

FEDERAL PUBLIC DEFENDER
Southern District of Texas

Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

FEDERAL PUBLIC DEFENDER:
MARJORIE A. MEYERS
First Assistant:
H. MICHAEL SOKOLOW

Telephone:
713.718.4600
Fax:
713.718.4610

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

Re: Public Comment on Proposed Amendments for 2012

Dear Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published by the Commission on January 19, 2012. At the public hearing on March 14, 2012, we submitted written testimony on the proposals, copies of which are attached and incorporated as part of our public comment. We expand on that testimony as necessary here to both address issues raised during the hearings and to clarify further our position on the proposed amendments and issues for comment.

I. Proposed Amendment 1: Dodd-Frank/Fraud

As the guidelines manual grows ever thicker and more byzantine, it is important to recognize that every amendment, especially those that add new specific offense characteristics, comes at a price. New provisions upset settled practice and add complexity to an already complicated process. This added complexity makes it more difficult to apply the guidelines consistently. Inconsistent application is, in turn, a potent source of unwarranted disparity.

Guideline amendments must be adopted cautiously and with restraint. No change should be made unless it clearly improves the accuracy and effectiveness of the sentencing process. In this regard, new SOC's are useful only to the extent they serve to better differentiate levels of culpability and offense seriousness.

In our view, the proposed fraud SOCs largely fail this test, either because they address factors already taken into account by existing guideline provisions or because they will apply so broadly (or narrowly) that they fail to distinguish between more and less culpable defendants. Amendments like these that are redundant or ineffective are not merely superfluous; the frictional drag they exert on the smooth operation of the guidelines exacts a very real cost.

Simplicity, consistency and ease of application are values essential to the success of the guidelines. They should not be compromised in service of an illusory comprehensiveness and false precision marked by an ever-growing number of enhancements and departures covering an ever-narrower subset of cases.

A. Harm to Financial Markets

The Commission proposes either new specific offense characteristics or departure provisions to directly account for the potential harm to public and financial markets from large frauds. The Commission seeks comment on a proposed new enhancement under §2B1.1 of two, four, or six levels if the offense “involved a significant disruption of a financial market or created a substantial risk of such disruption.” In the alternative, the Commission proposes a new upward departure provision in guideline §2B1.1 for such an offense.

Defenders oppose such an amendment on the ground that it is unnecessary and redundant. Any case posing such a risk to an entire financial or public market would, in virtually every case, be a fraud large and serious enough to result in a very high guideline range by virtue of the existing enhancements for loss amount, number of victims, and jeopardizing the soundness of a large financial institution, a large company, or the financial security of more than 100 victims. The most prominent example of such a case is the Madoff case, in which a sentence of 150 years was imposed. Likewise, the guideline ranges for father and son executives of Adelphia were life sentences, *United States v. Rigas*, 583 F.3d 108, 112 (2d Cir. 2009), and the guideline range for the large fraud perpetrated by the CEO of WorldCom, Inc., was 30 years to life. *United States v. Ebberts*, 458 F.3d 110, 129 n.4 (2d Cir. 2006). Jeffrey Skilling was sentenced to 24 years in prison for his role in the Enron fraud. *See United States v. Skilling*, 554 F.3d 529, 591 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010). In *Skilling*, the Fifth Circuit vacated the sentence and remanded on the ground that the four-level enhancement for jeopardizing the soundness of a “financial institution” was incorrectly applied to Enron, which was not a financial institution. The guideline has since been amended to apply that enhancement where the soundness of a large public company, like Enron, was jeopardized, so under the current guideline, that sentence would stand.

Guideline ranges for large, high loss frauds are so high already that courts frequently find a guideline sentence to be greater than necessary to serve the goals of sentencing and vary downward from the guideline ranges. *See, e.g., Rigas*, 583 F.3d at 113 (80-year old father and

son sentenced to 12 and 17 years respectively, where recommended guideline range was life in prison); *Ebbers*, 458 F.3d at 129 (sentence of 25 years imposed where guideline range was at least 30 to life); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006) (sentence of 42 months imposed in securities fraud case where guideline range was life imprisonment). Indeed the Second Circuit has noted: “Under the Guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment.” *Ebbers*, 458 F.3d at 129.¹

For the extremely rare fraud case that would be large and serious enough to pose a risk to an entire financial or public market, but would not generate a sufficiently high guideline range as a result of the loss and victims tables plus other enhancements, departure power is already provided in Application Note 19(A) to §2B1.1. This provides a departure ground in cases in which “the offense level substantially understates the seriousness of the offense.” Moreover, already included in the “non-exhaustive list of factors that the court may consider” for such a departure is whether the offense “created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).” USSG §2B1.1, comment. (n.19(A)(iv)). This would certainly apply to the disruption or risk of disruption of a financial or public market, in the rare case in which the offense level was not sufficiently high.

B. Securities Fraud and Insider Trading

1. Proposed Amendments to Guideline §2B1.4(b)

The Commission proposes two amendments to the insider trading guideline, §2B1.4, to address the actual and potential harm of such conduct. The first proposal would provide a specific offense characteristic of two levels, and a minimum offense level of 12 or 14 if the offense involved “sophisticated” insider trading. The proposed amendment defines sophisticated insider trading as “especially complex or intricate offense conduct pertaining to the execution or concealment of the offense,” and provides a non-exhaustive list of factors to consider, including number and dollar value of transactions; number of securities involved; duration of the offense; whether fictitious entities, corporate shells or offshore accounts were used to hide transactions; and whether internal monitoring or auditing systems or compliance and ethics program procedures were subverted to prevent detection.

¹ See Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent’g Rep. 167, 169 (Feb. 2008) (noting that “since *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines in fraud cases and the fundamental requirement of Section 3553(a) that judges impose sentences ‘sufficient, but not greater than necessary’ to comply with its objectives.”).

This amendment is unnecessary because §2B1.4 already accounts for insider trading being a sophisticated fraud. The base offense level for insider trading is 8, rather than the general fraud base offense level of 6, because it is sophisticated. *See* USSG §2B1.4, comment. (backg'd) (“Insider trading is treated essentially as a sophisticated fraud.”). The general fraud guideline adds a two-level enhancement under §2B1.1(b)(10)(C) because its base offense level does not account for sophistication and is two levels lower. An additional enhancement for sophistication would amount to double-counting for this factor.

Further, the conduct included in the definition of particularly sophisticated insider trading and its non-exhaustive list of factors is already accounted for elsewhere in the guidelines. For example, the two-level enhancement under §3B1.3 for Abuse of Position of Trust or Use of Special Skill would be applicable to most situations of especially complex execution or concealment of the offense, beyond the level of sophistication inherent in the offense and accounted for by the higher base offense level. Particularly, the non-exhaustive factors of (1) using fictitious entities, corporate shells, or offshore accounts and (2) subverting internal monitoring or auditing systems and ethics program standards would seem to *require* abuse of position of trust and/or use of special skill. The factors of the number and value of transactions, number of securities, and duration of the offense would ordinarily be reflected in a high gain amount.

The second proposed amendment would provide a four-level enhancement if the defendant held a specified position of trust at the time of the offense: an officer or director of a publicly traded company; a registered broker or dealer [or associates]; an investment advisor [or associates]; an officer or director of a futures commission merchant or an introducing broker; a commodities trading advisor; or a commodity pool operator. This enhancement would parallel the enhancement in §2B1.1(b)(18).

This amendment is also unnecessary because abuse of trust is inherent in the offense and accounted for in the higher base offense level for insider trading. As pointed out above, the base offense level in the general fraud guideline is two levels lower. In addition, a two-level enhancement for Abuse of Position of Trust is already provided in §3B1.3 and would be applicable to high-level insiders and fiduciaries. In fact, Application Note 1 to §2B1.4 limits the application of the two-level Abuse of Position of Trust enhancement to cases in which the defendant “occupied and abused a position of *special* trust,” demonstrating that some level of abuse of trust is inherent in the base offense level. This enhancement, combined with the two-level bump up in the insider trading base offense level, already matches the four-level enhancement in §2B1.1(b)(18) for specified positions of trust. Application Note 14(C) to the general fraud guideline specifically provides that if the four-level enhancement applies under §2B1.1(b)(18), the §3B1.3 enhancement for abuse of trust or use of special skill does not apply, thereby imposing a four-level cap for this kind of sophistication. The guidelines applicable to

insider trading now also cap sophistication of the offense at four levels, and it should remain so capped, for consistency and avoidance of unwarranted disparity.

