U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530*

July 24, 2015

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

Dear Chief 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.[1] 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, 2016.[2]

Strengthening the Bipartisan, Cross-Branch Partnership
So Needed Reforms to Federal Sentencing Can Be Enacted

Federal sentencing policy is a partnership between the three branches of government. It is embodied in criminal statutes crafted by Congress that define the minimum and maximum penalties associated with each federal crime; in sentencing guidelines developed by the Sentencing Commission within a congressionally-mandated legal framework and exercising delegated authority; in policies of the Attorney General and the judgment of federal prosecutors applying the laws, guidelines and policies, employing traditional Executive discretion and ensuring that the laws are faithfully executed; and in individual judicial decisions balancing facts, law and guidance relevant to individual cases.

For the last six years, we have seen the partnership in policy between Congress, the Administration, the Sentencing Commission, and the Federal Judiciary grow, with new advocacy and implementation of important reforms to federal sentencing and corrections policy. The Commission has played a leading role, using its data, analysis and expertise to identify critical flaws in current federal sentencing policy which clash with the consensus goals of sentencing:

[1] 28 U.S.C. § 994(o) (2006).
[2] Notice of Proposed Priorities and Request for Public Comment, 80 Fed. Reg. 36594 (June 25, 2015).

consistency, proportionality, parsimony, accountability, crime control, and simple just punishment. As importantly, the Commission has been united, in both identifying problems and crafting solutions, catalyzing the development of the emerging bipartisan, cross-branch consensus that a fairer, stronger and more just sentencing system can be found.

We think the Commission's chief priority for the coming year should be to develop further this partnership in policy and the growing consensus in order to achieve systemic reform. We think to do this – to address both structural and crime-specific flaws in federal sentencing and unify stakeholders around solutions – will be challenging and time-consuming, as different constituencies continue to come at these issues with different perspectives and different parochial interests. The Commission's role, at least more recently, has been to bridge the perspectives and help facilitate compromise and agreement around shared goals, national interests and rational, data-driven analysis. The opportunity and imperative exist now for the Commission to forge agreement on a wider, systemic scale.

A systemic reform project, which will require much of the Commission's focus, would lead to a design for a sustainable and more effective and just sentencing system – in both statutes and guidelines – and one that would be recognized as such by all constituencies. The elements of such a design would be – 1. statutory minimum and maximum penalties that are more proportional, that are not unnecessarily severe and that promote consistent rather than haphazard application; 2. a new, simpler set of sentencing guidelines that will better align the sentencing process with the legal framework announced by the Supreme Court in *Booker v. United States*, and better achieve the goals of the Sentencing Reform Act; and 3. statutes and guidelines that carry severity levels that will, as a whole, keep the federal prison population within the current prison capacity and budget constraints, so that resources can be allocated in a more balanced way to maximize both public safety and justice.

The design will not be something that will be implemented in a year or two; it will take research, development, diplomacy and advocacy for years to come. But such a design is desperately needed, as criminal justice stakeholders struggle with piecemeal reforms and the application of those reforms, prospectively and retrospectively, while trying to address serious and ever-changing crime challenges facing the country.

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The Commission has clearly documented how the operation of federal sentencing policy – as to both specific statutory provisions and the federal sentencing guidelines – is increasingly failing to achieve the goals of sentencing reform and why changes in federal sentencing policy, both structural and crime-specific, are needed. While some reforms have already been implemented, fundamental flaws remain.

In its multiple reports on federal cocaine sentencing, the Commission exposed the unwarranted disparity – embodied in statutes and guidelines – between crack and powder cocaine sentencing policy and the corrosive impact on trust and confidence in criminal justice

that disparity was producing.[3] In the first months of the Administration, Assistant Attorney General Lanny Breuer and Sentencing Commission Acting Chair Judge Ricardo Hinojosa testified before the Senate Judiciary Committee in support of reforming the crack/powder disparity,[4] and the analysis and advocacy of the Commission, the Judiciary, the Administration and non-governmental organizations led directly to the enactment of the Fair Sentencing Act. The Commission's subsequent amendments to the sentencing guidelines implementing the Act, and later application of those amendments retroactively to thousands of imprisoned offenders, were supported both by the Judiciary and the Department of Justice and have made an important contribution to reform and justice.

In its report on child pornography sentencing, the Commission recognized the flawed system of aggravating factors that currently make up the sentencing guidelines for most child pornography offenses.[5] The Commission has documented how the guidelines for these offenses are not working to provide consistent and just sentences and to meaningfully differentiate the aggravated offenders from the less culpable offenders.[6] The Department of Justice has supported the Commission's work in this area and has advocated in Congress for legislation to give the Commission authority and direction to reform sentencing policy for these offenses. Nonetheless, the flaws persist.

In its report on mandatory minimum sentencing statutes and the decision to reduce guideline sentences for drug offenses based on drug type and quantity,[7] the Commission documented how unnecessarily severe sentences for non-violent drug offenses were crowding out other critical public safety investments and how reductions in drug sentencing severity could simultaneously facilitate greater public safety and greater justice. The Department, the Judiciary and most Members of Congress supported the Commission's guideline reforms, including its decision to apply the reductions retroactively. Prosecutors, defense attorneys and the courts are implementing these changes now, with measurable results. But as both the Commission and the Attorney General have stated, the guideline changes enacted will have insufficient impact on

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[3] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. Sentencing Comm'n, *Racial, Ethnic, and Gender Disparities in Federal Sentencing Today*, *in* Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 113, 130-33 (2004), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap4.pdf.

[4] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. On Crime and Drugs of the Senate Comm. on the Judiciary*, 111th Cong 90, 130 (2009) (statement of Lanny Breuer, Assistant Att'y Gen. of the United States) (statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Commission).

