Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 30, 2009

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

RE: Response to Request for Comments on Proposed Amendments for 2009

Dear Judge Hinojosa:

On behalf of the Practitioners Advisory Group, we submit the following written comments on the Commission's various proposed amendments and requests for comment for the 2008 amendment cycle.

1. IDENTITY THEFT

A. Background

The Identity Theft Restitution and Enforcement Act of 2008 (the "Act") directs the Commission to consider, for crimes defined in 18 U.S.C. §§ 1028, 1028A, 1030, 2511, and 2701, whether current guidelines and policy statements adequately account for certain listed factors "in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data." Pub. L. 110-326 § 209(b). We submit comments on some of those factors.

B. Potential and Actual Loss Resulting from the Offense

Section 209(b)(3) directs the Commission to consider "the potential and actual loss resulting from the offense including–

> (A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and
>
> (B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information."

In response to subsection (b)(3), the Commission has asked for comment regarding two

proposed amendments to the application notes to U.S.S.G. § 2B1.1. Option 1 would expand the "Rules of Construction in Certain Cases" set forth in Application Note 3(A)(v)(III) as to "Offenses Under 18 U.S.C. § 1030." At present, the application note defines "actual loss" in § 1030 cases to include "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service." Option 1 would add to the definition of "actual loss" in such cases "any reduction in the value of proprietary information (e.g., trade secrets) that resulted from the offense."

Option 2 would make two changes to Application Note 3(C), "Estimation of Loss." Application Note 3(C) states that "[t]he court need only make a reasonable estimate of the loss" and sets forth a set of factors the court may consider in estimating loss. The first portion of the proposed Option 2 amendment affects the "fair market value" factor, which now permits courts to consider the fair market value of property that has been "unlawfully taken or destroyed." The amendment would allow courts to consider, in calculating loss, the fair market value of information that has been "copied." The second portion of Option 2 creates a new factor to be considered in estimating loss: "In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction that resulted from the offense in the value of that information."

The Proposed Amendments Are Unnecessary

Current guidelines and policy statements adequately account for the factors in § 209(b)(3) of the Act, that is, the value of information, even where the owner of the information is not deprived of the information, and the cost of developing proprietary information. There is a near-total absence of case law raising the issues that would be resolved by the proposed amendments. In particular, there is little confusion or controversy regarding the application of these factors in calculating loss. Significantly, we could locate no published case raising the concern that the calculated loss was too low because the court felt it was unable to consider the reduction in value of trade secrets or the cost of developing proprietary information. The proposed amendments are therefore unnecessary.

Option 2's Proposed New Factor is Redundant

The new factor set forth in Option 2 – allowing consideration of development costs of proprietary information – is redundant. Logic dictates that the cost to develop proprietary information or a trade secret could be considered a fair estimate of loss in two situations: (1) where the value of the trade secret is destroyed as a result of the offense; or (2) where the development costs provide a basis on which to estimate the fair market value of a stolen trade secret. The present guidelines and policy statements adequately address both situations.

As to the former situation – complete destruction of the value of the proprietary information – Application Note 3(C)(iv) already provides for estimation of loss based on "[t]he

reduction that resulted from the offense in the value of ... corporate assets." The proposed inclusion under either Option 1 or Option 2 of a provision expressly providing for consideration of the reduction in value of proprietary information caused by the offense would further ensure that the loss is fully captured in cases in which the value of proprietary information is destroyed.

As to the latter situation – estimation of the fair market value of stolen proprietary information – Application Note 3(C)(i) already permits consideration of the fair market value of stolen or destroyed property. Courts calculating loss in cases involving theft or destruction of proprietary information have considered development costs under appropriate circumstances where such costs provide a reasonable estimation of loss. *See United States v. Ameri*, 412 F.3d 893, 900 (8th Cir. 2005) (affirming loss calculation where estimate of fair market value of stolen software was based in part on development cost); *United States v. Wilson*, 900 F.2d 1350, 1355-56 (9th Cir. 1990) (affirming estimate of fair market value of stolen trade secret that factored in research and development costs).

