U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

March 22, 2010

The Honorable William K. Sessions III
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chief Judge Sessions:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 21, 2010. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard in addressing all of the guideline issues under consideration. We look forward to continuing our work with the Commission during the remainder of the amendment year on all of the published amendment proposals.

We also want to recognize the continuing and valuable work the Commission has done in response to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). As a result of *Booker* and other Court decisions, federal sentencing has undergone a constitutional shock, the full ramifications of which we still do not know. The Commission's regional hearings and data releases have been important contributions to all those concerned about the impact of *Booker* on federal sentencing policy and practice. We urge the Commission to continue the regular release of federal sentencing statistics and to explore new ways of analyzing federal sentencing data in order to understand federal sentencing outcomes better, identify any unwarranted sentencing disparities, and determine whether the purposes of sentencing are being met. Crime rates are at generational lows, and our goal is to continue to improve public safety while ensuring justice for all and the efficient use of enforcement and correctional resources. The Commission has always stimulated a healthy public dialogue about federal sentencing policy and ensured that such dialogue is based on the facts and meaningful analysis.

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I. ALTERNATIVES TO INCARCERATION

The Sentencing Reform Act directs the Commission "to insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . ." 28 U.S.C. § 994(j). We support implementation of this directive and the Commission's ongoing work relating to alternatives to incarceration. Ensuring that imprisonment resources are used wisely is an important and shared responsibility. At the Department of Justice, the Principles of Federal Prosecution have always recognized that in deciding whether or not to bring charges in a particular case, federal prosecutors should evaluate the availability of alternatives. At the same time, we note the critical role imprisonment plays in deterring crime, incapacitating those who continue to victimize the innocent, providing just punishment, and promoting trust and confidence in the criminal justice system.

We believe the Commission has two critical roles to play in addressing alternatives to incarceration. First, the Commission is uniquely positioned to provide the federal court family with information about the availability and efficacy of various alternative sanctions. Unlike individual courts, probation officers, prosecutors, or defense counsel, the Commission has both expertise and substantial resources to identify various alternative sanctions – including evolving alternatives such as electronic monitoring using GPS technology – to evaluate when these sanctions work to achieve the purposes of sentencing and when they do not work, and to provide all of that information to judges and other criminal justice stakeholders. We believe this should be the prime focus of the Commission's work surrounding alternatives in the coming years.

Second, the Commission can, through the sentencing guidelines, help to identify the kinds of offenses and offenders that are appropriate for an alternative sanction, either because these offenders meet the criteria of section 994(j) or because research and data suggest that the best of way of achieving the purposes of sentencing is through the use of an alternative sanction. This is the work the Commission has been doing for over two decades in examining individual offense types in Chapter Two of the guidelines and setting offense levels that call for either imprisonment or alternatives to imprisonment as appropriate.

* * *

Stemming from its continuing study of alternatives to incarceration, the Commission has proposed two separate, though not mutually exclusive, guideline amendments to expand the use of alternative sanctions. The first proposed amendment, Part A, would create a new guideline, section 5C1.3, to expand the availability of non-incarceration sentences for certain low-level drug offenders. Specifically, without regard to the applicable zone of the guidelines' sentencing table, this amendment would permit imposition of a sentence of probation conditioned upon the offender's participation in a substance abuse treatment program. To be eligible for this

alternative sentence, an offender must (1) have committed a drug offense;[1] (2) have committed such offense while addicted to a controlled substance; (3) not have a total offense level greater than some yet-underdetermined level between 11 and 16; (4) meet the requirements of the so-called "safety valve";[2] and (5) demonstrate a willingness to participate in a substance abuse treatment program.[3]

The second proposed amendment, Part B, would expand zones B and C of the sentencing table. This zone expansion would take place across the entire sentencing table, in each criminal history category, and would apply across a myriad of crime types. We support the proposed amendment in Part A[4] and oppose Part B.

* * *

1. The criminal justice system plays an important role in reducing drug use and its consequences. Many drug criminals, especially those who commit violent acts or are involved in drug trafficking, must be incarcerated to ensure public safety. Arrest, prosecution, and incarceration are necessary and appropriate for significant and repeat drug traffickers and otherwise dangerous drug offenders. Drug laws not only create a criminal sanction, they also serve as a clear statement about what our society believes is right and wrong. The criminal justice system plays a vital role in reducing the costs and consequences of drug crimes – not just by incarcerating serious offenders that threaten the community, but also by providing a powerful incentive to address drug abuse before it escalates into a more serious – and costly – problem. Indeed, the threat of incarceration, when properly employed, is a powerful deterrent. Further, those under criminal justice supervision can be strongly motivated to reduce or eliminate drug use if a credible threat of consequences for violations can be maintained.

Incarceration is often the right response to drug offenses, especially for those offenders involved in violence or trafficking (*i.e.,* most federal drug offenders). Strong imprisonment sentences achieve the purposes of deterrence and just punishment and respond to the dangers involved in trafficking dangerous drugs. For certain non-violent, low-level drug offenders driven by an underlying substance abuse problem, though, research and data have shown that an alternative sanction may be appropriate in limited circumstances.

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[1]Specifically, the offender must have committed an offense under section 841, 844, 846, 960, or 963 of Title 21 of the United States Code.

[2]*See* USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

[3]In place of the requirement that the defendant demonstrate a willingness to participate in substance abuse treatment, we suggest the Commission consider an *opt out* provision; that is that the defendant would be ineligible for the treatment option if he refused to participate in treatment.

[4]Our support is contingent on limitations we discuss *infra*.

While the type of drug offenders in the federal criminal justice system is generally far different than that prosecuted in most state courts, we are guided in our approach by a range of programs that exist around the country for low-level drug-involved offenders that have been proven effective through extensive research. The drug court program – now celebrating its twentieth anniversary – is such a program. Drug courts combine assessment, judicial interaction, monitoring and supervision, graduated sanctions and rewards, and treatment and ancillary services. They have been proven effective for certain offenders and certain offenses.

