



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

October 8, 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

Re: Temporary, Emergency Amendments to the Federal Sentencing
Guidelines to Implement the Fair Sentencing Act of 2010

Dear Chief Judge Sessions:

On behalf of the Department of Justice, I submit the following comments on the Sentencing Commission's proposed temporary, emergency amendments to the Federal Sentencing Guidelines to implement the Fair Sentencing Act of 2010.

Signed into law by the President on August 3, 2010, the Fair Sentencing Act is a historic, bi-partisan achievement that for a variety of reasons took almost 16 years to come to fruition. The Act addresses the disparity in federal sentencing policy between offenses involving cocaine base ("crack cocaine") and those involving powder cocaine, a disparity the Commission identified in 1995 as unwarranted. The Act repeals the mandatory minimum penalty for simple possession of crack cocaine and seeks to refocus sentencing policy for all drug trafficking offenses by changing the quantities that trigger mandatory minimum penalties for crack cocaine trafficking offenses, increasing the fines for major drug trafficking offenses arising under 21 U.S.C. §§ 841(b) and 960(b), increasing penalties for a defendant's violence during the commission of a drug trafficking offense, increasing penalties where certain aggravating circumstances are present, and providing new sentencing adjustments based on a defendant's role in the offense.

We think it is critical that in implementing the Fair Sentencing Act, the Sentencing Commission carefully and closely follow congressional intent as found in the Act itself and in the legislative history surrounding the Act. As we have stated before, the Commission exercises delegated congressional authority and, as a result, should generally hew as closely as possible to congressional intent on federal sentencing policy. Moreover, we think the Commission can

reinforce and support the bipartisanship that led to the passage of the Act and its important reforms by ensuring that the will of the nearly-unanimous Congress that passed the Act is achieved in its implementation.

The Department has consistently advocated for federal sentencing laws that not only ensure public safety by being tough on drug crime and thereby promoting deterrence and ensuring incapacitation of the dangerous, but also foster public confidence in the criminal justice system through consistency, fairness, and just punishment for all offenders. The Fair Sentencing Act is an important step in making the federal criminal justice system more fair, and the implementing guideline amendments should closely follow its dictates.

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The Fair Sentencing Act's amendments to the Controlled Substances Act and the Controlled Substances Import and Export Act establish new drug quantity thresholds that trigger statutory mandatory minimum penalties for crack cocaine offenses. The Commission has requested comment on the changes that should be made to the Drug Quantity Table at USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) regarding crack cocaine offenses.

In making changes to the Drug Quantity Table, the Commission should be cognizant of the Act's larger goal of differentiating better between drug traffickers – to increase penalties on especially dangerous drug traffickers – by placing greater emphasis on the defendant's role in the offense and the presence of particular aggravating and mitigating factors during the commission of the offense. The plain language of the Act strongly suggests that this greater emphasis is to apply in all drug trafficking offenses, across all drug types.¹

The goal of better differentiating between drug trafficking offenders is operationalized both through changes to the quantity triggers and through several provisions of the Fair Sentencing Act that direct the Commission to amend the guidelines to add certain aggravating and mitigating factors. These provisions were first developed by Senator Jeff Sessions in bills introduced as early as 2001. Senator Sessions' statements on introduction of these bills articulate the purpose underlying the provisions:

The measure also would shift some of the emphasis in sentencing from drug quantity to the type of criminal conduct by increasing penalties for the worst drug offenders who use violence and employ women and children as couriers. It would

¹ See also Statement of Sen. Sessions, *Congress Approves Landmark Drug Reform Compromise from Sessions and Judiciary Colleagues* (July 28, 2010) (“Sessions Press Release”) (available at www.sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=1a65bdfb-e4b4-53d1-f86c-e845c43ff542&Region_id=&Issue_id=ecaf7068-9f22-0909-73d6-ca29cc5d2533) (Senator Sessions observing upon the law's passage that “[u]nder this legislation, serious drug offenders are subject to more serious penalties, including tough new sentencing enhancements—helping to disrupt the drug trafficking operations that claim so many innocent victims[.]”).

decrease penalties on those who play only a minimal role in a drug trafficking offense, such as a girlfriend or child of a drug dealer who receives little or no compensation . . .

