



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530

July 29, 2014

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Saris:

The Sentencing Reform Act of 1984 requires the Criminal Division to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o) (2006). We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2015. *Notice of Proposed Priorities and Request for Public Comment*, 79 Fed. Reg. 31409 (June 2, 2014).

*The Promise and Danger of Data Analytics in Sentencing and Corrections Policy*

Eleven years ago, Michael Lewis released *Moneyball*,<sup>1</sup> a book describing how Billy Beane, the general manager of Major League Baseball's Oakland Athletics, used what was then considered massive amounts of statistical data to predict the future performance of baseball players. Beane built a winning ballclub by collecting promising players identified by his statistical models who had been passed over by other teams. These players then went on to overachieve at a startling rate. Beane succeeded by replacing the traditional method of evaluating baseball talent being used by most Major League clubs with something new. In the traditional method, older experienced baseball men "scouted" players – watching the players

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<sup>1</sup>MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003). Other commentators have also seen the value of *Moneyball* as a particularly illustrative example of how data analytics can outperform human decision making in all sorts of endeavors. See, e.g., Kate Torgovnick May, *infra* note 2. These include scholars and practitioners who have made the connection between *Moneyball* and criminal justice. See, e.g., Dawinder S. Sidhu, *Moneyball Sentencing*, (July 8, 2014), available at SSRN: <http://ssrn.com/abstract=2463876> or <http://dx.doi.org/10.2139/ssrn.2463876>, Anne Milgram, *infra* note 7.

perform and using their accumulated wisdom and judgment to identify those players who, they believed, would succeed into the future. These scouts were indeed the qualitative experts of baseball at the time. But Beane saw the value in analyzing past performance data in a more sophisticated and rigorous way to dramatically improve the building of a baseball team by more accurately predicting the future performance of players than scouts ever could. Finding value through data, Beane built a winning team at a low cost.

Since the publishing of Lewis' book, there has been an explosion in the use of data analytics to identify patterns of human behavior and experience and bring new insights to fields of nearly every kind.<sup>2</sup> The story of analytics in industry after industry often follows the pattern found in *Moneyball*.<sup>3</sup> The qualitative experts in a field – the wise men and women with years of experience – are outdone by a statistical researcher with little field knowledge, and even less experience, but with a tremendous understanding of modern data analysis. The researcher knows what the wise men and women have a tough time grasping: that an algorithm working on a problem thousands of times faster than traditional methods can bring new understanding of a correlation or sometimes even a specific cause and effect. Scientists have known for some time now that when sufficient information can be collected and quantified, statistical analysis will outperform an individual almost every time. The growth in computing power, storage capacity and statistical and computational methods has brought this reality to new areas of human experience at a growing pace. We have seen the linking of diverse datasets, the deployment of sophisticated analytics and algorithms, and the advancement in knowledge of human behavior applied to everything from marketing to medicine; genomics to agriculture; banking to matchmaking.<sup>4</sup>

In criminal justice, the use of analytics is not new, of course. CompStat, the New York City Police Department's management tool – now replicated and deployed in many other police departments across the country – has, for example, been used for decades to allocate police resources efficiently by mapping where crime has occurred and predicting where and when crimes are most likely to occur in the future.<sup>5</sup> The analytics of policing are evolving steadily and Predictive Policing – the use of algorithms that combine historical and up-to-the-minute crime information to do the work of hundreds of traditional crime analysts and produce real-time targeted patrol areas – is spreading.<sup>6</sup> Judges are also beginning to adopt risk assessment tools

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<sup>2</sup> Kate Torgovnick May, *The Moneyball Effect: How Smart Data is Transforming Criminal Justice, Healthcare, Music, and even Government Spending*, TED: IDEAS WORTH SPREADING (Jan. 28, 2014, 12:26 PM), <http://blog.ted.com/2014/01/28/the-moneyball-effect-how-smart-data-is-transforming-criminal-justice-healthcare-music-and-even-government-spending/>.

<sup>3</sup> See Lewis, *supra* note 1.

<sup>4</sup> See Torgovnick May, *supra* note 2.

<sup>5</sup> See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE & POLICE EXECUTIVE RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013), *available at* <https://www.bja.gov/Publications/PERF-Compstat.pdf>.

<sup>6</sup> See, e.g., Gordon Tokumatsu, *LAPD Rolls Out "Predictive Policing" to Prevent Crime*, NBC LOS ANGELES, (Feb. 11, 2014, 10:39 PM), <http://www.nbclosangeles.com/news/local/LAPD-Rolls-Out-Predictive-Policing-Prevent-Crime-245073541.html>; see also, Wm F. Cody, *Predictive Policing – Law Enforcement's New Cyber Tool*, LAW ENFORCEMENT TODAY (Jan. 15, 2012), <http://www.lawenforcementtoday.com/2012/01/15/predictive-policing-%E2%80%93-law-enforcements-new-cyber-tool/>.

based on data analytics in pretrial hearings. Recently, former New Jersey Attorney General Anne Milgram – who first connected *Moneyball* and criminal justice – together with the Arnold Foundation, developed a “comprehensive, universal risk assessment” tool that is already being used by judges at pretrial hearings in every county in Kentucky.<sup>7</sup>

Similarly, predictive analysis has been part of sentencing and corrections in the United States for many decades. The rehabilitative model of sentencing and corrections, which was at the heart of the creation of the modern penitentiary and which dominated sentencing and corrections policy in the U.S. until the late 20<sup>th</sup> Century, was fundamentally based on predicting future behavior.

After a sentencing judge had imposed a prison term, which sometimes would be set in a range as broad as one year to life, prison and parole officials were expected and instructed to consistently review offenders’ behavior in prison to determine if and when they should be released to the community.<sup>8</sup>

The work of these prison and parole officials – and the goal of the rehabilitative model – was to predict when the offender’s return to the community would be safe for all.

Through the 1960s, the determination of when an offender would be released from prison to the community looked a lot like a team of baseball scouts predicting the future performance of a prospect. It was human analysis: the gathering of bits of data and running them through individual human experience and wisdom to make the assessment – for the release decision by a parole board just as for picking a first baseman by a scout team. Psychological theory and research examined this kind of human analysis and decision making and revealed clear findings that are now, with new and better data analytics, becoming even clearer. First, this kind of complex human decision making is often based on errors, biases and heuristics. Second, decision makers have little insight into their own decision-making processes. And third, statistical models are more accurate and more consistent, and thus fairer, than non-statistical human decision making.<sup>9</sup>

This understanding of human decision making and its limitations compared to actuarial and statistical modeling first led the U.S. Parole Commission to issue guidelines for its release decisions and thus begin transforming the parole function to take advantage of statistical modeling. That Commission created the Salient Factor Score, based on such modeling, to help determine what the Commission called “the parole prognosis,” the likelihood of a parole

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<sup>7</sup> Anne Milgram, *Why Smart Statistics are the Key to Fighting Crime*, TED: IDEAS WORTH SPREADING (Oct. 2013), [http://www.ted.com/talks/anne\\_milgram\\_why\\_smart\\_statistics\\_are\\_the\\_key\\_to\\_fighting\\_crime](http://www.ted.com/talks/anne_milgram_why_smart_statistics_are_the_key_to_fighting_crime); Leila Walsh, *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments*, LAURA AND JOHN ARNOLD FOUNDATION (Nov. 14, 2013), <http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-develops-national-model-pretrial-risk-assessments>.

<sup>8</sup> Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J. L. & Pol’y 151, 159 (2014).

<sup>9</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); R. Barry Ruback and Jonathan J. Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psych. Pub. Pol. And L. 739 (2001).

violation of one kind or another by an offender being considered for release. The Parole Commission understood the superiority of the actuarial model in predicting future behavior and the evenhandedness that would come with using such a model as compared to human decision making. Subsequent research has shown the Salient Factor Score – and later the Sentencing Commission’s own Criminal History Score – to be reliable predictors of post-imprisonment misconduct.<sup>10</sup>

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The sentencing reform movement of the 1970s and 80s replaced the rehabilitative model of sentencing that had been in place from the earliest days of the Republic with a new sentencing framework based on truth-in-sentencing and the idea that a criminal sentence should largely be based on the crime committed. The foundation of the new system was the belief that reducing reoffending was not a task worth pursuing – that nothing worked to change offending behavior – and that excessive discretion in charging, sentencing and parole decisions had led to unwarranted disparities and discriminatory impacts on the poor and people of color. It was thought that certainty in sentencing – certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed – would simultaneously improve public safety by deterring new criminality, and also increase fairness in sentencing by reducing unwarranted sentencing disparities. This new determinate system of sentencing did not depend largely on predicting future behavior, for sentences were based primarily on the offender’s past criminal conduct.

