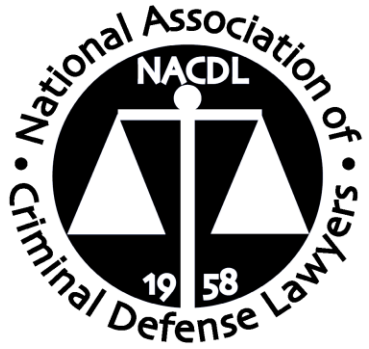

Written Statement of
Cynthia Hujar Orr

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
United States Sentencing Commission

Re: Proposed Amendments to the Sentencing Guidelines
and Issues for Comment

March 17, 2010

Judge Sessions and Distinguished Members of the Commission: Thank you for allowing me to testify today, on behalf of the National Association of Criminal Defense Lawyers, to present our views on the proposed amendments to the U.S. Sentencing Guidelines.

A. Specific Offender Characteristics

In a five-part Issue for Comment, the Sentencing Commission has requested general and particularized comments on various specific offender characteristics with respect to their relevancy to determining downward departures, and how any amendments to these specific offender characteristics should be implemented into the Guidelines. We address each part *seriatim*.

1. General Commentary on Part H, Chapter Five Specific Offender Characteristics

First, the Commission has requested comment "on the extent to which specific offender characteristics should be considered at sentencing generally and in the Guidelines Manual in particular. . . . Are specific offender characteristics already adequately addressed in the Guidelines Manual? If not, how should the Commission amend the Guidelines Manual to more adequately address specific offender characteristics?"

With respect to those characteristics set forth at 28 U.S.C. § 994(d), the Commission has generally incorporated these characteristics into Part H, of Chapter Five. While not required by the Sentencing Reform Act, when promulgating the policy statements in this section, the Commission noted that each of these characteristics is "not ordinarily relevant in determining whether a departure is warranted."

In light of the expanded scope of review and judicial sentencing discretion brought on by United States v. Booker, 543 U.S. 2000 (2005), as well as the Commission's own recent studies on recidivism, first offenders, and alternatives to incarceration, NACDL strongly urges the Commission to delete the phrase "not ordinarily" from the wording of these policy statements.

These changes would make all the factors set forth in 28 U.S.C. § 994(d) relevant when considering whether to depart, as opposed to "not ordinarily relevant" as is currently written.

NACDL also suggests that the heading to USSG §5H1.6 be amended to read as follows: "Family and Community Ties and Responsibilities (Policy Statement)" in order to better reflect the mandates of the SRA wherein Community Ties are specifically mentioned as a factor for consideration. See 994 U.S.C. § 994(d)(8).

2. & 3. Specific Commentary on Certain Part H, Chapter Five Specific Offender Characteristics

Second (and third), specifically with respect to Age; Mental and Emotional Condition; Physical Condition including Drug Dependence; Military, Civic, Charitable or Public Service, Record of Prior Good Works; and, Lack of Guidance as a Youth, NACDL urges the Commission to remove all language suggesting that these Specific Offender Characteristics either are not ordinarily

relevant (e.g., Age), or simply not relevant at all (e.g., Lack of Guidance as a Youth), when considering a departure.

Both the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that these factors are relevant both when taking into consideration the length of a proposed sanction as well as its form, e.g., whether prison is appropriate versus some alternative such as home or community confinement.

Also, NACDL suggests that language should be inserted at §5H1.1, §5H1.3 and §5H1.4 to the effect that alternatives to imprisonment should be strongly considered where they may be more cost effective, but also more effective in meeting the goals of rehabilitation.

With regard to age, more youthful defendants generally are amenable to corrective regimens to lower their risk of recidivism such as job training and educational programs. In contrast, long terms of incarceration during their formative years likely will increase their chances of recidivism and lower their ability to find meaningful, gainful and lawful employment.

Older defendants generally have health-related issues that often require intense medical supervision that the Bureau of Prisons in many cases cannot fully handle. Furthermore, as older defendants have far more years behind them than ahead of them, their likelihood of recidivism is greatly reduced as is their ability to recidivate, and long terms of imprisonment end up being *de facto* life sentences. Shorter prison terms or alternatives to imprisonment altogether can still achieve the purposes of 18 U.S.C. § 3553(a) without resort to the needless cost of imprisonment for elderly offenders.

With respect to those offenders with medical, psychological, and physical ailments, NACDL again urges the Commission to incorporate language into the Guidelines that would direct the sentencing judge to strongly consider alternatives to imprisonment or shorter prison terms to facilitate participation in programs that can address these offenders' medical, psychological, and physical needs.

