PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 22, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Sentencing Guidelines, December 26, 2023

Dear Judge Reeves:

The Practitioners Advisory Group ("PAG") provides comments on the Commission's proposed amendments regarding: (1) the rule for calculating loss under §2B1.1; (2) the treatment of youthful individuals; (3) the use of acquitted conduct; (4) the resolution of two circuit conflicts; (5) miscellaneous amendments related to §2D1.1(a) and §4C1.1; and (6) the simplification of the three-step process for calculating the guideline range.

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III. Acquitted Conduct

The Commission proposes amending the guidelines to address the use of acquitted conduct in determining a sentence, and it presents three options. The PAG describes its concerns about the use of acquitted conduct at sentencing and explains why it supports Option 1 over the other two options proposed.

A. The Use of Acquitted Conduct in Sentencing

The PAG reaffirms its position that acquitted conduct should not be considered when a federal district court is imposing a sentence.[38] The PAG maintains this position for several well-

[38] *See* PAG Letter to the Sentencing Commission at 33-36 (Mar. 14, 2023) ("PAG 2023 Letter"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=844.

recognized reasons. The use of acquitted conduct at sentencing "raises important questions that go to the fairness and perceived fairness of the criminal justice system."[39]

Yesterday, the Supreme Court decided *McElrath v. Georgia*, 601 U.S. __, 2024 WL 694921 (2024) which considers what constitutes an acquittal for purposes of the Double Jeopardy Clause. While this is a different context than federal sentencing procedure, *McElrath* is notable for its discussion of the broad protection that an acquittal affords a defendant. *McElrath* explains that an acquittal has been defined as "'any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.'"[40] This definition is broader than that proposed by the Commission and even by the PAG.

In *McElrath*, the defendant was charged by the state of Georgia with committing malice murder, felony murder and aggravated assault in connection with the killing of his mother. At trial, the defendant presented an insanity defense. The jury returned a verdict of not guilty by reason of insanity on the malice murder charge, and guilty but mentally ill on the felony-murder and aggravated assault charges.[41] On appeal, the defendant argued that his conviction on the felony murder count was "repugnant" to the jury's finding that he was not guilty by reason of insanity on the malice murder charge. Under Georgia law, the repugnancy doctrine allows a state court to "set aside a verdict as repugnant when there are 'affirmative findings by the jury that are not legally and logically possible of existing simultaneously.'"[42] The Supreme Court of Georgia agreed, because the verdicts for the malice murder and felony murder counts involved "different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury."[43] Instead of vacating only the felony murder conviction, the Supreme Court vacated the malice murder and felony murder convictions.[44]

The state then proceeded to re-try the defendant for the malice murder charge, and the defendant argued that this was prohibited under the Double Jeopardy Clause. The trial court disagreed, and the defendant appealed. The Supreme Court of Georgia affirmed the trial court's decision, and the defendant then appealed to the U.S. Supreme Court.[45]

The Supreme Court explained that "[a]n acquittal is an acquittal, even 'when a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact."[46] "Once there has been an acquittal, our cases prohibit *any* speculation about the reasons for a jury's verdict – even when there are

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[39] *McClinton v. United States,* 600 U.S. __, 143 S.Ct. 2400, 2401 (2023) (Sotomayor, J., statement on denial of certiorari) (citation omitted).

[40] *McElrath*, 2024 WL 694921, at *4 (quoting *Evans v. Michigan*, 568 U.S. 313, 318 (2013)).

[41] *See id*. at *3.

[42] *Id*. (quoting *McElrath v. State*, 308 Ga. 104, 112 (2020)).

[43] *Id*. (quoting *McElrath,* 308 Ga. at 112).

[44] *See id*.

[45] *See id*. at *4.

[46] *Id*. at *6 (quoting *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016)).

specific jury findings that provide a factual basis for such speculation – 'because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations.'"[47] "We simply cannot know why the jury in McElrath's case acted as it did, and the Double Jeopardy Clause forbids us to guess. 'To conclude otherwise would impermissibly authorize judges to usurp the jury right.'"[48]

Given the recency of *McElrath*, the PAG has not had the opportunity to fully consider its impact on the issues addressed here, but the PAG submits that if permitting speculation about the grounds for a jury's verdict in the context of the Double Jeopardy Clause results in judges "usurp[ing] the jury right," then sentencing judges also "usurp the jury right" when they consider acquitted conduct in sentencing.

