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To: Commissioners
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From: Glenn Schmitt, Director of Office of Research and Data
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Subject: Analysis of the Impact of the Influencing a Minor Amendment if Made
Retroactive

I. Influencing a Minor Amendment

On May 1, 2009, pursuant to 28 U.S.C. § 994(a) and (p), the United States Sentencing Commission (the “Commission”) submitted to Congress amendments to the federal sentencing guidelines that, absent congressional action to the contrary, will become effective November 1, 2009. Amendment 7, which pertains to offenses in which the defendant has acted to “unduly influence” a minor, may have the effect of lowering the guideline sentencing range for certain categories of offenses and offenders.¹ The amendment may decrease the offense level for certain categories of offenders by either two or four levels, depending on whether the offender was sentenced under §§2A3.2 or 2G1.3, and when.²

¹74 Fed. Reg. 21750, 21756-57 (May 8, 2009). When published in Appendix C, the amendments taking effect November 1, 2009, will be assigned amendment numbers beginning with 726. Accordingly, the influencing a minor amendment is expected to be assigned number 732.

²The Commission added the undue influence enhancement to §2A3.2 in 2000. *See* United States Sentencing Commission, *Guidelines Manual* (Nov. 2008) [hereinafter USSG] App. C, amendment 592 (Nov. 1, 2000). In 2004, the Commission increased the level of the undue influence enhancement in §2A3.2 from two levels to four levels, and added a four-level undue influence enhancement to the newly-promulgated §2G1.3. *See* USSG App. C, amendment 664 (Nov. 1, 2004).

Amendment 7 addresses a circuit conflict regarding application of the undue influence enhancement at §2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and at §2G1.3(b)(2)(B) (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). The undue influence enhancement applies if “a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct.” The Commentary to both guidelines states that in determining whether the undue influence enhancement applies, “the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.”

One of the issues involved in the circuit conflict is whether the undue influence enhancement can apply in a case in which the only “minor” involved is a law enforcement officer. *Compare United States v. Root*, 296 F.3d 1222, 1234 (11th Cir. 2002) (holding that the undue influence enhancement in §2A3.2 can apply in a case in which the only “victim” involved in the case is an undercover law enforcement officer), *and United States v. Vance*, 494 F.3d 985, 996 (11th Cir. 2007) (holding that the undue influence enhancement in §2G1.3 can apply in a case in which the minor is fictitious), *with United States v. Mitchell*, 353 F.3d 552, 559 (7th Cir. 2003) (holding that the undue influence enhancement in §2A3.2 “cannot apply in the case of an attempt where the victim is an undercover police officer”), *and United States v. Chriswell*, 401 F.3d 459, 469 (6th Cir. 2005) (holding that the undue influence enhancement in §2A3.2 “is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen”).

Amendment 7 resolves this issue by providing in the Commentary to §§2A3.2 and 2G1.3 that the undue influence enhancement does not apply in a case in which the only “minor” involved in the offense is an undercover law enforcement officer.³ The Commission determined that the undue influence enhancement should not apply in a case involving only an undercover law enforcement officer because, unlike other enhancements in the sex offense guidelines, the

³Amendment 7 also resolves another issue courts have struggled with: whether the undue influence enhancement can apply in a case of attempted sexual conduct. The amendment resolves this issue by providing that the undue influence enhancement can apply in a case involving attempted sexual conduct. Specifically, the amendment amends the Commentary in §§2A3.2 and 2G1.3 to provide that “[t]he voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.” This part of the amendment does not have the effect of lowering the guideline sentencing range for certain categories of offenses and offenders.

undue influence enhancement is properly focused on the effect of the defendant's actions on the minor's behavior.⁴

II. Legal Framework for Retroactively Reducing Sentences Based on Guideline Amendments

A. Statutory Authority

The Commission is statutorily authorized to determine whether a guideline amendment that reduces the sentencing range may be retroactively applied. Section 994(u) of title 28, United State Code, specifically provides that:

[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.⁵

Furthermore, sentencing courts are statutorily precluded from applying a guideline amendment retroactively unless the Commission has designated such amendment for retroactive application. Section 3582(c)(2) of title 18, United States Code, provides that the court may not modify a term of imprisonment once it has been imposed except that—

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.⁶

B. Guidelines Manual Policy Statement

To implement 28 U.S.C. § 994(u) and to provide guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2), the Commission promulgated §1B1.10 (Reduction in Term

⁴In addition to publication of the amendment in the *Federal Register*, a reader friendly version is available on the Commission's website at http://www.ussc.gov/2009guid/20090501_Reader_Friendly_Amendments.pdf.