[5] U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

[6] *Id.*

[7] U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

controlling the federal prison population, and legislation will be required to fully address unnecessary sentencing severity for non-violent drug offenses. The Commission has also documented the disproportionate and unnecessarily severe mandatory minimum statutes that exist in other areas and that similarly demand a legislative response.

The Commission has repeatedly heard from courts and practitioners how determining whether a prior conviction is a predicate "crime of violence," "violent felony" and "aggravated felony" under federal laws and the guidelines is one of the most vexing application issues in federal sentencing. 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," or "aggravated felony." And now, with the Supreme Court's decision in *Johnson v. United States*,[8] the litigation will spike. Congress, the Commission and the Administration have all made clear that for many crime types, significant imprisonment terms are appropriate, and should be reserved, for violent offenders and aggravated repeat offenders. The ability to adequately define what qualifies as a prior aggravating conviction is necessary to achieve this sensible crime and sentencing policy. We believe the Armed Career Criminal Act, the Career Offender provision of the guidelines, and perhaps other statutes and guidelines will need to be changed to achieve this sensible policy for dangerous, repeat offenders in a manner that meets constitutional requirements and policy objectives.[9] Moreover, we strongly believe that statutory and guideline provisions should be reformed to work together in an efficient and effective way. The Commission has a critical role to play in all these efforts this year.[10]

In its report on the impact of *Booker v. United States*,[11] the Commission recognized the disconnect between the legal structure left in the wake of the Supreme Court's new Sixth Amendment jurisprudence and the structure of the federal sentencing guidelines, which was crafted in a different legal context and based on different legal assumptions. In previous annual reports to the Commission, we have noted this disconnect and the fact that federal sentencing practice is fragmenting as a result, with sentencing outcomes in some courts closely tied to the sentencing guidelines,[12] and sentencing outcomes in others not; with courts accounting for

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[8] *Johnson v. United States*, No 13-7120 (U.S. June 26, 2015).

[9] Armed Career Criminal Act, 18 U.S.C. § 924 (1984); U.S. Sentencing Guidelines Manual §4B1.2 (2009); U.S. Sentencing Guidelines Manual §§2L1.1-2.2 (2014).

[10] Last year, the Department proposed to the Commission the elimination of the categorical approach in determining crime of violence and related predicate crimes in the guidelines for three reasons. First, in the absence of legislative change, a non-categorical approach is consistent with congressional directives that some recidivists deserve longer sentences than others because of the nature and severity of their prior convictions. *See* 18 U.S.C. §§ 924, 922; 8 U.S.C. § 1326. Second, a non-categorical approach supports the essential, post-*Booker* purpose of the guidelines – that is, to ensure that sentence is imposed based upon the defendant's individual history, personal characteristics and prior conduct. *See* 18 U.S.C. § 3553(a). Third, a non-categorical approach results in simpler, predictable sentencing enhancements for prior convictions involving the use of force against, and the causation of bodily/physical injury to, innocent persons. We believe the Commission should consider this proposal in addressing the *Johnson* case this year.

[11] U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf.

[12] We believe the Commission's methodology for reporting within- and non-guideline sentences masks the actual variation in guideline sentences imposed by courts around the country. Using a different methodology to isolate

offender characteristics in widely varying ways; and with fundamental policy disagreements among the Judiciary leading to dramatically different sentencing results between judges in the same district, between districts, and between circuits.[13]

We remain concerned by the continuing transformation of federal sentencing into sets of varying practices with disparate outcomes. The research and data make increasingly clear that unwarranted sentencing disparities are growing in the federal system. Statistical evidence increasingly shows that a defendant's sentence will be significantly influenced by the circuit in which the offense occurred and the judicial assignment of the case.[14] 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.[15] It seems that our federal sentencing system is effectuating this principle less and less.

Moreover, the complexity of the current guidelines system, while perhaps a necessity at a time when the guidelines operated within its original legal framework, now leads to unnecessary and gross inefficiency. The multitude of aggravating factors in the current Guidelines Manual often requires complex factual and legal decision-making, subject to *de novo* appellate review; but that process oddly is then followed by a free-floating and wide-open § 3553(a) analysis subject to deferential appellate review. It is a structure no one would have designed and that leads to a large appellate workload of marginal value, something we have heard repeatedly from appellate judges and appellate lawyers across the country.

It would be one thing to keep the current guideline structure if there were no knowledge of or experience with other sentencing guideline structures. But as the Commission well knows, this is not the case. The state experience with sentencing guidelines is one that differs dramatically from that of the federal system. There has been much research of these state

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judicial decision making around the guidelines, one that eliminates from the analysis cases involving substantial assistance departures, early disposition programs, or a guideline minimum of zero months (as to which judicial decision to vary downward from the guidelines is precluded and thus not relevant to measuring judicial decisions to sentence within the guidelines) we find many districts that sentence within the guidelines in less than a quarter of all cases and others that sentence within the guidelines more than 70% of the time. We suspect that looking at this data judge-by-judge would reveal even more troubling results.

[13] *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.

[14] *See, e.g.,* Transactional Records Access Clearinghouse, *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, TRACREPORTS (March 5, 2012), http://trac.syr.edu/tracreports/judge/274/. *See also* U.S. Sentencing Comm'n, *Booker Report, Part A* (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf#page=55 (showing the influence of the guidelines varying by circuit, that "sentencing outcomes increasingly depend on the district in which the defendant is sentenced," and that "Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since *Booker*, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.").

[15] "A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983).

sentencing guideline systems.[16] They differ structurally from the federal sentencing guidelines, utilizing 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 – with sentencing judges given substantial discretion to account for case-specific aggravating and mitigating factors. These simpler structures have been embraced by leading scholars, the American Bar Association, the Constitution Project and many others. They are best practice and should be the basis for reform of the federal sentencing guidelines.