With respect to those offenders who have engaged in military, civic, charitable or other activities in support of the public good, as well as those offenders who have lacked guidance as a youth, these factors certainly are relevant to considering the merits of a downward departure in the course of "individualizing" a sentence, especially pursuant to the dictates of 18 U.S.C. § 3553(a)(1) that the sentencing court "shall consider the nature and circumstances of the offense and the history and characteristics of the defendant." To hold that these factors otherwise are not ordinarily relevant, or not relevant at all, appears to be facially inconsistent with the Sentencing Reform Act.

The amending language would be rather simple, i.e., deleting any and all language that limits or eliminates the relevancy of these factors to sentencing. NACDL suggests that the Commission incorporate the following statutory language into these and all Part H Specific Offender Characteristics: "Pursuant to 18 U.S.C. § 3553(a)(1), when considering this factor for purposes of a downward departure, the court 'shall consider the nature and circumstances of the offense

and the history and characteristics of the defendant.' The Commission believes that this specific offender characteristic is relevant to determining whether to depart downward from the Guidelines, and what alternatives to imprisonment may be available."

4. Collateral Consequences of a Defendant's Non-Citizen Status

As the Guidelines already direct courts to consider (to a limited degree) the collateral consequences of imprisonment on defendants, see, e.g., USSG §5H1.6, adding a section to Part H, Chapter Five, that would direct courts to consider the collateral consequences of a sentence on non-citizens would be consistent with the current Guidelines framework. NACDL recommends adding a new section—USSG §5H1.13—that would *inter alia* direct courts to consider, for example, the fact that an alien defendant in fact does face deportation; the length of time the defendant has been away from the country to which he is to be deported; the extent of family and community ties, if any, he will have in the country to which he is to be deported; any civil or criminal repercussions the defendant could face prior to being, or once he has been, deported; and whether the fact that he is a non-citizen would fortuitously increase his sentence. This list, of course, is non-exhaustive.

Such consideration should be limited to those instances when a non-citizen faces deportation after serving his term of imprisonment.

B. Alternatives to Incarceration

The Commission has requested comment on Parts A and B to its proposed amendments regarding "Alternatives To Incarceration." NACDL has reviewed the proposed amendments and generally supports the promulgation of both Part A and Part B, with the following comments:

1. Proposed Part A

Part A expands a court's authority to sentence drug offenders to alternatives to incarceration, provided certain conditions are present. In particular, the amendment focuses on providing residential drug treatment to certain drug offenders, as an alternative to prison. NACDL generally supports the aim of this amendment. However, there are certain aspects of the proposed amendment upon which NACDL would like to specifically comment.

First, the proposed amendment applies only to drug offenders. The amendment should not be limited to defendants charged with drug offenses. All defendants with drug dependency issues, no matter the nature of their charge, should be considered for treatment as an alternative to incarceration.

Second, the amendment should not be tied to the requirements of the Safety Valve (USSG § 5C1.2). Limiting the benefit of this amendment to defendants who qualify for the Safety Valve unreasonably and unnecessarily limits its reach. In particular, the low criminal history threshold of 0 or 1 point will severely limit the number of defendants who qualify for the proposed treatment alternative. Many defendants with long-term drug dependency issues will, as a result, have prior contacts with the criminal justice system that result in more than 1 criminal history

point. For example, prior violations of probation resulting from positive drug screens may have resulted in an increased criminal history score. NACDL would therefore suggest a more reasonable standard by which a defendant with a criminal history category of III or lower will qualify and that the provisions of the Safety Valve at USSC §5C1.2(a)(2)-(4) not be requirements for this benefit to apply.

Third, the amendment should either eliminate or better define the requirement that a defendant's drug dependency "contributed substantially to the commission of the offense." NACDL suggests that this requirement be eliminated because all defendants with drug dependency issues – no matter whether their addiction contributed to the offense – will often benefit more, and the criminal justice system will be better served via reduced recidivism, by treatment rather than incarceration. Furthermore, if the Commission does include this limitation, it should very clearly define what satisfies this requirement.

Finally, in response to the Commission's specific call for comment, NACDL supports promulgation of this amendment to more broadly include other mental and emotional conditions, including gambling addiction. Like drug dependency, these others conditions will often justify treatment over incarceration.

2. Proposed Part B

NACDL generally supports the Commission's plan to expand zones B and C of the sentencing table, such that an expanded number of defendants would qualify for non-incarceration sentences. However, in response to the Commission's specific call for comment, NACDL does not support limiting these changes to "certain categories of offenses," including exempting public corruption, tax and other whitecollar offenses. Serious offenses committed by defendants with high criminal history categories will naturally exclude themselves from the proposed expanded zones B and C. And there is no particular category of offense that should be *per se* excluded. There is no support for the finding that prohibiting certain whitecollar offenders from qualifying for non-incarceration sentences is necessary to satisfy any of the goals of sentencing. Such an arbitrary division of offenses will likely also lead to needless litigation and further complicate application of the Guidelines and should therefore be avoided.