We also are guided in our approach to examining alternatives to incarceration by the principle that the federal sentencing structure must serve the interests of justice by ensuring public safety, appropriately and judiciously punishing criminal conduct, deterring future criminal conduct, and eliminating unwarranted sentencing disparities. We believe alternatives should be expanded only when the Commission can avoid undermining the important deterrent effect of the guidelines on more serious offenders and offenses as well as avoid undermining the congressional imperative to eliminate unwarranted sentencing disparities.

We believe the amendment in Part A can be targeted and focused on a small category of low-level offenders for whom research has shown alternative sentences may be appropriate and for whom deterrence may be ineffective. We support limitations on availability of a drug treatment alternative, as set out in Part A, to those drug offenders who (1) are not subject to a mandatory minimum sentence; (2) do not have more than one criminal history point; (3) did not engage in violence in the commission of the offense; (4) were not an organizer or leader in the commission of the offense; and (5) debriefed with the government concerning their offense. Congress has determined that those drug offenders who traffic in quantities triggering a mandatory minimum (*i.e.,* mid- or high-level dealers) should not receive probation. *See* 21 U.S.C. § 841(b)(1)(A-B). Furthermore, Congress has mandated that traffickers who would otherwise be subject to a mandatory minimum sentence but who are eligible for the safety valve should nonetheless receive at least a two-year imprisonment term.[5] We believe to comply with congressional policy, only those low-level offenders who are not involved in a quantity of drug that would trigger a mandatory minimum may be eligible for this alternative.

The Department further supports the evidence-based limit of Part A to low-level drug offenders who commit a non-violent drug offense *while addicted* to a controlled substance. Most existing drug courts assist non-violent low-level offenders to overcome substance abuse addictions that contributed to their offense, and studies demonstrate that participation in drug treatment programs imposed through drug courts reduces both recidivism rates and public safety costs. Recidivism rates for those who complete drug court programs are 8% to 30% lower than

[5]*See* Violent Crime Control and Law Enforcement Act of 1994, section 80001(b)(1)(B), (September 13, 1994).

the rates of other similarly situated offenders.[6] This evidence of improved public safety through reduction of recidivism via substance abuse treatment justifies the extension of treatment-based alternatives to incarceration to addicted, low-level drug offenders. We recognize that there will be a variety of guideline interpretation and implementation issues that will arise should this amendment be promulgated as published. We believe the Commission should work to address these in the coming weeks, with the Probation Service and the courts generally, before promulgating any amendment.

If the Commission promulgates the Part A amendment, we think it should make conforming changes to Chapter Five to indicate that the new section 5C1.3 would be the singular exception to the general principle under the guidelines that drug addiction is not ordinarily relevant in federal sentencing. While research and experience show that drug treatment may be an appropriate alternative for low-level, non-violent, first-time drug offenders, research and experience also show that treatment is not an appropriate alternative for other offenders. Moreover, a clear statement limiting the treatment alternative is critical to avoiding unwarranted disparities in sentencing.

We also believe that the Commission should develop standards for effective treatment programs. The Commission should gather the best experts on treatment programs, analyze the available research, and share the results of this work with the federal courts.

* * *

2. In contrast, the Department opposes the expansion of zones B and C of the guidelines as proposed by the Commission in Part B. While this option would permit more defendants to be eligible for alternative sentencing, it has several drawbacks. Most notably, there is no substantial evidence or research – that balances the costs (including public safety costs) and benefits of such a change – to support such a change to the guidelines, which would apply across all criminal history categories of the guidelines, apply across the full spectrum of offense types, and nearly double the number of federal offenders eligible for non-imprisonment sentences. Extending eligibility for alternatives without limits based on an offender's criminal history category would result in inappropriate sentences for offenders whose instant offense may be minor, but whose criminal history is significant. There is no evidence indicating that such offenders should receive alternative sentencing, or that alternative sentencing would not increase the public safety risks posed by such a class of offenders.

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[6] *See* U.S. Government Accountability Office, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005), at 45-46 (reporting that offenders who completed drug court programs had re-arrest rates between 10% and 30% lower than offenders who did not); Aos, S., Phipps, P., Barnoski, R., Lieb, R., THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME (2001), at 8 (Table 1) (reporting that the reduction in the recidivism rate attributable to drug courts was 8%).

Another adverse consequence of the proposed Part B amendment would be the increased likelihood that white-collar offenders would receive non-prison sentences. Under the current guidelines, offenders received probation-only or probation-plus-community confinement sentences in the following types of cases at the rates indicated: environmental/wildlife offenses (81.4%); food and drug offenses (66.7%); gambling/lottery offenses (63%); simple possession of drugs (60.4%); larceny (56.8%); embezzlement (48.5%); antitrust offenses (47.6%); tax offenses (41.2%); and other miscellaneous offenses (62.5%).[7] If the zones were amended such that more white-collar offenses were eligible for alternative sentencing, it is likely that even fewer white-collar offenders would be incarcerated, undermining the important deterrent effect of jail time in white-collar cases,[8] diluting effective white-collar enforcement efforts, and eroding public confidence by seemingly ignoring the serious harm that white-collar crime inflicts. According to the Commission's own data, under the proposal, alternatives would be available, for example, to identity thieves who are involved in stealing as much as $200,000. We think this is wrong.

Moreover, unwarranted racial and other disparities in sentencing would likely be exacerbated by the application of Part B to all offenses because, as described above, the offenses most likely to receive alternative sentencing are those in which white offenders already are over-represented compared to their percentage of the total number of federal offenders. For example, in fiscal year 2008, only 29.8% of federal offenders were white, yet white offenders constituted a much higher percentage of offenders in those offenses most likely to receive alternative sentencing: antitrust (90%); gambling/lottery (86.6%); environmental/wildlife (75.9%); food and drug (73.1%); and tax (71%).[9] Recent Commission data show a slow but steady move away from guideline sentencing and a slow and steady increase in unwarranted sentencing disparities. If promulgated, the Part B amendment will exacerbate these trends and make federal sentencing even more inconsistent.