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We continue to believe that a strong, consistent and balanced federal sentencing system is important to improving public safety across the country and to furthering justice for all in a cost-effective manner that preserves sufficient resources for other critical public safety investments. The Commission itself has identified the structural and crime-specific flaws in federal sentencing policy that are getting in the way of achieving these goals. Some reforms have been achieved, yet the fundamental problems clearly remain.

We believe the Commission should devote most of this amendment year to crafting a blueprint for a restructured federal sentencing system that would show – in specific and concrete terms – the way to rectify the fundamental flaws of the current system. In doing this work, the Commission should continue its dialogue with Congress, the Executive Branch, the Judiciary and all criminal justice stakeholders. By doing so, the blueprint will lay the groundwork for legislation and subsequent guideline changes that could create a more sensible and sustainable federal sentencing system for years to come. The blueprint would include:

- **A proposal for a restructured and simpler sentencing guidelines system and the proposed legislation needed to put such a system in place.** State guideline experience should guide Commission considerations of federal reforms. Given the current legal framework, we believe a new, simpler guideline system would better guide judicial decision-making and reduce needless litigation and unwarranted disparities in federal sentencing.

- **Proposed legislation to reform mandatory minimum sentencing statutes.** The Commission's report on mandatory minimum sentencing statutes identified a number of provisions that lead to unnecessarily severe and disproportionate sentences and also inconsistent application and unwarranted disparities. We agree with the Commission as to many of the identified provisions, and we think the blueprint should include proposed legislation to reform those provisions.

- **Proposed legislation to reform the Armed Career Criminal Act and the Career Offender provision of the guidelines.** The Supreme Court has made the reform of the Armed Career Criminal Act and the Career Offender provisions a necessity. We think

[16] *E.g.*, Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum. L. Rev. 1190-1232 (2005).

reformed provisions should be crafted in a consistent way that make application as simple as possible and that embody sensible sentencing policy that ensures enhanced, incapacitative sentences for repeat, dangerous, violent offenders.

- **Proposed legislation giving the Commission authority and direction to reform the sentencing guidelines for child pornography offenses.** 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 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. 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."[17] As a consequence, the child pornography guideline is currently being followed in only around one quarter of child pornography cases.[18]

- **An analysis of sentence severity that would, (1) identify those crime types where current law and guidelines lead to unnecessary or insufficient sentencing severity; and (2) describe how federal sentencing should be reformed to properly control the federal prison population.** In the last two years, the Commission has concluded that some aspects of federal sentencing policy lead to unnecessarily severe sentences in most cases – *e.g.*, drug crime – while others do not – *e.g.*, economic crime. The Commission should assess and identify clearly where it believes excessive severity remains a problem and where it does not and describe in detail how to remedy unwarranted severity.

We believe this comprehensive reform project can help shape federal sentencing policy for years to come and can drive reforms that will lead to federal sentences that far better achieve equal justice under law, improve public safety, and that are more just for all. Moreover, we think the Commission is uniquely situated to strengthen the partnership in policy between the branches and among the criminal justice stakeholders that will enable our political system to make these reforms a reality and sustainable. We think this should be the Commission's focus for the coming year.

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[17] U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses*, *supra* Note 5 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.

[18] *Sourcebook of Federal Sentencing Statistics*, *supra* note 13, at Table 27.

Other Priorities Including Miscellaneous Issues

If the Commission does set out to develop a blueprint for systemic and crime-specific reforms, we recognize it will need to limit the more granular guideline amendment issues it can consider during this amendment year. However, 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 directives addressing particular guideline areas as well as any other congressional enactments involving criminal law.

In addition, within the limits of the Commission's capacity to address crime-specific and more granular guideline amendments, we urge the following issues be reviewed and addressed.

A. Immigration

The Commission has listed the study of sentencing policy for immigration offenses among its proposed priorities. If the Commission does indeed focus on this area, we would renew our request, first sent to the Commission last year in a letter from then-Deputy Attorney General James Cole, to include a review of the sentencing guidelines for alien smuggling offenses. We continue to believe the guidelines provide for inadequate sentences for alien smugglers, especially those who smuggle unaccompanied minors. These smugglers often treat children as human cargo and subject them to a multitude of abuses throughout a long and dangerous journey, including sexual assault, extortion, and other crimes. We also believe the current guidelines, which limit the definition of a minor to those 15 years of age or younger, ought to be changed to provide enhanced penalties for all cases involving minors, including 16- and 17 year-old unaccompanied minors.

B. 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*, 500 U.S. 344, 347-49 (1991).

C. Hash Oil Manufacturing

We believe the Commission should amend §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) to provide enhanced penalties for hash oil manufacturing that results in serious bodily injury and property damage in a manner similar to what the guidelines currently provide for the manufacture of methamphetamine and amphetamine when it endangers human life.[19]

[19] *See* USSG §2D1.10(b)(1)(A).

With increasing recreational and medical marijuana use across the country, there has been a related increase in a process to extract tetrahydrocannabinol (THC) into so-called "hash oil," from marijuana. There is a growing demand for new ways of obtaining a stronger high from marijuana's active ingredients, beyond simply smoking its plant material. Hash oil, also known as "Butane Honey Oil" (BHO), is a product with a significantly higher potency than most smoked marijuana and is created in a dangerous process with the use of butane.[20] While not a new development (hash oil extraction has been known to exist back at least to the mid-1990s), its popularity has recently increased sharply. According to the 2014 National Drug Threat Assessment Summary, THC concentration in marijuana is around 12%, while the average concentration of THC in BHO is on average 52 percent.[21]

BHO is typically a waxy, oily substance, usually yellow in color. It can be vaporized ("dabbed"), allowing the user to inhale the concentrated active THC. It is also easily added to foods, creating "edibles" (or so-called "medibles" in the medical marijuana context).

