

[Philip Miller, Chief U.S. Probation Officer, Eastern District of Michigan]

2010 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

On January 21, 2010, the United States Sentencing Commission published its Proposed Amendments for the 2010 Sentencing Guidelines. The Sentencing Commission has set a deadline of March 22, 2010 for public comment on the proposed guidelines.

On January 27, 2010, the Presentence Specialists met to discuss the proposed amendments. The participants in the meeting included Senior United States Probation Officers Joan Pigott, Richard Rogala and Charmarie Green. A consensus was reached on the proposed amendments.

1. Proposed Amendment: Alternatives to Incarceration

In September 2009, the Commission indicated that one of its policy priorities would be continued study of alternatives to incarceration, including consideration of any potential changes to the zones incorporated in the Sentencing Table in Chapter Five and/or other changes to the guidelines that may be appropriate in light of the information obtained from that study. The proposed amendment contains two parts:

Part A of the proposed amendment expands the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and meet certain criteria. This is done by creating a new guideline, under § 5C1.3, that provides the court with the authority under the guidelines to impose a sentence of probation (with a requirement that the offender participate in a residential treatment program rather than a sentence of imprisonment, irregardless of the applicable Zone of the Sentencing Table.

Part B expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of the Criminal History Categories I through V and expands Zone C by one level in each of the Criminal History Categories I through V. Part B also provides guidance on the effectiveness of residential treatment programs and makes conforming changes to §§ 5B1.1 and 5C1.1.

Part A:

§5C1.3(a)(1), states that the defendant committed the offense while addicted to a controlled substance, then asks if the following should be added, “*and the controlled substance addiction contributed substantially to the commission of the offense.*” It is the probation department’s position that the latter should not be added. Whether or not it contributed to the offense may be difficult to ascertain. Our position is that the first phrase would suffice.

§5C1.3(a)(3), states that the defendant has demonstrated a willingness to participate in a substance abuse treatment program andone of two options. It is the probation department's position that the second option stating "*participation in such a program will likely address the defendant's need for substance abuse treatment,*" would be best. The defendant must demonstrate a need and willingness to change. To determine this, the probation department would recommend the use of an actuarial risk/needs assessment tool that is scientifically validated. Furthermore, the Commission may wish to consider how "substance abuse" is defined.

§5C1.3(a)(3), proposes a total offense level of not more than (11-16). It is the probation department's position that a level 16 would suffice as it does not take much of a drug quantity to reach that. A total offense level cut-off of 11 would impact too few defendant's. Other related changes are proposed, without options for comment.

Part B:

Part B involves amending the sentencing table, increasing the categories that fall into Zone B by adding one level to Zone B, and subsequently adding one level to Zone C's beginning and ending categories. The question raised is if Part A, Part B, or both should be promulgated. It is the probation department's position that both should be promulgated, to allow for more sentencing options, without removing incarceration as an option.

Issues for Comment:

1. The commission requests comment on how Part A of the proposed amendment should interact with other provisions in the guideline manual. In particular, if the commission were to promulgate Part A, what other amendments to Chapter 5 of the Guidelines Manual would be appropriate? The Commission cites several examples, including § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) currently provides that physical condition, "is not ordinarily relevant in determining whether a departure is warranted.

Response: With the provisions of this amendment allowing for treatment as an alternative to incarceration for certain offenders, it is not felt that Section 5 of the guidelines needs to be amended. If a defendant does not meet the criteria under this amendment, there is a great likelihood is that he/she is not appropriate for community supervision.

2. The Commission requests comment on whether defendants with a condition other than drug addiction, such as mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.

Response: The probation department's position is yes, in that they contribute to any defendant's actions in much the same way as drug addiction and could be treated in much the same way, to reduce a defendant's propensity to commit crimes. The exception to this would be sex offenses or specific crimes of violence, that result in injury or harm to another.

3. The Commission requests comment on whether the proposed amendment should include standards for effective treatment programs.

Response: Currently, there are standards in place for all contract treatment programs, which appear to suffice. However, for non-contract treatment programs, basic standards should include: adequate physical facility, certified counselors, monthly treatment reports and conformity with our drug testing standards and therapeutic standards that comply with the standards for our contract treatment providers.

4. The Commission requests comment on whether the Zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offense. Should the commission provide a mechanism to exempt certain offenses from these zone changes? If so, what mechanism should the commission provide and what offenses should be covered by it.