Expanding zones B and C also would have an adverse impact on sentencing in corruption, civil rights, and many other cases and enforcement programs. We think that the Commission should not amend sentencing policy for these offenses without fully studying, understanding, and sharing with all stakeholders the impact of such amendments on these types of cases. The wholesale expanded use of non-incarceration sentences should not be undertaken in the absence of careful analysis of the types of offenders and the types of offenses to which these alternatives would apply. And it should not be done without assurances that such a change

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[7] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics for Fiscal Year 2008* (2009) (Table 12, Offenders Receiving Sentencing Options in Each Primary Offense Category).

[8] In white-collar cases, where offenders often engage in cost-benefit analyses, the certainty of jail time is crucial in deterring offenders from conduct that can often reap significant economic gains.

[9] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics for Fiscal Year 2008* (2009) (Table 4, Race of Offenders in Each Primary Offense Category).

would not jeopardize public safety and the public confidence in imposition of fair and predictable sentences.

II. SPECIFIC OFFENDER CHARACTERISTICS

In connection with its review of departures, the Commission has requested comment concerning the relevance and treatment of five specific offender characteristics set forth in Chapter Five, Part H, of the guidelines: age; mental and emotional condition; physical condition, including drug dependency; military, civic, charitable, public service, or employment-related contributions and record of prior good works; and lack of guidance as a youth. The Commission seeks comment upon whether the current guidelines – which advise that these characteristics are "not ordinarily relevant" in determining whether a departure from a guidelines-calculated sentence is warranted – adequately address these specific offender characteristics. The Commission specifically seeks feedback regarding views as to the relevance of these characteristics to the decision whether to impose a sentence of probation or incarceration and, to the extent that the characteristics are deemed relevant, whether there is a risk that they might be used as a proxy for one of the "forbidden factors" in contravention of section 994(d) of Title 28 (which requires the guidelines and its policy statements be "entirely neutral" as to these factors).

We continue to believe that federal sentences should be determined largely by the offense committed and the offender's criminal history. Offenders who commit similar offenses and have similar criminal histories should be treated similarly. While we recognize that section 3553(a) directs judges to consider an offender's background, it also directs judges to avoid unwarranted disparities. The overwhelming legislative history behind the Sentencing Reform Act demonstrates that Congress intended for offenders who commit similar offenses to be treated similarly. We think the Commission should reaffirm this principle of federal sentencing policy that has been in place since the Sentencing Reform Act was adopted and also indicate that offender characteristics (outside of criminal history) generally should not drive sentencing outcomes.

We are extremely cautious about any revision to the guidelines related to offender characteristics. The Commission has not provided an administrative record that would justify delving into this area, nor has it provided any hint about how it might now regulate offender characteristics. We are also concerned because we suspect that a significant expansion of departure authority through consideration of these five characteristics – particularly in light of today's advisory guidelines landscape – will (1) further exacerbate unwarranted sentencing disparities; and (2) create a new level of uncertainty and unpredictability in sentencing that gives rise to litigation both at the trial and appellate levels. Indeed, discussion of the questions that the Commission poses for comment is complicated by the fact that consideration of how the guidelines should treat these five specific offender characteristics is inextricably intertwined with the examination of broader policy issues such as alternatives to incarceration and racial and ethnic disparities in sentencing.

In today's sentencing climate, where courts with authority to depart from guidelines sentences choose more often to vary altogether from the guidelines because of the perceived complexity of the departure guidelines and risk of appellate reversal, there seems no reason to expand departure authority further – a move that we believe would (1) further jeopardize uniformity in federal sentencing; (2) undermine the deterrent effect of guidelines sentences; and (3) potentially obscure the solutions to ongoing questions regarding the propriety of alternatives to incarceration for certain offenders and offenses and the elimination of unwarranted sentencing disparities.

The Department urges the Commission, instead, to study these offender factors individually over the coming years and consider issuing research papers to assist courts in how and when these factors are appropriately considered (within the context of sentencing outcomes being driven largely by the offense committed and the offender's criminal history). For example, we think it is important for the Commission to study the effects of traumatic brain injuries suffered by Iraq and Afghanistan war veterans, how such injuries may have affected veterans involved in criminal activity, and how federal courts should consider such injuries in determining an appropriate sentence. We believe the Commission should hold a hearing on this issue, complete thorough research and administrative study, and then issue relevant information to the federal courts to assist in appropriate cases. We think this kind of rigorous study and review is the best way to address these kinds of issues.

We do not believe a defendant's status as a non-citizen warrants a downward departure. We do think the Commission should consider, as part of the next amendment year, the proposal suggested at one of the Commission's regional hearings for a small sentence reduction for non-citizens who agree to resolve expeditiously any pending immigration, removal, or deportation matter. We also do not believe that "cultural assimilation" is generally an appropriate ground for a downward departure in an illegal reentry case sentenced under section 2L1.2.

III. APPLICATION INSTRUCTIONS

Section 1B1.1 of the guidelines currently provides a roadmap for applying the provisions of the guidelines. The Commission proposes to broaden section 1B1.1 so that it more fully reflects (1) the requirement of 18 U.S.C. § 3553(a)(4) and of *Booker*[10] that district courts consider the guidelines in imposing a sentence; and (2) the additional requirement of *Rita*,[11] and *Gall*[12] that district courts consider the guidelines *first* in crafting any sentence.

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[10] 543 U.S. 220, 264 ("district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing").

[11] 551 U.S. 338, 351 (2007) (directing that a district court should *begin* all sentencing proceedings by correctly calculating the applicable guidelines range).