2. Defenders Oppose Adding Specific Offense Characteristics to Guideline §2B1.4 as Alternatives to the Amount of Gain.

The Commission has raised a concern that the insider trading guideline (§2B1.4) may inadequately account for the seriousness of the conduct and actual and potential harm to individuals and markets because it uses gain to measure harm and some insider traders do not realize high gains. The Commission seeks comment on whether it should amend the guideline to provide one or more specific offense characteristics to account for the seriousness of the offense in cases where the defendant does not realize a high gain. The Commission proposes other methods of measuring harm, such as the number and dollar value of transactions, the number of securities involved, or a complicated “volume of trading” formula.

We oppose such an amendment on several grounds. First, we believe that the concerns about under-punishment of insider trading are unfounded. Defendants convicted of insider trading have been punished severely under the insider trading guideline. In the recent Galleon insider trading cases in the Southern District of New York, the hedge fund manager Raj Rajaratnum received a sentence of 11 years, 09-cr-01184-01 (RJH), and his trader Zvi Goffer received a 10 year sentence. 10-cr-56-01(RJS). Moreover, the Rajaratnam sentence varied down from the guideline range of 19-24 years and Goffer’s sentence was at the low end of the guideline range, demonstrating that the guidelines for this conduct are already more than sufficient to achieve the objectives of sentencing. Cases with much lower guideline sentences based on lower gain are generally far less serious cases. *See, e.g., United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006) (guideline sentences of 5 months imprisonment and 5 months home confinement imposed on Martha Stewart and her broker for single instance of insider trading with proceeds of \$230,000); *United States v. Edelman*, 2006 WL 1148701 (S.D.N.Y. April 24, 2006) (guideline sentence of 3 years probation with 6 months in home confinement for single small insider trading offense that garnered \$22,786).

Second, the alternative methods proposed are complicated, yet less precise, methods of measuring actual culpability. For example, an insider trader could seek and gain a relatively small amount from a large volume trade on inside information that would move the stock price only slightly. In such a case, there is nothing about the number of securities or dollar value of the overall trade that makes the defendant more culpable. On the other hand, an insider trader could make a very large gain selling one security based on inside information involving a very large drop in the price of the security. The fact that he needed to sell only one security to realize that gain would not reduce his culpability. Although gain is a crude measure of actual culpability, it serves as a better proxy than the alternatives proposed.

In the rare case where the guideline does not capture the seriousness of an insider trading offense, the district court may always consider an upward departure as a means of achieving appropriate punishment. Indeed, we suggest such an approach would be preferable to enshrining complex but imprecise alternatives to measure harm into the guidelines themselves. Moreover, an appropriate departure provision for handling such outlier cases already exists in USSG §5K2.0, which is specifically designed to capture extraordinary aggravating circumstances not accounted for under the applicable guideline.

However, if the Commission feels it necessary to address this circumstance more specifically, we suggest that the Commission provide in the commentary to §2B1.4 that a departure may be warranted in cases in which the gain “substantially understates the seriousness of the offense.” This departure ground, already specified in §2B1.1, comment. (n.19(A)), has been used in cases of zero loss in all sorts of frauds governed by §2B1.1. *See, e.g., United States v. Bobowick*, 113 F.3d 1302 (2d Cir. 1997) (upward departure of seven levels for wire fraud where zero loss figure understated the seriousness of the offense); *United States v. Sneed*, 34 F.3d 1570 (10th Cir. 1994) (upward departure in securities fraud case where zero loss understated the seriousness of the offense). *See also, United States v. Guzman*, 282 F.3d 177 (2d Cir. 2002) (approving of upward departure in zero loss case, and reversing to correct improper methodology). This would provide for the highly unusual case of the serious but unsuccessful insider trader. A departure is a more appropriate method of accounting for the unusual case than the addition of a new specific offense characteristic.

C. Calculation of Loss in Guideline §2B1.1

The Commission seeks comment on whether it should amend §2B1.1 to clarify which method should be used to calculate loss in securities fraud and similar offenses. The Circuits have split on how to measure loss, most fundamentally on whether to base loss (1) on the difference in the price of the security before and after the fraud was disclosed, either at a set point in time or an average price over a set period of time, *see United States v. Brown*, 595 F.3d 498 (3d Cir. 2010); *United States v. Bakhit*, 218 F. Supp. 2d 1232 (C.D. Cal. 2002) or (2) to exclude from that measurement changes in value that were caused by external market forces, the “market-adjusted method” adopted in the Second and Fifth Circuits. *See, e.g., United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005).

We urge the Commission to adopt the market-adjusted method of *Rutkoske* and *Olis* (method D) because that is the only method that measures the loss actually *caused* by the fraud. Merely measuring the total drop or gain in price captures all sorts of market factors that have nothing to do with the defendant’s conduct. *See Ebbers*, 458 F.3d at 128 (noting, for example, the negative effect of the bursting of the dot-com bubble, which effect on share price was not attributable to the defendant). Since the loss amount is used in §2B1.1 as a proxy for culpability,

price changes that are not attributable to the defendant's conduct should not be included in the loss amount. For this reason, *Rutkoske* and *Olin* have applied the loss causation standard of *Dura Pharmaceuticals, Inc., v. Broudo*, 544 U.S. 336 (2005), which limits loss to those proximately caused by the defendant's conduct. *Rutkoske*, 506 F.3d at 179; *Olin*, 429 F.3d at 546. The Ninth Circuit recently declined to apply the precise analysis of *Dura Pharmaceuticals*, and purported to disagree with *Rutkoske* and *Olin*, but accepted the principle that only losses actually caused by the defendant's actions may be counted. *United States v. Berger*, 587 F.3d 1038, 1044-46 (9th Cir. 2009).

We urge the Commission to adopt the market-adjusted method of loss calculation of *Rutkoske*, *Olin*, and *Dura* for all securities fraud, including market manipulation and Ponzi schemes. This is the only standard of loss calculation that limits the loss to that caused by the defendant's conduct.

The Commission asks whether Application Note 3(F)(iv) to §2B1.1 should be repealed or revised. This note provides that loss amount should not be reduced by payments made to any investor beyond his original investment. We agree with the submission of the New York Council of Defense Lawyers that it should be revised to provide more specific guidance on how to calculate loss.² Specifically, we urge the Commission to add a provision stating clearly that in Ponzi schemes, the loss is the out-of-pocket loss of the victims. This would prevent unwarranted disparities resulting from the use of varying methods of calculating loss from Ponzi schemes.

The potential for such disparities is apparent in the recent Second Circuit decision in *United States v. Hsu*, 2012 WL 516199 (2d Cir. Feb. 17, 2012), in which the Court of Appeals approved the district court's calculation of loss that included promised gains in addition to out of pocket loss. The Second Circuit expressly noted that this was only one way to reasonably estimate loss, that "other methodologies might have been appropriate in this case, and might even be preferable in other cases depending on the particular facts of the case." *Id.* at *9. Given the extraordinary importance of the loss calculation in determining the guideline sentence, such variability in the method of calculating Ponzi scheme loss is not desirable if the goal is to avoid unwarranted disparities in sentencing.

D. The Scope of Specific Provisions of §2B1.1(b)(15) and (18)

The Commission seeks comment on whether the specific offense characteristics of §2B1.1(b)(15) and (18), for endangering a financial institution and for being a fiduciary, respectively, should be expanded. We oppose any expansion of subsection 15 on the ground that, as discussed above, the loss table and the enhancements that exist already more than adequately punish any fraud large and serious enough to pose harm to markets. We likewise

² Statement of Marjorie J. Peerce Before the U.S. Sentencing Comm'n, Washington, D.C., at 5 (Mar. 14, 2012).

oppose any expansion of subsection (18) on the ground that it is broad enough to cover most financial fiduciaries and that any fiduciary that slipped through this definition could be captured by the Abuse of Trust enhancement in §3B1.3.

