

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

March 18, 2014

**Re: Lawyers' Committee for Civil Rights Under Law Comment Supporting
U.S. Sentencing Commission Proposed Amendment to the Drug Quantity
Table**

To Whom It May Concern,

The Lawyers' Committee for Civil Rights Under Law writes to submit our comments regarding the proposed rule published by the U.S. Sentencing Commission ("USSC" or "Commission") on January 17, 2014 (79 Fed. Reg. 3279), addressing the Drug Quantity Table in §2D1.1. The Lawyers' Committee, which was formed 50 years ago at the request of President John F. Kennedy to enlist the private bar's leaders and resources in combating racial discrimination, is involved in the fight for a fair and equitable criminal justice system.

We commend the Commission for addressing guideline sentences for drug offenses and strongly support its proposed amendment lowering the base offense level triggered by drug quantities. The effect of the proposed changes is estimated to lower sentences for drug offenses by an average of 11 months. The changes to the Drug Quantity Table address unwarranted racial disparities in federal sentencing practice, a central purpose of the Commission, further the purposes of the Fair Sentencing Act, and decrease the disproportionately negative impact of mandatory minimum sentences on African American and Hispanic defendants.

**I. The Proposed Rule Furthers the Commission's Purpose in
Addressing Sentencing Disparities**

Congress created the Commission in part to respond to reports of widespread disparities in sentencing practices across the country, including racial disparities. According to the Sentencing Reform Act of the Comprehensive Crime Control Act of 1984, which created the Commission, the Commission must ensure that the guidelines are "entirely neutral as to the race, sex, national origin,

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creed, and socioeconomic status of offenders.”¹ Furthermore, an express purpose of the Commission is to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”²

While facially race-neutral, the Sentencing Guidelines promulgated by the Commission have not eliminated racial disparities in federal sentencing practice or in the federal prison population. Having confronted this issue several times in the past, the Commission is not unfamiliar with the fact that racial disparities persist at every stage of the federal criminal justice system. African Americans and Hispanics are disproportionately arrested, charged, convicted, and sentenced to longer lengths of imprisonment than their white counterparts. This trend is rooted in large part by long lengths of imprisonment and higher enforcement and prosecution rates for federal drug crimes.

a. A Two-Level Reduction in the Drug Quantity Table Would Address the Unwarranted Racial Disparities in Incarceration for Federal Drug Offenses

African Americans and Hispanics continue to be over-represented in the federal prison population, largely due to disproportionate enforcement of federal drug laws against these groups and long lengths of imprisonment for these crimes. More than 45 percent of all drug offenders convicted were Hispanic, and Black offenders comprised 25.9 percent.³

The Commission’s proposed changes to the Drug Quantity Table would reduce racial disparities in the federal incarceration by reducing sentence lengths for drug offenses for which African Americans and Hispanics are disproportionately convicted. The Commission has estimated that the proposed changes would reduce drug sentences by an average of 11 months.

b. The Proposed Amendment Would Advance the Purposes of the Fair Sentencing Act

In 1986, Congress passed the Anti-Drug Abuse Act, which instituted harsh mandatory minimum penalties for crack cocaine that far exceeded penalties for offenses involving powder cocaine traffickers. The five-year penalty for possessing five grams of crack cocaine was the same for an offender selling 500

¹ 28 U.S.C. § 994(d).

² 28 U.S.C. § 991(b)(1)(B).

³ USSC, “Overview of Federal Criminal Cases: Fiscal Year 2012

grams of powder cocaine. This created what became known as the 100:1 weight disparity between crack and powder cocaine. Over the next 25 years, the vast majority of federal crack cocaine prosecutions were brought against African Americans, resulting in a regime that is widely acknowledged to have been racially discriminatory.⁴

In response to the blatant racial disparities in federal crack cocaine laws and enforcement, Congress passed the Fair Sentencing Act (FSA) in August 2010, which amended the quantity of crack cocaine needed to trigger the five- and 10-year mandatory minimum prison sentences, reducing the crack/cocaine weight disparity to a 1:18 ratio. Even with this partial legislative fix, the bearing of the drug quantity on sentence lengths in crack cocaine cases remains greater than in any other drug case. Evidence of this is found in the fact that average sentences for crack cocaine offenses (97 months) remain the longest of any drug.⁵ Nor has the Fair Sentencing Act changed the racial disparities in federal prosecution of crack cocaine offenses: in 2012, Blacks still constituted 82.6 percent of those convicted of crack cocaine offenses.

In 2007, the Commission took an interim step of lowering by the offense levels for crack cocaine triggered by mandatory minimum drug quantities. In implementing the Fair Sentencing Act, however, the Commission reverted to the old sentencing scheme, which linked quantities of crack cocaine to the mandatory minimum amounts, effectively increasing the length of some defendants' sentences.

The changes currently proposed by the Commission would help ameliorate the effects of the racially disparate effect of federal crack cocaine laws. First, the proposed amendment would decrease guideline penalty ranges for crack cocaine offenses, the vast majority of which are applied to Black defendants and which tend to be the lengthiest of any drug crime. Second, the proposed changes would lessen the emphasis currently placed on drug quantity, thereby shifting greater emphasis to the actual culpability of the defendant and his or her role played in the offense, which was a central purpose of the Fair Sentencing Act.

⁴ See e.g., *US v. Blewett*, 719 F. 3d 482 (6th Cir. 2013) (“The old 100-to-1 crack cocaine ratio has led to the mass incarceration of thousands of nonviolent prisoners under a law widely acknowledged as racially discriminatory.”).

⁵ USSC, “Overview of Federal Criminal Cases: Fiscal Year 2012,” 7-8.

c. Proposed Changes to the Drug Quantity Table Would Reduce the Impact of Racial Disparities in the Application of Mandatory Minimum Sentences

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The Commission's proposal to divorce guideline sentencing ranges from statutory mandatory minimum sentences would help ameliorate the harsh effects of racial disparities in the imposition of mandatory minimum sentences. More than three-quarters (77.4%) of convictions carrying mandatory minimum sentences were for drug trafficking offenses. African American and Hispanic defendants were more likely to be convicted of drug offenses carrying mandatory minimum sentences, 60.6 percent and 41 percent respectively, than similarly situated white defendants (36.3%). In addition, Black offenders are least likely to qualify for the federal safety valve (14.4%).

The Commission's proposed changes lowering guideline sentencing ranges which currently range up from the level corresponding to the drug amounts triggering mandatory minimums, would have a greater effect on Black and Hispanic defendants, who are disproportionately charged and convicted of these crimes.

For the foregoing reasons, the Lawyer's Committee urges the Commission to adopt the proposed changes reducing the Drug Quantity Table by two levels as an important step in its purposes of providing certainty and fairness and avoiding unwarranted racial disparities in federal sentencing.

Respectfully submitted,

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