Juries are representatives of the community and act as "a bulwark between the State and the accused."[49] Because an acquittal reflects the jury's - and therefore the community's – rejection of the government's request to punish an individual for an alleged crime, the acquittal is "'accorded special weight.'"[50] But treating an acquittal as a nullity for sentencing purposes gives no special weight to the jury's determination. Instead, this places acquitted conduct in the same category as any other sentencing factor. The use of acquitted conduct at sentencing is thus inconsistent with the accepted view that "[s]o far as the criminal justice system is concerned, the defendant 'has been set free or judicially discharged from an accusation; released from the charge or *suspicion* of guilt.'"[51] And, the use of acquitted conduct at sentencing may dissuade defendants with strong cases from proceeding to trial, raising concerns about procedural fairness.[52] The PAG has previously raised this concern, and in the PAG's experience, this occurs in the federal system with a degree of frequency.[53]

In its Synopsis of Proposed Amendment, the Commission notes that only 0.4 % (286) of all sentenced individuals in fiscal year 2022 were acquitted of at least one offense or found guilty of only a lesser included offense.[54] This statistic could be read to suggest that any proposed amendment regarding acquitted conduct will impact relatively few individuals. The PAG, however, views this differently. PAG members have seen the impact that the use of acquitted conduct at sentencing has on our clients' decisions to go to trial. The use of acquitted conduct in sentencing deters our clients from trying cases and undermines their constitutional right to have their cases decided by a jury.

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[47] *Id*. (quoting *Smith v. United States*, 599 U.S. 236, 252-53 (2023)).

[48] *Id*. (quoting *Smith*, 599 U.S. at 252).

[49] *Id*. (quoting *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012)).

[50] *Id.* at 2402 (quoting *United States v. DiFrancesco,* 449 U.S. 117, 129 (1980)) (distinguishing acquitted conduct from conduct never charged and considered by a jury).

[51] *Id.* (quoting *State v. Marley,* 321 N.C. 415, 424 (1988)).

[52] *Id.* at 2402.

[53] *See* PAG 2023 Letter at 33-36.

[54] *See* Proposed Amendments at 39.

Indeed, the more salient statistic is that in fiscal year 2022 nearly all sentenced individuals, 97.5%, were convicted through a guilty plea.[55] When our clients learn that they can be sentenced for conduct of which they are acquitted, that knowledge often discourages them from testing the government's proof through a public trial. Without access to sworn public testimony and the crucible of cross-examination, it becomes much more difficult to ferret out mistakes, and even identify bad actors. And acquitted conduct sentencing encourages prosecutors to "overcharge," especially if proof beyond a reasonable doubt is lacking as to some counts, but perhaps not all.[56]

For defendants who exercise the right to proceed to trial, the use of acquitted conduct at sentencing may cause the public and the jurors who rendered the not guilty verdict to question whether justice is being done, thereby undermining the legitimacy of the criminal justice system.[57] Indeed, the use of acquitted conduct to substantially increase a defendant's sentence may constitute a Sixth Amendment violation.[58]

A PAG member is currently litigating whether acquitted conduct can be used in determining the sentence for a client who went to trial and was acquitted of one count of conspiracy to defraud the United States and pay and receive healthcare kickbacks, but convicted of three counts of paying and receiving kickbacks and one count of conspiracy to launder monetary instruments.[59] The alleged benefit received from the convicted kickbacks is $64,821.77, resulting in a guidelines sentencing range of 27-33 months. The government, however, has asked the court to sentence the defendant based on $96,071,474.18 in benefits it alleged were received from the entire kickback conspiracy of which the defendant was, of course, acquitted. The use of acquitted conduct in sentencing this defendant leaves him facing a guidelines sentencing range of 188-235 months. This is a clear example of how the use of acquitted conduct at sentencing can lead to incredibly unjust results.

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[55] *See* U.S. Sent'g Comm'n, 2022 Datafile, USSCFY22, Figure 5, *Guilty Pleas and Trials by Type of Crime, Fiscal Year 2022*, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publication/annual-reports-and-sourcebook/2024/figure05.pdf . In comparison, pre-guidelines statistics indicate that in 1970, 15 percent of federal cases went to trial, and trials have been on the decline since then. *See* Hindelang Criminal Justice Research Ctr., Univ. at Albany Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.), available at: https://www.albany.edu/sourcebook/pdf/t5222010.pdf .