E. Financial Institution Fraud

We oppose the proposed addition to the application note to §2B1.1(b)(15)(B)(i)³ that directs a court, in determining whether the safety and soundness of a financial institution was jeopardized, to take into account harms that “were likely to result from the offense but did not result from the offense because of federal government intervention.”

Currently, all the factors a court is directed to consider are objective and factually verifiable. A financial institution either became insolvent or it did not; it either reduced its benefits to pensioners or it did not, etc. *See* §2B1.1, comment. (n.12). Because it is possible to determine with certainty the existence of a factor in any particular case, the note can be easily and consistently applied. The same would not be true of the amended note which, by its very nature, asks a question that cannot be objectively answered and, worse, asks it in an imprecise and ill-defined manner.

The first problem with the amendment is that it lacks clarity. For instance, the new language asks the court to determine whether certain harms were “likely” to befall a jeopardized institution absent intervention. “Likely”, however, has no fixed common or legal meaning. It might in some contexts be shorthand for nothing more than a preponderance of the evidence. More commonly, though, it refers to events of higher probability. When there is a 51% chance a rain, a weatherman does not say rain is likely. Given this ambiguity, it is inevitable that different courts will employ different degrees of “likelihood” in applying it.

Similarly opaque is the meaning of the term “federal government intervention.” Does this term only encompass federal financial recovery programs such as the Troubled Asset Relief Program (TARP) or does it include a criminal investigation that thwarts a conspiracy before it threatens the safety and soundness of an institution? If the former, would it include government actions aimed at improving the economy as a whole, such as moves to lower interest rates or loosen credit, or would it be limited to government interventions specifically targeted at the jeopardized institution? The note provides no guidance.

Beyond its imprecise language, the proposed amendment is flawed because it is unworkable. The task it asks of the district court is so speculative as to be impossible. Not only is the court required to divine whether an institution was likely to have foundered in one of four

³ These comments apply with equal force to the identical language proposed in regard to the application of §2B1.1(b)(15)(B)(ii).

specific ways, it must also somehow determine that the only reason it did not founder was because of some government intervention. Parsing out the infinite variety of reasons why some institutions survive when others do not or, worse, attempting to plot out the hypothetical fate of an institution in some alternative universe is the stuff of econometricians, not district courts. It is difficult to imagine what evidence a district court could rely upon to make meaningful findings regarding these issues. It is even more difficult to imagine that such a complex inquiry could be replicated with any degree of consistency or predictability across different cases and different courts.

II. Proposed Amendment 2: Drugs

A. BZP

Much of the Defender position on the issues related to BZP is set forth in the Written Statement of Penny Beardslee, which was submitted as part of the record of the Commission's March 14, 2012 hearing. Here, we supplement those comments.

As a preliminary matter, we wish to correct an inadvertent mathematical error in the written statement offered at the March 14th hearing. On page 7 of the written statement, it states: "The actual weight of the BZP in these pills has varied from around 12-13 grams to over 200 grams." Those reported weights reflect the weight range for each pill (mixture containing PCP). The actual weight of BZP in each pill varied from .044 grams to .18 grams.

As stated in Ms. Beardslee's written hearing testimony, Defenders believe that the proper equivalency for BZP is to treat 1 gram of BZP as 100 grams of marijuana. We understand from the hearing that the government advocates for a 1 gram of BZP to 200 grams of marijuana ratio.⁴ The issue then becomes whether the Commission should adopt the 1:200 ratio proposed by the government, or the 1:100 ratio proposed by Defenders, or some other ratio. There are several reasons the 1:100 ratio is the better option.

The government's reliance on a study involving 18 persons addicted to amphetamine does not support a 1:200 ratio. That study found BZP "is about 10 times less potent than

⁴ The government's written submission is confusing on this point, and seems to propose different ratios for actual (1:2000) and mixtures (1:200). Letter from Jonathan J. Wroblewski, Director, DOJ Office of Policy and Legislation, to the Honorable Patti Saris, Chair, U.S. Sentencing Comm'n, at 16-20 (March 12, 2012) [hereinafter *Wroblewski Letter*]. The government does not explain, and we do not comprehend, the rationale for treating seized and measured quantities of actual BZP at a substantially higher ratio than estimated quantities of BZP. Because no court has ever treated 1 gram of BZP (actual) as 2000 grams of marijuana, we assume the government confused the math and meant to propose a ratio of 1 gram of BZP (actual) to 200 grams of marijuana.

amphetamine in producing these effects in subjects with histories of amphetamine dependence.”⁵ The government claims that this study of BZP use in amphetamine addicts is “most relevant to measuring abuse liability,”⁶ but the government fails to explain how abuse by persons addicted to amphetamine is relevant to establishing guidelines for the typical user of BZP.

Perhaps more significantly, the Commission has never based the guidelines on an assessment of how a substance might be used by a person with an addiction to another substance. Instead, the Commission has looked at those factors that may make one drug more or less addictive to the *typical user* than the comparison drug.⁷ Current science does not tell us whether a typical user of BZP will use it in the same way as a person addicted to amphetamine. If sound clinical studies of humans later show the dependence and abuse potential of BZP among typical users warrants an increased penalty, the Commission can certainly revisit how to treat BZP under the guidelines.

Setting aside the question of abuse potential, BZP should be punished at a 1:100 BZP to marijuana ratio because the available evidence shows that BZP presents fewer risks than amphetamine or other controlled substances.⁸ First, a recent report from the Department of Justice’s National Drug Intelligence Center, indicates that BZP is no longer a drug of concern along the Northwest border with Canada. The 2012 Drug Market Analysis of the Northwest High Intensity Drug Trafficking Area states that in 2010, “there were no recorded seizures of BZP coming from Canada. *This may indicate that BZP, considered an inferior substitute for MDMA, is in less demand by the abuser population.*”⁹

Second, amphetamine and BZP are not used in a similar manner, are not used by the same population, and are not manufactured in the same way. BZP use is popular in the dance party culture as a club drug.¹⁰ In contrast to BZP, amphetamines are used for “both

⁵ DEA Diversion, *Drugs and Chemicals of Concern: N-Benzylpiperazine*, http://www.deadiversion.usdoj.gov/drugs_concern/bzp_tmp/bzp_tmp.htm.

⁶ *Wroblewski Letter* at 18.

⁷ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 62-63 (2007).

⁸ Amphetamine and methamphetamine are treated the same under §2D1.1.

⁹ U.S. Dep’t of Justice, *Northwest High Intensity Drug Trafficking Area: Drug Market Analysis* 11 (2011) (emphasis added).

¹⁰ U.S. Dep’t of Justice, National Drug Intelligence Center, *BZP Fast Facts: Questions and Answers* (2004) [hereinafter *BZP Fast Facts*], <http://www.justice.gov/ndic/pubs11/11052/index.htm>.

‘performance enhancement’ and recreational purposes.”¹¹ Amphetamines are the third most used drug behind marijuana and Vicodin, among 12th graders.¹² BZP is usually consumed orally.¹³ Amphetamine and methamphetamine are injected, swallowed, smoked, and snorted. Unlike drugs consumed orally, injectable drugs generate more secondary health effects because of the increased risk of infections, including HIV, from shared needles.¹⁴ BZP is generally manufactured in Canada, where it is lawful. Methamphetamine is often manufactured in the United States in clandestine labs that pose a risk to public health.

Third, the number of emergency room visits for BZP is so small that it is not separately reported in the Drug Abuse Warning Network (DAWN). DAWN data show that BZP and MDMA, another popular recreational drug, result in relatively few emergency room visits notwithstanding a rise in visits for MDMA.¹⁵ Cocaine, a highly popular stimulant, was involved in 43.4 percent of emergency room visits in 2009. Stimulants, including amphetamine and methamphetamine, were involved in 9.6 percent of visits. Illicit drugs, which include BZP, MDMA, and even PCP were each involved in less than 4 percent.¹⁶

In summary, we do not believe that the available evidence supports treating BZP at a 1:200 ratio. Aside from being twenty times less potent than amphetamine or methamphetamine in the typical user, BZP and amphetamine are dissimilar in patterns of use, risk, and manufacturing. Those differences favor treating 1 gram of BZP as 100 grams of marijuana in the drug equivalency table.

