

Minutes of the April 26, 1991, United States Sentencing Commission
Business Meeting

The meeting was called to order at 9:31 a.m. by Chairman William W. Wilkins, Jr.

The meeting was held in the library of the U.S. Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman
Julie E. Carnes, Commissioner
Helen G. Corrothers, Commissioner
Michael S. Gelacak, Commissioner
George E. MacKinnon, Commissioner
A. David Mazzone, Commissioner
Ilene H. Nagel, Commissioner
Paul L. Maloney, Ex Officio Commissioner
Phyllis J. Newton, Staff Director
Paul K. Martin, Deputy Staff Director
John R. Steer, General Counsel
Nolan Clark, Deputy General Counsel
Joel Garner, Director, Research Studies
Win Swenson, Deputy General Counsel
Samuel Buffone, Representative, Practitioners' Advisory Group
Roger Pauley, Criminal Division, DOJ
Victoria Toensing, Representative, Practitioners' Advisory Group

-- Motion made by Commissioner Corrothers to adopt the minutes of the April 16 and 17, 1991, Commission meetings; seconded by Commissioners Carnes and MacKinnon. Passed unanimously.

Amendments

§5E1.2: Fines for Individual Defendants

Motion made by Commissioner Corrothers to adopt the proposed amendment; seconded by Commissioner MacKinnon. Passed with 5 votes; Commissioners Gelacak and Nagel abstained.

§5K2.16: Restitution Prior to Discovery of the Offense (Policy Statement)

Motion made by Commissioner Carnes to delegate to Chairman Wilkins the responsibility to draft clarifying commentary so that this amendment does not rescind the immunity agreements in U.S.S.G. §1B1.8 nor permit departure for substantial assistance absent a government motion; seconded by Commissioners Mazzone and Nagel. Passed unanimously.

Corporate Sanctions

Commissioner MacKinnon applauded the position of the National Association of Manufacturers in their April 19, 1991, letter to the Commission in which they recognized that a statutory imperative for mandatory guidelines exists in 28 U.S.C. § 994(b)(1).

Chairman Wilkins briefed Commissioners on an April 23, 1991, letter to the Commission from Chairman Brooks and other members of the House Committee on the Judiciary, requesting consultations with the Commission prior to Commission action on organizational sanctions. Chairman Wilkins stated that in order to provide a timely response it had been necessary for him to respond on behalf of the full Commission. He commented that in his response he had noted that the Commission's efforts in this area have been deliberate and thorough: requesting and receiving input from interested members of the business community, government, and academia, holding public hearings and conducting extensive empirical research. He further noted that the Commission had been responsive to a number of inquiries from Congress, including members of the House Judiciary Committee, regarding specific issues in previous drafts of the proposed guidelines. He also mentioned the pledge from the Commission to the House Criminal Justice Subcommittee to promulgate organizational guidelines during the 1991 cycle and the Commission's intent to adhere to this schedule.

-- Motion made by Commissioner Mazzone to ratify Chairman Wilkins' letter and positions stated within; seconded by Commissioner Corrothers. Passed unanimously.

-- Motion made by Commissioner Nagel to delete in the second paragraph of the Introductory Commentary to Chapter Eight - Sentencing of Organizations the word "management's" and insert after the first "offense" in the same sentence, "by certain personnel"; seconded by Commissioner Corrothers. Passed unanimously.

-- Chairman Wilkins moved to adopt §8A1.2(b)(2)(A) with the numerical reversal of §8C2.1 and §8C2.2 in §8A1.2 (conform throughout); seconded by Commissioner Carnes. Passed unanimously.

-- Motion made by Commissioner MacKinnon to delete in §8A1.2, Application Note 3(a), all language after "conviction". Failed (1-5); Commissioner Gelacak abstained.

-- Motion made by Commissioner Mazzone to adopt in §8A1.2, Application Note 3(b), the revised substitute language; seconded by Commissioner Nagel. Passed unanimously.

-- Motion made by Commissioner MacKinnon to adopt §8A1.2, Application Note 3(c) as set forth: "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel and individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager) and any other individual who, although not part of an organization's management, nevertheless exercises substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis; seconded by Commissioner Mazzone. Passed unanimously.