Sessions said: “This bill would bring measured and balanced improvements in the current sentencing system to ensure a more just outcome – tougher sentences on the worst and most violent drug offenders and less severe sentences on lower-level, non-violent offenders.

Sens. Sessions, Pryor, Cornyn and Salazar Introduce Drug Sentencing Reform Act, Press Release of Senator Jeff Sessions, July 25, 2006 (available at: http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=d57f9580-7e9c-9af9-7727-d70caace37f1&Region_id=&Issue_id=). See *Sens. Sessions, Pryor, Cornyn and Salazar Introduce Legislation to Promote Fairness in U.S. Sentencing Guidelines*, Press Release of Senator Jeff Sessions, May 14, 2007 (available at: http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=cb02af84-7e9c-9af9-7f06-c91801ae1c26&Region_id=&Issue_id=).²

To accomplish all the goals of the legislation, the Commission should start by implementing the directives faithfully (*see* our discussion of these directives *infra*). As to the Drug Quantity Table, the Commission should analyze both the effects of the directives and of various possible changes to the Table to determine how best to effectuate congressional intent to increase penalties on those aggravating drug offenses and refocus penalties toward the factors enumerated in the Act. In doing so, the Commission should be mindful of its statutory duty to promulgate guidelines in a manner consistent with all federal laws, including the newly enacted statutory changes to the crack cocaine mandatory minimum quantity triggers. We support the congressional goals behind the Act's broader reforms, and we look forward to the Commission's analyses and to discussing them further with you.

The Commission also seeks comment on several specific aspects of the guidelines' implementation of the adjustments established by the new law.

A. The Violence Enhancement

In Section 5 of the new law, Congress directs the Commission to ensure that the guidelines provide an additional penalty increase of at least two offense levels where a defendant, during a drug trafficking offense, used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense. The Commission seeks comment regarding (1) whether there should be a single level of enhancement for any/all violence or whether, instead, there should be graduated levels of enhancement depending upon

² See also Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, H.R. 265, 111th Cong., 1st Sess. (2009) (this precursor to the Fair Sentencing Act, introduced by Congresswoman Jackson Lee, emphasized not only the need for an end to the crack-powder disparity, but Congress's broad objective of focusing federal resources on drug kingpins, consistent with the aim of the Anti-Drug Abuse Act of 1986, by focusing on culpability and aggravating and mitigating circumstances).

whether the defendant used or threatened or directed violence; (2) whether the enhancement for violent conduct should be applied cumulatively with the enhancement for dangerous weapon (including a firearm); and (3) whether the term “violence” should be defined and, if so, how.

The Department supports the adoption of two different levels of penalty enhancement that consider whether *actual* violence resulted from the defendant’s conduct. More specifically, the Department supports a penalty increase of two offense levels where the defendant’s threat or direction of the use of violence does not result in actual violence, and supports a penalty increase of four offense levels where the defendant’s use of, threat of, or direction of violence results in actual violence.

The Department further supports the general application of any enhanced penalty for violence cumulatively with any enhancement for possession of a dangerous weapon or firearm as these aggravating circumstances, though obviously closely related, are distinct and need not co-exist. There will be cases (1) where a defendant possesses a firearm or other dangerous weapon, but *no* violence or credible threat of violence occurs; (2) where violence is used, threatened, or directed, but in the absence of a dangerous weapon or firearm; and (3) where both aggravating factors occur. We believe that generally, these distinct factors are independently and cumulatively indicative of a defendant’s dangerousness and that, therefore, cumulative application of the enhancements is appropriate. Moreover, we also believe that cumulative application is most consistent with the plain reading of the law and congressional intent.

The Department believes it is unnecessary to define the term “violence” as that term has been used both in the federal criminal statutes and the guidelines, to date, without significant issue.