¹¹ National Institute on Drug Abuse, *InfoFacts: Stimulant ADHD Medications - Methylphenidate and Amphetamines* (2009), <http://www.drugabuse.gov/publications/infofacts/stimulant-adhd-medications-methylphenidate-amphetamines>.

¹² National Institute on Drug Abuse, *InfoFacts: High School and Youth Trends* (2011), <http://www.drugabuse.gov/publications/infofacts/high-school-youth-trends>.

¹³ *BZP Fast Facts*.

¹⁴ National Institute on Drug Abuse, *InfoFacts: Methamphetamine* (2010), <http://www.drugabuse.gov/publications/infofacts/methamphetamine>.

¹⁵ The rise in visits of MDMA shows that the high federal penalties imposed for that substance are not providing a deterrent effect.

¹⁶ Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Administration, Drug Abuse Warning Network, *National Estimates of Drug-Related Emergency Department Visits* (2009), <http://www.samhsa.gov/data/2k11/DAWN/2k9DAWNED/HTML/DAWN2k9ED.htm#High3>.

B. Safety-Valve

We fully support the proposed amendment that would create a “safety valve” provision in the guideline for chemical precursors, §2D1.11. Under existing law, a defendant convicted of 21 U.S.C. § 841(c) and sentenced under USSG §2D1.11 is not entitled to safety-valve relief even though he or she may meet the criteria under USSG §5C1.2. *See, e.g., United States v. Steffey*, 352 F. App’x 763, 765 (4th Cir. 2009) (upholding court’s refusal to grant two level reduction because §2D1.11 did not expressly provide for it); *United States v. Anton*, 380 F.3d 333, 335 (8th Cir. 2004); *United States v. Moreno-Espinoza*, 31 F. App’x 388 (9th Cir. 2002); *United States v. Saffo*, 227 F.3d 1260, 1273 (10th Cir. 2000).¹⁷ The failure of §2D1.11 to provide for safety valve relief has resulted in unwarranted disparity in sentencing. One court aptly described the bizarre consequence of the safety valve provision applying to methamphetamine cases under §2D1.1, but not applying to pseudoephedrine cases sentenced under §2D1.11:

This has the anomalous result that a person possessing pseudoephedrine could receive a higher sentence than a person possessing the equivalent amount of finished methamphetamine. A departure under §[5] K2.0 is appropriate to avoid unwarranted sentencing disparities under these circumstances.

Glenn v. United States, 2007 WL 4454296, *1, n.1 (E.D. Mo. 2007).

Unlike many defendants throughout the country, those sentenced under §2D1.11 in the Eastern District of Missouri who meet the safety valve criteria typically obtain it through a departure or variance. Both prosecutors and probation officers routinely support such reductions by stipulating in plea agreements to a two-level departure pursuant to §5K2.0, declining to object to a defense motion for variance, or recommending a variance in presentence reports.¹⁸

This disparity is unwarranted. No penological purpose is served by excluding from safety valve relief persons who are convicted of a chemical precursor offense and sentenced under §2D1.11. When the Commission created §2D1.14 (Narco-Terrosim) it deliberately omitted a cross-reference to safety valve relief, reasoning that an offense sentenced under

¹⁷ *See also United States v. Sarah McDonald, Government’s Response to Defendant’s Position with Respect to Sentencing Factors*, No. 1:06-cr-00033 (W.D. Pa. 2008) (citing *Anton* to oppose request for reduction in pseudoephedrine case).

¹⁸ *United States v. Gentile*, 473 F.3d 888, 892 n.1. (8th Cir. 2007) (parties agreed that two level “safety-valve” reduction was appropriate under §5K2.0), *vacated on other grounds*, 552 U.S. 1089 (2008); *United States v. Lazenby*, 439 F.3d 928, 929 (8th Cir. 2006) (government agreed to reduction for “safety-valve” for defendant involved in purchase of pseudoephedrine and sentenced under §2D1.11); *Glenn*, 2007 WL 4454296 (plea agreement and presentence report both recommended departure for defendant sentenced under §2D1.11, but who met safety valve criteria).

§2D1.14 “is not a typical drug offense, in that an individual convicted under this provision must have had knowledge that the person or organization receiving the funds or support generated by the drug trafficking ‘has engaged or engaged in terrorist activity . . . or terrorism.’” USSG App. C, Amend. 700, Reason for Amendment (Nov 1, 2007). No similar justification exists for excluding the women and men convicted of a chemical precursor offense. They typically did nothing more than get involved in the unlawful purchase of a substance like pseudoephedrine.

The Commission’s expansion of guideline safety valve eligibility in 2001 also supports a decision to include it within §2D1.11. Before 2001, the two-level safety valve reduction did not apply to defendants with an offense level less than 26. The Commission removed that limitation in 2011, recognizing that it was “inconsistent with the general principles underlying this two-level reduction (and the related safety valve provision, *see* 18 U.S.C. § 3553(f)) to provide lesser punishment for first time, nonviolent offenders.” USSG App. C, Amend. 624, Reason for Amendment (Nov 1, 2001). The same reasoning applies here.

III. Proposed Amendment 8: Multiple Counts (§5G1.2)

The essential question raised by this proposed amendment is whether a mandatory minimum sentence should be permitted to dictate the sentence imposed on every other count of conviction, including counts without mandatory minimum terms. We oppose this proposed amendment because it unduly complicates the guidelines, may result in unintended collateral consequences, and arbitrarily permits mandatory minimum sentences to trump all other guideline calculations during the imposition of the sentence.

Chapters Five and Three of the guidelines have long suffered from what one court has described as “labyrinthian complexity.”¹⁹ The proposed amendment to §5G1.2(b), the proposed addition to application note 1, and the proposed addition of another application note with four different subsections would only add to that complexity and generate more problems than it solves.

The alleged circuit conflict set forth in the synopsis of the proposed amendment is more theoretical than real. According to the synopsis, the Fifth Circuit, contrary to two other Circuits, has *held* that the mandatory minimum sentence affects the guideline range on all counts. The synopsis then concludes, without explaining why it is the better rule, that the “proposed amendment adopts the approach followed by the Fifth Circuit.”

¹⁹ *United States v. Reis*, 369 F.3d 143, 149 (2d Cir. 2004).

We believe the Commission misreads the Fifth Circuit's decision in *United States v. Salter*, 241 F.3d 392 (5th Cir. 2001), and overstates the existence of a Circuit conflict.²⁰ The Commission misconstrues a casual statement in *Salter* about the appropriate sentence on remand as a "holding" about the application of §5G1.2(b). The two issues presented in *Salter* were about proper application of the grouping rules and calculation of the defendant's criminal history score. No issue was presented on the appropriate application of §5G1.2. In *Salter*, the defendant was convicted of money laundering and conspiracy to possess with intent to distribute more than 100 kg of marijuana. The court declined to group the money laundering count with the conspiracy count. As a result, the court arrived at a total offense level of 29. With a criminal history category of III, the guideline range on both counts was 108-135 months. The court imposed a total term of imprisonment of 130 months. On appeal, the Fifth Circuit held that the counts should have been grouped, resulting in a range of 87-108 months. Because the drug count carried a mandatory minimum term of 120 months, the court, citing §5G1.2(b), concluded that the minimum required sentence was 120 months. The court remanded with instructions to the district court to impose a sentence of 120 months. *Id.* at 395. It said nothing about whether §5G1.2(b) required the court to impose 120 months on the count carrying no mandatory minimum. Hence, we believe it entirely incorrect to rely upon *Salter* to state that "[t]he Fifth Circuit has held that [in a multi-count case involving a "mandatory minimum sentence that affects the otherwise applicable guideline range"] the effect on the guideline range applies to all counts in the case."