Option 2's Proposed New Factor is Overbroad

While the present guidelines adequately address the situations in which the development costs of proprietary information are appropriately considered, the language of the new "Estimation of Loss" factor set forth in Option 2 is significantly overbroad. On its face it would appear to include circumstances in which the cost of developing proprietary information is *not* a reasonable estimate of the loss caused by the theft of that information, such as where the offense does not destroy the value of the proprietary information and is not a reasonable estimate of the fair market value of stolen proprietary information. In such cases, the proposed new factor could result in significant unwarranted increases in the guidelines range.

For example, *United States v. Willis*, 476 F.3d 1121 (10th Cir. 2007), involved unauthorized access to a financial information services website that contained a database of consumer information. The appropriate loss calculation was held to be the reasonably foreseeable pecuniary harm that resulted from a co-defendant's use of the database to commit identity theft – $10,000-$30,000. *Id.* at 1128. In cases of this type, the cost of developing proprietary information, such as a large-scale database of financial information, could be tens of millions, if not hundreds of millions, of dollars. The unauthorized access in *Willis* did not destroy, or even reduce the value of, the database. Nor did the development costs of the database in that case provide an accurate means to estimate the fair market value of the stolen information. Indeed, access to the database at issue in *Willis* was available by subscription, *id.* at 1123, which price would have provided the exact fair market value of the data that was obtained without authorization. The plain language of the Option 2 amendment would nonetheless appear to allow estimation of loss in a case like *Willis* based on the development costs of the database. That single factor could move a guidelines range from probation to life, depending on the cost to develop the proprietary information a defendant fraudulently obtained. The proposed estimation of loss factor seriously overstates culpability in many circumstances and creates a significant risk of unwarranted disparities between punishment for defendants whose offenses involve proprietary information and those convicted of other fraud and theft offenses.

Notably, Option 2 also appears to be broader than warranted by Congress's directive. Congress instructed the Commission to consider whether the guidelines applicable to sections 1028, 1028A, 1030, 2511, and 2701 adequately account for the listed factors "in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data." While Option 1 is limited to offenses under 18 U.S.C. § 1030, Option 2 would appear to apply to any fraud or theft offense involving proprietary information, not just those found in sections 1028, 1028A, 1030, 2511, or 2701, dealing with "computer crime" or "the theft or misuse of personally identifiable data."

C. Extent to Which Offense Violated Privacy Rights of Individuals

Section 209(b)(5) of the Act directs the Commission to consider whether the guidelines adequately account for "the extent to which the offense violated the privacy rights of individuals" for deterrence purposes.

The Commission proposes two options for revising § 2H3.1 in response to that directive. Option 1 would create a specific offense characteristic for offenses under 18 U.S.C. § 2511, adding a table of three alternative enhancements under § 2H3.1(b)(3). Offense levels would be added categorically based on the number of individuals whose personal information was "involved" in the offense. Option 2 would amend Application Note 5(i) to indicate an upward departure may be warranted when the offense level substantially understates the seriousness of the offense and the offense involves "personal information or means of identification" of "a substantial number of individuals."

If the Commission deems it necessary to take action here, it should adopt Option 2 with one slight modification.

Option 2 has the benefit of being incremental and nuanced, in contrast to Option 1.

It has been noted, however, that Option 2, as currently drafted, is too broad because § 2H3.1 applies to offenses other than those mentioned in the directive. So, to avoid creating upward departures Congress did not intend, the Commission should consider clarifying that the change to Application Note 5(i) extends only to cases under section 2511, perhaps in this fashion:

> (i) The offense involved confidential phone records information or tax return information of a substantial number of individuals, *or the offense was under 18 U.S.C. § 2511 and involved personal information or means of identification.*

The PAG submits that the factor set forth in section 209(b)(5) is otherwise adequately addressed by the guidelines, and that neither the breadth nor the magnitude of the enhancements should be increased at this time.

D. Should "Victims" Include Individuals Whose Privacy Was Violated

Section 209(b)(12) of the Act directs the Commission to consider whether the term "victim" as used in § 2B1.1 should be expanded to include individuals whose privacy was violated as a result of the offense. The current definition of "victim" in Application Note 1 to § 2B1.1 includes only those who sustained actual loss or bodily injury.