The sentencing reform movement not only brought with it a new framework for sentencing but also led, as we and many others have documented, to an extraordinary increase in the use of incarceration. The Attorney General has written and spoken regularly about the increase in the Nation’s prison population over the last three decades and why, in particular, it is imperative that we control federal prison spending. The Commission’s recent vote to reset guideline offense levels for drug trafficking offenses is an important step to meeting that imperative. We continue to work with Congress and the Commission to find ways to adequately control the federal prison population while simultaneously ensuring public safety.

We have also previously noted how the increase in the prison population led to an explosion in the number of people returning to the community each year from stints in prison.<sup>11</sup> Then-Attorney General Janet Reno and then-National Institute of Justice Director Jeremy Travis recognized this phenomenon in the late 1990s, and much has been done to focus on effectively preparing offenders to return to the community. Various efforts to reduce reoffending have

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<sup>10</sup> E.g., Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States’ Parole Commission’s Salient Factor Score*, 22 J. CRIM. JUST. 477 (1994); see also U.S. SENTENCING COMM’N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104\\_Recidivism\\_Salient\\_Factor\\_Computation.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf).

<sup>11</sup> Annual Report from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, Department of Justice, to Patti B. Saris, Chair, U.S. Sentencing Comm’n (July 11, 2013) (on file with Dept. of Justice, available at <http://www.justice.gov/criminal/foia/docs/2013annual-letter-final-071113.pdf>).

yielded promising results, and legislators, prosecutors, courts, and probation offices around the country are focusing more and more on effective prisoner reentry.

This new focus on reentry has brought with it a renewed need to identify those offenders most at risk for reoffending upon release to the community and to identify the individual needs of those offenders that if effectively addressed could reduce the risk of reoffending. In the federal system, this has taken form, for example, in the Judiciary's implementation of "evidence-based practices" and the deployment of the Post-Conviction Risk Assessment Instrument (PCRA). The PCRA uses information from an offender's past to identify both the risk of reoffending and the needs to be addressed to lessen that risk.<sup>12</sup> Risk and needs assessment instruments like the PCRA are a step in bringing data and the scientific method to corrections. We think there is much to be celebrated about this step.

Moreover, research and experience are showing increasingly that the notion from the 1970s that nothing works to reduce reoffending is simply incorrect. Effective prisoner reentry is eminently possible. However, for many offenders, especially those who enter the criminal justice system with social deficits, limited skills and little family support, reentry is very difficult work. Despite the progress seen in prisoner reentry programs in recent years, recidivism research continues to show unacceptably high rates of reoffending among released offenders.<sup>13</sup> Clearly, there is far more to be done, and we believe the Commission has an important role in supporting research and development work around reentry programs.

In particular, we believe the Commission should support research and development around the use of data analytics in reentry programs. We believe such use has the potential to dramatically improve performance of reentry programs and to transform the work of probation and community supervision. It holds the long term potential to revolutionize community corrections to make it far more effective than it is today and also a far more palatable alternative to incarceration in certain cases.

The deployment of analytics and other information technology in furtherance of reentry can improve risk and needs assessments, but also has the potential to do far more. For example, we believe that properly deployed, analytics and information technology more generally can provide early warnings when an offender is straying from her reentry plan. They can enable faster responses from probation officers to get an offender back on track. They can provide more effective delivery of needed services, the real-time awareness to let probation officers know what's happening on the ground moment by moment, and real-time feedback comparing what's happening relative to what was intended. Effective service delivery combined with swift, certain and fair responses to misconduct – the keys to successful corrections – can be greatly facilitated by these technologies and analytics.

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<sup>12</sup> OFFICE OF PROB. AND PRETRIAL SERV.S, ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT (2011) *available at* [http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA\\_Sep\\_2011.pdf](http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA_Sep_2011.pdf).

<sup>13</sup> PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS (Apr. 2011) *available at* <http://www.pewtrusts.org/en/research-and-analysis/reports/2011/04/12/state-of-recidivism-the-revolving-door-of-americas-prisons>.

We think the role, effectiveness and efficiency of community corrections and individual probation officers could be dramatically reengineered with the use of varied technologies and analytical tools and that recidivism rates can be brought down on the same scale that violent crime has been reduced over the last two decades. Linking diverse datasets, deploying analytics, and applying advances in knowledge of human behavior, we believe, will all be part of that reengineering. As former New Jersey Attorney General Anne Milgram stated, “The returns for better applying technology in criminal justice extend far beyond reducing crime or costs, to something that government officials are sworn to uphold: justice.”<sup>14</sup> The research and development around this potential transformation is something the Sentencing Commission is in a unique position to accomplish, and we think it is something the Commission should have on its agenda.

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While we are excited about the promise of using analytics in risk and needs assessments and otherwise in furtherance of effective reentry, we are troubled by another use of these tools in sentencing and corrections: the increasing role of risk assessment tools in the sentencing phase of criminal cases, specifically in determining how long an individual will be imprisoned for a criminal conviction. As we noted, risk assessments – through the Salient Factor Score – had a prominent place in the federal parole system in place prior to the Sentencing Reform Act and were a major determinant of the amount of time a federal offender served in federal prison for an offense. The Sentencing Reform Act was enacted to reduce the role of such assessments and to base imprisonment terms largely, but not entirely, on the crime committed and proven in court.

In recent years, states are increasingly adding risk assessments to the criminal sentencing process. Pennsylvania<sup>15</sup> and Tennessee,<sup>16</sup> for example, have enacted legislation mandating the use of risk assessments to inform sentencing decisions. Vermont<sup>17</sup> and Kentucky<sup>18</sup> use sex offense recidivism risk instruments in sentencing defendants convicted of sex crimes. For many years now, Virginia has mandated the use of an actuarial risk tool to identify low-risk offenders for diversion from prison for certain criminal convictions and high-risk sex offenders for an increased sentencing range.<sup>19</sup> The Model Penal Code is in the process of being revised to include actuarial risk tools in the sentencing process. The revisions would direct sentencing commissions to –

Develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risk that individual offenders pose to public safety through their future criminal conduct. When these

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<sup>14</sup> Milgram, *supra* note 7.

<sup>15</sup> 42 Pa. Consol. Stat. Ann. § 2154.5 (2009).

<sup>16</sup> Tenn. Code Ann. § 41-1-412(b) (2013).

<sup>17</sup> 28 V.S.A. § 204a(b)(1) (2013).

<sup>18</sup> KRS 17.554(2) (2013).

<sup>19</sup> Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 723 (2011).

instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.<sup>20</sup>

In the federal system, legislation pending in both the House and Senate would make risk assessment once again a major determinant of imprisonment terms served by federal offenders.<sup>21</sup> The legislation would regulate the portion of an imposed term of imprisonment ordered by a court that would actually be served by a federal offender. While the goals of improving reentry programming and efficacy are laudable and while there is much we support in the legislation, we are concerned by these key provisions that would base imprisonment periods to be served on the results of a yet-to-be-created risk assessment instrument that will evolve over time as data analytics develop and make their way into such instruments. We think these provisions – and the larger emerging trends around risk assessments and sentencing – raise many concerns the Commission ought to study and address.

First, most current risk assessments – and in particular the PCRA, which is specifically mentioned in the pending federal legislation – determine risk levels based on static, historical offender characteristics such as education level, employment history, family circumstances and demographic information. We think basing criminal sentences, and particularly imprisonment terms, primarily on such data – rather than the crime committed and surrounding circumstances – is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools. This phenomenon ultimately raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics. Criminal accountability should be primarily about prior bad acts proven by the government before a court of law and not some future bad behavior predicted to occur by a risk assessment instrument.

Second, experience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills. The touchstone of our justice system is equal justice, and we think sentences based excessively on risk assessment instruments will likely undermine this principle.