[56] "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by Statute, the decision whether or not to prosecutor, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[57] *McClinton,* 143 S.Ct. at 2402-03.

[58] *See, e.g., Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., Thomas, J., & Ginsberg, J., dissenting from denial of certiorari).

[59] During trial, one count of engaging in a monetary transaction in property derived from specified unlawful activity, namely kickbacks, was dismissed with prejudice as a result of the government's failure to prove a monetary transaction with Anti-Kickback Statute proceeds when its expert utilized tracing methodology not permitted by the Fifth Circuit.

For all these reasons, the PAG fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing.

B. The PAG Supports Option 1

Of the three options proposed by the Commission to address the issue of the use of acquitted conduct at sentencing, Option 1 comes the closest to addressing the PAG's concerns and is therefore the option endorsed by the PAG.

Option 2, which would create a downward departure recommendation, does not prevent a sentencing court from calculating guidelines based on acquitted conduct and only suggests a departure in cases where the use of acquitted conduct has a "disproportionate" or "extremely disproportionate" impact on the guideline range. In the PAG's view, under Option 2, use of acquitted conduct would only be discouraged in a limited number of cases. Option 2 does not adequately address the PAG's concerns that acquittals be treated as inviolate; that the use of acquitted conduct at sentencing unfairly discourages our clients from exercising their jury trial rights; and that the public is losing confidence in the fairness of our criminal justice system.

Option 3, like Option 2, does not prevent a sentencing court from calculating the guidelines based on acquitted conduct, and it does not recommend a downward departure for cases where the guideline range is disproportionately impacted by the use of acquitted conduct. Option 3 raises the standard of proof for acquitted conduct from a preponderance of evidence to the clear and convincing evidence standard. If a sentencing judge determines by clear and convincing evidence that conduct occurred, Option 3 would allow that judge to freely use acquitted conduct that a sworn jury has rejected. Again, like Option 2, this proposal fails to adequately address the PAG's concerns. However, given the three options set forth, if the Commission adopts Option 1, the PAG recommends that Option 3 also be adopted to apply whenever a sentencing court considers acquitted conduct to determine the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. This approach serves to reinforce that acquitted conduct requires a different standard of proof and that this evidence must be assessed and considered sparingly, and with added scrutiny, if at all.

C. Issues for Comment

The PAG provides the following comments in response to the Commission's numbered requests.

1. With respect to Option 1, the Commission asks whether it should prohibit the consideration of acquitted conduct for purposes other than determining the guideline range, such as prohibiting the consideration of acquitted conduct in determining the sentence to impose within the guideline range; whether a departure from the guideline range is warranted; or prohibiting the consideration of acquitted conduct for all purposes when imposing a sentence. The PAG's position is that acquitted conduct should not be considered for any purpose in determining a sentence. Only a complete prohibition addresses all of the PAG's concerns detailed above. A complete prohibition allows the jury's verdict to remain inviolate, it allows defendants to exercise their jury trial rights without fear of the government obtaining a "second bite at the apple" after an acquittal, and it maintains the fairness of federal sentencing.

The Commission also asks about the interaction between a complete prohibition on the consideration of acquitted conduct at sentencing and 18 U.S.C. § 3661, which provides that "[n]o 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." The broad language of § 3661 should be viewed within the historical context in which it was written and the legislative history surrounding its passage.

Section 3661 was originally enacted as part of the Organized Crime Control Act of 1970.[60] At that time, individualized sentencing was the norm, sentencing ranges focused on rehabilitative progress, and federal parole still existed. Fifteen percent of federal criminal cases proceeded to trial, and federal dismissal or acquittal rates were 34.8%.[61] Nothing in the legislative history, even in the Title X statutory provisions enacted to enhance penalties based on recidivism or leadership, suggests that acquittals were intended to be included in the "conduct of a person convicted of an offense" for purposes of sentencing. This context, combined with the later impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) on Sixth Amendment jurisprudence, makes it difficult to reconcile a broad reading of § 3661 with allowing a district court judge to consider acquitted conduct at sentencing. "While *Alleyne's*[62] requirement that the jury, not a judge, find facts fixing the permissible sentencing range applies to *statutory* limitations, it is hard to understand why the same principle would not apply to dramatic departures from the Sentencing Guidelines range based on acquitted conduct."[63]

