently raises the standard of proof above the “preponderance of the evidence” standard that applies to most other sentencing determinations.<sup>52</sup>

18 U.S.C. § 3661 states:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

However, §3661 does not grant the government *carte blanche* to make unsubstantiated allegations that cannot be proved at sentencing beyond a reasonable doubt. Moreover, Section 3661 and its corresponding guideline, USSG §1B1.4, have an inherent due process layer protecting the defendant against the use of unreliable information at sentencing. Experience has shown that the preponderance standard is constitutionally insufficient to safeguard core due process concerns at this critical stage of the criminal process.

NACDL respectfully invites the Commission to reconsider issues relating to the standard of evidence and use of acquitted conduct at sentencing. The Commission should adopt an

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<sup>50</sup> USSG §1B1.2, comment. (n. 4) (“Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense...”).

<sup>51</sup> See USSG §3A1.1(a) (“If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines *beyond a reasonable doubt* that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by 3 levels.”) (emphasis added). While this enhancement and the beyond the reasonable doubt standard were the result of a Congressional directive, the Commission nevertheless expanded the application of this enhancement in cases of pleas of guilty or *nolo contendere*. See *id.* comment. (backg’d).

<sup>52</sup> *United States v. Montague*, 40 F.3d 1251, 1253-54 (DC Cir. 1994). The Court added: “And we cannot imagine why the Sentencing Commission would have written the Application Note as it did had it intended nothing more than the usual standard of proof. The preponderance-of-the-evidence standard generally puts evidence on an evenly balanced scale. See MCCORMICK ON EVIDENCE § 339 (John W. Strong ed., 4th ed. 1992) (suggesting that proof by a preponderance means the greater weight of the evidence); JONES ON EVIDENCE: CIVIL AND CRIMINAL § 3:9 (Clifford S. Fishman ed., 7th ed. 1992). Viewing the evidence in a light most favorable to the defendant,” however, means putting a thumb on the scale, or resolving all doubts, in favor of the defendant. . . .”

appreciably higher standard of proof for application of enhancements under the Guidelines, and exclude acquitted conduct from the sentence determination.

### CONCLUSION

NACDL applauds both Congress and the Commission for the critical extension of sentencing reform embodied in the Fair Sentencing Act. Elimination of the 100:1 ratio and implementation of the Act by the Commission is a milestone on the path to fairer drug sentencing. Still, it is not enough. The need for retroactivity now is manifest.

Furthermore, rather than executing congressional mandates through Chapters Two and Three of the *Guidelines Manual*, NACDL respectfully recommends that any guideline change resulting from the Fair Sentencing Act, the Dodd-Frank Act, or other legislation should provide an “additional penalty” in the nature of a guided departure under Chapter 5K. This, we believe, is consistent with the legislative directive and a proper construction of *Booker*.

Finally, while not formally part of the Commission’s request for comment, NACDL strongly urges the Commission to re-evaluate the continuing adequacy—whether as a matter of law or policy—of the preponderance of the evidence standard for purposes of imposing enhancements at sentencing. NACDL believes that *Booker* requires a beyond a reasonable doubt standard when applying the advisory Guidelines, and in all events, such a higher standard of proof should be adopted by the Commission as a matter of policy to ensure fair sentencing procedures and just sentences.

We are grateful for the opportunity to submit public comment on behalf of our membership and respectfully urge your utmost consideration. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim E. Lavine". The signature is fluid and cursive, written in a professional style.

Jim E. Lavine  
President, National Association of Criminal Defense Lawyers