[12] 552 U.S. 38, 39 (2007) (stating that to ensure nationwide consistency in the administration of sentences,

The Commission notes that the majority of the circuits recognize that, subsequent to *Booker*, there remain two types of sentences *within the framework of the guidelines.*[13] Indeed, the Fifth Circuit has explained:

> Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence.

United States v. Tzep-Mejia, 461 F.3d 522, 525 (5th Cir. 2006) (internal footnote omitted; citation omitted). The majority of circuits recognize that a within-guidelines-range sentence and a "departure" sentence are both "guideline sentences." Combining the Supreme Court's mandate to begin all sentencing calculations with a reference to the guidelines with the view that two types of guideline sentences exist results in the following process: calculation of the applicable guidelines range, followed by consideration of whether any departure within the framework of Chapter Five of the guidelines is warranted, followed by consideration of all the factors under section 3553(a) of Title 18 (which may or may *not* ultimately result in a sentence outside of the guidelines framework). It is this process, driven by post-*Booker* Supreme Court jurisprudence, that the Commission seeks to incorporate into the instructions of section 1B1.1

The Department does not object to the Commission's proposed amendment of section 1B1.1 to the extent that it accurately reflects the central role of the guidelines as the starting point for all sentencing calculation consistent with the Supreme Court's decisions in *Rita* and *Gall.* Because sentences involving departures, like within-guidelines-range sentences, are equally within the framework of the guidelines, it is appropriate and helpful for the Commission to provide further guidance, within section 1B1.1, regarding the sequence of how departure-related provisions of the guidelines manual and related policy are to be interpreted and applied.

"the Guidelines should be the starting point and the initial benchmark" for calculating a federal sentence).

[13] *See, e.g., United States v. Dixon*, 449 F.3d 194, 203-04 (1st Cir. 2006) (court must consider "any applicable departures"); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006) (same); *United States v. Morehead*, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006) (same); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate" and, after that, must consider a variance); *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). *But see United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2006) (departures are "obsolete").

The Department strongly recommends, however, that the Commission revise the newly proposed subparagraph 1B1.1(c) so that it does not seek to address matters beyond the scope of the guidelines (*i.e.*, variances). We think by referring to variances in the manual, without further consideration or amendments, the Commission will be implicitly endorsing the ability of courts to ignore policies embodied by the guidelines. For example, there has been significant litigation over the availability of substantial assistance departures under the section 3553(a) analysis and outside the guidelines analysis. We think the Commission may be inadvertently suggesting the scope of the section 3553(a) analysis with this amendment.[14]

IV. RECENCY

In connection with the computation of the criminal history category under Chapter Four of the guidelines, subsection 4A1.1(e), known as the "recency" provision, provides for the addition of two points to an offender's criminal history score if the offender committed the offense for which he currently is being sentenced less than two years after his release from any type of criminal justice supervision. However, if subsection 4A1.1(d), known as the "status" provision applies to the offender, the guidelines provide that no more than one point will be added to the offender's score on the basis of "recency."

Concerned that operation of the recency and status provisions of section 4A1.1 permit a single prior conviction to be factored into the calculation of criminal history as many as three times,[15] the Commission proposes two options for reducing what it views as the unwarranted, cumulative impact of recency. Option 1 would eliminate recency points altogether, for all offenders regardless of the offense committed. Option 2 would retain recency points, but would not authorize the addition of recency points where the status provision applied. Under Option 2, therefore, only a total of two points could be added to an offender's score where both status and recency applied (in contrast to the total of three points that can be added today under current subsections 4A1.1(d) and (e)).

The Department opposes the amendments proposed in both Options 1 and 2. As an initial matter, current subsections 4A1.1(d) and (e) are drafted appropriately to target two distinct recidivism and culpability concerns: (1) commission of an offense while under sentence or some form of court supervision; and (2) commission of an offense after recently – that is, within two years – having served a sentence of at least 60 days in connection with a prior offense. The

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[14]We believe the newly proposed subparagraph (M) of the Application Notes, which defines "variance," should be deleted.

[15]The Commission also points out that a single conviction could count as many as *four* times in the calculation of the applicable guidelines range where, as in section 2L1.2 (Unlawfully Entering or Remaining in the United States), a prior conviction can also operate to increase the offense level.

guidelines appropriately weigh these factors separately and, in recognition of the fact that these matters often coincide, appropriately limit their cumulative effect to a total of three points.

Further, neither option is justified in light of the broad, stated goals of Chapter Four to measure offender culpability, deter criminal conduct, and protect the public from further crimes of an offender – as well as to predict and account for recidivism. First, with respect to predicting recidivism, in 2005, the Commission analyzed the power of each element in its Criminal History Category ("CHC") model to predict recidivism and concluded that "*each* of the five elements [of] §§ 4A1.1(a)-(e)[] makes an independent and *statistically significant* contribution" to predicting recidivism. *See* U.S. Sentencing Commission, *Research Series on the Recidivism of Federal Guideline Offenders, Release 3: A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) at 11 (internal footnote omitted; emphasis added). Recently, however, the Commission has suggested, based on one aspect of this one study, that recency alone contributes very little to the predictive accuracy of the CHC and that status alone contributes nothing to the predictive accuracy of the CHC. This ignores the fact that recidivism measures include not just whether or not an offender will or will not commit some new crime, but also how quickly such a crime may be committed, how frequently an offender may recidivate, and the type of crime that may be committed. It also ignores many other studies of the salient factor score and of recidivism generally that validate the use of recency and status as recidivism predictors.