Response: It is the probation department's belief that the changes should apply to all offenses, other than those that are a risk to the community; i.e. sex offenses and crimes of violence, causing injury or harm to another. Drug problems, mental problems and emotional problems contribute to the commission of offenses other than drug offenses, and treatment for these problems would reduce the risk of commission of most offenses, including white collar offenses. Any exempt offenses could be covered by a second sentencing table, the current one, without the zone changes.

5. The Commission requests comment on what revisions to Chapter 5, Part B (Probation) and Chapter 5, Part F (Sentencing Options) may be appropriate to provide more guidance on the use of alternatives to incarceration.

Response: It is the probation department's view that the current wording in Chapter 5 with the proposed wording of §5C1.3, would suffice. However, the probation department would note that it would be difficult for the Commission to provide guidance to alternatives to incarceration without a validated actuarial needs/risk assessment tool. Without such a tool, guidance would be too subjective.

2. **Issues for Comment: Specific Offender Characteristics**

In September 2009, the Commission indicated that one of its policy priorities would be a "review of departures within the guidelines, including (A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forms the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the Guidelines Manual. This addresses a review of the extent to which pertinent statutory provisions prohibit, discourage or encourage certain factors as forming the basis for departure from the guideline sentence and possible related revisions to the guidelines manual. The Commission requests comment on the extent to which specific offender characteristics should be considered at sentencing and in the Guidelines Manual in particular.

1. Are the specific offense characteristics already adequately addressed in the Guideline Manual? If not, what amendments are needed?

Response: In light of Booker, some of the specific offense characteristics in Chapter 5 may need to be revised. The procedure in the manual appears sufficient, just changes to, or removal of, certain factors may be appropriate (see next issue).

2. The Commission requests comment on five specific offender characteristics. In particular, age; mental and emotional conditions; physical condition, including drug dependence or gambling addiction; military, civic or charitable contributions; and lack of guidance as a youth.
 - A. In general, are these adequate?
 - B. Is the characteristic relevant to decisions regarding prison or probation, length of imprisonment or probation, and conditions of supervision.
 - C. Could they be used as a “proxy” for one of the forbidden factors; race, sex, national origin, creed and socioeconomic status?

3. Specifically address each of the five factors:

Response: It is the probation department’s position that the five specific offender characteristics should be considered. As the guidelines are now advisory, offender characteristics are more important than ever when considering the factors contained in 18 U.S.C. § 3553(a). The sanctions imposed on the individual offender should target the changeable characteristics of the offenders, that is, the characteristics that, if changed, are most likely to reduce the risk of the offender re-offending. In order to determine this, the probation department would recommend the use of an actuarial risk/needs assessment tool, that it scientifically validated. A tool that identifies an offenders “criminogenic needs”, which are the factors that are most likely to affect the risk of recidivism. These factors include, but are not limited to; an offender’s anti-social thoughts as well as attitudes, companions and personality patterns. This would represent a shift in thinking as today the focus is on substance abuse, education and lack of employment. However, research shows that the aforementioned issues are not the main factors that contribute to recidivism.

3. What conforming changes should be made to Chapter 5 of the Guidelines Manual?

Response: The probation department would recommend that §5H1.3 (mental and emotional conditions) and §5H1.4 (physical condition) be moved into Section 5K, factors that may be relevant for departure.

4. Should defendant’s status as a non-citizen warrant a departure?

Response: The probation department believes that this should not be a factor in most cases. A United States citizen should not be punished more severely than a non-citizen.

5. Could a downward departure be appropriate in an illegal re-entry case due to “cultural assimilation,” or times to the United States? Should the commission amend the guidelines to address this?

Response: It is the probation department’s position that the Commission should consider this as a factor due to the fact that the unusual circumstances of “true cultural assimilation” is so rare.

3. Proposed Amendment: Application Instructions

This proposed amendment amends § 1B1.1(Application Instructions) in light of the 2005 decision in *United States v. Booker*. The District Court, in determining the appropriate sentence in a particular case, must consider the properly calculated guideline range, the grounds for departure (provided in the policy statements) and then the factors contained in 18 U.S.C. § 3553(a). This has been described as a “three-step process”. The proposed amendment follows the approach adopted by a majority of circuits and structures § 1B1.1 to reflect the three-step process (which includes the three-step process).