The guidelines typically account for non-monetary harm through minimum offense levels or upward departures. The Commission is considering whether subsection (b)(12) is adequately dealt with by the upward departure provisions in Application Note 19 to § 2B1.1 and Application Note 5 to § 2H3.1.

The PAG submits that expanding the definition of "victim" in § 2B1.1 to include those who suffer privacy violations is not preferable to the guidelines' approach of using upward departures. While "actual loss" and "bodily injury" lend themselves to objective measure, a "privacy violation," being inherently subjective, does not. It is likely that expanding the definition of victim in this way will lead to a presumption in every case that individuals whose personal information was involved experienced a privacy violation. The Commission has previously noted how the undue focus on numbers of victims can overstate (or understate) the harm from an offense.

The PAG is not aware of any cases, studies, or other evidence showing that the upward departure approach is inadequate. The Commission may wish to monitor periodically the use of upward departures under these application notes.

2. COURT SECURITY IMPROVEMENTS ACT OF 2007

A. Increases in Statutory Maximum Penalties

As part of The Court Security Improvement Act of 2007, Congress increased the maximum statutory penalties for several offenses. The Commission has asked whether, as a result, the relevant guidelines are adequate. First and foremost, PAG believes there should be no increase in the base offense levels for these crimes. Congress began work in 2005 on what eventually became this Act. At that time, bills introduced in both chambers would have carried a number of mandatory minimum sentences for these offenses.[1] Before enactment, all statutory mandatory minimums were removed. As a result, the PAG believes the present base offense levels are appropriately severe for the least serious conduct falling under these guidelines.

The question remains whether the new statutory maximums require new enhancements and/or increases to the present ones. For the reasons below, the PAG believes no changes need be made to accommodate the new statutory maximums. In reaching this conclusion, we make the assumption that Congress increased the penalties to address the exceptionally egregious case,

[1] See, H.R. 1751 and S 1968 http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109IxADpr:e6962:

not to increase every offender's sentence. Further, Congress has not directed the Commission to make any changes as a result of the Act.

18 USC § 115 (§ 2A2.2)

The Act raises the maximum penalty for assaults resulting in serious bodily injury or involving the use of a dangerous weapon from 20 to 30 years and for assaults involving physical contact or intent to commit another felony from eight to ten years. Sentence calculations for these offenses are referred to § 2A2.2.

In 2007, the mean sentence for non-sexual assaults over all criminal history categories was 39 months and the median was 30 months. *2007 Sourcebook of Federal Sentencing Statistics*, Table 14. Even Criminal History Category VI career offenders received sentences well below the twenty-year maximum (Mean: 6.3 years, Median: 6.4 years). *Supra.* That the courts are sentencing well below the new maximums strongly indicates that that the Guidelines should not be increased.[2] Further support for maintaining the status quo is that the worst offenders falling under § 2A2.2 can still be sentenced at the maximum of 30 years as follows:

Base Offense Level:	14
More Than Minimal Planning:	2
Firearm Discharge:	5
Serious Bodily Injury:	5
Payment Involved:	2
Conviction Under § 115:	2
Official Victim:	6[3]

Total:	36

This would produce a range of 188 months (15.6 years) to 235 months (19.5 years) for an offender in Criminal History Category (CHC) I, while those in CHC V or VI would easily fall into ranges at or above 30 years.

18 USC § 1112 – Voluntary Manslaughter (§ 2A1.3).

The statutory maximum for voluntary manslaughter has increased from ten to fifteen years. With the present § 2A1.3 base offense level of 29 and a six-level increase for official victim,[4] the offense level would be 35. This produces a range of 168 to 210 months for an

[2] Of 313 sentences for assault in 2007, only 17 were above the guideline range, while 39 non-government sponsored sentences were below the range. *Supra*. Table 28.
[3] PAG assumes, given the act authorizing them, that all increases in the maximum allowable sentences were triggered by concerns for court and other official victims.
[4] *Supra.*

offender in CHC I. Because this exceeds, at the upper end, the fifteen-year maximum, we do not believe any change in the guideline is needed. Further, the Commission has only recently raised the base offense level for voluntary manslaughter from level 25 to level 29. USSG, App. C, Amend. 663 (Nov. 1, 2004).