BHO can be made using a number of different processes. However, the most common method – and unfortunately, the most dangerous – involves packing a cylinder with marijuana plant material, and injecting (often referred to as "shooting" or "blasting") butane through the cylinder. The manufacturer typically uses the parts of the marijuana plant that are not appealing to traditional smokers, which allows the grower to monetize the parts of the plant that were often previously discarded.[22] Butane is a gas, but is heavier than air, so it flows downward through the cylinder and turns into a liquid, dissolving the cannabinoids/THC, and then flowing out of the bottom of the cylinder. The manufacturer boils off the butane (often by using a hot water bath, somewhat like a double boiler), leaving behind the concentrated BHO. The resulting substance is referred to by a number of slang terms, including "BHO," "honey oil," "dabs," "wax," "shatter," and other terms.[23]

This manufacturing process can be extremely hazardous. Butane is highly flammable, odorless, colorless and heavier than air. Once released, it can seep into low-lying areas and remain for a significant period of time. When butane is sufficiently concentrated, any spark or other ignition source can cause a significant explosion. Butane comes in canisters in a pressurized and compressed form. If an explosion occurs during the process, any unused butane canisters nearby can result in serious secondary explosions.[24]

As this activity has spread over the last year or so, there have been a number of serious and damaging explosions around the country.[25] Most of the explosions result in property

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[20] *United States v. Schultz*, 14 CR 00232 JLR (W.D. Wash. 2014) (Document 74). The Schultz case involved a BHO explosion which occurred on November 5, 2013. One woman, who was not involved in the criminal enterprise, was killed, another victim was permanently injured, and millions of dollars of property damage resulted.
[21] Drug Enforcement Administration, National Drug Threat Assessment Summary, 25-28 (2014), *available at* http://www.dea.gov/resource-center/dir-ndta-unclass.pdf.
[22] *Schultz*, 14 CR 00232 JLR.
[23] *Id.*
[24] *Id.*
[25] *See, e.g., United States v. Meiser*, 14 CR 00233 JCC (W.D. Wash. 2014). This case involved an explosion which occurred on January 1, 2014, in Kirkland, Washington, and resulted in property damage in the amount of

damage and serious bodily injury, and occasionally fatalities. Most of the people injured are the manufacturers themselves, although there have been a number of instances where innocent bystanders (including children) have been harmed.[26]

The Drug Enforcement Administration (DEA), state and local law enforcement, and reports from other government entities indicate that manufacture and abuse of marijuana concentrates is increasing throughout the United States. For example, in the first six months of 2014, the High Intensity Drug Trafficking Area (HIDTA) component of the Office of National Drug Control Policy confirmed approximately 26 explosions and 27 reported injuries from the manufacture of BHO in Colorado alone. The number of confirmed explosions in just the first six months of 2014 was more than double the total reported to the HIDTA in all of 2013. Similarly, the San Diego Narcotics Task Force seized approximately 30 hash oil extraction laboratories in San Diego County in 2013, and 12-15 of those laboratories were identified after an explosion or fire. The United States Attorneys' Offices from the District of Colorado, Western and Eastern Districts of Washington, District of Oregon, and the Northern, Southern, and Central Districts of California all report an increase in hash-oil-related explosions in 2014.

The production of hash oil often does not involve the quantity of marijuana that would trigger an appropriate offense level in the guidelines commensurate with the serious bodily injury and property damage caused by the hash oil labs. In recent years, the Commission has trended away from a quantity-based methodology in calculating appropriate sentences and towards emphasizing aggravating factors listed in specific offense characteristics. For example, the Commission amended the guidelines in 2014 to provide a two-level increase for certain defendants involved in marijuana cultivation operations on state or federal land or while trespassing on tribal or private land. The Commission passed this amendment while concurrently revising the base offense levels downward in the Drug Quantity Table in §2D1.1. Our proposal here fits within this paradigm shift.

Of note, sentencing courts have themselves found the guidelines inadequate in accounting for hash oil labs. One court noted that ". . . the advisory guideline range did not contemplate or account for the horrific explosion, destruction of property, death, and serious personal injury that this offense created."[27] Section 2D1.10 currently provides for a three-level increase above the offense level in the Drug Quantity Table, and a floor of 20, for endangering human life when illegally manufacturing a controlled substance, and an additional three-level increase when the manufacturing involves amphetamine or methamphetamine (§2D1.10(b)(1)(A)). We suggest amending the guidelines by adding a specific offense characteristic in §2D1.10 to guide sentencing courts to a more appropriate sentence reflective of the individual conduct that will serve as an adequate deterrent to others and without regard to the specific controlled substance involved. We believe if a manufacturing operation caused an explosion resulting in property damage, the offense level should be increased by two (above the base offense level); if it caused

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[26] *Id.*
[27] *Schultz*, 14 CR 00232 JLR.

an explosion resulting in bodily injury, by four, with a minimum offense level of 30; and if it caused an explosion resulting in death,[28] by six, with a minimum offense level of 35.

D. Animal Fighting

We support the Commission's decision to make a priority the study of animal fighting offenses. In order to strengthen national efforts to deter and punish this activity and protect the vulnerable, we recommend the Commission consider creating a new guideline for animal welfare offenses.