Third, use of risk assessments to determine sentences erodes certainty in sentencing, thus diminishing the deterrent value of a strong, consistent sentencing system that is seen by the community as fair and tough. Our brothers and sisters in the defense and research communities have repeatedly cited research to the Commission about the value and efficacy of certainty of apprehension and certainty of punishment in deterring crime. Swift, certain and fair sanctions are what work to deter crime, both individually and across society. We know that certainty in sentencing – certainty in the imposition of a particular sentence for a particular crime, and certainty in the time to be served for a sentence imposed – simultaneously improves public safety and reduces unwarranted sentencing disparities. We are concerned that excessive reliance on

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<sup>20</sup> Model Penal Code: Sentencing § 6B.09(2) (Tentative Draft No. 3, 2014).

<sup>21</sup> Recidivism Reduction and Public Safety Act, S.1675, 113th Cong. (2014); Public Safety Enhancement Act, H.R.2656, 113th Cong. (2013).

risk tools will greatly undermine what has been achieved around certainty of sentencing in the federal system.

Determining imprisonment terms should be primarily about accountability for past criminal behavior. While any effective sentencing and corrections policy will take account of future behavior to some extent – incapacitating those more likely to recidivate and utilizing effective reentry efforts to reduce the likelihood of recidivism – we believe the length of imprisonment terms should mostly be about accounting for past criminal conduct. As analytics evolve, we are concerned about the implications of sentencing policy moving away from this precept.

We think the Sentencing Commission's agenda should include the study of risk assessment tools and their various uses in the sentencing and corrections/reentry processes. Following such study, the Commission should issue a statement of policy about the proper role of these instruments in the federal criminal justice system in particular. As analytical tools transform risk assessment instruments, there is great potential for their use, but also great dangers. With the Commission's help, the good can be harnessed, the dangers avoided, and like Billy Beane, we can achieve success – here, increased public safety and greater justice – at far lower costs to all.

### Structural Sentencing Reform

Several years ago, we noted that federal sentencing practice was fragmenting into at least two distinct sets of sentencing outcomes. On the one hand, sentencing outcomes in many courts remain closely tied to the sentencing guidelines. These courts have continued to impose sentences within the applicable guideline range for most offenders and most offenses.<sup>22</sup>

On the other hand, many courts that while still influenced by the sentencing guidelines deviate regularly and significantly from them.<sup>23</sup> These courts regularly impose sentences outside the applicable guideline range irrespective of the offense type or the nature of the offender.<sup>24</sup> In addition, there are certain offense types for which the guidelines have lost the respect of a large number of judges across districts. The most obvious of these offense types is child pornography crimes.

We remain concerned by this evolution of federal sentencing into two separate practices. Most importantly, the research and data make increasingly clear that this divide leads to unwarranted sentencing disparities. More and more, studies are showing that a defendant's sentence will be significantly influenced by the judicial assignment of the case and the particular

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<sup>22</sup> See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 26 (2013) available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table26.pdf>.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at Table 27 available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table27.pdf>.

court that conducts the sentencing.<sup>25</sup> This is quite troubling. In our consideration of federal sentencing policy, we begin from the principle that offenders who commit similar offenses and have comparable criminal histories should be sentenced similarly. This was the foundational principle of the Sentencing Reform Act of 1984. It seems that our federal sentencing system may be meeting this principle less and less.

We continue to believe the Commission should study these diverging practices and, over the long run, consider structural reform of the federal sentencing guidelines to address them. In addition to increasing disparities, the current guidelines structure spurs much needless litigation. This is not surprising, given that the guidelines structure was developed for a different legal framework, when the guideline calculation was intended to be the last word for most cases.

To this end, much can be learned from state sentencing guideline systems. There has been significant research of state guideline systems.<sup>26</sup> As we have stated before, these systems, by and large, differ structurally from the federal sentencing guidelines in that they have simpler sentencing grids, fewer grid cells, and less complex guideline formulas – *i.e.* fewer aggravating and mitigating factors *embodied in rules* for litigators to fight over. Conventional thinking would suggest that a greater numbers of cells with more factors embodied in rules would create a greater number of sets of similarly situated offenders and result in a greater degree of sentencing consistency and meaningful differentiation among offenders.<sup>27</sup> However, the available research and experience suggest that greater detail in the sentencing grid and sentencing formulas does not better sort offenders into more meaningful categories for purposes of sentencing decisions.<sup>28</sup> In particular, our experience with the very detailed federal guidelines, when applied through the legal framework created by *Booker*, has seen quite disparate guideline application and sentencing outcomes. These findings should guide the Commission in its work evaluating unwarranted disparities as much as data on guideline compliance by federal judges. Moreover, we think these findings – along with many other factors – should guide the Commission to consider structural guidelines reform to produce a simpler guideline system.

We continue to believe that a strong and consistent federal sentencing system is important to improving public safety across the country – as it has over the past decades – and to furthering greater justice for all in a cost effective manner. And we further believe that much can be learned from the states, including how a simpler form of sentencing guidelines can improve consistency, reduce unwarranted sentencing disparities, and better allocate sentencing decisions among the stakeholders in the criminal justice system.

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<sup>25</sup> Transactional Records Access Clearinghouse, Surprising Judge-to-Judge Variations Documented in Federal Sentencing, TRACREPORTS (March 5, 2012), <http://trac.syr.edu/tracreports/judge/274/>.

<sup>26</sup> *E.g.*, Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190-1232 (2005).

<sup>27</sup> Wroblewski, *supra* note 11.

<sup>28</sup> *See, e.g.*, BRIAN J. OSTROM, ET AL., NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES (2008).

A strong and effective federal sentencing system is critical to keeping national crime rates low, moving them still lower, improving justice, and addressing specific and acute crime problems.

### Other Priorities

While simultaneously considering systemic reforms, we think the Commission can and must consider evolving and problematic crime-specific, application and reentry issues under the current sentencing guidelines structure.

#### A. Congressional Enactments

One Commission priority for the coming amendment year must be to respond to directives and other enactments from Congress. The Commission is a product of Congress and exercises authority delegated by Congress. Thus, its first priority should be to respond to congressional action. During the amendment year, the Commission should complete work on any congressional pending directives addressing particular guideline areas as well as any other congressional enactments involving criminal law. Below, we note an enactment from 2010 the Commission has not yet addressed, and an enactment from 2002 that the Commission did not address completely.

##### 1. The Small Business Jobs Act of 2010, Contract Fraud Related to the Small Business Administration, and Credits Against Loss

The Commission should amend the guidelines, consistent with the Small Business Jobs Act of 2010 (Act),<sup>29</sup> so offenders who fraudulently obtain federal contracts under small business preference programs serve at least some minimal time in prison. The applicable guideline, §2B1.1 (Theft, Property Destruction, and Fraud), currently directs an insufficient sentencing outcome, steering courts to focus only on the net pecuniary loss involved, which is an inadequate measure of culpability and harm in this context.

Section 2B1.1 measures harm in procurement fraud cases in relation to pecuniary loss. But a recurring theme in the Commission's 2013 Symposium on Economic Crime<sup>30</sup> was that loss is an inadequate measure of culpability in some fraud cases. For this unique crime type, where offenders obtain government contracts by fraudulently certifying they are part of a minority owned firm, there is often no pecuniary loss to any identified victim. There may be no direct impact on the quality of the goods or services provided to the government from these fraudulently obtained contracts. Application note 3(E) (Credits Against Loss) provides that "Loss shall be reduced by . . . the fair market value of the property returned and the services

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<sup>29</sup> Pub. L. No. 111-240, 124 Stat. 2504 (2010).

<sup>30</sup> *U.S. Sentencing Comm'n Symposium on Economic Crimes*, (2013), available at <http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commission-symposium-economic-crime>.

rendered, by the defendant . . . to the victim before the offense was detected.”<sup>31</sup> Thus, application of §2B1.1 in these cases will often result in no loss or in a loss amount that includes only re-procurement costs. As a result, a guideline sentence in cases where small business contractors make material false statements to the government regarding their compliance with Federal requirements such as contract eligibility, but where the government suffers no financial loss because it obtains the contracted-for goods or services, will rarely include even a short prison term. We believe this is insufficient to serve the purposes of punishment.

We also think the current guideline application for these cases is at odds with 15 U.S.C. § 632, which was amended by the Act. Section 632 now provides a presumption that the loss to the United States is to be based on the total amount expended on the contract whenever a small business concern receives a government contract by misrepresentation.<sup>32</sup> The credits against loss provision of §2B1.1 as applied to these cases is inconsistent with the revised statute.