B. Official Victims - § 3A1.2

The Commission has requested comment on whether the official victim guideline (§ 3A1.2) adequately addresses the circumstances of an official victim. PAG notes that in 2004 the Commission increased this adjustment from three to six levels for offenses against the person motivated by the official status of the victim. *See* USSG, App. C, Amend. 663 (Nov. 1, 2004). The adjustment is three levels in all other circumstances. It is difficult to rationalize an increase when the adjustment for a vulnerable victim is two levels (§ 3A1.1 (1)) and any increase could create the perception that the Guidelines put a greater value on protecting federal officials than they do any other victims.

PAG does suggest that the Commission consider defining "immediate family member" as it is in § 3A1.2(a)(1)(C).

C. Section 115(b)(4) - Threats Over the Internet

Section 209 of the Act directs the Commission to review threats that occur over the Internet in violation of 18 USC § 115 to "determine whether and how much that circumstance should aggravate the punishment…." PAG notes that this language only requires a review, not a change.

PAG believes that using this characteristic to enhance the base offense level for defendants who threaten a federal official or family member is irrational, both logically and factually. Threats can be conveyed by any number of means, to include in person, by phone, by U.S. mail and over the internet (*e.g.*, e-mail, website or blog postings, social network forum entries, etc.). There is no rational basis for distinguishing threats made via the Internet from threats made by other means. To the contrary, on-line threats would seem to be less severe in that they usually are more easily identified and traced than other 'anonymous' threats, such as phone calls and letters.

Importantly, as Dr. Mario Scalora testified at the Commission's March 18 hearing, the potential for harm from a given threat rests not in the modality by which it is conveyed but on the nature of the underlying behavior. In other words, modality is effectively a neutral consideration. Indeed, it is not uncommon, according to Dr. Scalora, for individuals to employ one or more modalities for threats — none of which, standing alone, is more aggravating or reflects an increased degree of culpability than another. This point is further reflected in Michael Prout's testimony concerning threats the Marshal's Service has encountered, citing an example where a radio talk show host broadcast comments that were then posted on his website. Also significant is the lack of any evidence cited in that testimony that anyone responded to the

talk show host's call to act.

Appreciating the concern that surrounds the dissemination of personal information involving public or government officials, there is no legitimate basis to aggravate punishment for § 115 offenses merely because threats may occur over the Internet. Any specific offense characteristic that might attempt to capture the points raised by Dr. Scalora obviously exceeds the scope of the Congressional directive and, without further research and opportunity for comment, is premature. In many respects, public officials are not readily distinguishable from private citizens in that regard. As examples, an entire website is devoted to making public the assistance to law enforcement of cooperating witnesses (http:// www.whosarat.com/), and defense attorneys routinely do not list their home addresses or telephone numbers to ward against reprisal from potentially disgruntled clients.

The realities of modern life compel added diligence by those who wish to maintain their privacy. However, as the PAG noted in its testimony, the Commission must exercise care in not creating a differing, higher level of punishment for crimes involving public or government officials. In doing so, the Commission risks creating a class system within the guidelines wherein the lives and property of public and government officials are perceived as more valuable than that of ordinary citizens.

3. WILBERFORCE AMENDMENTS

A. Overview

The Commission seeks comment on proposed amendments to the Sentencing Guidelines in response to the William Wilberforce Trafficking Victim Protection Re-Authorization Act of 2008. ("Wilberforce 2008"). It is PAG's position that the existing guidelines provide significant and often severe punishment of persons convicted under existing statutes pertaining to human trafficking and should not be enhanced. Rather we urge that, in some cases, the guidelines should be modified to provide for downward departures. PAG further recommends that two new statutes implemented under Wilberforce 2008, 18 U.S.C. §§ 1351 and 1593A, be indexed, respectively to guideline sections 2B1.1 and 2H4.1. PAG further recommends that offenders sentenced under the obstruction provisions of 18 U.S.C. § 1581, as extended to six other Chapter 77 provisions, be sentenced under the obstruction of justice guideline at section 2J1.2 rather than the human trafficking provisions of guideline section 2H4.1. Specific comments follow.

