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March 27, 2009

Honorable Richard H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comments on Proposed Amendments Regarding the Ryan Haight Online Pharmacy
Consumer Protection Act of 2008

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments on the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (the "Act."). We submitted written testimony on March 10, 2009 as well as public comment in December 2008. Those submissions are attached and incorporated as part of our public comment. Here, we summarize a few salient points.

First, given the Congressional directive that the Commission "should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement," the Commission should proceed very cautiously in deciding whether to amend USSG § 2D1.1. Because the available evidence does not show a need to increase the guidelines in order to comply with the directive or to satisfy the purposes of sentencing set forth in 18 U.S.C. § 3553(a), the Commission should simply refer the new offense created under the Act, 21 U.S.C. § 841(h), to USSG § 2D1.1. Existing guidelines provide ample flexibility for courts to ensure that those who distribute larger quantities of Schedule III-V controlled substances over the internet receive sufficient sentences. *See* Written Testimony of Jon Sands, at 2-7 (attached).

Second, we are particularly troubled by any proposal to change the drug equivalency for hydrocodone combination products or to use weight rather than unit dose in calculating the guidelines. Although the Department of Justice has disavowed any desire to increase sentences for modest or low-level distributors (those distributing less than 40,000 units), and conceded that the guidelines are adequate for those defendants, changes in the conversion ratio under the drug equivalency table or the method of calculation (weight v. unit dose) will severely impact those defendants. To demonstrate the impact of the Department's proposal, we provide a real life example of a doctor's receptionists, whose base offense level for distributing 31,000 units of Vicodin ES® 7.5/750mg would jump from 18 under existing guidelines to 26 under the Department's proposal. *See* Written Testimony of Jon Sands, at 11-13.

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Third, we believe that drug quantity is an unsound way of measuring offense severity in online pharmacy cases and that other means are available to account for the aggravating circumstances that may exist in such cases. See Written Testimony of Jon Sands, at 9-11. We also point out how ratcheting up sentences for online pharmacy participants or those who distribute more than 40,000 units of hydrocodone and other Schedule III-V substances would create sentencing disparity – where those offenders are treated as, or more, harshly than more serious offenders, including those who support terrorist organizations or illegally export arms. We believe the long-term effects of such ratcheting will lead to even more increases in other guidelines. See Written Testimony of Jon Sands, at 7-9.

Fourth, if the Commission were to amend the guidelines so that drug quantities for hydrocodone combination products are based on weight rather than unit dose, it would have to (1) disregard the available scientific evidence about the relative effects of various doses of hydrocodone combination products; (2) return to a methodology that it found flawed in 1991 when it sought to simplify application of the guidelines by adopting a single conversion ratio for all Schedule III-V substances; and (3) justify why the same rationale for singling out hydrocodone combination products would not also apply to other Schedule III-V substances with differing potencies. See Written Testimony, at 14-17.

Fifth, the latest available evidence – released in February 2009 – casts serious doubt on any claim that the growing abuse of controlled prescription drugs provides a reason to increase the penalties for hydrocodone combination products or other Schedule III-V substances. The data shows that the nonmedical past month use of prescription pain relievers in 2007 “does not differ significantly from that in 2002.” Office of Applied Studies, SAMSHA National Survey on Drug Use and Health, *Substance Trends in Nonmedical Use of Prescription Pain Relievers: 2002 to 2007* (Feb. 2009). Similarly, a careful analysis of the DAWN data, the STRIDE data, and the Florida cases the Department claims are representative of the entire country shows that they do not provide sound empirical support for any increase in the sentencing guidelines for Schedule III-V substances, including hydrocodone combination products. See Written Testimony of Jon Sands, at 20-24.

As always, please do not hesitate to contact us for additional information, observations, and comments.

Sincerely,

JON M. SANDS
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Chair, Federal Defender Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair
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