The courts that have expressly addressed whether a mandatory minimum sentence becomes the guideline range on all counts have concluded that it does not. *See United States v. Evans-Martinez*, 611 F.3d 635 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 956 (2011); *United States v. Kennedy*, 133 F.3d 53, 60-61 (D.C. Cir. 1998). While the court in *Evans-Martinez* noted *Salter's* suggestion that the sentence should be 120 months, it found that conclusion "unpersuasive" because it lacked "analysis or explanation." 611 F.3d at 641 n.9. The Ninth Circuit's refusal to permit a mandatory minimum sentence to trump the guideline sentence on other counts stands on firm ground. In *Evans-Martinez*, the defendant was convicted of three counts: (1) sexual abuse of a minor; (2) sexual exploitation of children; and (3) witness tampering. The district court determined that the sentencing range for all counts was 120 months imprisonment – the statutory minimum sentence for sexual exploitation. The court then imposed concurrent sentences of 160 months imprisonment. On appeal, the Ninth Circuit concluded that the guideline sentence on count two was the 120 month mandatory minimum. The guideline sentence on the remaining counts, however, was 30-37 months. The Ninth Circuit declined to

²⁰ Defenders in the Fifth Circuit report that district courts typically impose separate sentences in multi-count cases where the guideline range is restricted or truncated by a mandatory minimum penalty.

permit the count with the mandatory minimum sentence to control the sentence on the remaining counts.

The Court reached this conclusion for four reasons. First, the language of §5G1.2(b) requires that the sentence imposed on each other count (*i.e.*, each count other than the one subject to a mandatory minimum) be determined on the basis of the guideline range, not the mandatory minimum sentence applicable to another count. Second, the D.C. Circuit reached the same conclusion in *Kennedy*. Third, its reading of §5G1.2 would avoid absurd results when one count has a mandatory minimum sentence in excess of the statutory maximum on another count. Fourth, any “logic” in applying a mandatory minimum term to all counts was “overcome by . . . the possibility that the conviction on the count carrying the mandatory minimum sentence could be vacated or reversed, putting in doubt any sentence based on it.” 611 F.3d at 637.

Other reasons counsel against the proposed amendment. First, the meaning of “total punishment” as it is used in the guidelines has never been clear and the proposed amendment only makes the definition murkier.²¹ See *United States v. Martinez*, 274 F.3d 897, 904 (5th Cir. 2001) (guidelines provide “incomplete definition” of “total punishment”); *United States v. Reis*, 369 F.3d 143, 149 (2d Cir. 2004) (“concept of ‘total punishment’ is not well-defined”); *United States v. Iniguez*, 368 F.3d 1113, 1115 (9th Cir. 2004) (en banc) (“Guidelines do not provide an easy, capsulized definition of ‘total punishment’”). Consequently, some courts exclude departures from the “total punishment” calculation whereas others do not. Compare *Martinez*, 274 F.3d at 904 (“total punishment” excludes departures) with *United States v. Evans*, 314 F.3d 329, 332 n.1 (8th Cir. 2002) (“total punishment” for purposes of §5G1.2(d) includes departures). See generally *Reis*, 369 F.3d at 149 (noting conflict).

The reference to “total punishment” in the proposed language as meaning “the combined length of the sentences to be imposed,” does not clarify the murky definition and conflicts with §3D1.5, “Determining the Total Punishment.” Under §3D1.5, the court is instructed to determine the “total punishment” by using “the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.” The commentary to §3D1.5 then explains that “[t]he combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, part B (Career Offenders and Criminal Livelihood).” Hence, under §3D1.5, “the “total punishment” or “appropriate sentence” refers to the guideline range determined under Chapters Two, Three, and Four, but not Chapter Five departures or variances. In contrast to §3D1.5’s definition of “total punishment,” the same term as used in proposed §5G1.2(b) refers to the “combined length of the sentences to be

²¹ The synopsis of proposed amendment hints at the lack of clarity surrounding the definition of “total punishment” by referring to an “ancillary application issue,” but it does not describe the issue. Nor does it explain how the proposal clarifies the issue.

imposed,” which suggests that departures and variances are considered. This continued lack of clarity over the meaning of “total punishment” will only generate more, rather than less, litigation.

Second, the proposed amendment will deprive the Commission of valuable feedback about the operation of the guidelines. If a mandatory minimum sentence on one count must be the guideline sentence on all counts, then the Commission will never know whether the sentencing court found the guideline range applicable to the non-mandatory counts to be too high, too low, or just right. The proper functioning of the guideline system depends upon a meaningful dialogue between the Commission and judges. See *Rita v. United States*, 551 U.S. 338, 350 (2007); 28 U.S.C. § 994(o); USSG Ch. 1, Pt. A, Subpt. 2 (“Continuing Evolution and Role of the Guidelines”). For the system to work, the Commission must be able to determine when judges decline to follow a guideline, and if they do so, whether it is because (1) the guideline lacks clarity; (2) circuit case law interprets the guideline incorrectly; or (3) the guideline “fails properly to reflect § 3553(a) considerations.” *Rita*, 551 U.S. at 351. If a mandatory minimum sentence is permitted to affect the guideline range on all counts, including counts not subject to a mandatory minimum, the Commission would be deprived of the feedback necessary for “ongoing revision of the Guidelines” that “will help to avoid excessive sentencing disparities.” *Kimbrough v. United States*, 552 U.S. 85, 107 (2007).²²

The case of *United States v. Major*, No. 1:11-cr-00016-001 (E.D. Va. July 15, 2011), provides an example of how a rule that requires a mandatory minimum to control the sentence on other counts would deprive the Commission of valuable information. *Major* is a case involving BZP, which is cited in the March 14, 2012 testimony of Penny Beardslee. In that case, the defendant was convicted of one count of conspiracy to distribute a quantity of a mixture and substance containing BZP and one count of possession of a firearm and ammunition by a convicted felon. Count one carried a statutory maximum penalty of twenty years. Count two carried a mandatory minimum of 180 months. The defendant’s final offense level would have been determined under §4B1.4. Instead of imposing two concurrent sentences of 180 months, the court imposed a 36 month sentence on the BZP count and a concurrent 180 month sentence on the firearm count. Structuring the sentence so the mandatory minimum count did not trump

²² The Commission made ameliorative changes in 2010 and 2011 in response to feedback from the district courts and courts of appeal. See USSG, Amend. 742 (Nov. 1, 2010) (eliminating “recency” points from the criminal history score, citing below-guideline sentences); USSG, Amend. 738 (Nov. 1, 2010) (slightly expanding the availability of alternatives to straight imprisonment, citing judicial feedback); USSG, Amend. 754 (Nov. 1, 2011) (reducing large increases in immigration guideline based on stale prior convictions, citing appellate decisions finding unwarranted uniformity in requiring same increase regardless of age of conviction). It also undertook a review of the child pornography guidelines in response to such feedback.

the sentence imposed on the non-mandatory BZP count provided the Commission with valuable information about how courts treat BZP under the guidelines.

Third, permitting a mandatory minimum count to override the guideline range on all other counts may infect other decisions. What follows are two examples. The first points out the effect that guideline calculations may have on a court's decision to impose consecutive sentences under 18 U.S.C. § 3584. The second discusses the potential collateral consequences of having a mandatory minimum sentence affect the length of sentence imposed on a non-mandatory minimum count.

In the first example, the defendant is convicted of possession with intent to distribute .5kg of marijuana, 21 U.S.C. § 841(b)(1)(D), and distribution of 10g of marijuana (10 blunts) within a thousand feet of a community college, 21 U.S.C. § 860. Count one carries a statutory maximum penalty of five years. Count two carries a mandatory minimum penalty of one year and a statutory maximum of ten years. 21 U.S.C. § 860. The combined offense level is 9.²³ With a two-level reduction for acceptance of responsibility, and at criminal history category III, the defendant's guideline range is 4-10 months. Because count two carries a one year mandatory minimum penalty, the guideline range for that count is twelve months. Under prevailing practice, and absent any reason for departure or variance, the court would impose a one year sentence on count two and a concurrent sentence of anywhere from four to ten months on count one. If the court were inclined to impose a harsher sentence, it might choose to exercise its discretion under 18 U.S.C. § 3584 (after considering the § 3553(a) factors, including the sentencing guidelines) and impose a sentence anywhere from four to ten months on count one and a consecutive one year sentence on count two. Under the proposed amendment, and absent any reason for departure or variance, a court following the guidelines would be required to impose a one year mandatory minimum sentence on count two and a concurrent one year sentence on count one. If the court were inclined to impose consecutive sentences, it may well choose to impose a sentence of one year on count one and a consecutive one year sentence on count two. In short, the arbitrary increase in the "guideline sentence" on the non-mandatory minimum count would have an anchoring effect on the court's decision to impose consecutive sentences. Our concern here is not merely hypothetical. Discretionary decisions to impose consecutive sentences are often tethered to the underlying guideline calculations.²⁴

²³ The offense level under §2D1.2 is 9. The offense level under §2D1.1 is 8.