One of the purposes of the Act is to ensure that some government contracts are awarded to small businesses and businesses owned by minorities and disadvantaged persons. When bidders’ obtain contracts by falsely certifying their status, the harm done is to qualifying competitors who were cheated, to the integrity of the Small Business Administration, and to the will of Congress. Allowing fraudsters like these to go virtually unpunished fails the sentencing goals of just punishment as well as deterring this type of fraud and fraud in government contracting more generally.

This type of fraudulent conduct directly undercuts the government’s policy of providing benefits to small firms owned by minorities or disadvantaged persons. Legitimate small business contractors are prevented from obtaining program benefits, and fraudsters benefit from illegal acts, encouraging public contempt for federal programs and for the law generally.

We believe the Commission should take up this issue this amendment year and should amend the guidelines so they recommend that these offenders serve at least some minimal time in prison.

2. Hidden Offshore Bank Accounts and Matching the Statutory Enhancement in 31 U.S.C. § 5322(b) to §2S1.3 (Money Laundering And Monetary Transaction Reporting)

The Commission should also amend the sentencing enhancement at §2S1.3(b)(2) so that it is consistent with the similar statutory enhancement enacted in 2002,<sup>33</sup> by expressly providing that the sentencing enhancement applies if the defendant committed a Title 31 offense “while violating another law of the United States or as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period.” Although §2S1.3(b)(2) was added in 2002 in response to statutory amendments providing for enhanced criminal penalty provisions under 31

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<sup>31</sup> See USSG §2B1.1 comment. n. (3)(E) (Credits Against Loss).

<sup>32</sup> 15 U.S.C. § 632(w)(1) (2012).

<sup>33</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, § 371(c), 115 Stat. 337 (2002).

U.S.C. § 5322(b),<sup>34</sup> the sentencing enhancement omits the statutory language “while violating another law of the United States.”

A top priority for the Department’s Tax Division is combating violations of U.S. tax laws using secret offshore bank accounts. Increased technical sophistication of financial instruments and the widespread use of the Internet have made it increasingly easy to move money around the world. According to reports, the use of secret offshore accounts to evade U.S. tax laws costs the Treasury at least \$100 billion annually.<sup>35</sup> The linchpin of the Department’s Offshore Compliance Initiative is § 5314 (records and reports on foreign financial agency transactions), which obligates U.S. citizens and resident aliens to report financial accounts in a foreign country with an aggregate value of more than \$10,000.<sup>36</sup>

The Tax Division charges violations of § 5314 under § 5322 (criminal penalties), which provides for an increased maximum penalty of a \$500,000 fine and 10 years imprisonment for willfully committing the reporting violation “while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period.”<sup>37</sup> Unfortunately, as explained below, the guidelines in their current form impede the application of this statutory sentencing enhancement to all of the circumstances intended by Congress.

In a typical offshore tax evasion case, a defendant earns income from an offshore account and willfully conceals the existence of the account from the government in order to avoid paying taxes on the income. This conduct violates both the tax laws and Title 31, which governs monetary transactions. Under the guidelines, sentences for tax crimes are governed by Part T of Chapter Two, under which the offense level is generally determined by intended tax loss. In contrast, sentences for violations of 31 U.S.C. §§ 5314 and 5322 are governed by §2S1.3, where the offense level is generally determined by the value of the funds that went unreported. Section 2S1.3 provides a base offense level for a violation of § 5314 of 6 plus the number of offense levels from the table in §2B1.1.<sup>38</sup> Significantly, however, §2S1.3(b)(3) provides that the offense level is reset back to 6 if no §2S1.3 sentencing enhancement applies. The triggering of the reset provision will almost always result in a lower offense level under §2S1.3 than under Part T – the tax guidelines which reach offense level 8 with only \$2,000 in tax loss.<sup>39</sup>

If the funds in the undisclosed foreign bank account were amassed legally and are used for a lawful purpose, the government’s ability to avoid the reset to offense level 6 is largely limited to proving that the enhancement under §2S1.3(b)(2) applies; *i.e.*, that the defendant “committed the [Title 31] offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period.” Although it is the Department’s position that a defendant’s failure to pay tax on the income generated by unreported funds in an unreported foreign account

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<sup>34</sup> See USSG App. C, vol. II, amend. 637, supp. at 244 (2002).

<sup>35</sup> See *e.g.*, Staff Rep. S. Perm. Subcomm. on Investigations, 111th Cong., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE, at 1 (July 17, 2008).

<sup>36</sup> 31 U.S.C. § 5314 (2012).

<sup>37</sup> 31 U.S.C. § 5322(b) (2012).

<sup>38</sup> USSG §2S1.3(a)(2).

<sup>39</sup> USSG §2T4.1(B).

satisfies the “pattern of unlawful activity” requirement – because the conduct would violate both the tax laws and the offshore-account reporting requirement – adding the phrase “while violating another law of the United States” to §2S1.3(b)(2) would remove any ambiguity on that point, thus fulfilling the provision’s purpose of “giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b).”<sup>40</sup> We ask the Commission to amend §2S1.3(b)(2) in this way this amendment year.

#### B. The “Categorical Approach”

As the Commission well knows, one of the most vexing application issues in federal sentencing is determining whether certain prior convictions trigger higher statutory and guideline sentences. We have repeatedly encouraged the Commission to review the terms “crime of violence,” “violent felony,” “aggravated felony,” and “drug trafficking offense” as they are used in federal sentencing statutes and guidelines, and the use of the “categorical approach” to determine whether prior convictions trigger higher statutory and guideline sentences.

Few statutory and guideline sentencing issues lead to as much litigation as determining whether a prior offense is categorically a “crime of violence,” “violent felony,” “aggravated felony,” or “drug trafficking offense.” Although the Supreme Court has employed the murky “categorical approach” to define these terms as they appear in statutes,<sup>41</sup> because of the advisory nature of the guidelines, we believe the Commission is free to simplify the determination within the guidelines manual. The Commission is also well positioned to advise Congress on how to do the same in federal statutes.

The examples of problems caused by the doctrine are countless, and we think this issue should concern the Commission because the categorical approach has led the courts to very inconsistent sentencing results.<sup>42</sup> We do not believe defendants should receive dramatically different sentences simply because of varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States or because of varying drafting conventions among state legislatures. Moreover, Congress, the Commission and the Administration have all made clear that for many crime types, significant imprisonment terms should be reserved for those who are violent, aggravated or repeat offenders. The inability to efficiently and effectively define prior aggravated convictions thwarts this sensible strategy. We are hopeful the Commission’s work will result in a resolution of this problem that will ultimately reduce the resources needed to litigate these cases and increase sentencing consistency.

#### C. Child Exploitation Crimes

The Department shares the Commission’s view that child pornography offenses are serious crimes that have a profound impact on victims and their families. We also agree with the

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<sup>40</sup> USSG App. C, vol. II, amend. 637, supp. at 244 (2002).

<sup>41</sup> See *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); and *Chambers v. United States*, 555 U.S. 122 (2009).

<sup>42</sup> We have noted these inconsistent results for the Commission in the past.

Commission that technological advancements have changed the way offenders obtain and distribute child pornography, so much so that the specific offense characteristics in the current guidelines no longer reliably capture the seriousness of offender conduct, nor fully account for differing degrees of offenders' dangerousness. The Department has repeatedly called for reform of the sentencing guidelines for non-production child pornography crimes, but has stated that such reform must keep the threat offenders pose to children front and center.

Specifically, the Department is hoping to work with the Commission to obtain congressional authority to amend §2G2.2 of the guidelines. As we have detailed before,<sup>43</sup> we believe §2G2.2 (under the current guideline structure) should be amended in a number of ways. For example, we believe an enhancement should be added to account for offenders who, through online communication with others, encourage the sexual abuse or exploitation of a minor, solicit the production of child pornography, or facilitate measures to avoid detection. We also recommend an enhancement for offenders who engage in repeated and long term child pornography trafficking and collecting. The guideline should also account for the sophistication of the offender's behavior, particularly with respect to measures taken to avoid detection or prosecution, such as using anonymizing mechanisms designed to mask an offender's identity online, and encryption, which greatly impedes investigators' ability to gain access to evidence necessary to procure a conviction. These actions demonstrate a level of sophistication and commitment to offending that should play a role in enhancing an offender's sentence.