Alternatively, should the Commission feel constrained to avoid a total prohibition on the use of acquitted conduct by the breadth of the decades-old § 3661, pursuant to 28 U.S.C. § 994(w)(3), the Commission may recommend legislation "that the Commission concludes is warranted" based on its analysis of sentencing data provided by the district courts. The PAG suggests that a clarifying amendment of 18 U.S.C. § 3661 to expressly preclude the consideration of acquitted conduct is warranted and urges the Commission to recommend such legislation.

The Commission also seeks comment on whether more expansive prohibitions on the use of acquitted conduct would exceed the Commission's authority under 28 U.S.C. U.S.C. § 994 or other congressional directives. As noted above, the guidelines have long limited the use of the factors contained in Chapter 5, such as age, mental and emotional conditions, or lack of guidance as a youth. There is nothing in 28 U.S.C. § 994 that limits the Commission's authority to discourage the use of disfavored facts. Rather, the Commission's authority under 28 U.S.C. § 994 is couched in expansive terms. For example, the Commission is directed to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in § 3553(a)(2)."[64] When establishing categories of offenses and policy

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[60] *See* 18 U.S.C. § 3577. Section 3661 was later renumbered as part of the Sentencing Reform Act of 1984.

[61] *See* Hindeland Criminal Justice Statistics; *see also* 116 Cong. Rec. 18830-18957 (1970) (remarks by Congressman McClellan in Response to American Civil Liberties Union Charges against S.30, June 9, 1970 Debate).

[62] *See Alleyne v. United States*, 570 U.S. 99, 103 (2013).

[63] *United States v. Bell*, 808 F.3d 926, 931 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*).

[64] 28 U.S.C. § 994(a)(2).

statements governing the imposition of particular sentences, the Commission "shall consider," among other matters, any "circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;" "the community view of the gravity of the offense;" and "the public concern generated by the offense."[65] Also, when establishing categories of defendants and policy statements regarding the imposition of various sentences, the Commission can consider the relevance of factors that include the defendant's role in the offense and criminal history.[66] All of these provisions authorize the Commission to define the parameters of the factors that a sentencing court can consider, and the PAG submits that limiting the consideration of acquitted conduct is no different.

Finally, when determining the appropriateness of incremental penalties, the Commission is directed to promulgate guidelines based on convictions, not convictions *and* acquitted conduct.[67] This appears to preclude the use of acquitted conduct. "It is difficult to square this explicit statutory command to impose incremental punishment for each of the 'multiple offenses' of which a defendant is 'convicted' with the conclusion that Congress intended incremental punishment for each offense of which the defendant has been acquitted."[68] In the PAG's reading of 28 U.S.C. § 994, the Commission has the authority to limit the use of acquitted conduct in sentencing.

The Commission requests comment on whether it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps. The PAG believes that a policy statement, in addition to Options 1 and 3, would be entirely appropriate. For all of the reasons described above, the PAG recommends a broad policy statement against the use of acquitted conduct at any stage of the sentencing process. At a minimum, the PAG recommends that the policy statement address the one area where the use of acquitted conduct is still possible under Option 1: when determining the sentence to impose within the guideline range or whether a departure from the guideline range is warranted.

2. The Commission seeks comment on how to define acquitted conduct. The PAG urges the Commission to adopt the more precise and broader definition of acquitted conduct used in the Prohibiting Punishment of Acquitted Conduct Act of 2023.[69] This bill defines acquitted conduct as:

> (1) an act –
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> (A) for which a person was criminally charged and adjudicated not guilty after trial in a Federal, State, or Tribal court; or
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> (B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication hearing; or

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[65] 28 U.S.C. §§ 994(c)(2), (4) & (5).

[66] *See* 28 U.S.C. §§ 994(d)(9) & (10).

[67] *See* 28 U.S.C. § 994 (l)(1).

[68] *See Watts*, 519 U.S. at 168-69 (Stevens, J., dissenting).

[69] *See* Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (2023).