Overall, both Part A and Part B of this proposed amendment advance the goals of consistency and fairness in sentencing, while also remaining consistent with the Commission's statutory responsibilities. Consistent with the above comments, NACDL therefore generally supports the promulgation of the amendment.

C. Recency and Status re: Criminal History

The Commission has requested comment on two proposed amendments to Guideline provisions affecting criminal history score, namely USSG §§ 4A1.1(d) and (e), in order to eliminate or lessen the cumulative impact of the two provisions. NACDL supports the promulgation of the amendment labeled "Option 2," which eliminates entirely the overlap of the recency and status provisions of these Guidelines sections. Where the recency and status provisions each apply to a defendant, application of both results in unnecessary and often unfair double-counting of the

same prior criminal conviction, thereby artificially inflating the defendant's criminal history score.

Furthermore, in response to the Commission's specific call for comment, NACDL supports amending the Guidelines to specify that any prior conviction that increases a Chapter Two offense level should not also be used to increase a defendant's criminal history points based upon § 4A1.1(e) (recency). Such an amendment should apply not only to § 2L1.2, but also to any other Chapter Two offense guideline in which a defendant's offense level is increased by that same prior conviction. Where a prior conviction increases a defendant's offense level and criminal history points, it is unnecessary to count that same conviction against the defendant a *third* time by counting it under § 4A1.1(e).

D. Organizational Guidelines

1. Commentary to Guideline 8 B2.1 (Effective Compliance and Ethics Program)

Guideline 8B2.1 identifies the elements that an organization's compliance and ethics program must have in order for the program to be deemed "effective." An organization must have an effective compliance and ethics program in place at the time of the commission of a criminal offense in order to receive mitigation credit under 8C2.5(f). The court may also order the establishment of an effective compliance and ethics program as a condition of probation pursuant to Guideline 8D1.4.

Subsection (b)(7) of current Guideline 8B2.1 requires the following as one element of an effective compliance and ethics program: "After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."

The proposed amendment adds an Application Note to Guideline 8B2.1(b)(7) which would require that an organization's compliance program expressly provide that upon discovery of criminal conduct, the organization (a) *must* provide restitution and perform other remedial actions and consider self-reporting, cooperation with authorities, and "other forms of remediation" and (b) assess the efficacy of the program and consider modifications, including the retention of an independent monitor.

NACDL opposes this amendment. The current Guideline – subsection 8B2.1(b)(7) – is sufficient. It allows an organization to qualify for mitigation credit if its compliance program requires that reasonable steps be taken to respond appropriately to criminal conduct and prevent further criminal conduct. This Guideline allows an organization the flexibility to respond appropriately to the many varieties of possible criminal conduct that may occur despite the existence of a good compliance program.

Requiring restitution and strongly encouraging self-reporting and cooperation fail to take into account the variety of circumstances that an organization may encounter when possible criminal conduct is revealed. For example, whether criminal conduct in fact has occurred may not be capable of determination, even with an internal investigation. Sufficient evidence to determine

whether criminal conduct has occurred may not even be available to the organization when individuals outside the organization are participants.

Moreover, restitution may not be warranted in certain cases. There are a large number of regulatory offenses punishing violations of record keeping and reporting requirements, such as those governing waste disposal or pharmaceutical manufacturing. What form of restitution must the company make for such a violation, when the harm is limited to inaccurate information? In many cases, the appropriateness and extent of restitution is hotly contested. Does an organization fail to get mitigation credit for its compliance program or is it deemed in violation of probation for not having an effective compliance program, if it does not offer the extent of restitution that the government decides is appropriate?

Most significantly, immediate restitution, self-reporting, and other external actions based on possible criminal violations deprive organizations of legally viable defenses. These actions also expose organizations to a greater likelihood of crushing civil liability arising from the admission of possible criminal conduct. Organizational criminal and civil liability often is unclear, and to require an organization to expose itself to severe sanctions based on possible criminal conduct is fundamentally unfair and may be financially harmful to an organization and its shareholders or other constituents.

The Guidelines already provide for mitigation for self-reporting, cooperation, and acceptance of responsibility for the offense at issue. *See, e.g.*, Guideline 8C2.5(g). The organization should be permitted to make a determination whether restitution, self-reporting and cooperation is appropriate in the particular circumstance of a possible criminal violation. To require, as the proposed amendment does, that an organization have an established compliance policy that requires or strongly encourages restitution and other admissions in all circumstances ignores the variety of circumstances that an organization may confront.