²⁴ See, e.g., *United States v. Fight*, 625 F.3d 523 (8th Cir. 2010) (three consecutive 77-month terms, which were each within sentencing range of 77 to 96 months), *cert. denied*, 131 S. Ct. 2474 (2011); *United States v. Looper*, 399 F. App'x 368, 370 (10th Cir. 2010) (court imposed consecutive sentences of 12 months each on two counts; each sentence was within guideline range of six to twelve months for each count); *United States v. Rutherford*, 599 F.3d 817, 819 (8th Cir. 2010) (court imposed consecutive

The second example of the unfair, unintended collateral consequence of the proposed amendment concerns how prior convictions are counted in various sentencing schemes, including the federal sentencing guidelines. Take a case involving two counts: one with a mandatory minimum of one year and one with no mandatory minimum and an otherwise applicable guideline range of 0 to 6 months. Assume that the defendant is subsequently convicted of another offense and a second court must calculate his criminal history score under §4A1.1. Also assume that the sentences for the two prior convictions are counted separately under §4A1.2(a)(2). If the first sentencing court had imposed a one year sentence on count two and a thirty day sentence on count one, the defendant would receive 3 criminal history points.²⁵ If, however, the first sentencing court imposed two one year sentences according to the proposed amendment, the defendant would receive 4 criminal history points and be moved into a criminal history category III rather than II. This would occur not because any judge or policy making body decided that the defendant deserved a one year sentence on the non-mandatory minimum count, but because the Commission arbitrarily decided that a count involving a mandatory minimum sentence should affect the guideline sentence for all other counts in a case.

Fourth, as the Commission acknowledges, a decision to have a mandatory minimum count drive the sentence on all other counts would necessitate a special rule on resentencing like the one the Commission sets forth in proposed §5G1.2, comment. (n.3(D)). The need for such a special rule counsels against adopting the proposed amendment in the first place. In no other context do the guidelines attempt to regulate the scope of an appellate court mandate on resentencing. To do so now would set a dangerous precedent that may well cause confusion, and waste resources, upon a remand for resentencing in cases where the mandatory minimum sentence no longer applies.

Lastly, Defenders believe that the proposed amendment promotes disrespect for the law by permitting a count with a mandatory minimum to overtake the sentencing decision on all counts. A defendant and any member of the public looking at a judgment and commitment order should be able to see the clear impact of the mandatory minimum and what sentence the court would have imposed on all other counts. Sentences must, among other things, “reflect the seriousness of the offense,” “promote respect for the law,” and “provide just punishment for the offense.” 18 U.S.C. § 3553(a). Those purposes are undermined when the sentence imposed on all counts of a multi-count indictment does nothing more than reflect the mandatory minimum sentence of a single count.

sentences of 37 months each on two counts; each sentence was within guideline range of 37 to 46 months).

²⁵ The one year sentence would get 2 points under §4A1.1(b). The thirty day sentence would receive 1 point under §4A1.1(c).

IV. Proposed Amendment 9: Rehabilitation

This proposed amendment states that it responds to the Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), in which the Court held, in reliance on 18 U.S.C. § 3553(a)(1)-(2) and 18 U.S.C. § 3661, that a district court may consider evidence of the defendant's postsentencing rehabilitation to support a downward variance from the advisory guideline range. *Id.* at 1235-36. The Court found that evidence of postsentencing rehabilitation may be highly relevant, and was highly relevant in Pepper's case, to several of the purposes and factors that "Congress has expressly instructed district courts to consider at sentencing."²⁶ *Id.* at 1242. The Court concluded that "the Court of Appeals' ruling prohibiting the District Court from considering any evidence of Pepper's postsentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives in §§ 3661 and 3553(a)." *Id.* at 1243.

Although the court of appeals did not rely on §5K2.19 below, amicus appointed to defend its judgment argued that the judgment could be upheld on the basis of the policy statement.²⁷ The Supreme Court rejected that argument, finding that the policy statement rests on unconvincing policy rationales not reflected in the sentencing statutes, and holding in general that policy statements cannot be elevated over other § 3553(a) factors. *Pepper*, 129 S. Ct. at 1247, 1249.

Pepper was thus exclusively concerned with whether a court of appeals may prevent consideration of post-sentencing rehabilitative efforts as grounds for a variance. Section 5K2.19, which pertains only to departures, was not directly at issue in the case. As such, the Commission need not respond to *Pepper*. If, however, the Commission is concerned that *Pepper* renders irrelevant its categorical prohibition on departures, it should repeal §5K2.19 as proposed in Option 1. If so, the courts will understand that they may depart based on post-sentencing

²⁶ *Pepper* completed a drug treatment program, remained drug free, attended college, worked, got married, supported his wife's daughter, and reestablished a relationship with his father. The Court stated that this evidence "provides the most up-to-date picture of Pepper's 'history and characteristics,'" "sheds light on the likelihood that he will engage in future criminal conduct," "suggest[s] a diminished need for 'educational or vocational training . . . or other correctional treatment,'" and "bears directly on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing." *Id.* at 1242-43.

²⁷ The Eighth Circuit, in holding that post-sentencing rehabilitation was an "impermissible factor to consider in granting a downward variance," *id.* at 1237, relied on its own circuit rule. That circuit rule first appeared in *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999), which held that post-sentencing rehabilitation "cannot be an appropriate basis for a downward departure." The Commission then adopted the Eighth Circuit's *Sims* rule, see USSG §5K2.19; USSG App. C, amend. 602 (Nov. 1, 2000), over the contrary holdings of seven other circuits. After *Booker*, the Eighth Circuit re-adopted the *Sims* rule and applied it to variances. See *United States v. Pepper*, 486 F.3d 408, 414 (8th Cir. 2007).

rehabilitative efforts, just as they have always been able to depart (at least since *Koon v. United States*, 518 U.S. 81 (1996)), based on post-offense rehabilitative efforts, although not mentioned in a policy statement.

If the Commission wants to affirmatively encourage departures based on rehabilitative efforts, and wants judges to use departures instead of variances, it should use the same model it has used for departures based on military service,²⁸ rather than the commentary proposed in Option 2. That is, the Commission should state that rehabilitative efforts “may be relevant,”²⁹ and post on its website examples from the caselaw (such as *Pepper*, *Gall*, and other cases such as those in the footnote³⁰), along with research demonstrating that rehabilitative efforts, such as obtaining education or job skills, holding a job, maintaining family ties, acting responsibly toward dependents, and receiving treatment, reduce the risk of recidivism.³¹

²⁸ See USSC, *Case Annotations and Resources – Military Service – USSG §5H1.11 Departures and Booker Variances* (2012).

²⁹ Here (and with respect to other factors the Commission has recently said “may be relevant”), the Commission should simply state that rehabilitative efforts may be relevant in determining whether a departure is warranted. The requirement that such efforts be “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines” is difficult to distinguish from the standard for factors deemed “not ordinarily relevant.” See USSG §5K2.0(a)(4) (2010) (factors “identified [] as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristics or other circumstance is present to an exceptional degree.”); see also USSG §5K2.0 (2002) (A factor “that is, in the Commission’s view, ‘not ordinarily relevant’ in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the guidelines.”).

³⁰ See, e.g., *United States v. Shull*, 793 F. Supp. 2d 1048, 1063 (S.D. Ohio 2011) (while incarcerated, Shull completed a Drug Education Program, obtained his GED, completed courses and obtained certifications in several trades, and was enrolled in college taking business classes); *United States v. Hernandez*, 604 F.3d 48, 53-54 (2d Cir. 2010) (during his twenty years of imprisonment, Hector Hernandez earned an associate degree with honors and a diploma for financial planning, tutored other inmates, and received positive performance reports for work in a variety of prison jobs); *United States v. McMannus*, 262 F. App’x 732 (8th Cir. 2008) (while on pretrial release, Patrick McMannus stopped using drugs, put himself through community college, was a model employee, and passed all drug tests); *United States v. Preacely*, 628 F.3d 72, 81-82 (2d Cir. 2010) (Jamar Preacely overcame his drug addiction after his arrest and pretrial release, when he was required to submit to random drug testing, then underwent voluntary counseling, became a model employee after completing a competitive workforce training program, married his girlfriend, was a responsible father to their child, and become a youth advisor for a gang prevention program).