> (2) any act underlying a criminal charge or juvenile information dismissed –
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> (A) in a Federal court upon a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure; or
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> (B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.[70]

This proposed definition addresses the PAG's concerns regarding the use of acquitted conduct in several ways. First, the proposed definition is easy to apply to a broad array of conduct, however uniquely defined by different jurisdictions across the country. Second, even though Congress did not enact this legislation in 2023, a prohibition against punishment for acquitted conduct has enjoyed broad bipartisan support for several years. And finally, this proposed definition removes ambiguity under the Double Jeopardy Clause as it includes both underlying acts as well as criminally charged acts and it provides a uniform definition across multiple jurisdictions.

3. The Commission asks for comment about its proposed language in Option 1 that excludes certain conduct from the definition of acquitted conduct. The proposed definition would exclude "conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt."[71] As the PAG explained in its comment on the Commission's proposal regarding acquitted conduct last year, this issue of "overlapping conduct" is one that

> as a practical matter, [] seems like an unworkable task for a sentencing court to undertake. The PAG's position is that a bright-line rule precluding the use of acquitted or uncharged conduct in determining a defendant's sentence will address this concern and eliminate the need for time-consuming mini-trials at sentencing to determine the significance, if any, of "overlapping" conduct.[72]

The PAG notes that if the Commission were to define acquitted conduct as the PAG recommends, consistent with the proposed 2023 legislation discussed above, then the consideration of overlapping conduct would rarely, if ever, arise. And while the various hypothetical situations that the Commission posed last year are thought-provoking and raise interesting concerns, the reality in PAG members' experience is that it is difficult, if not impossible, for the PAG to identify cases involving overlapping conduct. The PAG welcomes the opportunity to consider this issue and discuss it further during the upcoming March hearings.

4. The Commission seeks comment about potential amendments to address acquittals for reasons unrelated to the substantive evidence. The PAG maintains that none of the options should be revised to exclude acquittals based on reasons unrelated to substantive evidence. Exclusion of such acquittals from the definition of acquitted conduct suggests that procedures designed to safeguard the fairness of criminal proceedings are mere "technicalities."

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[70] *See id*. at Sec. 2, available at: https://www.congress.gov/bill/118th-congress/senate-bill/2788/text?s=1&r=1&q=%7B%22search%22%3A%22S.2788%22%7D.

[71] *See* Proposed Amendment at 42.

[72] *See* PAG 2023 Letter at 35.

For example, proper venue is twice enshrined in the Constitution,[73] and was first listed in our nation's Declaration of Independence. "Proper venue in criminal proceedings was a matter of concern to the Nation's founders."[74] This was for good reason. Proper venue protects the due process rights of defendants from litigating in a distant forum.[75] It allows local communities to prosecute acts occurring in their jurisdictions, thereby strengthening their oversight role as jurors,[76] and proper venue ensures that cases are tried where the evidence is most easily accessible.[77] Moreover, differing cultural norms in our geographically vast country encourages civic participation by juries; avoids the perception or practice of forum shopping; and reaffirms that our criminal justice system is fair and accessible. Venue is not a technicality, nor is it any lesser a constitutional protection than the standard of proof beyond a reasonable doubt.

Similarly, the statute of limitations bolsters due process rights designed "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[78] Statutes of limitations enhance predictability and a point certain beyond which a defendant's fair trial rights will be prejudiced. Excluding acquittals based on stale claims undercuts the legislative policy judgments and due process considerations the statutes of limitations were designed to reinforce.

The PAG sees no principled basis by which "non-substantive" bases for an acquittal should be excluded from limiting or prohibiting the use of acquitted conduct in sentencing.

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[73] Article III, § 2, cl. 3 "Trial of all Crimes…shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const., amend. VI.

[74] *United States v. Cabrales*, 524 U.S. 1, 6 (1998).

[75] *See United States v. Cores*, 356 U.S. 405, 407 (1958).

[76] *See United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)

[77] *See Travis v. United States*, 364 U.S. 631, 640 (1961)(quoting *Cores*, 356 U.S. at 407) (Harlan, J., dissenting).

[78] *Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

[79] §2K2.1(b)(4)(B)(i).

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VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding these proposed amendments. Our PAG colleagues look forward to providing testimony on several of these amendments during the Commission's upcoming

hearing, and the PAG welcomes further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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