The amendment's requirement that a compliance program contemplate the retention of an independent monitor also is objectionable, for the reasons set forth in our comments on proposed amendments to the organizational probation Guidelines.

2. Guideline 8 D1.4 Governing Organizational Probation

New subsections (b)(3) and (b)(6) (B) would provide as possible "appropriate conditions" of probation requirements that the organization (a) retain an independent corporate monitor agreed upon by the government and the organization or, in the absence of such an agreement, selected by the court and that the organization pay for the monitor, and (b) submit to "a reasonable number of regular or unannounced examinations of facilities subject to probation supervision." The proposed amendments also eliminate the distinction between allowable conditions of organizational probation for financial and non-financial offenses.

NACDL objects to the premise of these recommendations -- and the commentary that accompanies the proposal -- that the use of "independent monitors" is presumptively necessary in most or all cases of organizational probation. In fact, there is often no reason to believe that the corporation, once it has disciplined those responsible, cannot effectively monitor its own compliance. The increasing use of independent monitors has been appropriately criticized as

extremely costly to organizations, subject to prosecutorial favoritism in the selection of monitors, overly intrusive into corporate policymaking, and often unnecessary. *See, e.g.,* P. Spivack and S. Raman, "Essay: Regulating the Regulators: Current Trends in Deferred Prosecution Agreements," 45 Amer. Cr. L. Rev.159, 184-87 (2008). Courts currently have the authority to use independent monitors. The Sentencing Commission should not encourage and institutionalize the use of this controversial practice.

NACDL also proposes that the Sentencing Commission add language making it clear that some conditions of probation may not be appropriate for certain offenses and certain organizations. For example, an organization that already is subject to mandatory government inspection of records because it is in a highly regulated industry should not also be required to make those records available as a condition of probation. An organization whose liability is based on the conduct of a lower level employee who causes a discrete financial loss that is unlikely to recur should not be subject to the more invasive conditions of probation.

3. Commentary To Guideline 8 B2.1 (Effective Compliance And Ethics Program) Re: Document Retention Policies

These amendments add language to Application Notes 3 and 6 requiring that the organization's high and lower level employees understand the organization's document retention 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." NACDL questions the need for this amendment, since document retention practices are now engrained in organizations' compliance programs. At a minimum, this amendment should be clarified to state that employees need only be aware that the organization has a document retention program and how to access and apply its requirements as appropriate for the employee's position. High level employees in particular should not be required to recite chapter and verse of every document retention policy in the organization. Many large organizations have thousands of types of records and hundreds of record categories with unique disposal and retention requirements. Requiring high level employees to memorize these requirements would be a waste of compliance resources and surely is not what the Sentencing Commission intends.

4. Mitigation Credit Under 8 C2.5(F)

The Commission has asked for comment on whether that mitigation credit under 8 C2.5(f), should be allowed, even if high-level personnel are involved in criminal conduct, if (A) compliance personnel have the authority to report directly to the Board of Directors, (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery, and (C) the organization promptly reported the violation to the appropriate authorities. NACDL supports the principle that mitigation credit should be an option even when high-level personnel are involved in criminal conduct, but believes that the proposed requirements for qualifying for the exception are far too onerous.

The current legal standard for establishing organizational criminal liability in the federal courts subjects an organization to criminal liability – with potentially severe consequences – no matter how diligent that organization may have been in putting in place strong internal controls and creating a strong culture of compliance. The proposal under consideration provides corporations

with a better opportunity for a three-level reduction in their culpability score, but it underscores that such an organization still faces severe sanctions under the Sentencing Guidelines even if it has a superlative "best practices" compliance program. The three-level reduction is inadequate to reflect the lack of *organizational* culpability in situations posited by the proposed amendment, namely, where the organization has an exemplary compliance program and could not have undertaken other reasonable compliance efforts.

Requirement A – that compliance personnel report directly to the Board of Directors – may well be appropriate in many organizations, but not in all. A "one size fits all" reporting requirement may not take into account a different organizational structure that makes compliance more effective when compliance personnel's authority limits reporting below Board level.

The requirement in subsection B that the compliance program must have succeeded in detecting the offense prior to discovery or a reasonable likelihood of discovery outside the organization is unwarranted. While it can be a factor that the errant behavior was detected by the compliance program, that should not be a prerequisite to receiving this credit. For instance, there may be situations where the errant behavior was isolated and hard to detect, and yet the compliance program was robust. In fact, Guideline 8 B2.1 acknowledges that the mere fact that that the compliance program did not prevent or detect the offense at issue does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

Finally, for the same reasons as set forth above in Section 1, it should not be a requirement that the organization promptly report the violation, as is required by Subsection C.

* * *

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 11,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.