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March 30, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Firearms Trafficking:

Dear Judge Hinojosa:

This supplements our comments on the firearms amendments. We believe our proposed definition of firearms trafficking best meets the Commission's concerns as to overbreadth. It enhances the punishment for those who are true firearms traffickers: those who deal in firearms repetitively either as a livelihood or to further criminal activity. This fulfills the Commission's narrowing intent.

Our definition, which tracks congressional language, *see* 18 U.S.C. § 921(a)(21)(A-F) & (a)(22), addresses the questions posed by the Commission at the public hearing on March 15. The proposal covers the culpable trafficker and avoids the aberrant actor; it captures the "urban" problem (urban violence) while recognizing occasional rural circumstances. Our proposal reads:

- (7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

- (13) Application of Subsection (b)(7).--
 - (A) Definition of "engaged in the business of trafficking." —For purposes of subsection (b)(7), "engaged in the business of trafficking" means a defendant who:
 - (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms,

- (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and
- (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

“Livelihood and profit” is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

“Terrorism” is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

This application note assures that the trafficking enhancement captures the criminals DOJ desires to punish. As DOJ explained in its written testimony: “Firearms traffickers are persons who violate existing laws and deliberately circumvent the background-check and record-keeping requirements of legal commerce in order to supply firearms to convicted firearms, drug dealers, gang members, and other prohibited persons.” Hertling Testimony, p. 3. Not only does our proposal fully capture what DOJ has asked the Commission to target, it does so without sweeping in individuals who are not traffickers who DOJ expressly disavowed as deserving enhanced sentences, *id.* at p. 8, and moreover, does so without relying on the confusing “patchwork quilt” of 20,000 gun laws.

To cure that overbreadth, DOJ proposed a definition that would require transfer of two or more firearms as part of an “unlawful scheme” and that the defendant knew, had reason to believe or was willfully blind to the fact that the firearms were being distributed to a person whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. Hertling Testimony, p. 9.

The problem with DOJ’s “unlawful scheme” formulation is that it applies to everyone who falls under the guideline. This would reach the girlfriend who is a straw purchaser, a farmer who barter firearms for provisions, or anyone who transfers heirlooms to an underage relative. Each of these situations involves an unlawful scheme because the transfer is by or to one who is a prohibited possessor. This also would reach any other transfers that are made unlawful under the innumerable federal, state, and local laws, codes, and regulations (which we are sending to Mr. Dorrhofer under separate cover). DOJ claims that the enhancement would not apply to these situations because it would not be mandatory. It is difficult to understand what DOJ means by this; it certainly *would* be required in calculating the guideline range.

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Thank you for considering our comments, and please let us know if we can assist the Commission further.

Sincerely,

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