After undertaking a multi-year examination of sentencing in child pornography cases, the Commission concluded that “. . . the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability.”<sup>44</sup> As a consequence, the child pornography guideline is currently being followed in only about a third of child pornography cases.<sup>45</sup> We urge the Commission to continue its work in this area to resolve this situation as soon as possible.

#### D. Review of Supervised Release Violators

We support the Commission's review of recidivism and reoffending. We reiterate our hope that the review will focus in significant part on the circumstances under which offenders who violate their terms of supervised release have those terms of supervision revoked so that they are returned to federal prison. As we have indicated in the past,<sup>46</sup> innovative work – like the HOPE Program – happening across the country and involving probation and supervision violators, suggests there may be opportunities for public safety improvements and cost savings regarding this group of offenders in the federal system.

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<sup>43</sup> Wroblewski, *supra* note 11.

<sup>44</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at i-xxvi, ii available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive\\_Summary.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Executive_Summary.pdf) (2012).

<sup>45</sup> U.S. SENTENCING COMM'N, *supra* note 22, at Table 27.

<sup>46</sup> Wroblewski, *supra* note 11, at 12.

E. Native American Advisory Group

We previously sent a letter to the Commission requesting that it form a new American Indian Sentencing Advisory Group to study the treatment of American Indian defendants and victims in federal criminal courts. In light of the unique federal jurisdiction in Indian Country and the expanded focus of federal law enforcement on crimes committed there, we believe such an advisory group is critical to further developing trust and confidence in the federal sentencing system and the federal criminal justice system more broadly. An advisory group could make use of various data sources and the Commission's research capacity to identify concerns with federal sentencing in Indian Country and recommend solutions as warranted. We urge the Commission to form such a group this year.

F. Burrage and Causation

The Controlled Substances Act provides for a 20-year mandatory minimum sentence when a defendant unlawfully distributes a covered substance and "death or serious bodily injury results from the use of such substance."<sup>47</sup> The guidelines similarly provide an enhanced penalty, in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking, Or Possession; Continuing Criminal Enterprise), when the "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance."<sup>48</sup>

In *Burrage v. United States*, the Supreme Court interpreted the phrase "results from" in the Controlled Substances Act to require but-for causation between the use of the drug distributed by the defendant and the resulting death or serious bodily injury, where the use of the drug is not an independently sufficient cause of the death or injury.<sup>49</sup> According to Commission data, 83 defendants were sentenced under §2D1.1(a)(2), where the offense established that death or serious bodily injury resulted from the use of the substance, during fiscal year 2012.<sup>50</sup> We believe in most circumstances, when a drug trafficker sells a controlled substance that is a contributing – but not a but-for – factor in the end user's death or serious bodily injury (perhaps because, as in the case of *Burrage*, the user had consumed other drugs that also contributed to the death), the trafficker should still receive some enhanced penalty to account for the death or injury.

To address this issue, the Commission should amend the guidelines to provide additional guidance to courts in sentencing drug offenders who sold drugs involved in the death or serious bodily injury of users both to conform the guidelines with *Burrage* and to ensure appropriate penalties for the serious harm caused by these offenses. This should include an invited upward departure provision to account for the death or serious bodily injury caused when a controlled

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<sup>47</sup> See, e.g., 21 U.S.C. § 841(b)(1)(C) (2012).

<sup>48</sup> USSG §2D1.1(a)(2), which triggers a base offense level of 38 (235-293 months at Criminal History Category I), consistent with the statutory minimum.

<sup>49</sup> *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

<sup>50</sup> See U.S. SENTENCING COMM'N, FISCAL YEAR 2012 DATAFILE, available at <http://www.ussc.gov/research-and-publications/commission-datafiles> (2012).

substance that is a contributing – but not a but-for – factor in the end user’s death or serious bodily injury.

#### G. Definition of “Controlled Substance Offense”

In 2008, the Commission amended the guidelines to clarify that the term “drug trafficking offense” includes “offers to sell” illegal drugs.<sup>51</sup> There has also been litigation over the term “controlled substance offenses” and whether it also includes offers to sell.<sup>52</sup> We believe a similar amendment should now be made to make clear that the term “controlled substance offense” as used in the guidelines includes offers to sell. An amendment clarifying the term in a manner consistent with the 2008 amendment would be appropriate.

#### H. Definition of “Criminal Justice Sentence”

Pursuant to §4A1.1(d), a defendant receives two criminal history points if he commits “the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.” The introductory commentary to §4A1.1 explains the rationale for the adjustment: “Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation” and that a defendant’s “likelihood of . . . future criminal behavior” must be considered.

However, the applicability of the adjustment for offenders who commit the instant offense while already serving a sentence is limited to sentences countable under §4A1.2. In 2007, the Commission amended §4A1.2 to exclude certain misdemeanor offenses from the criminal history score.<sup>53</sup> Defendants no longer receive the two criminal history points under §4A1.1(d) if the instant offense was committed while under a term of probation of exactly one year for misdemeanor convictions for reckless driving, contempt of court, disorderly conduct, disturbing the peace, driving without a license or with a revoked or suspended license, giving false information to a police officer, gambling, hindering or failing to obey a police officer, writing a bad check, leaving the scene of an accident, failure to pay child support, prostitution, resisting arrest and trespassing.<sup>54</sup>

In many cases – including violent crime, firearms and narcotics cases – defendants are serving a term of probation at the time of the federal offense for one of the offenses listed in §4A1.2(c)(1). As the Commission itself has recognized, this fact evidences an increased likelihood of recidivism. Nonetheless, under the current guideline, the two-point increase does not apply.

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<sup>51</sup> USSG App. C, Amendment 709 (Nov. 1, 2007).

<sup>52</sup> See, e.g., *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008) (vacating and remanding a federal sentence because the previous conviction under a Connecticut statute that criminalized offers to sell illegal drugs was not necessarily a “controlled substance offense” under the guidelines); *United States v. Price*, 516 F.3d 285, 288 (5th Cir. 2008) (vacating and remanding a federal sentence because Texas controlled substance offense included a broader range of offenses, including offers to sell, unlike “controlled substance offense” as defined in the guidelines).

<sup>53</sup> USSG App. C, Amendment 709 (Nov. 1, 2007).

<sup>54</sup> See USSG §4A1.2(c)(1).

We believe that anytime a defendant commits a federal offense while serving a period of state parole or probation, that defendant should receive two additional criminal history points to reflect an increased risk of recidivism. We think the Commission should review this issue and consider amending Chapter Four accordingly.

I. Hidden Offshore Bank Accounts Involved in Tax Crimes

In addition to the tax issue discussed above concerning hidden offshore bank accounts and §2S1.3(b)(2) (Money Laundering And Monetary Transaction Reporting), the Commission should also review a separate issue involving hidden foreign bank accounts and §2T1.1 (Income Taxes, Employment Taxes, Estate Taxes, Gift Taxes, And Excise Taxes). By law, U.S. taxpayers are required to report worldwide income from all sources, including income from offshore accounts.<sup>55</sup> Similarly, the law requires a U.S. taxpayer to report to the U.S. Treasury Department his or her foreign accounts with balances in excess of \$10,000 as to which he or she has certain ownership interests and/or control.<sup>56</sup> The use of bank or investment accounts maintained in a tax haven with strict bank secrecy laws is often done less for customary investment purposes (due to low rates of return and high fees) than because it increases the difficulty of U.S. law enforcement agencies to discover the accounts and enforce U.S. laws.

Our national tax enforcement program is enhanced when wrongdoers are appropriately sentenced and those who would contemplate engaging in similar conduct are deterred. Conversely, the program is impaired and tax revenue is correspondingly lost when offshore cases that are criminally prosecuted result in sentences that do not deter continued evasion. We believe in many cases involving offshore accounts, the tax loss will significantly understate the seriousness of the tax offense (as a result of low rates of return and high fees charged in exchange for the secrecy procured).

We propose that the Commission amend the commentary in §2T1.1 to recognize that an upward departure may be warranted where the tax loss, the customary proxy for harm in tax-related cases, substantially understates the seriousness of the offense. A provision patterned after Application Note 19 in §2B1.1 would best accomplish this and be most consistent with the current guideline structure. We propose a new Application Note 8 to §2T1.1 as follows:

8. *Upward Departure Consideration*— There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted.