There are several federal statutes[29] that criminalize the mistreatment of animals in a variety of contexts, including dog-fighting, breeding operations, and slaughterhouses. Some animal welfare offenses (*e.g.*, dog-fighting) are committed by highly organized interstate criminal enterprises and involve an array of criminal activities that threaten public safety; while other offenses (*e.g.*, creating animal crush videos) invoke very serious concerns of abuse and violent crime. At their core, the federal animal welfare laws reflect a national policy to ensure the humane treatment of animals. However, this important federal policy is not adequately addressed in the current sentencing guidelines. Some of the animal welfare statutes have no applicable guidelines at all, while the remainder are governed by guidelines that provide for sentences that are grossly deficient.

For example, neither the Animal Welfare Act nor the Horse Protection Act are referenced to any guideline. While sentences under the Animal Fighting Venture Prohibition Act are guided by §2E3.1, that guideline has a base offense level of only 10 for animal fighting, with no enhancements regardless of the number of animals involved, whether death resulted, whether the fighting was for profit, or the extent and purposefulness of injuries (although a possible upward departure is mentioned in the Application Notes for "extraordinary cruelty"). The Humane Methods of Livestock Slaughter Act is referenced to §2N2.1, which deals with certain agricultural and drug violations, has a base offense level of 6, and contains no relevant enhancements. Lastly, the Animal Crush Video Prohibition Act relies on §2G3.1, which relates to obscenity, has a base offense level of 10, and, while it has some relevant enhancements, none are specific to animal cruelty violations.[30] Judges who have presided over animal cruelty cases, most notably animal fighting prosecutions, have concluded that where there are applicable sentencing guidelines, they are wholly inadequate.[31]

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[28] It is also worth noting that provisions under §2D1.1(a) currently account for death or serious bodily injury resulting from the *use* of an illegal substance; that is, the drug trafficker is held responsible for the injury or death of the user.

[29] These statutes include the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, the Animal Fighting Venture Prohibition Act, 7 U.S.C. § 2156, 18 U.S.C. § 49, the Horse Protection Act, 15 U.S.C. §§ 1821-1831, the Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1902-1907, and the Animal Crush Video Prohibition Act, 18 U.S.C. § 48.

[30] This base offense level does not reflect the gravity of the offense. *See, e.g.*, *United States v. Richards*, 755 F.3d 269, 272 (5th Cir. 2014), *cert. denied*, 575 U.S. ___ (Mar. 23, 2015) ("[T]he videos portray Richards binding the animals (a kitten, a puppy, and a rooster), sticking the heels of her shoes into [their eye sockets and through their rib cages], chopping off their limbs with a cleaver, removing their innards, ripping off their heads, and urinating on them.").

[31] At a recent sentencing of an organizer of dog fights in *United States v. Anderson*, No. 3:13cr100-WKW (M.D.

Recognizing the growing problem of animal abuse, Congress increased the maximum term of imprisonment for dog-fighting from a one-year misdemeanor to a three-year felony in 2007. The next year, it was increased to five years. That same year, dog-fighting became a felony crime in all 50 states when Idaho and Wyoming enacted laws prohibiting it. Also in 2014, Congress criminalized the attendance at animal fighting events as a misdemeanor offense and added a felony offense for causing the attendance of a person under 16 years of age. Nonetheless, the problem continues to grow. In recent years, the Department of Justice has worked to enhance federal enforcement efforts in this area. The Department brought charges involving animal cruelty offenses against over 250 defendants in the last seven years. In 2014, U.S. Attorneys' Offices pursued ten dog-fighting cases charging 49 defendants, marking a significant uptick in federal law enforcement activity in this area.

During the current fiscal year, the number of dog-fighting cases referred for federal prosecution has continued to increase. The Department has also made long-term structural changes to improve national coordination on this issue. Last year, Federal Bureau of Investigation Director James Comey announced an historic change in the identification and reporting of animal cruelty crimes. For the first time, rather than being categorized as miscellaneous offenses, animal cruelty crimes will be distinctly classified in the National Incident-Based Reporting System, enabling law enforcement and others to better understand and respond to these crimes. And in October 2014, the U.S. Attorneys' Manual was revised to add the five aforementioned animal welfare laws to the statutes administered by Environment and

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Ala. Nov. 7, 2014), Judge W. Keith Watkins stated:

> Now, the sentencing guidelines, in my view, are wholly inadequate in dogfighting cases and are, in fact, in this Court's opinion, irrational. I agree with Judge Boyle from the Eastern District of North Carolina in the [*United States v. Hargrove*, 701 F.3d 156 (4th Cir. 2012) (defendant had 250 fighting dogs)] case cited by defense counsel who said this about the sentence in that case, which happened to be zero to six months, unlike this case, which is – the range is 12 to 18 months. I would say that other than the criminal dogfighters in America, every other person in America would be shocked beyond belief that you could do what Mr. Hargrove did and come out with a federal sentence of zero to six months. No one could defend that, no judges, no legislators, no president, no one.
>
> ***
>
> Judge Reagan in the Southern District of Illinois, in a large case in St. Louis, shares my concern with the lack of incremental punishment for the conspiracy in the sentencing guidelines in these cases. "[T]he guidelines in this case are deficient in that they do not account for multiple dogs, multiple fights, or the injuries that the dogs suffered. Under the guidelines, if you had one dog, one fight, you're looking at the same guideline range as if you had 100 dogs and 100 fights and they all had to be euthanized. That simply does not make sense, because there is no incremental punishment. There are no specific offense characteristics in the guidelines that allow for enhancements regarding the length of the conspiracy, the number or circumstances surrounding the actual fights, or, as I have said, the number of dogs involved. Likewise, there is no enhancement for being a facilitator or sponsor of the fight." [*United States v. Courtland*, 642 F.3d 545 (7th Cir. 2011) (affirming departures from sentencing ranges of 0 – 6 months to sentences of 16, 18, and 24 months in dog-fighting case involving 59 dogs, one of which a defendant electrocuted before a large crowd because she had embarrassed him by losing).]