B. The § 222(g) Directive

Under section 222 (g) of Wilberforce 2008, Congress directs the Commission to review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a sexual act if (1) the harboring was committed in furtherance of prostitution and (2) the defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.

In effect, Congress is requesting review of the sentencing guidelines applicable to alien harboring under 8 U.S.C. § 1324(a), which makes it unlawful to harbor an illegal alien, and determine whether to revisit guidelines governing the sentencing of persons convicted under that statute who harbored aliens in furtherance of prostitution and who are also organizers, leaders, managers or supervisors of this activity.

PAG maintains that the existing guidelines under § 2L1.1 *et seq*. more than adequately punish alien harboring under 8 U.S.C. § 1324(a) and that Congress and the Commission have already addressed illegal harboring for the purpose of prostitution under two statutes. The first, 8 U.S.C. § 1328 makes it a crime to illegally bring an alien into the United States, or to harbor that alien, for the purpose of prostitution or any other immoral purpose. The second, 18 U.S.C. § 1591, governs sex trafficking offenses and prohibits sex trafficking of children by force, threat or coercion for commercial purposes. Both statutes are subject to Chapter G's often more severe sentencing provisions.

There are at least three reasons not to amend § 2L1.1. First, § 2L1.1 is specifically aimed at the broad panoply of harboring offenses, exclusive of commercial sex, whereas Part G of the guidelines -- especially guideline section 2G 1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and guideline section 2G 1.3 (Promoting a Commercial Sexual Act or Prohibited Sexual Conduct with a Minor et. seq.) -- are specifically aimed at commercial sexual conduct including prostitution.

Second, PAG is concerned that exporting the commercial sex provisions of Part G into § 2L1.1 will unfairly result in increased punishment for defendants convicted under the more general alien harboring statute. As a result, a defendant convicted under § 1324 (a) but not convicted under § 1328 may be subject to a significantly increased sentence for commercial sex activity under a preponderance of evidence standard where there has <u>not</u> been an underlying conviction at trial for such conduct. Under § 2L1.1, the base offense level is generally 12 whereas the base offense level under Part G ranges from 14 to 24, potentially including a 10-level increase where a minor is involved.

Nor is there a need for a separate enhancement under Part G or Part L for an organizer, leader, manager or supervisor of criminal activity. Guideline § 3B1.1 already increases the offense level by up to 4 levels, depending upon the defendant's role. An additional specific offense characteristic is unnecessary.

Finally, § 2L1.1, as presently drafted, can lead to potentially severe sentences where, for example an offender intentionally or recklessly creates a substantial risk of death or serious bodily injury to another person or causes serious bodily injury, permanent or life-threatening bodily injury or death. Moreover, the Commentary to § 2L1.1 contemplates an upward departure where, among other things, an offender smuggles, transports or harbors an alien for the purpose of subversive activity, drug trafficking or "other serious criminal behavior."

For all of these reasons, the existing sentencing guideline provisions pertaining to alien harboring are more than adequate and should not be modified.

C. 18 U.S.C. § 1593A

Wilberforce 2008 creates 18 U.S.C. § 1593A, which prohibits knowingly benefiting financially or receiving anything of value for participation in a venture that has engaged in any act in violation of §§ 1581(a), 1592 or 1595(a). While PAG concurs that § 1593A is governed by U.S.S.G. § 2H4.1, the existing provisions are more than adequate. The base offense level, generally 22, is the starting point for the addition of significant specific offense enhancements, such as those for injuries or when a weapon is involved. Further, the Commentary to § 2H4.1 provides the potential basis for an upward departure where more than ten victims are subject to peonage or involuntary servitude. Therefore, additional amendments enhancing penalties under this guideline section are unnecessary.

D. 18 U.S.C. § 1351

Wilberforce 2008 created a second new offense, 18 U.S.C. § 1351, which makes it unlawful to knowingly, and with intent to defraud, recruit, solicit or hire a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment. Violation of this statute subjects the offender to a fine and imprisonment of up to 5 years.