For example, a defendant who willfully fails to disclose an offshore bank account may have unreported income from the account that is relatively small in comparison with the value of the assets hidden, as a result of low rates of return and high fees charged in exchange for the secrecy procured. In such a case, the tax loss table in §2T4.1 may

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<sup>55</sup> Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 97 (codified as amended in scattered sections of 26 U.S.C.).

<sup>56</sup> 31 C.F.R. § 1010.340 (2010).

produce an offense level that substantially understates the seriousness of the offense. If so, an upward departure may be warranted.

#### J. Economic Crimes

We are pleased the Commission will be continuing its review of sentencing policy for economic crimes and in particular the application of fraud guideline, §2B1.1, over the coming amendment year. While we believe the current guideline recommends appropriate sentences in most cases, we recognize that certain amendments to §2B1.1 may be needed. The Commission's 2013 Symposium on Economic Crime<sup>57</sup> helped to identify discrete and important issues that we believe ought to be addressed this year. We look forward to working with the Commission on these issues in the coming months.

#### K. Evasion of Export Controls

We recommend the Commission amend §2M5.1 (Evasion of Export Controls) in order to conform the guideline to the structure of the export control regime administered pursuant to the International Emergency Economic Powers Act (IEEPA), as well as to address problems created by the inflexibility of the current guideline applicable in IEEPA prosecutions.

The applicable guideline should reflect the range of conduct governed by IEEPA. The Commerce Control List (CCL) administered by the Department of Commerce regulates a range of munitions and dual use items of varying levels of sensitivity, the unlawful export of which may constitute a criminal violation of IEEPA. The CCL regulates many items that are highly sensitive, including items that can be used in nuclear weapons, and controls exports based on important national security and foreign policy interests associated with the sensitivity of the items or the destination countries or end users. The controls also apply to less sensitive items, end uses, and end users. These controls have undergone significant reform under the President's Export Reform Initiative to ensure that the controls are calibrated to the national security and foreign policy interests at stake. In addition, the Departments of State and Treasury also administer controls under the authority of IEEPA, criminal violations of which are captured by this guideline.

The current §2M5.1 does not take full account of this regulatory regime. The current guideline imposes a base offense level of 26 in nearly all cases. A base offense level of 14 is available in very limited instances (when national security controls or countries supporting international terrorism are not involved). For the most sensitive controls, a base offense level of 26 does not capture the seriousness of the conduct. At the same time, the fact that the guideline does not account for the broad range of controls in the CCL has led to a widespread practice of district courts departing or varying from the guidelines. The courts have imposed disparate sentences that undermine the strong policy interest in uniform sentencing, often sentencing defendants at levels that reflect unwarranted departures from the base offense level of 26. This

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<sup>57</sup> *U.S. Sentencing Comm'n Symposium on Economic Crimes*, (2013) available at <http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commission-symposium-economic-crime>.

practice weakens the credibility of the guideline in a range of potential cases, frustrating the government's ability to rely on the guideline to lead to an adequate sentence.

A revised guideline could address these problems by providing a greater range of sentencing levels to better capture the range of export control violations to which the guideline applies. Rather than two base offense levels in the current guideline, we propose three possible base offense levels, with the addition of three specific offense characteristics for three types of aggravating factors. We propose a base offense level of 25 if controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; a base offense level of 22 if other national security controls were evaded, or if the offense involved a financial transaction with a country supporting international terrorism; and a base offense level of 14 in cases where none of these factors applied.

We further suggest three specific offense characteristics: a three level increase if the relevant item, technology or services relates to a WMD program, a weapon, or a military, missile or nuclear end use or end user; a three-level increase if the relevant commodity, technology, software, or service was intended for or facilitated or received by (A) a country, foreign entity or person that is sanctioned or otherwise designated by the Departments of Treasury, State, or Commerce for national security or foreign policy reasons; or (B) a country subject to a U.S. arms embargo; and a three-level increase if the transaction involves more than \$100,000. An application note should specify in addition that if the base offense level of 25 applied for controls relating to nuclear, biological, or chemical weapons or materials, then the specific offense characteristic relating to WMD programs, weapons, or military, missile or nuclear end use or end users would not apply.

The resulting adjusted offense levels for the most serious offenses would be higher than under the current guideline, but the graduated offense level structure would also allow for a lower offense level in cases without the aggravating factors. We believe that a guideline revised in this manner would provide judges with more useful advice and generally promote greater consistency in sentencing.

The addition of a base offense level and the specific offense characteristics would further provide flexibility to allow tailored sentences for defendants who participate in a criminal network. Section 2M5.1 is most frequently used for IEEPA Iranian sanctions offenses and "dual-use" items to China offenses, and some of these networks may be relatively complex, involving actors of differing culpability.

We are continuing to evaluate whether a similar approach is justified as to §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), but the export controls subject to §2M5.2 are significantly different from the controls administered under the CCL. The sensitivity of items on the International Traffic in Arms Regulations (ITAR), violations of which implicate §2M5.2, tend to be more uniform. As part of the Export Reform Initiative, less sensitive items on the ITAR are being moved to the CCL. For these reasons, §2M5.2 does not present the same need for the proposed calibrated structure (and restructuring) we are proposing for §2M5.1.

Circuit Conflicts and Other Court Decisions

We continue to urge the Commission to make the resolution of circuit conflicts a priority for this guideline amendment year, pursuant to its responsibility outlined in *Braxton v. United States*.<sup>58</sup> We also urge the Commission to clarify the guidelines in light of issues identified by the appellate courts in case law.

A. Section 2Q1.2 and Recordkeeping Offenses to Conceal Substantive Environmental Offenses

The Commission should resolve a circuit split concerning the application of §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) when the defendant has engaged in a recordkeeping offense that conceals a substantive environmental offense.

Section 2Q1.2 applies to prosecutions brought pursuant to a host of environmental criminal statutory provisions.<sup>59</sup> When the violation is a "recordkeeping offense," §2Q1.2(b)(5) provides, "[i]f a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense."<sup>60</sup>

Nevertheless, there is a split among the circuit courts of appeals on how to apply §2Q1.2(b)(5). The Tenth Circuit (and a district court in the Seventh Circuit) has held that the enhancements in §2Q1.2(b)(1) - (4) apply to recordkeeping violations regardless of the motive for the violation.<sup>61</sup> In contrast, the Sixth and Second Circuits have held that when the motive is at least in part other than to conceal an environmental violation, those enhancements do not apply.<sup>62</sup> In other words, if a defendant's motive to falsify records or not disclose information as required is motivated by some other factor, such as to save money, to save time, or simple laziness, the enhancements do not apply in the Sixth and Second Circuits even if the result of the

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<sup>58</sup> 500 U.S. 344, 347-49 (1991).

<sup>59</sup> These include, among others, the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act. Section 2Q1.3 is applicable to charges brought pursuant to the same provisions, but generally applies to violations involving other, less hazardous substances. It has a base offense level of 6.

<sup>60</sup> Application Note 1 further defines a "recordkeeping offense" to include ". . . both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed." The Background explains: "The first four specific offense characteristics [§2Q1.2(b)(1)-(4)] provide enhancements when the offense involved a substantive violation. The fifth and sixth specific offense characteristics [§2Q1.2(b)(5)-(6)] apply to recordkeeping offenses." In defining the term broadly, the Sentencing Commission recognized that in the environmental context, recordkeeping violations can have significant repercussions that should be punished consistent with substantive environmental violations that have the same consequences.

<sup>61</sup> See *United States v. Morris*, 85 Fed. App'x 117 (10th Cir. 2003); *United States v. Hagerman*, 525 F.Supp.2d 1058 (S.D. Ind. 2007), aff'd on other grounds, 555 F.3d 553 (7th Cir. 2009).

<sup>62</sup> See *United States v. White*, 270 F.3d 356, 369 (6th Cir. 2001); *United States v. Canal Barge Co., Inc., et al.*, 631 F.3d 347 (6th Cir. 2011) (involving a failure to report a benzene leak on a vessel as required by the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1) (2006), motivated by a desire to avoid delay of vessel's voyage due to unsafe condition); *United States v. Liebman*, 40 F.3d 544, 552 (2d Cir. 1994).

violation is a discharge into the environment, a death, an evacuation, or a disposal without a permit.