The Commission has also long recognized that in contrast with other recidivism prediction instruments, the purpose of the CHC model (which is incorporated into Chapter Four of the guidelines) is not only to predict recidivism in order to protect the public from the offender's future crimes, but to consider recidivism along with just punishment and deterrence.[16] *Id.* at 3. Thus, to ensure public safety, the guidelines appropriately take into account not only the likelihood of reoffending, but what the Commission has termed "culpability" – that is, the notion that an offender with an aggravated criminal background should receive a harsher penalty than an offender without an aggravated criminal background. *Id.* The fact that an offender stands before a court for sentencing having committed a new offense while under some form of court supervision or within a short period after having committed another offense unquestionably remains an important consideration for judges at sentencing. Thus, beyond the issue of recidivism, status and recency continue to have relevance in determining what is just – even if harsher – punishment. In the absence of a justification in policy or research, the Department can support neither Option 1 nor Option 2.

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[16]Section 991(b)(1)(A) of Title 28, United States Code, requires the Commission to "assure . . . the purposes of sentencing as set forth in section 3553(a)(2) of title 18" are met. Section 3553(a)(2) provides, among other things, that a sentence should promote respect for the law, provide just punishment, and afford adequate deterrence.

Nevertheless, in light of data indicating that a frequent basis for non-guidelines sentences is a court's view that an offender's criminal background is over-represented by the CHC, we do believe it is important for the Commission to study and consider the impact of guidelines – like section 2L1.2, for example – that provide for an increase in an offender's offense level in circumstances where any subsection of 4A1.1 of the guidelines also applies. Specifically, the Department recommends that the Commission collect and analyze empirical data in an effort to determine whether cumulative application of section 4A1.1 and any Chapter Two section that increases an offense level based on criminal history is (1) redundant and unduly harsh; or (2) after considering all the purposes of sentencing, constitutes just punishment. The Department believes that this focus (on the interplay between Chapter Two and Chapter Four) is the appropriate approach – indicated by the data – to ultimately determine whether there is any unjust treatment of criminal background by the guidelines.

V. HATE CRIMES

The Commission proposes an amendment that responds to the recent enactment of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (Pub. L. 111-84, Division E) (the "Shepard-Byrd Act"). Named for two men who were tortured and murdered as a result of bias-motivated acts in 1998, and signed into law on October 22, 2009, the Shepard-Byrd Act expands existing federal hate crimes law by creating two new offenses: one for the commission of a hate crime, *see* 18 U.S.C. § 249, and one for an attack on a United States serviceman on account of service, *see* 18 U.S.C. § 1389.

A. Amendments Related to the Newly Enacted Hate Crime Offense

The new hate crime offense makes it unlawful, *regardless of whether the offender is acting under color of law*, for a person willfully to "cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, [to] attempt[] to cause bodily injury to any person, because of the actual or perceived religion, *national origin, gender, sexual orientation, gender identity, or disability* of any person . . . " (emphasis added). A person who violates section 249 is subject to imprisonment for up to 10 years. However, if death, an attempt to kill, kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse occurs, a person who violates section 249 is subject to imprisonment for any term of years or for life. 18 U.S.C. § 249(a)(2)(A).

In response to the newly enacted hate crime offense, the Commission first proposes to amend Appendix A, the Statutory Index of the guidelines, to reflect that section 2H1.1 of the guidelines will apply to conduct within section 249. Indexing section 249 to section 2H1.1 is appropriate and consistent with the indexing of other individual rights offenses (including 18 U.S.C. § 245(b), which prohibits, among other things, discrimination in the exercise of voting rights and 42 U.S.C. § 3631, which prohibits discrimination in housing). The Commission's

proposed conforming amendment to the "Statutory Provisions" of the commentary to section 2H1.1 of the guidelines is, for the same reasons, appropriate.

In adding a protection for discrimination motivated by actual or perceived "gender identity," the Shepard-Byrd Act expanded the definition of "hate crime" in section 280003(a) of the Violent Crime Control and Law Enforcement of Act of 1994 (Pub. L. 103-322), effectively expanding the scope of the congressional directive of section 280003(b) to require the Commission to provide a victim-related enhancement in Chapter Three of the guidelines for crimes motivated by actual or perceived "gender identity." In response, the Commission proposes amendments that would (1) revise section 3A1.1(a) to include gender identity among the biases that give rise to a three-level increase in an offender's offense level; (2) revise Note 3 of the Application Notes to section 3A1.1 to include gender identity among the biases listed; (3) add a new Note 5 to the Application Notes to section 3A1.1 defining "gender identity" pursuant to 18 U.S.C. § 249(c)(4); and (4) revise the Background Note to section 3A1.1 to explain the addition of "gender identity" to the bases for the enhancement. These amendments appropriately respond to the directive of section 280003(b) in light of the new hate crime offense at 18 U.S.C. § 249, and we support all of them.

The Commission's proposal also contains bracketed proposals to (1) delete the special instruction of section 3A1.1(c), which provides that the three-level enhancement of section 3A1.1(a) shall *not* apply if the six-level enhancement of section 2H1.1(b) applies; (2) delete from Application Note 1 of section 3A1.1 the sentence precluding application of the enhancement of 3A1.1(a) if an enhancement from 2H1.1(b)(1) applies; and (3) delete from Application Note 4 of section 2H1.1 the sentence precluding application of the enhancement of 3A1.1(a) if an enhancement from 2H1.1(b)(1) applies. Under the current guidelines, a three-level enhancement pursuant to section 3A1.1(a) applies if the offense constitutes a hate crime, but that three-level hate crime enhancement cannot be applied in conjunction with the six-level enhancement of section 2H1.1(b)(1), which is applicable if the offender was a public official or the offense was committed under color of law. Thus, deletion of the bracketed language as proposed by the Commission would permit *cumulative* application of the enhancements of sections 3A1.1(a) and 2H1.1(b)(1) for a total nine-level enhancement.

The Department supports the proposed deletions from the instructions and application notes of sections 3A1.1 and 2H1.4 to permit the cumulative application of enhancements for bias *and* "acting under color of law." By way of example, the result of the amendment would be that if a law enforcement officer committed an offense under section 241 or 242 of Title 18 *and* the officer was motivated to commit the offense(s) by racial, ethnic, religious, homophobic, or other biases recognized by section 249, then the officer's offense level could be enhanced a total of nine levels.

