July 7, 2014

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

Re: Retroactivity of Amendment 3

Dear Judge Saris:

NACDL hereby responds to the Commission's request for comment on retroactive application to Amendment 3 from this year's amendment cycle, which decreased the drug table set forth in USSG §2D1.1 by two-offense levels across all drug types and without limit to any specific offender characteristics. NACDL joins with the Federal Defenders and the Practitioners Advisory Group in whole-heartedly endorsing retroactivity without any limitation. Principles of fundamental fairness dictate that sentence length should not be determined by the date sentence is imposed. Moreover, retroactive application of the amendment will reduce the disproportionate effect of drug quantity on the sentence length, which has fuelled some of the racial disparities rife in our federal criminal justice system. While implementation of a retroactive amendment will necessarily consume time and resources, we write separately to emphasize the positive impact retroactive application of Amendment 3 will have on reducing prison overcrowding and promoting significant financial savings. We note also the positive experience with retroactive implementation of the 2007 amendment to USSG §2D1.1 relating to crack offenses – a process that did not increase recidivism – and the federal judiciary's current willingness to implement Amendment 3 retroactively.

As you articulated in your "Remarks for Public Meeting" on April 10, 2014, "[r]educing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32% overcapacity, and federal prison spending exceeds $6 billion a year, making up more than a quarter of the budget of the entire Department of Justice and reducing the resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime

prevention programs – all of which promote public safety." Chief Judge Patti B. Saris, Remarks for Public Meeting (Apr. 10, 2014).

As you also observed, "[w]hen the drug quantity tables were set at their current level, above the mandatory minimum penalties, drug quantity was the primary driver of drug sentences. There was only one other specific offense characteristic in the drug guideline. Now, there are sixteen specific offense characteristics, including enhancements for violence, firearms, aggravating role, and a whole host of other factors to help ensure that dangerous offenders receive long sentences. *Quantity, while still an important proxy for seriousness, no longer needs to be quite as central to the calculation*." *Id.* (emphasis added).

This de-emphasis on drug quantity for purposes of sentencing policy also is reflected in the Department of Justice's recent Smart on Crime Initiative, which encourages federal prosecutors to decline charging drug amounts that otherwise would trigger mandatory minimum penalties. As General Holder stated in his testimony before the Commission last March, "[t]his proposed amendment is consistent with the Smart on Crime Initiative that I announced last August. Its implementation would further our ongoing effort to advance common sense criminal justice reforms, and it would deepen the Department's work to make the federal criminal justice system both more effective and more efficient when battling crime in the conditions and the 14 behaviors that breed it." Transcript, *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines* 14 (Mar. 13, 2014).

Assuming an average bed-year cost of $28,948, total savings is projected to be 83,525 bed years, or just over $2.4 billion. U.S. Sentencing Commission Memorandum, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* 8 (May 27, 2014). While this savings will only be realized in full over the next 30 years, as 56.2% of eligible offenders (28,220 inmates) will be released within the first three years, that still means a savings of over $1.3 billion within that same first three year period. *Id.* at 9, tbl. 1; 15.

Finally, we wish to address the position of the Department of Justice, which is in favor of retroactive application of Amendment 3, but only in a limited manner. *See* Statement of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia, Before the U.S. Sentencing Commission (June 10, 2014) ("Yates Testimony"). The DOJ advocates for limits regarding the culpability of the inmate:

> We believe the Commission should limit retroactive application to offenders in Criminal History Categories I and II who did not receive: (1) a mandatory minimum sentence for a firearms offense pursuant to 18 U.S.C. § 924(c); (2) an enhancement for possession of a dangerous weapon pursuant to §2D1.1(b)(1); (3) an enhancement for using, threatening, or directing the use of violence pursuant to §2D1.1(b)(2); (4) an enhancement for playing an aggravating role in the offense pursuant to §3B1.1; or (5) an enhancement for obstruction of justice or attempted obstruction of justice pursuant to §3C1.1.

Yates Testimony at 7-8. Yet, DOJ gives no reasons as to why these particular facts are relevant to retroactive application consideration. Further, such factors already were addressed by the Commission in deciding to promulgate Amendment 3 in the first instance. Finally, and echoing the CLC, "[t]he retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future." Judge Keeley Testimony at 1-2. This will not be possible under DOJ's proposed *ad hoc* limitation on its applicability.

NACDL firmly believes that for the reasons the Commission promulgated Amendment 3 speak with equal force to making that amendment retroactive *without limitation*. Those limitations suggested both by the CLC and DOJ simply are not persuasive to override considerations of fundamental fairness. Ultimately, the *significant* additional cost savings and reduction to the federal prison population constitute compelling reasons to make Amendment 3 retroactive without *any limitations*.

Respectfully,

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