B. The Bribery, Maintenance of Drug-Involved Premises and Role Enhancements

Section 6 of the Act provides for an additional penalty increase of at least two offense levels where a defendant (1) bribed or attempted to bribe a law enforcement official in connection with a drug trafficking offense; (2) maintained a drug establishment as described in 21 U.S.C. § 856; or (3) was involved in drug trafficking activity as an organizer, leader, manager, or supervisor where one or more of five “super-aggravating” factors also was present. In connection with implementation of these enhancements, the Commission requests comment concerning, among other things: (1) whether enhancements arising from a role as an organizer, leader, manager or supervisor coupled with super-aggravating factors should apply cumulatively with enhancements for bribery and maintenance of a drug establishment; (2) whether, with respect to enhancements arising from a defendant’s role as an organizer, leader, manager or supervisor coupled with super-aggravating factors, the Commission should distinguish between the super-aggravating factors, assigning greater enhancements for more egregious conduct and providing for upward departure where multiple types of aggravating conduct are present; (3) whether an enhancement for bribery should be applied cumulatively with an enhancement for obstruction under USSG §3C1.1; (4) whether conduct constituting bribery must be proved through conviction or whether proof by a preponderance of the evidence is sufficient; (5)

whether the enhancements provided for in Section 6 of the Act should apply cumulatively with other provisions such as §§2D1.2 (offenses near protected locations/individuals), 3C1.1 (obstruction), and 4B1.3 (criminal livelihood); and (6) whether, instead of creating new enhancements in USSG §2D1.1(b)(14) and reductions in USSG §2D1.1(b)(15), the Commission should implement these directives in Chapter Three.

As a general matter, the Department believes many of the issues presented for comment (at least for purposes of the temporary, emergency amendment) are answered largely through examination of the language and structure of the Fair Sentencing Act. Congress grouped three bases for penalty enhancement together in a single section, Section 6, uniting them in the disjunctive. Thus, to be eligible for an increase of at least two levels, a defendant need only have engaged in one of the three following types of conduct: (1) bribed or attempted to bribe a law enforcement official in connection with a drug trafficking offense; (2) maintained a drug establishment as described in 21 U.S.C. § 856; *or* (3) been involved in drug trafficking activity as an organizer, leader, manager, or supervisor where one or more of five “super-aggravating” factors also was present. The Department believes that Congress did not necessarily preclude the cumulative application of any one of these three forms of aggravating conduct with another, and certainly did not preclude the cumulative application of any one of these three forms of aggravating conduct with any other enhancement already contained in the guidelines, provided that the cumulative application does not result in over-representation of identical or very similar types of aggravating conduct. Thus, for example, a defendant could receive cumulative enhancements where he (1) both bribed a public official and maintained a drug establishment; or (2) both maintained a drug establishment and functioned as an organizer of the drug activity in which he also distributed to a person who was less than 18 years of age.

The Department supports cumulative application of the bribery enhancement with the obstruction of justice enhancement of §3C1.1, because bribery in connection with the *drug trafficking offense itself* represents conduct that is distinct from conduct involved with the obstruction of the administration of justice. In making the determination of whether bribery occurred, the Department further believes that proof by preponderance of the evidence is sufficient and is consistent with congressional intent.

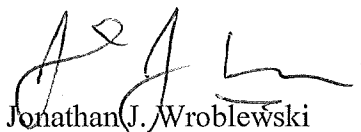
In contrast, the Department does not believe, for purposes of the temporary, emergency guideline amendment, that enhancements arising from the defendant’s role as an organizer, leader, manager or supervisor coupled with super-aggravating factors need apply cumulatively with each other. Congress made clear that the enhancement for this third form of aggravating conduct would apply if any one *or more* of the five super-aggravating factors was present. As we stated earlier, following the promulgation of the emergency amendment, we think the Commission should analyze the impact of all the new and old aggravating factors to determine whether applying these aggravators cumulatively as part of the permanent amendment effectuates congressional intent with regard to refocusing drug penalties toward these aggravating factors.

Finally, the Department believes that the enhancement of Section 6 of the Act and the reductions of Section 7 of the Act should be implemented through USSG §2D1.1 and not through Chapter Three of the guidelines. This, we believe, is appropriate because even though Congress spoke in terms of emphasizing a defendant's "role," the conduct and circumstances detailed by Congress (even where the super-aggravating factors are coupled with traditional "roles") are much more like other special offense and offender characteristics addressed in Chapter Two of the guidelines.

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The Department appreciates the opportunity to provide the Commission with our views on the implementation of the Fair Sentencing Act of 2010. As the amendment cycle unfolds and the Commission re-examines these issues for permanent promulgation, we look forward to additional analyses and robust discussion of how the Commission might further the goals of promoting fairness in the federal drug sentencing laws while ensuring public safety.

Sincerely,



Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Judith Sheon, Staff Director
Kenneth Cohen, General Counsel