STATEMENT OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

HEARING ON
PROPOSED AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES

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Mr. Chairman and Members of the Commission:

Thank you for the opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines regarding alternatives to incarceration and specific offender characteristics. We commend the Commission for its leadership over the past 25 years and its commitment – as demonstrated by the various regional public hearings held during this past year – to listening and gathering feedback from practitioners regarding the state of federal sentencing since the Supreme Court's decision in *Booker v. United States*.

The Department of Justice has long recognized that in the context of exercising prosecutorial discretion in charging and sentencing decisions, federal prosecutors should consider the availability of alternatives to incarceration. Indeed, this important principle – which recognizes both that alternative sanctions may be appropriate for certain carefully-identified offenders and that alternatives to imprisonment reduce the strain on prison resources and safety – is embodied in the Department's Principles of Federal Prosecution. At the same time, however, the Department is keenly aware of the critical role that imprisonment plays in providing just punishment, deterring crime, removing from our communities offenders who seriously or repeatedly victimize the innocent, and promoting the public's trust and confidence in the criminal justice system. Thus, we believe that alternatives should be adopted only when the Commission can avoid undermining the important deterrent effect of the guidelines on more serious offenders and offenses and the other purposes of sentencing. It is within the framework of these principles that we have reviewed the Commission's proposals regarding alternatives to incarceration and now provide our comments.

The first guideline amendment proposed by the Commission, Part A, would create a new guideline, section 5C1.3, to expand the availability of non-incarceration sentences for certain drug offenders. 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; (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"; and (5) demonstrate a willingness to participate in a substance abuse treatment program.[1]

We believe that the amendment in Part A is targeted and focused on a category of low-level offenders for whom research has shown alternative sentences may be appropriate and for whom deterrence may be ineffective. We support the amendment.

We also support the Commission's limitations on availability of the drug treatment alternative of Part A to those drug offenders who (1) are not subject to a mandatory minimum sentence (*i.e.*, not the mid- and high-level dealers); (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

[1] 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.

of the offense; and (5) debriefed concerning their offense with the government. Congress has determined that those drug offenders who would otherwise be subject to a mandatory minimum sentence (*i.e.*, a mid- or high-level dealer) but who are eligible for the safety valve should nevertheless receive at least a two-year imprisonment term.[2] We believe that to comply with congressional policy (and to avoid initiating a non-incarcerative approach to higher-level drug dealers that ultimately would undermine deterrence and public safety) only those offenders who are not involved in a quantity that would otherwise trigger a mandatory minimum sentence should 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 and when *the controlled substance addiction contributed substantially to the commission of the offense*. Existing state 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 the rates of other similarly situated offenders. This

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

evidence of improved public safety through reduction of recidivism as a result of substance abuse treatment justifies the extension of treatment-based alternatives to incarceration to addicted, low-level drug offenders. We urge the Commission to develop standards for effective substance abuse treatment programs, gathering the best experts on treatment programs, analyzing the available research, and sharing the results of this work with the federal courts as guidance.

If the Commission promulgates the Part A amendment, we think that it should make conforming changes to Chapter Five to indicate that the new section regarding incarceration alternatives, section 5C1.3, remains the *only* exception to the general principle under the guidelines that drug addiction is not ordinarily relevant in federal sentencing.

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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. 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 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 substantially increase the number of federal offenders eligible for non-imprisonment sentences. Extending eligibility for alternatives without limits based on 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 the current guidelines are inappropriate, 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.

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%).[3] 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, diluting effective white-collar enforcement efforts, and eroding public confidence by seemingly ignoring the serious harm that white-collar crime inflicts. We note that in 2001, the Commission ultimately *declined* to adopt its proposed expansion of zones B and C, acknowledging concerns that such expansion (though greater than the expansion currently proposed) would undermine changes in the economic crime package that had recently been adopted. Inasmuch as Congress has increased penalties since 2001 for many economic and other white-collar crimes (for example, antitrust offenses), we see no justification for the changes the Commission currently proposes.

Moreover, unwarranted racial 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

[3]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).

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%).[4]

Expanding zones B and C also would have an adverse impact on sentencing in corruption, civil rights, and many other cases. 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. 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 would not jeopardize public safety and the public confidence in imposition of fair and predictable sentences.

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In connection with its review of departures, the Commission has requested comment concerning the relevance and treatment of five specific offender

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

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 specifically seeks public comment on whether the current guidelines adequately address these specific offender characteristics given the guidelines' current admonition that these characteristics are "not ordinarily relevant" to departure determinations. The Commission also seeks feedback regarding views as to the relevance of these characteristics to the "in or out" decision (that is, 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 race, sex, national origin, creed, or socioeconomic status of an offender.

We continue to believe that federal sentences should be determined largely based on the offense committed by the offender as well as the offender's criminal history. Offenders who commit similar offenses and have similar criminal histories should be treated similarly. While we recognize that 18 U.S.C. § 3553(a) directs judges to consider an offender's background, it also directs judges to avoid unwarranted disparities. The overwhelming legislative history of the Sentencing Reform Act demonstrates that Congress intended for offenders who commit

similar offenses to be treated similarly. We think that the Commission should reaffirm this principle of federal sentencing policy that has been in place since the Sentencing Reform Act was adopted and should indicate that offender characteristics (outside of criminal history) should generally 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 the 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; an expansion that would, we believe, (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 that this kind of rigorous study and review is the best way to address these kinds of issues.

Further, we do not believe that a defendant's status as a non-citizen warrants a downward departure. We do think that 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.

In closing, I would again thank the Commission for this opportunity to share the views and concerns of the Department of Justice. We believe that the Commission has a critical role to play in addressing alternatives to incarceration and in the continued study and analysis of offender characteristics and what role they should play in sentencing. The Commission is uniquely positioned and staffed to provide reliable empirical data and analysis with respect to these issues,

and we look forward to working the Commission over the coming years to tackle these complex and evolving issues.