⁵28 U.S.C. § 994(u).

⁶18 U.S.C. § 3582(c)(2).

of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).⁷ Subsection (a)(1) of §1B1.10 specifies when an 18 U.S.C. § 3582(c)(2) reduction is generally available:

In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

Application Note 1 further states: "Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range."⁸

Listing an amendment in §1B1.10(c) "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants."⁹ Among the factors considered by the Commission in selecting the amendments included in subsection (c) are "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine the amended guideline range under subsection (b)(1)."¹⁰

Section 1B1.10(a)(2) provides an exclusion from the reduction in term of imprisonment, even when an amendment listed in subsection (c) is applicable to the defendant. Subsection (a)(2) states that "[a] reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." Application Note 1(A)(iii) provides that the effect of another guideline or statutory provision—such as a statutory mandatory minimum penalty—could prevent an amendment from having the effect of lowering the defendant's applicable guideline range.

⁷USSG §1B1.10 was amended effective March 3, 2008. *See* USSG App. C, amendment 712.

⁸USSG §1B1.10, comment. (n.1(A)).

⁹USSG §1B1.10, comment. (backg'd.).

¹⁰*Id.*

The Commentary provides factors courts should consider in making the determination of “(I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b) [described below].” Application Note 1(B) states that “the court shall consider” the factors set forth in 18 U.S.C. § 3553(a) and the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment. Application Note 1(B) states that “the court may consider” post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.

Further, subsection (a)(3) makes it clear that “proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.” The background commentary likewise provides that “authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.”¹¹

In addition to specifying which guideline amendments may be retroactively applied, consistent with 28 U.S.C. § 994(u), §1B1.10 guides courts as to the amount by which a sentence may be reduced under 18 U.S.C. § 3582(c)(2). Subsection (b)(1) of §1B1.10 states:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.¹²

Subsection (b)(2)(A) provides that any reduction of sentence under 18 U.S.C. § 3582(c)(2) and the policy statement be no more than “a term that is less than the minimum of the amended guideline range.” Subsection (b)(2)(B) provides an exception that allows for “a reduction comparably less than the amended guideline range” if “the original term of imprisonment was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing.” However, if the original term of imprisonment “constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.”

¹¹*Id.*

¹²USSG §1B1.10(b)(1); *see also* USSG §1B1.10, comment. (n.2).

The “reduced term of imprisonment” may not be “less than the term of imprisonment the defendant has already served.” Finally, as stated above, the factors listed in Application Note 1(B) also guide the court in its determination of the extent of the defendant’s reduction in sentence.

Accordingly, the estimate of the impact of the amendment were it applied retroactively is based on the eligibility criteria and extent of reduction limitation provided by 18 U.S.C. § 3582(c)(2) and §1B1.10 and its commentary. Therefore, the estimate presented below accounts only for the application of the two- or four-level reduction provided by the influencing a minor amendment and does not assume any other reduction in the sentence, consistent with §1B1.10. The estimate does not account for the applicability, if any, of the United States Supreme Court’s decision in *United States v. Booker*,¹³ to 18 U.S.C. § 3582(c)(2) sentence modifications.

III. The Analysis of the Impact of the 2009 Influencing a Minor Amendment

Staff identified 250 offenders who have received the undue influence enhancement at §2A3.2(b)(2)(B)(ii) or at §2G1.3(b)(2)(B) and would still be imprisoned as of November 1, 2009.¹⁴ Staff examined these cases to determine: (1) whether the only “minor” involved in the case was an undercover law enforcement officer; and (2) whether the offender would still be imprisoned as of November 1, 2009.

Of the 250 cases examined, staff identified 103 cases that involved an undercover law enforcement officer as the only “victim.” Of these 103 offenders, 71 were subject to a mandatory minimum penalty of 60, 120, or 360 months in prison and were sentenced at the applicable mandatory minimum penalty. These 71 offenders would not receive any benefit from retroactive application of the amendment and were excluded from the analysis.