The Commission asks whether § 1351 should be referred to either U.S.S.G. § 2B1.1 (Theft, Property Destruction, and Fraud) or § 2H4.1 (Peonage, Involuntary Servitude or Slave Trade). PAG maintains that 18 U.S.C. § 1351 fits more closely with the fraud sentencing provisions of § 2B1.1 than the human rights sentencing provisions of § 2H4.1. First, 18 U.S.C. § 1351 is found in Chapter 63 of the U. S. Code, which addresses other fraud-related offenses including mail (§ 1341), wire (§ 1343), bank (§ 1344), health care (§ 1347) and securities (§ 1348) fraud. Further, the provisions of § 1351 make clear that Congress is addressing a fraud type of crime and not one that pertains to human rights criminal activity. Also, the guidelines under § 2H4.1, which generally commence at a base offense level 22, are far more severe than the punishment envisioned under 18 U.S.C. § 1351, which carries a five year maximum sentence.

E. Other Modifications in Chapter 77 of United States Code

Wilberforce 2008 has engrafted other modifications on certain provisions of Chapter 77 of the Code. The PAG's positions on the guideline implications of these modifications are as follows:

Obstruction Guidelines under § 2J2.1 Should Be Extended to Encompass Chapter 77 Obstruction Provisions.

Wilberforce 2008 extends the obstruction of justice provision of 18 U.S.C. § 1581 to §§ 1583, 1584, 1589, 1590 and 1591, by providing that a person who obstructs, interferes with, or prevents the enforcement of laws pertaining to those crimes will be subject to the same penalties as a person who commits the substantive offense. This, of course, means only that that these obstruction offenses have the same minimum and maximum statutory penalties as the substantive offenses, not that guideline ranges within those limits must be the same. Although 18 U. S. C § 1581 is currently referred to U.S.S.G. § 2H4.1, the obstruction violations found in Chapter 77 (embracing all aforementioned statutes including § 1581) should be referred to § 2J1.2, which addresses obstruction issues, and not 2H4.1, which better addresses the underlying substantive human rights violation. The penalties found in § 2H4.1 are far too severe for obstruction-type offenses, which are better addressed in § 2J1.2. Those offenders who commit the substantive offense under Chapter 77 will be subject to the more severe penalties under § 2H4.1. As a general matter, it is the less culpable offender who commits obstruction of justice but does not engage in the substantive crime. Such persons are more properly sentenced under obstruction-oriented guidelines, with the possibility of an upward adjustment in those cases where culpability is greater.

Guidelines for Conspiracy Liability Under 18 U.S.C. § 1594 Should Encourage Downward Departures Under U.S.S.G. § 2H4.1.

Wilberforce 2008 extends the conspirator liability provisions of 18 U.S.C. § 1594 into six other Chapter 77 statutes including §§ 1583, 1584, 1589, 1590, 1591 and 1592. While acknowledging that § 2H4.1 governs sentencing for persons convicted under the conspiracy provisions of these respective statutes, PAG recommends that the Commentary to § 2H4.1 be amended to encourage a downward departure where a co-conspirator plays a lesser role in any of these offenses. Further, the language should clarify that a downward departure may be in addition to the appropriate adjustment under § 3B1.2 based upon a defendant's mitigating role in the offense.

Guidelines for Financial Benefits From Venture Involving Trafficked Labor Should Include Downward Departure Under Guideline Section 2H4.1.

Wilberforce 2008 provides in 18 U.S.C. §§ 1589 and 1591 that any person who benefits financially from participating in a venture involving trafficked labor is subject to the same punishment as a person who commits the substantive offense. While U.S.S.G. § 2H4.1 applies to these two offenses (financial benefit from trafficked labor venture), it is PAG's position that the Commentary should be amended to encourage a downward departure for a less culpable participant in the venture. Any downward departure should be in addition to any decrease under § 3B1.2 based upon a defendant's mitigating role in the offense.

4. ONLINE PHARMACY AMENDMENTS

In view of increases in statutory maximum penalties resulting from the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, the Commission requests comment on whether offenses involving Schedule III, IV and V controlled substance are adequately addressed by the guidelines. The PAG believes that the current guidelines are adequate and that absent clear evidence of judicial dissatisfaction, as evidenced by, *inter alia*, a disproportionate number sentences above the recommend guideline range (as compared to other sentences imposed under § 2D1.1), the Commission should monitor penalties imposed in the wake of the Act to evaluate the need for change, if any. In this regard, we note the Commission's recognition that frequent amendments in response to Congressional action "make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." *Fifteen-Year Assessment* at 73. Similarly, the PAG believes that the marijuana equivalencies for Schedule III, IV and V controlled substance offenses are adequate and do not require amendment.