At odds with the interpretations of the Sixth and Second Circuits is the recent Supreme Court decision in *Loughrin v. United States*.<sup>63</sup> In *Loughrin*, the Court held that for bank fraud (18 U.S.C. § 1344), the government is not required to prove that the defendant intended to defraud a financial institution, as there is no such requirement in the statute's text.<sup>64</sup> Rather, the government must show merely that a defendant obtained money (or funds, or property, etc.) under the custody or control of a financial institution by means of false or fraudulent pretenses, representations or promises.<sup>65</sup> Requiring more would prevent the statute from applying to cases falling within the clear terms of the statute's language, in the case of bank fraud, third party custodians of bank owned property.<sup>66</sup>

Similarly, in §2Q1.2(b)(5), there is no requirement that the judge must rule out an additional motivation, besides the effort to conceal a substantive environmental offense. More generally, the nation's environment is a precious resource that deserves protection, and we think this interpretation of the guidelines impedes the full protection intended by the Commission and the law. We believe the Commission should resolve this conflict by clarifying that the Tenth Circuit's interpretation is correct as a matter of law and of policy.

#### B. Prior Convictions for Statutory Rape and Sexual Abuse of a Minor

The Commission should also resolve a circuit split concerning the application of a 16-level adjustment under §2L1.2 (Unlawfully Entering or Remaining in the United States) for prior crimes of statutory rape and sexual abuse of a minor. The 16-level enhancement is triggered by a prior felony crime of violence conviction.<sup>67</sup> Application Note 1(B)(iii) defines "crime of violence" to include statutory rape and sexual abuse of a minor.<sup>68</sup> Circuits differ, though, as to whether statutory rape and sexual abuse of a minor require the victim to be under 16 or under 18. The Supreme Court has not taken up this issue, denying many petitions for certiorari entreating the Court to resolve this circuit split and leaving the issue to the Commission.<sup>69</sup>

The Ninth Circuit, relying on the fact that thirty-two states, the federal government, and the District of Columbia have all set the age of consent at 16, has held that the age of consent for

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<sup>63</sup> No. 13-316, 2014 U.S. LEXIS 4306 (U.S. June 23, 2014).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> USSG §2L1.2(b)(1)(A)(ii).

<sup>68</sup> USSG §2L1.2 comment.

<sup>69</sup> See, e.g., *Perez-Mejia v. United States*, No. 13-9150 (June 16, 2014); *Gonzalez-Silva v. United States*, No. 13-5808 (Feb. 24, 2014); *Rodriguez v. United States*, No. 12-10695 (Nov. 4, 2013); see also, e.g., *Quiroga-Hernandez v. United States*, No. 12-10954 (Nov. 4, 2013); *Anaya-Santiago v. United States*, No. 12-8034 (Feb. 19, 2013); *Vera-Gonzalez v. United States*, No. 11-06378 (Jan. 9, 2012); *Mancera v. United States*, No. 10-9053 (June 20, 2011); *Castaneda-Alfaro v. United States*, No. 10-8562 (May 31, 2011); *Martinez v. United States*, No. 10-8558 (May 31, 2011).

the purposes of the “generic, contemporary meaning” of statutory rape in §2L1.2 is 16.<sup>70</sup> The Fourth Circuit has likewise held that the generic definitions of the offense of statutory rape and sexual abuse of a minor require the victim to be younger than 16.<sup>71</sup> In contrast, the Fifth Circuit, relying on Webster’s Dictionary and Black’s Law Dictionary, has held that the generic meaning of “minor” in sexual abuse of a minor is a person under 18 and that the age of consent for statutory rape is defined by local statute.<sup>72</sup>

As a result, in the Ninth and Fourth Circuits, a defendant’s previous conviction under a state statute where the age of consent is seventeen or eighteen or that defines a child as a person under seventeen or eighteen (as at least seventeen states do) would not qualify as a prior crime of violence, whereas in the Fifth Circuit such convictions would qualify.<sup>73</sup>

A related issue is whether both statutory rape and sexual abuse of a minor require an age differential between the perpetrator and the victim. An element of sexual abuse of a minor, under 18 U.S.C. § 2243 (sexual abuse of a minor or ward), is that the victim be at least four years younger than the perpetrator. However, this is not the case in all relevant state statutes.

To our knowledge, only the Ninth Circuit has directly addressed the issue. Relying in part on the definition found in federal law at § 2243, the Ninth Circuit has held that the generic definition of sexual abuse of a minor includes an age difference of at least four years.<sup>74</sup> The Ninth Circuit similarly found a four-year age differential in the generic definition of statutory rape.<sup>75</sup> In contrast, the Fifth Circuit did not mention a requirement of an age differential when holding that the age of consent for statutory rape is that defined by the state statute.<sup>76</sup>

We believe the Commission should resolve all of these issues related to §2L1.2 in the coming amendment year.

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<sup>70</sup> *United States v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007).

<sup>71</sup> *United States v. Rangel-Castaneda*, 709 F.3d 373, 378 (4th Cir. 2013).

<sup>72</sup> *United States v. Rodriguez*, 711 F.3d 541, 561 (5th Cir. 2013) *cert. denied*, 134 S. Ct. 512 (2013) (“We reject the Ninth Circuit’s reliance on this definition of ‘age of consent’ because the Black’s Law Dictionary definition of ‘statutory rape’ states explicitly that the age of consent in the specific context of statutory rape is to be defined by statute.”).

<sup>73</sup> Muddying the waters further, a dissenting judge in the Eighth Circuit questioned whether the majority view is truly representative, given that seventeen states are excluded, including the most populous state California. *See United States v. Viezcas-Soto*, 562 F.3d 903, 914 (8th Cir. 2009) (Gruender, J., dissenting) (“It seems to me that a definition of ‘statutory rape’ that excludes the statutory rape laws of seventeen states, including the most populous state in the Union [California], along with Texas [age of consent 17], New York [17], Florida [18], and Illinois [17], cannot reasonably be classified as ‘generic.’”).

<sup>74</sup> *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156 (9th Cir. 2008); *United States v. Gomez*, 2014 U.S. App. LEXIS 7810, 47 (9th Cir. Wash. Apr. 24, 2014) (“[W]e defined the generic offense of ‘sexual abuse of a minor’ as requiring ‘four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.’”).

<sup>75</sup> *Gomez*, at 50-51. (“The development of our law in this area, as well as the statutory law of other jurisdictions, leads us to conclude that a four-year age difference is an element of the generic offense of statutory rape.”); *see United States v. Caceres-Olla*, 738 F.3d 1051, 1057 (9th Cir. 2013).

<sup>76</sup> *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*).

C. King, Williams, and The Effect of Grouping on Career Offender Predicates

The Commission should resolve an emerging circuit split concerning the effect of consolidated state convictions on whether or not a crime qualifies as a career offender predicate. In *King v. United States*,<sup>77</sup> the Eighth Circuit held that the “concurrent sentence provision” of §4A1.2(a)(2) (Definitions and Instructions for Computing Criminal History) is ambiguous. It found that the provision is subject to two plausible interpretations, and under the rule of lenity, the defendant is entitled to the more favorable interpretation. Under *King’s* construction of §4A1.2(a)(2), a conviction that would qualify as a career offender predicate on its own ceases to qualify if the defendant was simultaneously convicted of another non-predicate offense for which he received a longer concurrent sentence. Thus, in the Eighth Circuit, a prior conviction for armed robbery alone is a predicate felony for career offender purposes, but if the prior conviction for armed robbery is consolidated with a non-predicate offense, for example, drug possession, it would cease to be a predicate felony for career offender purposes if the sentences for the two crimes were ordered to run concurrently and the sentence for the drug possession count was longer.

In *United States v. Williams*, the Sixth Circuit, fully aware of the Eighth Circuit’s view, ruled the opposite way: that the concurrent sentence provision of §4A1.2(a)(2) is not ambiguous, because it says nothing about the scoring of multiple crimes within a single predicate episode.<sup>78</sup> Therefore each of Williams’s previous convictions, including his conviction for fourth-degree fleeing and eluding, independently supported the assessment of criminal history points under §4A1.1(a), (b), and (c) and thus the fleeing and eluding conviction would count as a career offender predicate.<sup>79</sup>

We believe the Commission did not intend an otherwise applicable predicate conviction to be excluded from the career offender calculus by the conviction of an additional crime, and we therefore ask the Commission to clarify the relevant guideline language.