In the Department's view, application of this cumulative enhancement is justified because the enhancement for commission of a hate crime and the enhancement for acting under color of

law reflect entirely different harms. As a result, cumulative application of the enhancements, when supported by the nature of the conduct of the offense, is not duplicative.

Further, preclusion of cumulative application of the bias and color of law enhancements will result in sentencings where individual rights offenders with similar criminal history who commit *dis*similar offenses would, nevertheless, receive similar punishments. For example, under the current scheme, a corrections officer who uses excessive force against *all* inmates (*i.e.*, without motivation by the race, color, religion, etc., of the inmate) would receive exactly the same enhancement as a corrections officer who uses excessive force only against inmates of a particular race and/or ethnicity in his custody. In the example, the first corrections officer is acting under color of law and section 2H1.1(b)'s specific offense characteristic enhancement would be appropriate because that officer is using his position and, effectively, abusing the public trust in that position to facilitate his crime.[17] Under those circumstances, it is reasonable that Application Note 5 of section 2H1.1 precludes an additional enhancement for "abuse of position of trust or use of special skill" under section 3B1.3; the harms targeted by the enhancements are so similar that cumulative application of the two would be duplicative. However, the enhancement of section 3A1.1(a) is intended to provide additional punishment to an offender who targets his or her victim based upon the victim's membership (or perceived membership) in a protected group – a harm entirely different from the harm that results from acting under color of law or through the abuse of a position of trust. Thus, the second corrections officer in our example (who uses his position only to abuse inmates of a particular race and/or ethnicity) should receive a total penalty greater than that of the first corrections officer in the example. Revision of the guidelines to permit cumulative application of the enhancements of sections 3A1.1(a) and 2H1.1(b) would correct this inequitable result and protect what Congress recognized during enactment of the Shepard-Byrd Act as the strong national interest in deterring and punishing crimes motivated by bias. *See also* Testimony of Attorney General Eric Holder before the Senate Committee on the Judiciary, June 25, 2009 (emphasizing that hate crimes divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit).

In reviewing the Commission's proposals related to hate crimes, the Department notes that the Background Note to section 3A1.1 indicates that the enhancement applies if the "*primary* motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim" (emphasis added). While the guidelines use "primary" to describe the level of motivation necessary to establish a hate crime offense, the applicable jury instruction uses "substantial" to describe that level in relation to the relevant statutory provision.

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[17] As another example, a law enforcement officer who trips burglar alarms, "responds" to the scene of the "crime," and then steals the victim's property – thereby violating the victim's right to be free of unreasonable searches and seizures – should receive a penalty enhanced beyond that of the penalty applicable to a common thief who obtains the same property by breaking and entering the victim's property.

As a result of that inconsistency, the appellant in *United States v. Smith*, 2010 WL 510634, at *6 (9th Cir. Feb. 12, 2010), contended that the district court erred in applying a three-level hate crime motivation enhancement because, consistent with the applicable jury instruction, the jury found only that the victim's race was *a substantial* motivation for his crime, rather than *the primary* motivation. Relying on the higher standard of the guidelines' Background Note, the appellant argued that the lesser standard of the jury instruction was insufficient to support application of the bias enhancement. *Id.* The Ninth Circuit rejected the appellant's claim, however, stating that

> [n]othing in [Congress's directive in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994] specifies the degree to which the victim's race must be a motivating factor, and Guideline §3A1.1(a) itself tracks the statutory language directly.

Id. Finding that there was "no textual basis for applying a different standard to the sentencing than to the conviction for hate crimes," the court concluded that the Background Note's "primary motivation" standard could not be applied, and held that the jury's factual finding supported application of the bias sentencing enhancement. *Id.*

In light of the discrepancy between the Commentary and the Shepard-Byrd Act with respect to the degree to which the victim's protected status must have motivated the crime, the Department urges the Commission to delete from the Background Note the word "primary." This amendment will bring the Note in line with the Act and reduce the litigation, as exemplified by *United States v. Smith*, that is likely to arise from application of the section 3A1.1(a) enhancement.

B. Amendments Related to Newly Enacted Attacks on U.S. Servicemen on Account of Service Offense

The second new offense created by the Shepard-Byrd Act prohibits knowingly assaulting or battering a United States serviceman or his immediate family member or knowingly destroying or injuring the property of such serviceman or his immediate family member on account of the military service or status of that individual as a United States serviceman. 18 U.S.C. § 1389. A person who violates this new law is subject to, among other things, imprisonment (1) for up to two years in the case of a simple assault or property damage of $500 or less; (2) for up to five years in the case of property damage of more than $500; and (3) for up to 10 years, but not less than six months, in the case of a battery or an assault that results in bodily injury. 18 U.S.C. § 1389(a).

In response to the newly enacted "attacks on U.S. servicemen" offense, the Commission proposes to amend Appendix A, the Statutory Index of the guidelines, to reflect that sections 2A2.2, 2A2.3, and 2B1.1 will apply, as appropriate, to conduct within section 1389. The Department supports the proposed indexing of section 1389 offenses to these guidelines sections.

In addition, the Commission "anticipates that the official victim adjustment in §3A1.2 (Official Victim) would apply in such a case." The Commission has not, however, proposed any specific amendment to section 3A1.2 of the guidelines. The Department recommends that the Commission consider amending Application Note 3 in the Commentary to section 3A1.2 to indicate that U.S. servicemen are contemplated by section 3A1.2(a).

VI. ORGANIZATIONAL GUIDELINES

The Commission proposes several amendments to Chapter Eight of the guidelines, which addresses the sentencing of organizations. Overall, the Department supports the organizational guidelines and the intent behind the proposed amendments. We believe the proposed amendments, with some modifications, will better promote compliance; deter organizational recidivism; encourage early, high-level reporting and prompt cooperation with government authorities upon detection of criminal activity; and provide a significant enforcement tool through the provision of facility inspections – all while maintaining the penalties that serve, in the first instance, as a significant deterrent to crime and appropriately punish the serious crime of organizations.