Of the remaining 32 offenders, one offender was sentenced pursuant to §4B1.5 (Repeat and Dangerous Sex Offenders Against Minors). Because of the application of the minimum offense level, the final offense level for this offender would be unaffected by the amendment and, therefore, is excluded from the analysis.

The remaining 31 offenders appear to be eligible to receive a reduced sentence if Amendment 7 were applied retroactively. These offenders have a current average sentence of 107 months. If Amendment 7 were applied retroactively, and every offender received the maximum sentence reduction consistent with 18 U.S.C. § 3582(c)(2) and §1B1.10, these offenders would receive an average sentence of 89 months, a 16.8 percent reduction.

¹³543 U.S. 220 (2005).

¹⁴*See supra* note 2.

A. Offender and Offense Characteristics

Table 1 presents information on the demographic characteristics of the offenders who appear to be eligible to seek a reduction in sentence if Amendment 7 were to be applied retroactively.¹⁵ The vast majority are U.S. citizens (90.3%), male (100.0%) and White (90.3%). The average age of these offenders on November 1, 2009 will be 41 years.

To better understand the offense conduct of the offenders who appear to be eligible for a sentence reduction, ORD staff analyzed offense-related factors that contributed to the sentence originally imposed for these offenders, the criminal history categories of these offenders, and the extent to which their original sentences were within the applicable guideline ranges. Table 2 displays these factors for the 31 offenders as a group.

¹⁵All three tables include information on offenders who were sentenced under either §§2A3.2 or 2G1.3.

Table 1
Demographic Characteristics of Retroactive Eligible Undue Influence Offenders
FY 2000 through FY 2008

DEMOGRAPHICS	N	Percent
Race/Ethnicity		
White	28	90.3
Black	1	3.2
Hispanic	0	0.0
Other	2	6.4
Total	31	100.0
Citizenship		
U.S. Citizen	28	90.3
Non-Citizen	3	9.7
Total	31	100.0
Gender		
Male	31	100.0
Female	0	0.0
Total	31	100.0
Average Age		
41 (as of November 1, 2009)		
39 (at time of sentencing)		

SOURCE: U.S. Sentencing Commission, 2000-2008 Datafiles, OPAFY2000 - OPAFY2008

Table 2
Guideline Sentencing Characteristics, Criminal History and Position Relative to the
Guideline Range of Retroactive Eligible, Undue Influence Offenders
FY 2000 through FY 2008

CHARACTERISTICS	N	Percent
Average Offense Level	24	
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Specific Offense Characteristics		
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Offender was the parent/relative/legal guardian of the minor, or the minor was in care/custody/control of the offender	0	0.0
Use of computer to persuade/entice minor in prohibited sexual conduct	31	100.0
Offense involved a minor under the age of 12 years	5	16.1
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Criminal History Category		
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I	22	71.0
II	6	19.4
III	2	6.4
IV	0	0.0
V	1	3.2
VI	0	0.0
Total	31	100.0
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Sentence Relative to Guideline Range		
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Within Range	26	83.9
Above Range	2	6.4
Substantial Assistance (§5K1.1)	0	0.0
Other Government Sponsored Below Range	0	0.0
Otherwise Below Range	3	9.7
Total	31	100.0

SOURCE: U.S. Sentencing Commission, 2000-2008 Datafiles, OPAFY2000 - OPAFY2008

B. Extent of Possible Sentence Reduction and Projected Release Dates

As part of its analysis, ORD staff estimated the release date for each offender who appears to be eligible to seek a reduced sentence, provided the documentation received for that offender's case was sufficient to perform this analysis.

1. Methodology for Determining Sentence Reduction and Release Dates

The methodology for this analysis is based on the Commission's Prison Impact Model, which has been in use in some form since the guidelines were first developed. This model is used to estimate the impact of proposed guideline amendments on newly sentenced offenders and to project into the future the impact of those amendments on bed space in the Bureau of Prisons (BOP). For this analysis, those offenders who appear to be eligible to seek a reduced sentence under 18 U.S.C. § 3582(c)(2) were hypothetically "resentenced" with the computer program as if the amended guideline had been in effect in the year in which they were sentenced. Their new sentences were then compared with their original (*i.e.*, actual) sentences to determine the average reduction in sentence length. A new release date for each offender was also calculated in order to determine the year in which each offender would be eligible for release if they were given the full reduction in sentence provided by the guidelines.