³¹ See, e.g., USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 4-6, 54 (1994), http://www.bop.gov/news/research_projects/Published_reports/recidivism/oreprrecid87.pdf; Correctional

The Commission should also encourage judges to use alternatives to straight prison so that those without jobs or education have the best opportunity to obtain them, and so that those with family ties and responsibilities can best maintain them. While some succeed at developing job skills or education while in prison, research demonstrates that lengthy prison terms increase the risk of recidivism by reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.³² As Congress suggested when it enacted the Sentencing Reform Act, a defendant's need for education, employment, treatment, or to support her family can often best be addressed through probation or other alternative

Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (2005); Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006); Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002); U.S. Dep't of Health & Human Servs., Nat'l Inst. on Drug Abuse, *Principles of Drug Addiction Treatment: A Research-Based Guide* 13 (2d ed. 2009); Missouri Sent'g Advisory Comm'n, *Smart Sentencing*, Vol. 1, Issue 4 (July 20, 2009), <http://www.mosac.mo.gov/file.jsp?id=45342>; Elizabeth K. Drake, Steve Aos, & Marna G. Miller, Washington State Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>; Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006); Doug McVay et al., Justice Policy Institute, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004).

³² See Valerie Wright, Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment* 7 (2010) ("When prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism."); Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol'y 589, 591-93 (2007) ("imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (finding that "[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release," and "alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties."); Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent'g Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism."); USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (2009) ("alternatives to incarceration can provide a substitute for costly incarceration," and "also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.").

sentences.³³ The Commission should, for example, include information on its website about workforce programs that have been successful in reducing recidivism, such as the programs in the District of Delaware³⁴ and the Eastern District of Missouri.³⁵ If the Commission were to encourage alternatives involving job training and placement, it would benefit society by reducing recidivism and would reduce any difference between African American and white males in receiving probation that may stem from employment status.³⁶

³³ S. Rep. No. 98-225, 172-73 (1983) (“The Commission might conclude . . . that the need for an educational program might call for a sentence to probation if such sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment.”); *id.* at 173 (need for vocational skills should be “similar” to “the education factor”); *id.* (need for employment record should be “similar” to “education and vocational skills”); *id.* at 174 (“The Commission certainly could conclude [that] a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family.”). *See also id.* at 173 (“The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment.”); *id.* (The Commission might “recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for ‘drying out,’ as a condition of probation.”).

³⁴ Christy Visher *et al.*, *Workforce Development Program: A Pilot Study of its Impact in the U.S. Probation Office, District of Delaware*, 74 Fed. Probation 3, 15 (2010) (those who participated in workforce program outside of prison were 58% less likely to recidivate than the matched samples of offenders who received no workforce development services), <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2010-12/workforce.html>.

³⁵ The Defendant/Offender Workforce Development Initiative in the Eastern District of Missouri, which provides job training and placement to offenders on probation and supervised release, has reduced its recidivism rate by 33%, and the unemployment rate for people on probation in the district is less than half the rate in St. Louis or nationally. *See* USSC, *Symposium on Alternatives to Incarceration 22-24* (testimony of Chief Probation Officer Doug Burris, E.D. Mo.); *see also id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.); Scott Weygandt, Scott Anders and Felix Mata, *Missouri’s Eastern District Finds Success With Work Force Initiative*, *Corrections Today*, Volume 70, Issue 4, pp. 62-65 (Aug. 2008), <http://www.aca.org/>.

³⁶ As Raymond Moore testified before the Commission last month, it is likely that the increased odds of imprisonment for African American males found by the Pennsylvania State Study, *see* Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC’s 2010 Report*, 10 *Criminology & Pub. Pol’y* 1077, 1100, 1105 (2011), is attributable to the fact that employment status is missing from the Commission’s datasets. *See* Statement of Raymond Moore Before the U.S. Sentencing Comm’n, *The Current State of Federal Sentencing*, at 29-30 (Feb. 16, 2012). Employment strongly and appropriately influences judges’ decisions to impose probation rather than a prison term. USSC, *Sentencing Options under the Guidelines* 16-18 (1996). While we do not know the employment status of the defendant population or of any racial group within it, we know that African Americans have a higher unemployment rate than members of other races in the general population. U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, at 378, tbl. 588, <http://www.census.gov/compendia/statab/2012edition.html>.

We do not support Option 2 because it would not encourage departures. The proposed commentary sets forth unnecessary limitations that would discourage courts from rewarding positive achievements that bear directly on the purposes of sentencing, and would impose those same limitations on departures based on post-offense, pre-sentencing rehabilitation. Option 2's commentary would introduce unnecessary complexity and rigidity, and thus dissuade lawyers and judges from relying on it. Advising judges to consider at the outset whether the defendant "engaged in a pattern of activity" would invite litigation over a rigid and limiting test whose only analogues in the Manual refer to aggravating factors or other criminal conduct as a basis for an upward enhancement or upward departure.³⁷ The requirement that "the effort is likely to be successful" would also invite litigation, and would unnecessarily exclude deserving individuals. For example, recovery from drug addiction is characterized by set-backs and periods of relapse that do not mean that rehabilitation efforts have failed, are not effective, or are not likely to be successful, but that treatment needs to be readjusted or reinstated.³⁸ The suggestion that the court consider the "extent to which the specific rehabilitative acts were taken at the defendant's own initiative" may be read to disqualify or limit consideration of rehabilitative efforts that began while the defendant was incarcerated or as a condition of pretrial or supervised release. A court might conclude that such a defendant never acted on his "own initiative" because his rehabilitative efforts began under official encouragement or compulsion.³⁹ But these efforts and accomplishments are as relevant to the unlikelihood that the defendant will commit further crimes as those of a person who changed his life solely on his own initiative.⁴⁰

In sum, the Commission should simply delete §5K2.19. If the Commission wants to affirmatively encourage departures based on rehabilitation, it should use the same model it has adopted for military service, rather than promulgate a policy statement that judges and parties will avoid.

³⁷ In those contexts, a "pattern" of activity requires "two or more separate instances" or "two separate occasions" of specified conduct, *see, e.g.*, USSG §§ 2A6.2(b)(1)(D), 2B1.5(b)(5), 2G2.2(b)(5), 4B1.5(b), or requires "planned acts occurring over a substantial period of time," *see, e.g.*, USSG §§ 2D1.1(b)(14)(E), 4B1.3 cmt. (n.1). In this context, if a court finds that a single act of rehabilitation (such as saving someone's life, or abruptly quitting a drug habit) shows that the defendant is unlikely to commit further crimes, there would be no reason to deny a departure because the act does not constitute a "pattern."

³⁸ *See, e.g.*, U.S. Dep't of Health & Human Servs., Nat'l Institute on Drug Abuse, *Principles of Drug Abuse Treatment: A Research Based Guide* 2-3, 12 (2d ed. 2009) ("Recovery from drug addiction is a long-term process" that "frequently requires multiple episodes of treatment" and that "relapsing to drug abuse is not only possible but also likely."), <http://www.nida.nih.gov/podat/Preface.html>.

³⁹ *See, e.g., Pepper*, 131 S. Ct. 1229, and cases cited in note 30, *supra*.

⁴⁰ U.S. Dep't of Health & Human Servs., Nat'l Institute on Drug Abuse, *Principles of Drug Abuse Treatment: A Research Based Guide* 19 (2d ed. 2009).

