

## F. 2010 – 2011: Department and Congressional Actions Regarding Interpretation of the CVRA

In connection with the Department’s 2010 effort to update its 2005 Guidelines, the Office of the Deputy Attorney General convened a Victim of Crimes Working Group that asked OLC to revisit its 2005 preliminary review concerning the definition of “crime victim” under the CVRA and solicited input concerning the issue from Department components and federal law enforcement agencies. In response, OLC issued a December 17, 2010 opinion entitled, *The Availability of Crime Victims’ Rights Under the Crime Victims’ Rights Act of 2004*. Based on the CVRA’s language, relevant case law, and memoranda opinions from Department components, OLC reaffirmed its 2005 conclusion that CVRA rights do not vest until a criminal charge has been filed (by complaint, information, or indictment) and the rights cease to be available if “all charges are dismissed either voluntarily or on the merits (or if the [g]overnment declines to bring formal charges after the filing of a complaint).”<sup>378</sup>

After OLC issued its opinion, the Department revised the 2005 Guidelines in October 2011 but did not change its fundamental position that the CVRA rights did not vest until after criminal charges were filed. The 2011 revision did, however, add language concerning victim consultation before a defendant is charged: “In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultation prior to the filing of a charging instrument with the court.”<sup>379</sup> The use of the word “should” in the 2011 Guidelines indicates that “personnel are expected to take the action . . . unless there is an appropriate, articulable reason not to do so.”<sup>380</sup> Nevertheless, the required consultation “may be general in nature” and “does not have to be specific to a particular plea offer.”<sup>381</sup> The revisions also specified that AUSAs were to ensure that victims had a right to be reasonably heard at plea proceedings.<sup>382</sup>

On November 2, 2011, U.S. Senator Jon Kyl, a co-sponsor of the CVRA, sent a letter to Attorney General Eric Holder, arguing that the 2011 Guidelines revisions “conflict[ed] quite clearly with the CVRA’s plain language” because the 2011 Guidelines did “not extend any rights to victims until charges have been filed.” The Department’s response emphasized that the

---

<sup>378</sup> OLC “express[ed] no opinion” as to whether it is a matter of “good practice” to inform victims of their CVRA rights prior to the filing of a complaint or after the dismissal of charges.

<sup>379</sup> See 2011 Guidelines, Art. V, ¶ G.2, available at [https://www.justice.gov/sites/default/files/olp/docs/ag\\_guidelines2012.pdf](https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf). In its 2011 online training video regarding the Guidelines, the Department encouraged such consultation when reasonable, but it also continued to maintain that there was no CVRA right to confer for pre-indictment plea negotiations.

<sup>380</sup> See 2011 Guidelines, Art. I, ¶ B.2.

<sup>381</sup> See 2011 Guidelines, Art. V, ¶ G.2.

<sup>382</sup> The 2005 Guidelines contained no specific provision requiring AUSAs to ensure that victims were able to exercise their right to be reasonably heard at plea proceedings, only at sentencing. See 2005 Guidelines, Art. IV, ¶ C.3.b.(2). However, the 2005 Guidelines generally require AUSAs to use their best efforts to comply with the CVRA, and the CVRA specifically affords victims the right to be heard at plea proceedings. The 2011 revision remedied this omission.