A. Section 8B2.1, Application Note 6

The Commission proposes amending the commentary to section 8B2.1 (Effective Compliance and Ethics Program) of the guidelines to clarify the steps that an organization must take, pursuant to section 8B2.1(b)(7), after detecting criminal conduct. Specifically, the Commission seeks to add a new Application Note 6 which advises that remedying the harm caused to identifiable victims, payment of restitution, and retention of an independent monitor are among the appropriate remedial steps upon discovery of criminal conduct.

The Department agrees that an effective compliance and ethics program should "respond appropriately to criminal conduct" and that a company with an organizational culture that encourages ethical conduct should effectively address (and, in fact, may be legally required to provide) restitution to victims. *See* USSG §8B1.1. The Department also agrees that retention by a company of its own outside professional advisor to "ensure adequate assessment and implementation of the [compliance and ethics program] modifications[,]" may be an appropriate remedial step.

B. Section 8B2.1, Application Note 7

The Commission also proposes that former Application Note 6 (now proposed as Application Note 7) include a new subparagraph (iv) concerning periodic risk assessments. We agree that an organization should conduct periodic risk assessments of its corporate compliance and ethics program, and that such a review should consider "[t]he nature and operations of the organization with regard to the particular ethics and compliance functions." However, the single

example provided, which focuses on the organization's document retention policy, does not sufficiently illustrate the nature and depth of the assessment that the Commission is proposing. To provide a more illustrative example, the Department proposes the following language:

> (iv) The nature and operations of the organization with regard to particular ethics and compliance functions. For example, if an organization acquires another organization, and, as a result, its compliance risk profile changes, its compliance and ethics program must be changed as well to reflect the new risks. Similarly, if an organization whose sales were strictly domestic begins to conduct international sales, its compliance and ethics program must be changed to account for the additional risks (*e.g.*, corruption, export control, and sanctions risks).

C. Section 8D1.4

The Commission proposes to amend section 8D1.4 by consolidating subsections 8D1.4(b) (addressing safeguards of the organization's ability to pay monetary penalties as part of probation) and 8D1.4(c) (addressing conditions of probation imposed for any other reason) into a single new provision, section 8D1.4(b)(6). According to the Commission, this amendment is proposed in order to place all conditions of probation in a single section for consideration by the court.

The new provision, among other things, retains the existing authorized condition of probation allowing probation officers (as well as experts engaged by the court) to inspect books and records of an organization and to interrogate knowledgeable individuals within the organization about compliance, but adds a provision, at newly proposed section 8D1.4(b)(6)(B), that would permit unannounced facility inspections. The Department strongly supports this proposal because it would close a critical gap that has existed in the organizational guidelines since their adoption in 1991.[18] For example, this proposal would allow access to and examination of facilities that are the subject of an environmental crimes prosecution to assure that the facilities are in compliance with environmental laws.

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[18] Section 8D1.4 currently allows as a condition of organizational probation "a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises" and "interrogation of knowledgeable individuals within the organization." The provision was drafted in 1991 from a financial crime perspective and, consequently, focuses upon matters that are likely to be reflected in written records. The Commission appears to have recognized that evidence of continued violations of probation and/or the law may not, in all instances, be manifested on paper – and individuals knowledgeable of such violations or crimes very well may fail to disclose or conceal those violations or crimes.

However, site inspections, like inspections of books and interrogation of representatives, have their limitations. For example, during the examination of a facility on probation for environmental crimes, it may be easy to determine whether the defendant is operating equipment properly or *appears* to be storing hazardous waste properly. Nevertheless, a site inspection alone cannot reveal the nature of a waste product in terms of its identity or concentration, both of which commonly are critical to environmental compliance. Thus, the authority to take samples at a facility is essential. Accordingly, the Department recommends, as follows, that the Commission's proposal be modified to include the right to take samples during the examinations:

> (6) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer, experts engaged by the court, or independent corporate monitor; (B) a reasonable number of regular or unannounced examinations (including collection of pertinent samples) of facilities subject to probation supervision; and (C) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court or independent corporate monitors shall be paid by the organization.

The Department further recommends that newly proposed subsection 8D1.4(b)(3) be modified as follows:

> The organization shall be required to retain an independent corporate monitor agreed on by the parties or, in the absence of such an agreement, selected by the court. The independent corporate monitor must have appropriate qualifications and no conflict of interest in the case. The scope of the independent corporate monitor's role shall be agreed on by the parties or, in the absence of such an agreement, approved by the court. Compensation to and costs of any independent corporate monitor shall be paid by the organization.

Thus, the language in proposed subsection (b)(3) regarding the scope of the independent corporate monitor's role would be consistent with and reflect the early language of that same subsection and would accommodate situations where probation may be the result of an agreement between the parties as well as situations where probation is imposed by the court.

The Department also suggests that the references to litigation proceedings in newly proposed subsections 8D1.4(b)(4) and (b)(5) be revised for consistency. Both paragraphs should incorporate language regarding "criminal prosecution, civil litigation, or administrative or bankruptcy proceeding. . . ."

D. Request for Comment regarding Section 8C2.5(f)

Section 8C2.5(f) of the guidelines provides for a three-level reduction in the culpability score of an organization if, during the commission of the offense, the organization nevertheless had in place an effective compliance and ethics program as defined by section 8B2.1. However, due to the rebuttable presumption that an organization lacked an effective compliance and ethics program when high-level personnel of the organization have been involved in the offense, *see* USSG §8C2.5(f)(3), organizational offenders rarely qualify for a downward adjustment to their culpability scores under section 8C2.5(f). The Commission now requests comment on whether, in an effort to encourage direct reporting to the board of directors by compliance personnel, an organization should be permitted a three-level mitigation of its culpability score – even if high-level personnel are involved in the criminal conduct – where

> (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (*e.g.*[,] an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities[.]