-- Motion made by Commissioner Carnes to delete in §8A1.2, Application Note 3(f), "government program"; seconded by Commissioners Corrothers and Mazzone. Passed unanimously.

-- Motion made by Commissioner Nagel to delete in §8A1.2, Application Note 3(k) and throughout, the word "meaningful" and insert "effective"; seconded by Commissioner Carnes. Passed unanimously.

-- Motion made by Commissioner MacKinnon to delete on page 5 the bracketed language within the last paragraph and insert the words "and follow" before the first use of the word "applicable" in the last sentence; seconded by Commissioners Corrothers and Carnes. Passed unanimously.

-- Motion made by Commissioner Gelacak to adopt in §8C2.4(a) the third option #3 with the inclusion of "to the extent" and the deletion of "if" and delete §8C2.4(c); seconded by Commissioners Corrothers and Mazzone. Passed with 6 votes. Commissioner Nagel abstained.

-- Motion made by Commissioner MacKinnon to delete §8C2.4, Application Notes 4 and 5. Deferred until later to redraft language referring to apportionment in relation to multiple participants.

-- Motion made by Commissioner MacKinnon to delete §8C2.4, Application Notes 6 and 7; seconded by Commissioner Carnes. Passed unanimously.

-- Motion made by Commissioner Corrothers to delegate to Chairman Wilkins the authority to draft conforming background commentary in light of the Commission's decision on loss; seconded by Commissioner Nagel. Passed unanimously.

- Motion made by Commissioner Mazzone to adopt the second option for §8C2.5(b); seconded by Commissioner Corrothers. Passed with 5 votes. Commissioners Gelacak and Nagel voted "no" because this option takes the size of an organization into account in a way in which they find logically inconsistent. Conduct of an individual is more reflective of the conduct of the organization as the size of the organization decreases. Commissioner Nagel concurred with Commissioner Gelacak and further stated that size plays much too large a role and further that dollar loss is a better measure.
- Motion made by Commissioner Nagel to adopt in §8C2.5(c)(1) and (2) her proposed substitute language in (c)(1)(B) and (2)(B): "a civil or administrative adjudication(s) based on two or more instances of similar misconduct;" seconded by Commissioner Mazzone. Passed with 6 votes. Commissioner Gelacak was not present.
- Motion made by Commissioner Mazzone to adopt in §8C2.5(c), (d), and throughout "line of business"; seconded by Commissioner Corrothers. Passed unanimously.
- Chairman Wilkins moved to adopt in §8C2.5(e) "3" points, the first proviso with its bracketed language including the addition after "unit" of "with 200 or more employees" and the shaded second proviso; seconded by Commissioner Corrothers. Passed with 4 votes; Commissioners Nagel and MacKinnon voted "no" and Commissioner Gelacak abstained.
- Chairman Wilkins moved to adopt in §8C2.5(f)(1) "5" points; seconded by Commissioner Corrothers. Passed with 6 votes; Commissioner MacKinnon voted "no."
- Motion made by Commissioner MacKinnon to delete in §8C2.5, Application Note 5, all language in the first sentence after account"; seconded by Commissioner Mazzone. Passed unanimously.
- Motion made by Commissioner Corrothers to adopt in §8C2.5, Application Note 5, "frequently"; seconded by Commissioners Mazzone and Nagel. Passed unanimously.
- Motion made by Commissioner Carnes to adopt the second bracketed §8C2.5, Application Note 8; seconded by Commissioners Corrothers and Nagel. Passed unanimously.
- Chairman Wilkins moved to adopt new proposed §8C2.5(e) (Obstruction of Justice) and Application Notes x and y; seconded by Commissioner Nagel. Passed unanimously.
- Motion made by Commissioner Nagel to adopt in §8C2.6 the shaded language; seconded by Commissioner Corrothers. Passed unanimously.