Judge Watkins departed upward 10 levels, from an offense level of 13 to 23, and then applied a variance to a level 29. The defendant was sentenced to a term of incarceration of 96 months rather than the range of 12 - 18 months called for by the guidelines.

Natural Resource Division's Environmental Crimes Section, enabling a more coordinated approach to criminal enforcement.

While these and other changes will improve our ability to more effectively deter and punish these violations, the sentencing guidelines remain an area of needed reform. There is no single sentencing guideline applicable to animal welfare violations. It would be useful to create one. Such a provision could include enhancements that take into account the true nature of this criminal activity, including, for example, upward adjustments for the number of animals abused, for causing the death of an animal in a dog-fighting violation, and for intentionally inflicting pain or injury.

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

We ask that the Commission amend the sentencing enhancement at §2S1.3(b)(2) so that it is consistent with the similar statutory enhancement enacted in 2002,[32] 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 U.S.C. § 5322(b),[33] 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. 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.[34]

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."[35] Unfortunately, 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

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[32] 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).
[33] *See* USSG App. C, vol. II, amend. 637, supp. at 244 (2002).
[34] 31 U.S.C. § 5314 (2012).
[35] USSG §2S1.3(b)(2).

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 six, plus the number of offense levels from the table in §2B1.1.[36] Significantly, however, §2S1.3(b)(3) provides that the offense level is reset back to six 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 eight with only $2,000 in tax loss.[37]

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 six 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 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)."[38] We ask the Commission to amend §2S1.3(b)(2) in this way this amendment year.

F. Marijuana Equivalency for Five Chemicals

We recommend that the Commission establish sentencing guideline ranges – through new marijuana equivalencies in §2D1.1 – for five controlled substances: (1) MDPV; (2) Mephedrone; (3) Methylone; (4) JWH-018 and (5) AM-2201.[39] The first four of these substances were temporarily placed in Schedule I by the Drug Enforcement Administration (DEA) in 2011 through rulemaking authority, and all but Methylone were permanently placed into Schedule I by the Food and Drug Safety and Innovation Act of 2012 (FDSIA), signed into

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[36] USSG §2S1.3(a)(2).
[37] USSG §2T4.1(B).
[38] USSG App. C, vol. II, amend. 637, supp. at 244 (2002).
[39] The synthetic cannabinoid AM-2201 was first scheduled by Congress in 2011. *See* Synthetic Drug Control Act, H.R. 1254, 112th Cong. § 2 (2011). For illustration of the effects of these substances, *see* the following studies related to AM2201 published in the last few years: David McQuade, Simon Hudson, Paul I. Dargan, & David M. Wood, *First European Case of Convulsions Related to Analytically Confirmed Use of the Synthetic Cannabinoid Receptor Agonist AM-2201*, 69(3) European Journal of Clinical Pharmacology 373 (2013); and Amy L. Patton, Krishna C. Chimalakonda, Cindy Moran, Keither McCain, Anna Radominska-Pandya, Laura P. James, Charles Kokes, & Jeffery Moran, *K2 Toxicity: Fatal Case of Psychiatric Complications Following AM2201 Exposure*, 58(6) Journal of Forensic Sciences 1676 (2013).

law on July 9, 2012.[40] Pursuant to rulemaking authority, the DEA Administrator permanently placed Methylone into Schedule I effective April 12, 2013.[41]

The DEA National Forensic Laboratory Information System (NFLIS) systematically collects results from drug chemistry analyses conducted by state and local forensic laboratories across the country. Approximately 300 state and local forensic laboratories in the United States perform nearly two million drug analyses each year. As of March 2012, 48 state laboratory systems and 91 local laboratory systems, representing 288 individual laboratories, are participating in NFLIS. Appendix A lists the number of cases involving each of the five substances obtained from NFLIS. The DEA Office of Diversion Control is collecting scientific information to assist the Commission in determining the appropriate marijuana equivalency for each of the five substances and will be prepared to share that information in the coming months and work with the Commission on setting the appropriate marijuana equivalencies.

G. Flavored Drugs

Following the Commission's decision not to make a change to the drug sentencing guidelines for offenders who flavor illegal drugs or otherwise package them with the intent to market the drugs to children, the Commission requested the Department of Justice to provide information about any drug trafficking cases in which federal prosecutors or law enforcement identify this aggravated behavior. In June, the Department provided the Commission with information in response to this request. The Department will continue to monitor this issue, and we look forward to discussions with the Commission to determine whether and when to revisit this issue.

H. 18 U.S.C. § 1715 (Firearms as Nonmailable Items)

We ask the Commission to establish a guideline reference, base offense level and appropriate specific offense characteristics for violations of 18 U.S.C. § 1715 (Firearms as Nonmailable, Regulations). In recent years, the United States Attorney Office (USAO) for the Virgin Islands (VI) has brought several cases charging § 1715, which generally precludes the mailing of firearms to individuals. These cases are brought to combat a common method used to bring firearms illegally onto the Islands, by simply mailing them from the mainland United

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[40] For JWH-018, *see* 76 Fed. Reg. 11075, Temporary Placement of Five Synthetic Cannabinoids Into Schedule I (Mar. 1, 2011); For MDPV, Mephedrone, and Methylone, *see* 76 Fed. Reg. 65371, Temporary Placement of Three Synthetic Cathinones Into Schedule I (Oct. 21, 2011). *See also* Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1152, 1130 Stat. 126 (2012).