V. Miscellaneous

A. Cell Phones

The Commission sets forth two proposals in response to the Cell Phone Contraband Act of 2010, Pub. L. 111-225 (August 20, 2010). Option 1 assigns a base offense level of 13. Option 2 assigns a base offense level of 6. Defenders support Option 2. The Cell Phone Contraband Act makes it a misdemeanor punishable by one year imprisonment to provide an inmate with a cell phone or to be an inmate in possession of a cell phone. If the Commission were to set the offense level at 13, then every defendant convicted under 18 U.S.C. § 1791 for providing or possessing a cell phone would be within a guideline range of 12-18 months. Given the wide range of circumstances under which a person might provide a cell phone to an inmate or be an inmate in possession of a phone, such a result is untenable. This is particularly true given the total lack of data on the percentage of cell phones in prison that were reportedly used in criminal activity.⁴¹

There is a fundamental difference between a family member who smuggles in a cell phone to allow an inmate to call home more often, and a prison contractor who smuggles in a cell phone to sell it for profit knowing that it might be used for criminal activity. Similarly, there is a large difference in culpability between the inmate who uses a phone to communicate with friends and relatives,⁴² or has a phone to call home because he cannot afford 23 cents per minute for a long distance phone call,⁴³ and the inmate who uses the phone to conduct criminal activity. The inmate found in joint possession of a cell phone in a common area⁴⁴ also may be less culpable than an inmate caught using a phone. An offense level 6 would set the range at 0-6 months, giving judges multiple sentencing options to account for the seriousness of the offense.⁴⁵

⁴¹ United States Government Accountability Office, Bureau of Prisons: *Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection* 23 (2011) [hereinafter *Cell Phone Detection*].

⁴² *United States v. Beason*, 2011 WL 399839 (N.D.W. Va. Feb 1, 2011) (parties agreed defendant possessed phone to communicate with friends and relatives). This defendant received 2 years probation. *Beason*, 1:10-cr-00105-IMK -JSK-1 (N.D.W. Va. June 27, 2011).

⁴³ *Cell Phone Detection*, at 12.

⁴⁴ *Id.* at 24 (noting that phones are often found in “common areas” including bathrooms and television rooms).

⁴⁵ See, e.g., *United States v. Blake*, 288 F. App’x 791 (3d Cir. 2008) (defendant found in possession of cell phone sentenced to six months).

The availability of other non-criminal sanctions for cell phone use in prison is also a relevant consideration in setting the offense level. Under BOP regulations, an inmate found in possession of a cell phone may “face a range of sanctions from transfer to a higher-security institution to loss of ‘good time’ or other privileges.”⁴⁶ This wide-range of sanctions reflects the myriad circumstances under which cell phones may be possessed in prison. The sentencing guidelines should similarly permit a court to consider a range of sanctions rather than aggregate all cell phone offenses under 18 U.S.C. § 1791 at the upper end of the statutory maximum penalty.

B. Prevent All Cigarette Trafficking Act of 2009 (PACT Act)

The Commission proposes amending the guidelines in two ways related to the PACT Act. The first proposed amendment amends Appendix A to reference offenses under 15 U.S.C. § 377 to §2T2.1 (Non-Payment of Taxes), and possibly, additionally to §2T2.2 (Regulatory Offenses). The second proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 1716E to “either or both” §2T2.1 and §2T2.2. Defenders oppose both of these amendments related to the PACT Act. First, they are unnecessary, as these offenses can be adequately addressed by reference to the most analogous offense guideline. Second, they are premature. If the Commission nonetheless feels the need to refer PACT Act violations to a specific guideline, the reference should be to §2T2.2, not §2T2.1.

The PACT Act “imposes strict restrictions on the ‘delivery sale’ of cigarettes and smokeless tobacco. A ‘delivery sale’ occurs when the buyer and seller are not in each other’s physical presence at the time the buyer requests or receives the cigarettes, as when cigarettes are ordered over the Internet and delivered by mail.”⁴⁷ Section 5 of the Act, however, “expressly preserved all existing limitations under federal and state law on state and local authority and jurisdiction over Indian nations and their citizens, Indian commerce, and Indian country.”⁴⁸ The Bureau of Alcohol, Tobacco, Firearms and Explosives has indicated that 80% of all cigarettes

⁴⁶ *Id.* at 8.

⁴⁷ *Red Earth LLC v. United States*, 657 F.3d 138, 141 (2d Cir. 2011).

⁴⁸ Letter from Robert Odawi Porter, President, Seneca Nation of Indians, to James P. Ficarella, Program Manager, Bureau of Alcohol, Tobacco, Firearms and Explosives, at 3 (Dec. 29, 2011), http://www.usetinc.org/Libraries/meeting_page_documents/Seneca_Nation_PACT_Comments_122911.sflb.ashx; *see also* 15 U.S.C. § 375, Historical and Statutory Notes (Exclusions Regarding Indian Tribes and Tribal Matters, Pub. L. 111-154, §5, Mar. 31, 2010) [hereinafter *Odawi Letter*].

sold through the mails in the United States are by businesses licensed by the Seneca Nation of Indians.⁴⁹

There are multiple reasons it is premature for the Commission to address sentences for offenses under the PACT Act. First, Defenders agree with the suggestion of the Department of Justice that the Commission consider tribal input regarding appropriate sentences for violations of this Act.⁵⁰ Second, serious questions remain about the reach of this Act in Indian country. The Department of Justice, Office of Tribal Justice has indicated the Department is “considering issuance of a formal interpretive rule on the PACT Act, to be published in the Federal Register” to “provide detail and clarity on the statute and on issues important to tribal nations.”⁵¹ The Seneca responded to the Department’s request for input.⁵² The comment period ended on January 15, 2012,⁵³ and no interpretative guidance has yet been issued. Finally, constitutional challenges to the Act have resulted in two Courts enjoining enforcement of the Act.⁵⁴

If the Commission insists on acting at this juncture, offenses under both 15 U.S.C. § 377 and 18 U.S.C. § 1716E should be referenced only to 2T2.2, as the offenses are regulatory in nature. DOJ and the Defenders agree violations of 18 U.S.C. § 1716E should be referenced only to §2T2.2 because the statute deals with regulations regarding nonmailable tobacco products and does not criminalize non-payment of taxes.⁵⁵

⁴⁹ Statement of Richard E. Nephew Before Bureau of Alcohol, Tobacco, Firearms and Explosives, at 3 (June 8, 2010), attached to Declaration of Robert Odawi Porter in *Red Earth LLC v. United States*, 10-cv-530 (W.D.N.Y. July 16, 2010), ECF No. 42-2.

⁵⁰ *Wroblewski Letter*, at 34.

⁵¹ Letter from Tracy Toulou, Director, Office of Tribal Justice, to Tribal Leader, at 2 (Nov. 15, 2011), <http://www.ncai.org/fileadmin/broadcasts/2011/November/PACT%20Act%20followup%20consultation%20letter.pdf>; DOJ, Request for Tribal Input on Interpretative Guidance Regarding the Prevent All Cigarette Trafficking (PACT) Act, [http://www.ncai.org/fileadmin/broadcasts/2011/November/PACT%20Act%20framing%20paper%20\(2\).pdf](http://www.ncai.org/fileadmin/broadcasts/2011/November/PACT%20Act%20framing%20paper%20(2).pdf) [hereinafter *Toulou Letter*].

⁵² *Odawi Letter*.

⁵³ *Toulou Letter*, at 2 (noting “all comments received by January 15, 2012 will be considered in this process”).

⁵⁴ See *Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010), *aff’d* 657 F.3d 138 (2d Cir. 2011); *Gordon v. Holder*, 2011 WL 6018814 (D.D.C. 2011).

⁵⁵ *Wroblewski Letter*, at 36.

Defenders also believe 15 U.S.C. § 377 should also be referred in Appendix A only to §2T2.2. On this point, it appears DOJ also agrees.⁵⁶ Although it is somewhat ambiguous, based on a reading of DOJ's letter to the Commission in its entirety, it appears the Department believes that because the obligations and concomitant offenses are regulatory in nature, and the statute does not require payment of any taxes, §2T2.2 is the only appropriate guideline to reference in Appendix A.⁵⁷ This is appropriate because a review of the obligations imposed on delivery-sellers in § 376a reveal that noncompliance is a regulatory offense. The obligations under the Act focus on strict shipping, packaging, age-verification, and record-keeping requirements. The guideline for non-payment of taxes, §2T2.1, is not the appropriate guideline for violations of this offense. Currently, only violations of the Internal Revenue Code are referenced to §2T2.1. *See* USSG App. A.

VI. Conclusion

We appreciate the opportunity to submit these comments on the Commission's proposed amendments, and look forward to continuing to work with the Commission on all matters related to federal sentencing policy.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

Enclosures

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Kenneth Cohen, General Counsel
Jeanne Doherty, Public Affairs Officer

⁵⁶ *Id.* at 35-36.

⁵⁷ *Id.*