

April 22, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Sentencing Guideline Provisions of HR 1528, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*.

Dear Mr. Chairman and Mr. Conyers:

The undersigned organizations, which together represent millions of businesses, officers, directors and general counsel across the United States, do not frequently express their views on issues of sentencing. Unquestionably, we strongly support the efforts of Congress, the Department of Justice, and the Courts to maintain a justice system that protects public safety, encourages fair competition in the marketplace, and adheres to our country's constitutional principles.

However, we believe that Section 12 of HR 1528 would have a sufficiently negative impact on this country's sentencing system that we must express our concern. Section 12 has the operative effect of imposing a system of mandatory minimum sentences because it would eliminate, by statute, 36 grounds for downward departures that are currently available to judges under the now-advisory Guidelines. At the same time, Section 12 provides that these factors *could* be considered when sentencing a defendant within or above the Guideline range. The bill goes so far as to prohibit judges from basing a sentence below the Guideline range on factors currently allowed by the Guidelines (for example, the possibility of a downward departure in a fraud case under Section 2B1.1 if "the offense level determined under these guidelines substantially overstates the seriousness of the offense"). In this regard, we would like to voice the following concerns:

- ***First***, and most important, we believe that the ***advisory Guidelines are working***. Statistics compiled on a nearly real-time basis by the United States Sentencing Commission indicate that judges are applying the Guidelines with the same consistency as before the Supreme Court's decision in *United States v. Booker* and *Fanfan*. The American Bar Association in February formally recommended that Congress allow the USSC to continue to collect data for at least a year so that all stakeholders may properly evaluate whether and how to reform this complex system. What are its strengths and weaknesses? What is the proper role of judicial

discretion? What are the parameters of *Booker* and *Fanfan*? With respect, this is an issue that we believe everyone must study carefully and conscientiously as we reflect on how we can best fulfill criminal sentencing's twin goals of consistency and justice.

- **Second**, the federal criminal laws exert substantial influence over the nation's economy and the conduct of U.S. commerce. Congress certainly recognized this through passing legislation such as Sarbanes-Oxley to encourage certain kinds of corporate executive behavior and discourage inappropriate and illegal behaviors. Before you begin any effort to re-legislate criminal sentencing, we strongly urge you to take the time and steps necessary to gather data from the business community regarding the current sentencing system and its ability to influence meaningfully the corporate behaviors that the Sentencing Guidelines are intended to affect. We suggest that as a part of that process, you should receive expert input from a wide range of sources, including the business community, regarding the likely impact of any new proposal. Changes as important as this one deserve open and frank debate; they should not be last-minute additions that have not had the benefit of comment and discussion by all affected parties.

Fortunately, the current sentencing system is not in legal disarray after *Booker* and *Fanfan*. Most litigation that has taken place after these decisions has concerned the weight to be given the Guidelines and the standard for appellate review. These are important, but manageable, legal questions. By contrast, Section 12 of HR 1528 directly raises issues not answered by *Booker* and *Fanfan* — in particular, whether it is still good law that judicial fact-finding alone can raise a minimum sentence (*United States v. Harris*). Enacting Section 12 into law would result in widespread litigation challenging the legality of a large proportion of federal sentences. This would neither benefit the public nor provide prosecutors with useful tools. We therefore ask that the Committee give careful consideration to the impact of any broad sentencing reform effort before it proceeds.

We look forward to providing the views of business as you turn your attention to this complex issue.

Sincerely,

U.S. Chamber of Commerce

National Petrochemical and Refiners Association

Association of Corporate Counsel

American Chemistry Council

Business Civil Liberties, Inc.

Corporate Environmental Enforcement Council

cc: Members of the House and Senate Judiciary Committees

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