In performing this analysis, ORD staff were required to make some assumptions concerning the decisions that courts would make in resentencing the offenders. Of course, these assumptions may not hold in every case. Further, as discussed above, this analysis does not account for the applicability, if any, of the *Booker* decision to 18 U.S.C. § 3582(c)(2) sentence modifications. The analysis accounts only for the application of the reduction provided by Amendment 7 and does not assume any other reduction in the sentence, consistent with §1B1.10. The assumptions are as follows:

- (1) each offender would be resentenced at the same point in the new guideline range as they were when originally sentenced;¹⁶
- (2) offenders sentenced outside the applicable guideline range at the time they were sentenced would be resentenced to a new position outside the amended guideline range that is the same proportional distance above or below the amended guideline range as their original sentence was from the guideline range

¹⁶ Courts are not required to reduce the sentence for any offender seeking such a reduction under the amendment, should it be made retroactive. Courts may also sentence an offender to any point in the new guideline range, and would not be required to impose a sentence at the same point in the new range as it did when first sentencing the offender. For offenders sentenced to a higher point in the new sentencing range than in the original range, the assumption discussed in the text above would overestimate the amount of the offender's sentence reduction. For offenders sentenced to a lower point in the new sentencing range than in the original range, the assumption discussed in the text above would underestimate the amount of the offender's sentence reduction.

in effect at the original sentencing;¹⁷

(3) offenders for whom the new estimated sentence is below an existing mandatory minimum, and where no substantial assistance reduction was applied when the offender was originally sentenced, would be resentenced at the applicable mandatory minimum;¹⁸

(4) the sentence for each offender would be reduced based on the maximum good conduct credit allowed by the BOP; and

(5) offenders would serve the lesser of the newly calculated sentence or their life expectancy.¹⁹

ORD also assumed that: (1) the effective date of the amendment if it were to be applied retroactively to these offenders would be November 1, 2009 (the date the amendment becomes effective for newly-sentenced offenders), and (2) pursuant to 18 U.S.C. § 3582(c)(2), courts applying the amendment retroactively would adhere to the limitations of the extent of sentence reduction outlined in §1B1.10.

¹⁷This assumption may overestimate the amount of sentence reduction and projected release dates for some offenders. Section 1B1.10(b)(2)(B) states that if the original term of imprisonment “constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.” ORD staff has only identified one offender who received “a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005).”

¹⁸ This assumption is likely to underestimate the amount of the sentence reduction and projected release dates for some offenders. Because of limitations in Commission data, the final sentence imposed on offenders who received a reduced sentence pursuant to Federal Rule of Criminal Procedure 35(b) for cooperating with the government after they were incarcerated is unknown. Some offenders who received a resentencing under Rule 35(b) in this manner may currently have a sentence that is below the otherwise applicable statutory mandatory minimum penalty, because the court was authorized to impose a sentence without regard to that mandatory minimum punishment. For these offenders, ORD’s assumption that any resentencing pursuant to the undue influence amendment would be limited by the statutory mandatory minimum punishment would be inaccurate and, therefore, underestimate the magnitude of sentence reduction for some offenders. In such cases, the actual release dates for these offenders would be earlier than the projected release dates used in this analysis.

¹⁹ The Commission’s Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

2. Projected Release Dates

Table 3 shows the projected time remaining in prison as of November 1, 2009, for the 31 offenders who are estimated to be eligible to seek a reduced sentence pursuant to retroactive application of the amendment.

Table 3
Projected Date of Release for Retroactive Eligible Undue Influence Offenders

RELEASE DATE	IF AMENDMENT RETROACTIVE		IF AMENDMENT NOT RETROACTIVE	
	N	Percent	N	Percent
Nov. 1, 2009–Oct. 31, 2010	8	25.8	2	6.4
Nov. 1, 2010–Oct. 31, 2011	9	29.0	6	19.4
Nov. 1, 2011–Oct. 31, 2012	3	9.7	9	29.0
Nov. 1, 2012–Oct. 31, 2013	0	0.0	2	6.4
Nov. 1, 2013–Oct. 31, 2014	1	3.2	1	3.2
Nov. 1, 2014 +	10	32.2	11	35.5
Total	31	100.0	31	100.0

SOURCE: U.S. Sentencing Commission, 2000-2008 Datafiles, OPAFY2000 - OPAFY2008