[41] *See* 78 Fed. Reg. 21818 (Apr. 12, 2013). Note that the scheduling of these drugs – and the creation of marijuana equivalencies in the guidelines – are fundamentally different tasks than the Commission's work last amendment year in determining the appropriate marijuana equivalency for Hydrocodone. Hydrocodone was, at one time, a Schedule 3 controlled substance and is a pharmaceutical. As a consequence there have been multiple scientific studies regarding hydrocodone; the scientific evidence regarding the potency and effects of Hydrocodone was well established. In contrast, the five drugs here have never been approved for use by humans. As result, there are not the same number or types of scientific studies available to the DEA Administrator or the Commission. The placement of these drugs on Schedule I relied on a chemical analysis and animal studies, as set out in the various Federal Register notices.

States. Prosecutors have indicated that most illegal handguns recovered in the Virgin Islands were indeed purchased on the mainland and mailed to the Islands. The USAO/VI works closely with the United States Postal Inspection Service, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Homeland Security Investigations component of the Department of Homeland Security in investigating and prosecuting these offenses.[42]

The guidelines currently do not provide a statutory reference or guideline for these crimes. The lack of guidance has led to sentencing disparities and should be rectified. We believe the guidelines should be amended this year to address this issue.

I. Technical Amendment to Amend Application Note to §2T1.6

We ask the Commission to make a technical amendment to the Background Commentary to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax).

The Internal Revenue Code (Title 26) requires employers to withhold from their employees' paychecks money representing the employees' personal income and Social Security taxes.[43] Because the Code directs the employer to collect taxes as wages are paid, while requiring payment of such taxes to the IRS only periodically, the funds accumulated prior to the due date of payment can be a tempting source of ready cash to a failing corporation or to a businessperson looking to divert corporate assets for personal benefit.[44] Should an employer fail to collect, truthfully account for, or pay over such taxes, Title 26 provides both civil and criminal remedies. Section 7202 authorizes the government to criminally prosecute "responsible persons" who willfully fail to collect, correctly account for, or pay over employment tax.

The sentencing guideline applicable to § 7202 offenses is §2T1.6. The Background Commentary in §2T1.6 states that "[t]he offense is a felony that is infrequently prosecuted."[45] While that may have been the case when the relevant application note was originally written, due in part to the slow pace at which courts applied to § 7202 the willfulness definition recognized in *United States v. Pomponio*, 429 U.S. 10, 12 (1976),[46] the number of prosecutions under § 7202 have since increased substantially. Indeed, according to the Commission's statistics, the use of §2T1.6 increased from three cases in 2002 to 50 cases in 2013.[47] As a result, the comment on

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[42] Some examples of cases charged, include *United States v. Joseph, et al.*, Criminal Number 2015-0015, in which four individuals were charged with, *inter alia*, a conspiracy to mail firearms to Virgin Island; *United States v. Williams*, Criminal Number 2015-0004, in which the defendant was charged with receiving a semi-automatic pistol that had been mailed from Florida to the Virgin Islands; *United States v. Alexander*, Criminal Number 2015-0002, in which the defendant was charged with causing a firearm to be mailed; and *United States v. Bailey*, Criminal Number 2014-0054, in which the defendant was charged with aiding and abetting the delivery by mail of firearms which had been sent to Virgin Islands. There are also a number of pending investigations as well.

[43] 26 U.S.C. §§ 3102(a), 3402(a).

[44] *See, e.g., Slodov v. United States*, 436 U.S. 238, 242-245 (1978).

[45] USSG §2T1.6, comment. (backg'd).

[46] S*ee e.g., United States v. Easterday*, 564 F.3d 1004 (9th Cir. 2009).

[47] *See* U.S. Sentencing Comm'n, *Guidelines Application Frequencies for Fiscal Year 2013* (2013), *available at* http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2013.

the number of prosecutions using §2T1.6 is no longer factually accurate and any current reliance upon it by defense counsel and courts handling § 7202 sentencings would not be appropriate.

In addition to inaccurately describing the current number of prosecutions under § 7202 (compared to other criminal tax offenses), the "infrequently prosecuted" statement in the note may also give the misleading impression that employment tax offenses, in general, are infrequently prosecuted, which is not the case. Employment tax crimes regularly are prosecuted not only under § 7202, but also 26 U.S.C. § 7201 (tax evasion), 26 U.S.C. § 7206(1) (false returns), 26 U.S.C. § 7212(a) (obstruction), and 18 U.S.C. § 371 (conspiracy to defraud).

For these reasons, we ask the Commission to delete the sentence "The offense is a felony that is infrequently prosecuted."

J. Conditions of Release

As we have discussed with the Commission on a number of occasions, we believe the Commission should amend the guidelines applicable to conditions of probation and supervised release to address the concerns expressed by the United States Court of Appeals for the Seventh Circuit in a series of cases decided over the last two years.[48] Courts and litigants within the Circuit are addressing those concerns in a variety of ways. They are spending a great deal of time and effort proposing and reviewing responses to conditions prior to sentencing and justifying those conditions at sentencing case-by-case, often struggling to find the appropriate support and justifications for various conditions of release.

At the same time, the Commission's most recent research suggests that many judges do not follow the provisions of Chapter Seven (Violations of Probation and Supervised Release).[49] The same research also indicates that most judges do not follow the guidelines when it comes to decisions on when to revoke supervised release, nor on what sentence to impose when there has been a revocation of supervised release.[50] In short, the guidelines do not reflect the factors guiding courts in revocations.