The proposed amendment is as follows; as amended, § 1B1.1(a) addresses how to apply the provisions in the manual, to properly determine the kinds of sentence and the guideline range. The amendment changes § 1B1.1(a) by adding the phrase, “The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4) by applying the provisions of this manual in the following order, except as specifically directed. The proposed amendment lists the provisions under (a)1-8. Section (b) is amended to include the wording, “The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing a sentence (18 U.S.C. § 3553(a)). Section C is added, which states, The court shall then determine the sentence (i.e., a sentence within the guideline range, a departure, or a variance), considering the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.

In the commentary section, wording is added in (E) which defines “Departure”, stating that as provided for in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, or any other policy statements or commentary in the guidelines. Furthermore, under (M), “Variance” is defined as meaning imposition of a sentence other than as provided in the guidelines, policy statements, and commentary of the Guidelines Manual.

Probation Departments comments:

The probation department agrees with the proposed amendment in accordance with the decision in light of the decision in *United States v. Booker*.

4. Proposed Amendment: Recency

In September 2009, the Commission indicated that one of its policy priorities would be consideration of miscellaneous guideline application issues including, “examination of and possible guideline amendments relating to, the computation of criminal history points under § 4A1.1(e)”. Subsection (e) of § 4A1.1 is known as the “recency” provision. The Commission is examining how the “recency” provision interacts with other provisions regarding criminal history in various Chapter Two offense guidelines.

At the present time, §4A1.1 provides that if the instant offense was committed while under another criminal justice sentence, two points are added under subsection (d) for “status”. If the offense was committed less than two years after release from imprisonment, or while in imprisonment or escape status, two points are added, under subsection (e) for “recency”. Under § 4A1.1, a sentence for a single prior conviction may count up to three times in the calculation of the Criminal History Category (under § 4A1.1(a) or (b), 4A1.1(d) and (e)). Additionally, the prior conviction can increase the offense level determined under certain Chapter 2 guidelines, for example, Unlawfully Entering or Remaining in the United States. Therefore, in a case in which the prior conviction increases the Chapter 2 offense level, the single prior conviction maybe counted four times in the determination of the applicable guideline range.

The proposed amendment presents two options for amending § 4A1.1 that would reduce the cumulative impact of “recency”. The Commission presents two options:

Option One: “recency” points are eliminated for all offenders in all cases and conforming changes to § 4A1.2 are also made.

Option Two: “recency” points are retained but are not cumulative with “status” points. In the case of an offender eligible for both “status” points and “recency” points, the combined impact is limited to 2 points rather than 3. The proposed amendment also makes stylistic changes to § 4A1.1, so that it’s subdivisions are referred to as “subsections” rather than “items”. The Commission has also included issues for comment that, in part, comment on whether the Commission should instead address the cumulative impact of “recency” more narrowly, for example, only for cases sentenced under Chapter Two offense guidelines that increase the offense base offense level based on Criminal History.

Probation Departments comments:

It is the probation department’s position that Option 2 is the best option. As stated previously, Option 2 amends § 4A1.1(e), adding that if § 4A1.1(d) applies, do not apply this (e) subsection. This option takes into account all of the Commission’s concerns without a complete re-construction of § 4A1.2.

5. Proposed Amendment: Hate Crimes

The proposed amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, or the “Act.” The Act created a new offense and amended a 1994 congressional directive to the Commission and created a new offense relating to attacking a United States serviceman on account of his or her service. This proposed amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 249 (Hate crimes acts) to § 2H1.1 (Offenses Involving Individual Rights). 18 U.S.C. § 249 makes it unlawful, whether or not acting under the color or law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosion or incendiary device, attempt to cause bodily injury to any person, because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person.

In addition, the Act also expanded the definition of “hate crime” to include crimes motivated by actual or perceived “gender identity,” which has the effect of expanding the scope of the congressional directive in section 280003(b) of the Violent Crime Control and Law Enforcement Act of 1994 to require the Commission to provide an enhancement for crimes motivated by actual or perceived “gender identity.” The proposed amendment amends § 3A1.1(a) to include crimes motivated by actual or perceived “gender identity,” and makes conforming changes to § 2H1.1 and § 3A1.1.