In prior reviews of section 8C2.5(f), the Department's concerns have not focused on *who* within an organization was involved in the offense, but whether it made any sense to credit a compliance program as effective if it not only failed to deter the organization's commission of the offense in the first instance, but also failed, after the fact, to detect the organization's involvement such that timely notification of and cooperation with the government could ensue. Thus, the Department's focus in assessing the question of mitigation of culpability has long been on detection and deterrence. This is illustrated particularly in the antitrust context where, provided that an organization meets certain specified conditions, it is the Department's policy not to charge a firm criminally for illegal antitrust activities that are reported by the firm to the Antitrust Division before the Division has received information about the illegal activity from another source. *See,* Antitrust Division Leniency Program, www.justice.gov/atr/public/criminal/leniency.htm (Nov. 19, 2008).

The Department believes that the Commission's proposal regarding mitigation of culpability through an effective compliance and ethics program – even where high-level personnel have been involved in the offense – may have merit, but only if it is focused on compliance programs that detect offenses and begin cooperation early with enforcement officials. Consequently, even where high-level personnel are involved, the newly proposed section should permit mitigation of an organization's culpability score only when the organization's compliance program was successful in detecting the offense prior to discovery or a reasonable likelihood of discovery outside the organization and the organization promptly reported the violation to the appropriate authorities.

The Department further believes that the Commission's proposal would be improved if it encouraged direct reporting by compliance program managers to the organization's general counsel in addition to the board of directors. In the Department's experience, the company officer whose involvement in the decision-making process is most likely to result in a corporate acknowledgement of wrongdoing and cooperation with the government is the organization's general counsel. Boards of directors, and even committees of boards, often meet infrequently and may not be able to evaluate properly either the nature of the conduct that has been uncovered through the compliance program or the ramifications of disclosure to the government. While a good board of directors will quickly involve the general counsel in these situations, a good general counsel will quickly bring unlawful conduct to the attention of the board in a manner that will enable the board to assess thoroughly the consequences of prompt cooperation versus inaction. To ensure that the benefits of deterrence, detection, and high-level reporting are achieved, the Department recommends that subparagraph (B) of the Commission's proposal be modified as follows:

> (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization and effectuated the prompt report of the offense to the general counsel and/or board of directors[.]

The Department supports a proposal that combines reporting to high-level organization officials and the board of directors with a requirement that the compliance program result in early detection and prompt reporting to and cooperation with the government. The Department's recommended revision of the Commission's proposal would further strengthen section 8C2.5(f).

VII. MISCELLANEOUS AMENDMENT

The Commission proposes a four-part miscellaneous amendment that responds to the recently enacted legislation of the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111-21), the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11), and the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111-3) as well as the regulatory change in the status of iodine as a listed chemical. The Department supports this amendment.

VIII. TECHNICAL AMENDMENTS

The Department has no objection to the various technical proposals to amend the guidelines to promote accuracy and completeness by correcting typographical errors, revising cross-references, and so forth. The Department provides the following comments, however, based on its review of the technical amendments proposed to sections 2A3.3, 2G1.3, 2G2.1, 2G2.2, and 2G3.1.

A. Sections 2A3.3 and 2G1.3

The Department notes that the definition of "minor" in section 2A3.3 is the same as that in section 2G1.3. In both instances, a "minor" is defined in the Application Notes, in part, to include a fictitious child who "could be provided for the purposes of engaging in *sexually explicit conduct* . . . ." USSG §§2A3.3 (Application Note 1); 2G1.3 (Application Note 1) (emphasis added). The term "sexually explicit conduct" – defined nowhere in the guidelines – is defined statutorily within Chapter 110 (Sexual Exploitation and Other Abuse of Children) of Title 18 at Section 2256. However, neither section 2A3.3 nor 2G1.3 relates to sentencing of Chapter 110 offenses. In fact, only Chapter 109A (Sexual Abuse) of Title 18 is indexed to section 2A3.3, and only Chapters 77 (Peonage, Slavery, and Trafficking in Person) and 117 (Transportation for Illegal Sexual Activity and Related Crimes) of Title 18 and Chapter 12 of Title 8 are indexed to section 2G1.3.

Because all of these different chapters target distinct offenses and sexual conduct, the Department cautions against transplanting a term of art from one chapter (that is, "sexually explicit conduct" from Chapter 110) into guidelines applicable to crimes defined in other chapters. Instead, the Department recommends revising the Application Note of section 2A3.3 to define "minor" as including a child that could be provided for the purposes of engaging in "sexual acts or sexual contact." Additionally, an Application Note should be added to section 2A3.3 to indicate that "sexual act" and "sexual contact" have the meaning given each of those terms in Application Note 1 of the Commentary to section 2G1.3 (which refers specifically to the definition of these terms by Section 2246 of Title 18 of the United States Code). These revisions would appropriately tie the definition of "minor" to the statutory chapter to which section 2A3.3 applies. Additionally, the Department recommends revising the Application Note of section 2G1.3 to define "minor" as including a child that could be provided for the purposes of engaging in "a commercial sex act or prohibited sexual conduct."

B. Sections 2G2.1, 2G2.2, and 2G3.1

The application notes of sections 2G2.1, 2G2.2, and 2G3.1 each define "distribution" as including "posting material involving the sexual exploitation of a minor *on a website for public viewing*" (emphasis added). It is the experience of the Department, however, that most contraband posted on websites is not available for public viewing, but for viewing limited to individuals who pay a subscription fee to obtain password access to the website posting the contraband. Though the language of the application notes appears intended solely to provide an example, the Department is concerned that the example could be interpreted to limit unduly the scope of the provision. Thus, the Department recommends that the words "for public viewing" be struck from the definition of "distribution."

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Judy Sheon, Staff Director
Ken Cohen, General Counsel