The PAG finds it problematic that the Commission would look to increase penalties for drug offenses given the longstanding, overwhelming criticism of federal drug penalties. Rather than amend the guidelines to increase penalties for Schedule III, IV and V controlled substance offenses to make them proportionate to Schedule I and II offenses, the Commission should give serious consideration to reducing the latter. Indeed, penalties for drug crimes, particularly those lacking any element of violence, merit serious review. Piecemeal amendments (increases) to address the drug du jour (*e.g.*, crack cocaine, methamphetamine, Oxycodone, Ecstasy, Ketamine and, now apparently, hydrocodone) do not embody a rational or comprehensive approach to sentencing policy. Rather, a reactive approach to calls for stricter sanctions produces a system that punishes drugs offenses out of proportion to other criminal misconduct with little known deterrent effect. This is an area where the Commission may wish to consider convening a group of interested parties to participate in a systematic review of the appropriate penalties.

Finally, the PAG submits that violations of 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet) should be referred not to Guideline Section 2D1.1 but to Section 2D1.6. Although having no substantive impact given that § 2D1.6 cross-references to § 2D1.1, such an approach promotes continuity and makes the proper analogy of the Internet to other communication facilities.

5. MISCELLANEOUS AMENDMENTS: SUPERVISED RELEASE

Under Part F of the Miscellaneous Amendments, the Commission proposes several changes to the *Guidelines Manual* to reflect statutory amendments concerning probation and supervised release brought about by the Judicial Administration and Technical Amendments Act of 2008. Appreciating the PAG for the proposed amendments, the PAG is concerned that by addressing these issues but failing to take further action, the Commission perpetuates a

fundamental defect in the *Manual* that runs counter to the law and impedes courts' ability to structure individualized sanctions for low-level offenders.

The guidelines restrict placement in community confinement to a condition of probation or supervised release. U.S.S.G. § 5F1.1. However, since at least the 1960s, the federal Bureau of Prisons (BOP) has, consistent with its statutory authority and controlling precedent, used halfway houses as places of imprisonment. *See Reno v. Koray*, 515 U.S. 39 (1995); 18 U.S.C. § 3621(b); T. Bussert, P. Goldberger and M. Price, *New Time Limits on Federal Halfway Houses: Why and how lawyers challenge the Bureau of Prisons shift in correctional policy - and the courts' response*, Criminal Justice (ABA Spring 2006) (reviewing history). This includes Zone D offenders sentenced to relatively brief terms of imprisonment (*e.g.*, one year or less remaining to serve). In fact, following last year's passage of the Second Chance Act of 2007, the BOP, through its Assistant Director of Correctional and its General Counsel, affirmed that "[i]nmates are legally eligible to be placed in [a Residential Reentry Center (RRC or halfway house)] at any time during their prison sentence. Federal courts have made clear that RRCs <u>are</u> penal or correctional facilities within the meaning of the applicable statutes." Kathleen M. Keeney and Joyce K. Conley, Memorandum for Chief Executive Officers, <u>Inmate Requests for Transfer to Residential Reentry Centers</u>, 1 (Nov. 14, 2008).

The *Guideline Manual* should be amended to account for this disconnect between statute and guidelines. Additionally, to the extent that the Commission seeks to make amendments expanding the use of intermittent confinement, such opportunities should not be restricted to conditions of probation or supervised release. By curtailing potential placement options, the Commission encourages courts to work around the guidelines. For instance, a sentencing judge looking to impose imprisonment implemented through 'weekends in jail' is compelled to do so through a potential non-Guidelines sentence of probation or supervised release, conditioned on the same. The PAG believes strongly that the Commission should promote alternatives to traditional imprisonment and courts' ability to structure individualized sanctions.

CONCLUSION

On behalf of our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input on the proposed amendments and issues for comment. We would be happy to discuss them further as the Commission prepares to vote on these proposals.

Sincerely,

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