Finally, the proposed amendment contains a proposal to strike the special instruction in § 3A1.1(c), which states that the 3-level enhancement in § 3A1.1(a) shall not apply if the 6-level enhancement in § 2H1.1(b) applies. By striking the special instruction in § 3A1.1(c), the proposed amendment would allow both enhancements to operate, if applicable, in a particular case to address the distinct harms addressed by these enhancements. The 3-level enhancement applies in 3A1.1(c) if the offense was a hate crime, and the 6-level enhancement applies in § 2H1.1(b) if the defendant was a public official at the time of the offense, or the offense was committed under color of law.

The proposed amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 1389 to § 2A2.2 (Aggravated Assault), § 2A2.3 (Minor Assault), and § 2B1.1 (Theft, Property Destruction, and Fraud). 18 U.S.C. § 1389 makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or status of that individual as a United States serviceman. The Commission anticipates that the official victim adjustment in § 3A1.2 (Official Victim) would apply in such a case.

6. Proposed Amendment: Organizational Guidelines

This proposed amendment amends Notes 3 of the Commentary to §8B2.1 (Effective Compliance and Ethics Program) to clarify the efforts required to satisfy subsection (b)(7) (the seventh requirement for an effective compliance and ethics program). The proposed amendment adds a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution. Specifically, a new paragraph is added to clarify what is expected of high-level personnel and substantial authority personnel.

In addition, the proposed amendment revises Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters assessed. An example is provided that indicates "all employees should be aware of the organization's document retention policy or policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law".

The second part of the proposed amendment amends §8D1.4 (Recommended Conditions of Probation –Organizations) (Policy Statement) to combine and simplify the recommended conditions of probation for organizations.

The existing policy statement distinguishes between conditions of probation regarding the enforcement of monetary penalty (addressed in subsection (b)) and conditions of probation imposed for any other reason (addressed in subsection (c)). Under the proposed amendment, subsections (b) and (c) are consolidated; accordingly, when a court determines there is a need for organizational probation, all conditional probation terms are available for consideration by the court. The proposed amendment also inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects current governmental policy and best practices with regard to the appointment of such independent corporate monitors. Finally, the proposed amendment inserts specific language requiring the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.

Issue for Comment:

1. The Commission requests comment regarding whether or not to amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (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?

Probation Department's comments:

It is the position of the Probation Department that a three-level reduction should be allowed even when a high-level employee was involved, provided all the conditions are met as outlined in the proposed amendment. This would allow for a reduction in cases where the high-level employee acted independently from the organization and it was the organization, either through a compliance program or an audit committee, who ultimately brought the offense to the attention of the authorities.

7. Proposed Amendment: Miscellaneous

The proposed multi-purpose amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment responds to the Fraud Enforcement and Recovery Act of 2009, which expanded the securities fraud statute (18 U.S.C. § 1348), so that it also covers commodities fraud. The proposed amendment adds 18 U.S.C. § 1348 to the list of offenses that qualify as “commodities law” for the purpose of the enhancement under § 2B1.1(b)(17)(B).

Part B of the proposed amendment responds to the Omnibus Public Land Management Act of 2009, which established 16 U.S.C. § 470aaa-5. The proposed amendment adds the new offense to Appendix A (Statutory Index) and references it to § 2B1.1 and § 2B1.5, including technical and conforming changes. The proposed amendment references paleontological resources and removes references to “cultural heritage” and “cultural heritage resource” from the application notes in § 2B1.5.

Part C of the proposed amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009, which amends the Social Security Act to establish 42 U.S.C. § 1396w-2. The proposed amendment adds the new offense to Appendix A (Statutory Index) and references it to § 2H3.1.

Part D of the proposed amendment responds to the regulatory change in the status of iodine as a listed chemical. Iodine was upgraded from a List II chemical to a List I chemical. The proposed amendment changes the Chemical Quantity Table in § 2D1.11 to reflect the upgrade. The proposed amendment also extends iodine's maximum base offense level to level 30 and specifies the amount of iodine that would be needed (1.3 kilograms) for a base offense level of 30 to apply.

8. Proposed Amendment: Technical Amendments

The proposed amendments make various technical and conforming changes to the guidelines.

Part A of the proposed amendment makes changes to the Guidelines Manual to promote accuracy and completeness. The changes correct typographical errors, and address information that has become incorrect or obsolete. Please review for changes.

Part B of the proposed amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated to follow the structure used by Congress to divide statutory sections into subdivisions. Part B identifies places in the Guidelines Manual where these principles are not followed and brings them into conformity.