- Motion made by Commissioner Carnes to adopt in §8C2.6 Minimum Multiplier, "0.05"; seconded by Commissioner Corrothers. Passed by 5 votes; Commissioners Gelacak and Nagel abstained.
- Chairman Wilkins moved to adopt in §8C2.6 Maximum Multiplier, "0.20"; seconded by Commissioner MacKinnon. Passed by 6 votes; Commissioner Nagel abstained.
- There was no objection to adopting §8C2.6, Application Note 1.
- Motion made by Commissioner MacKinnon to increase the base culpability score to 6 at §8C2.5 as proposed by DOJ; seconded by Commissioner Nagel. Failed (2-5).
- Chairman Wilkins moved to delete in §8C2.6 Culpability Score "or more"; seconded by Commissioner Corrothers. Passed by 6 votes. (Chairman Wilkins withdrew this motion).
- Motion made by Commissioner MacKinnon to adopt in §8C2.8, Application Note 3, the shaded language. Passed unanimously.
- Motion made by Commissioner Gelacak to delete §8C4.7; seconded by Commissioners Corrothers and Nagel. Passed unanimously.
- Chairman Wilkins moved to adopt in §8C4.10 the first two sentences and delete the rest; seconded by Commissioner Gelacak. Deferred for redrafting until later.
- Chairman Wilkins moved to adopt the shaded §8C4.11 with the deletion of "solely"; seconded by Commissioner Nagel. Passed with 5 votes; Commissioners Carnes and Gelacak voted "no." Commissioner Gelacak stated that a compliance program is not necessarily ineffective just because an individual in an organization commits an offense while the organization is under court order.
- Motion made by Commissioner MacKinnon to adopt in §8C4.12 Chairman Wilkins' proposed inclusion of an additional first paragraph: "If the organization's culpability score is greater than 10, an upward departure may be appropriate."; seconded by Commissioner Corrothers. Passed unanimously. It was the general consensus to replace in the title the word "Exceptional" for the word "Minimal."
- Motion made by Commissioner Nagel to add in §8D1.1(a)(4) her suggested language. Deferred until later.
- Chairman Wilkins moved to adopt in §2R1.1(d)(2), "0.75" and the shaded (d)(3) language to conform organizational guidelines with individual guidelines in Chapter Two; seconded by Commissioner Corrothers. Passed unanimously.

-- Motion made by Commissioner Mazzone to adopt §2S1.4(c)(1) and (2); seconded by Commissioners Carnes and Corrothers. Passed unanimously.

Chairman Wilkins recessed the meeting until 2:00 p.m.

Chairman Wilkins reconvened the meeting at 2:11 p.m.

-- Commissioner Nagel withdrew her earlier motion to §8A1.2, Application Note (k)(1).

-- Motion made by Commissioner MacKinnon to adopt in lieu of §8C2.4, Application Notes 4 and 5, the proposed substitute language; seconded by Commissioner Mazzone. Passed unanimously.

-- Commissioner Nagel withdrew her earlier motion to §8D1.1(a)(4) and (5).

-- Chairman Wilkins moved adoption of §8C4.10 as set forth: If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense a departure would not be appropriate under this section. Departure under this section will be increasingly appropriate (1) the lower the level and the more limited the extent of substantial authority personnel involvement in the offense and (2) the greater the degree to which remedial costs exceeded or will exceed gain." Seconded by Commissioners Corrothers and MacKinnon. Passed unanimously.

-- Motion made by Commissioner Carnes to adopt for §2F1.1, Application Note 7, the proposed substitute language; seconded by Commissioner Mazzone. Passed unanimously.

-- Chairman Wilkins moved to promulgate the Organizational Sanctions guidelines as amended and submit to Congress; seconded by Commissioner Mazzone. Passed unanimously. Commissioner MacKinnon stated that although the guidelines are too lenient with respect to mitigating factors and compliance programs, he would still vote to promulgate. Commissioner Nagel stated that although the Commission has the authority and responsibility to adopt rules for organizational sanctions she would have preferred initially to issue policy statements. Commissioner Mazzone stated that the corporate sanctions draft was the workproduct of all Commissioners.

Chairman Wilkins expressed appreciation to staff and all outside parties who contributed to the production of these guidelines.

-- Motion made by Commissioner MacKinnon to delegate authority to Chairman Wilkins to make all grammatical and conforming changes; seconded by Commissioner Corrothers. Passed unanimously.

Chairman Wilkins announced that the next Commission meeting will be held on May 14, 1991, at 10:00 a.m. and that the Commission will celebrate Employee Recognition Day on May 15 at 3:00 p.m.

Chairman Wilkins adjourned the meeting at 2:26 p.m.