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[48] The Seventh Circuit has published a number of decisions either reversing or remanding cases involving the conditions of supervised release which a defendant was found to have violated. *See, inter alia, United States v. Moore*, __ F.3d ___, 2015 WL 3540667 (7th Cir. June 8, 2015); *United States v. Downs*, 784 F.3d 1180 (7th Cir. 2015); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015) (three consolidated cases); *United States v. Sewell*, 780 F.3d 839 (7th Cir. 2015); *United States v. McMillian*, 777 F.3d 444 (7th Cir. 2015); *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015) (four consolidated cases); *United States v. Cary*, 775 F.3d 919 (7th Cir. 2015); *United States v. Hinds*, 770 F.3d 658 (7th Cir. 2014); *United States v. Johnson*, 765 F.3d 702 (7th Cir. 2014); *United States v. Johnson*, 756 F.3d 532 (7th Cir. 2014); *United States v. Farmer*, 755 F.3d 849 (7th Cir. 2014); *United States v. Baker*, 755 F.3d 515 (7th Cir. 2014); *United States v. Benhoff*, 755 F.3d 504 (7th Cir. 2014); and *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014) (two consolidated cases).

[49] *See, e.g.*, U.S. Sentencing Comm'n, *Results of 2014 Survey of United States District Judges: Modification and Revocation of Probation and Supervised Release* (February 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20150225_Judges_Survey.pdf).

[50] *Id.*

We understand that the Criminal Law Committee of the Judicial Conference is preparing a monograph, to be completed this year, to assist courts in selecting the appropriate conditions for release and that will lay out the circumstances that justify each condition. Once the Criminal Law Committee has completed and approved the monograph, we believe the Commission should quickly review the monograph and amend the appropriate sentencing guidelines, this amendment year, to ensure that sentencing courts have the guidance and policy support needed to impose the appropriate conditions of release and address the Seventh Circuit's concerns. The Commission should also follow its normal amendment process to provide better guidance to courts so they can fairly and uniformly revoke supervised release when appropriate and sentence offenders upon such revocation.

K. Technical Clarification to §2B1.1(19)

In conjunction with the Commodity Futures Trading Commission (CFTC), we request that the Commission clarify §2B1.1(b)(19)(B), an enhancement for certain securities and commodities fraud cases, to reflect what we believe was the Commission's intended scope for the enhancement, by stating that the enhancement is applicable to individuals who control the activities of futures commission merchants, commodity pool operators and commodity trading advisors. The CFTC indicates that the vast majority of futures commission merchants, commodity pool operators and commodity trading advisors are established as separate legal entities. The individuals who control or direct the activities of these entities are principals or associates of the entities. As currently written, it can be argued that §2B1.1(b)(19) does not cover these individuals, which we think is contrary to the intent of the Commission.

Section 2B1.1(19)(A) states that a violation of securities law includes a defendant who was "(i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, *or a person associated with a broker or dealer*; or (iii) an investment advisor, *or a person associated with an investment advisor*." (Emphasis added). We propose that §2B1.1(b)(19)(B) be amended to explicitly include principals and associated persons of futures commission merchants, commodity trading advisors and commodity pool operators, to ensure the Commission's intent to include the individuals responsible for the unlawful activities by a futures commission merchant, commodity trading advisor and/or commodity pool operator are covered by the enhancement. We propose that the Commission add the following highlighted language to clarify §2B1.1(b)(19)(B):

If the offense involved –

* * *

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or introducing broker or a principal of, or a person associated with, a futures commission merchant or introducing broker: (ii) a commodity trading advisor or a principal of, or a person associated with, a commodity trading advisor; or (iii) a

commodity pool operator, or a principal of, or a person associated with, a commodity pool operator,

In § 41 of the Commodity Exchange Act, 7 U.S.C. § 61, Congress found that the activities of a commodity trading advisor (CTA) and a commodity pool operator (CPO) affect the national interest as their activities and interactions with the public involve substantial transactions subject to the rules of contract markets or derivatives transaction execution facilities. Such activities and interactions necessarily involve the participation of the principals and associated persons of CTAs and CPOs, and the unlawful criminal activities of those persons should not be excluded from the coverage of §2B1.1(b)(19)(B).

According to the CFTC and information provided through the National Futures Association, there are currently 3,331 CTAs and/or CPOs registered with the CFTC. Of that number, 2,819 CTAs and/or CPOs are registered as a separate corporate legal entity, and only 512 CTAs and/or CPOs are registered as sole proprietorships. There are 15,219 individuals that are registered as an associated person of a firm that is registered as a CTA and/or CPO and 11,421 individuals that are listed as a principal of a firm registered as a CTA and/or CPO.

The proposed language is intended to clarify that the principals and associated persons of CTAs and/or CPOS, currently numbering 26,640 individuals, cannot avoid the sentencing enhancement of §2B1.1(b)(19) by hiding behind a separate legal entity.

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Conclusion

We believe that this is the year for the Commission to focus primarily on its statutory responsibilities to oversee the systemic health of the federal sentencing system and its structural elements. The Commission itself has identified significant and wide-ranging flaws in federal sentencing, and we look forward to discussing all of this with the Commission and how the Commission can set a path to a more sensible, effective, efficient, fair, and stable sentencing policy long into the future.

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
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

APPENDIX

Data from the National Forensic Laboratory Information System[51]

Number of Cases Involving Particular Controlled Substances

		2011	2012	2013	2014	Total
Synthetic Cannabinoids	JWH-018 1-Pentyl-3-1-(1-Naphthoyl)Indole)	3,274	1,112	368	124	4,878
	AM-2201 (1-(5-Fluoropentyl)-3-(1-Naphthoyl)Indole)	7,483	14,678	1,250	312	23,723
Synthetic Cathinones	MDPV Methylenedioxypyrovalerone	3,678	3,694	1,118		8,816
	Methylone N-Methyl-3,4-Methylenedioxycathinone	1,816	4,257	10,621	3,843	20,537
	4-MMC,Mephedrone	338	71	33	6	448

[51] NFLIS queried March 19, 2015.