D. Conditions of Supervised Release

In *United States v. Siegel*,<sup>80</sup> the Seventh Circuit, in an opinion by Judge Posner, held that several conditions of supervised release were invalid on vagueness grounds. One of the invalidated conditions – to refrain from excessive alcohol use – is found at §5D1.3(c)(7) of the guidelines and is among a number listed in the guidelines as recommended standard conditions of supervised release.<sup>81</sup> In subsequent cases, the Seventh Circuit has rejected various imposed conditions of supervised release based on the sentencing court’s failure to explain the need for the conditions.<sup>82</sup>

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<sup>77</sup> 595 F.3d 844 (8th Cir. 2010).

<sup>78</sup> No. 12-2108 (6th Cir. June 2, 2014).

<sup>79</sup> *Id.*

<sup>80</sup> 2014 WL 2210762 (7<sup>th</sup> Cir. May 29, 2014).

<sup>81</sup> *See also*, 18 U.S.C. § 3563(b)(7).

<sup>82</sup> *See, e.g., United States v. Benhoff*, 13-2369, 2014 WL 2724650 (7th Cir. 2014); *United States v. Baker*, 13-1641, 2014 WL 2736016 (7th Cir. 2014); *United States v. Farmer*, 13-3373, 2014 WL 2808079 (7th Cir. 2014); *United States v. Johnson*, 12-3229, 2014 WL 2854996 (7th Cir. 2014).

We believe the Commission can and should remedy any vagueness problem in §5D1.3(c)(7), either by amending the guidelines to more specifically address the circumstances that would constitute excessive alcohol use or in the alternative by directing sentencing courts to specify such circumstances. Further, we think the Commission should consider amending the commentary in Chapter Five more generally to direct sentencing courts, in imposing conditions of supervised release, to specifically address the need for the conditions.

### Miscellaneous Issues

#### A. Antitrust Offenses

The Commission has indicated it plans “a study of antitrust offenses, including examination of the fine provisions in §2R1.1.” The American Antitrust Institute (AAI) has previously requested that the Commission re-examine §2R1.1’s 10 percent overcharge presumption and at least double this presumption due to its belief that it significantly understates the gain from cartel activity.<sup>83</sup>

We believe the current §2R1.1 fine provisions, which provide for a base fine of 20 percent of an organizational defendant’s volume of affected commerce, are appropriate.<sup>84</sup> The Commission determined that volume of commerce “is an acceptable and more readily measurable substitute” for damages caused or profit made by a defendant, because antitrust “damages are difficult and time consuming to establish.”<sup>85</sup> The Commission also established the 20 percent proxy for the economic impact of, or loss from, an antitrust offense, based on the estimated average gain of 10 percent and the recognition that loss from an antitrust offense exceeds gain, in order “to avoid the time and expense . . . required for the court to determine the actual gain or loss.”<sup>86</sup> The Commission directed that “[i]n cases in which the actual . . . overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.”<sup>87</sup>

Based on current evidence, the Department believes the typical cartel does increase prices more than 10 percent, but the actual average overcharge is subject to debate. Very recent literature concludes that the accumulated evidence points to a lower average overcharge than the AAI presumes, although still greater than 10 percent.<sup>88</sup> We do not believe it would be a

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<sup>83</sup> Letter to the U.S. Sentencing Commission from The American Antitrust Institute, (July 8, 2013), *available at* <http://www.antitrustinstitute.org/sites/default/files/USSCAAILetter.pdf>.

<sup>84</sup> USSG §2R1.1(d)(1), 8C2.4(b).

<sup>85</sup> USSG §2R1.1, comment. (backg’d.).

<sup>86</sup> USSG §2R1.1, comment. (n.3).

<sup>87</sup> *Id.*

<sup>88</sup> Marie-Laure Allain, Marcel Boyer & Jean-Pierre Ponssard, *The Determination of Optimal Fines in Cartel Cases: Theory and Practice*, 4 CONCURRENTS 32, (2011); Marcel Boyer & Rachidi Kotchoni, *How Much Do Cartels Overcharge?* (Toulouse School of Economics, Working Paper TSE-462, 2014).

worthwhile expenditure of resources to put any process in motion to increase the 10 percent presumption marginally. The current guidelines already provide a mechanism to increase fines by imposing fines higher in the guidelines range. By sentencing a defendant at or near the top of a defendant's guidelines range, a court can impose a sentence that accounts for overcharges well in excess of the 20 percent figure proposed by the AAI. Thus, even if the Commission were to adopt the AAI's proposal, it would have only a marginal impact on our ability to adequately deter, detect and punish cartel offenses.

Any reconsideration of the guidelines' approach to antitrust fines should also not lose sight of the general deterrence rationale of the antitrust guideline. The purpose of antitrust fines and jail sentences and the antitrust guideline is to deter antitrust offenses through a predictable, uniform methodology. Closely tying antitrust penalties to a defendant's attributable volume of commerce necessarily promotes the twin goals of certainty of punishment and proportionality of punishment. The deterrence rationale for penalties means that proper sentences are only loosely related to the actual harm from offences. The level of the penalty necessary to deter relates to the *expected* gain from offending at the time the decision whether to offend is made.

We would be happy to address any additional issues of interest to the Commission regarding antitrust fines.

B. Cyberstalking, Violence and Extortion by Proxy, Hacking of Personal Social Media and Extortion, and the Statutory Index for Convictions Under 18 U.S.C. § 1030

We believe the guidelines' statutory index should be amended so that convictions under 18 U.S.C. § 1030 (Fraud and Related Activity in Connection with Computers) are considered under the guideline for stalking, §2A6.2, in addition to the guideline for theft and fraud, §2B1.1. We believe the fraud guideline is inappropriate and inadequate when the offense behavior involves cyberstalking and related conduct. As the digital age continues to evolve, so have online threats. These threats are variously described as cyberstalking, violence and extortion by proxy, hacking of personal social media, "sextortion," and "revenge pornography." In a recent case, for example, perpetrators hacked into a victim's email, Facebook, and other social media accounts, found compromising pictures and videos, then used these files to extort nude and otherwise compromising pictures and videos of the victim and to gain access to the accounts of others, and do the same thing to them.<sup>89</sup>

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<sup>89</sup> In *United States v. Kazaryan*, No. 13-56 (C.D. Cal. Feb. 25, 2013), the defendant hacked into hundreds of victims' email, Facebook and Skype accounts. He then methodically searched these accounts for nude pictures of the victim, passwords, and contact information of the victim's friends. Once he had access to an account, he would take over the account and pretend to be that person to her friends. He would persuade the friends to show him sexually explicit pictures of themselves and to provide other information that he then used to obtain access to their accounts. He would then return to original victims in the guise of another victim's account, extorting additional sexually explicit pictures and videos. If the victims hesitated at all, he posted previously obtained pictures publicly, causing the victims to receive calls from other friends about how their entire friend network could now see them naked. There were 370 victims. Those targeted most seriously characterized the experience as devastating, akin to rape, with the harm ongoing.

Unless interstate communications are demonstrably involved, such defendants are usually charged with computer hacking under 18 U.S.C. § 1030. Unfortunately, the applicable guideline under Appendix A, §2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit), is not designed to address this kind of cyberstalking and related conduct. Although Application Note 20(A)(ii) contemplates an upward departure where the offense “caused or risked substantial non-monetary harm,” sentences usually fail to reflect the tremendous harm done to the victims. We ask that the Commission to review these cases and consider amending the Appendix A so that convictions under 18 U.S.C. § 1030 are also referenced to the guideline for stalking, §2A6.2.

Conclusion

The policy agenda we suggest here is substantial. The range of issues represents the range of the Commission’s statutory responsibilities, including overseeing the systemic health of the federal sentencing system and its structural elements, addressing individual guidelines in need of reform, resolving circuit conflicts, and more. We look forward to discussing all these issues with you and the other Commissioners with the goal of refining the sentencing guidelines and laying out a path for developing effective, efficient, fair, and stable sentencing policy long into the future.

Under the leadership of the Attorney General, violent crime rates continue to fall and are now at generational lows. Our goal is to continue to improve public safety while ensuring justice for all by means of the efficient use of enforcement, judicial and correctional resources. We appreciate the opportunity to provide the Commission with our views, comments, and suggestions.

Sincerely,



Jonathan J. Wroblewski  
Director, Office of Policy and Legislation

cc: Commissioners  
Kenneth P. Cohen, Staff Director  
Kathleen Cooper Grilli, General Counsel