

United States Sentencing Commission Public Meeting Minutes
August 18, 2016

Chair Patti B. Saris called the meeting to order at 1:01 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio
- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris welcomed the members of the public, both in person and watching via the Commission's livestream broadcast, and thanked the public for its interest in federal sentencing and the Commission's work.

Chair Saris introduced the commissioners. Judge Charles R. Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the Commission in 2013 and serves as a Vice Chair.

Dabney Friedrich has served on the Commission since 2006. Immediately prior to her appointment to the Commission, she served as Associate Counsel at the White House. Commissioner Friedrich previously served as counsel to Chairman Orrin Hatch of the Senate Judiciary Committee and as an Assistant United States Attorney, first for the Southern District of California and then for the Eastern District of Virginia.

Judge William H. Pryor, who also joined the Commission in 2013, is a United States Circuit Judge for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the Federal bench, Judge Pryor served as Attorney General for the State of Alabama.

Rachel Barkow, who also joined in 2013 as a Commissioner, is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focuses her teaching and research on criminal and administrative law. She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Michelle Morales serves as the designated ex officio member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy

and Legislation in the Criminal Division of the Department of Justice. She first joined that office in 2002 and has served as its Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.

Patricia Wilson Smoot serves as the designated ex officio member of the Commission representing the United States Parole Commission. Commissioner Smoot was nominated to the Parole Commission by President Obama and was confirmed by the Senate on September 16, 2010. She was designated as Chairman of the Parole Commission effective May 29, 2015. Immediately before joining the Parole Commission, she served as the Deputy State Attorney for Prince George's County, Maryland. Commissioner Smoot has also been an Assistant United States Attorney in the District of Columbia and a Public Defender in Prince George's County, Maryland.

Chair Saris noted that with the current Commission's final meeting in December, it will end the year with a number of transitions and vacancies. However, she added, the Commission was moving forward in the meantime as there were important issues pending before it.

Chair Saris called for a motion to adopt the April 15, 2016, public meeting minutes. Commissioner Friedrich made a motion to adopt the minutes, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris reported that in July the Commission published several reports including a Report to the Congress: Career Offender Enhancements. Building upon a multi-year analysis, the report analyzed career offenders' prior criminal history, incarceration terms and recidivism rates, and found that there are important differences between violent career offenders and those engaged only in drug trafficking.

Chair Saris highlighted one of the report's key findings. Compared to offenders who have only engaged in drug trafficking, violent career offenders generally had a more serious and extensive criminal history, recidivated at a higher rate, and were more likely to commit another violent offense in the future. The career offender provision, however, has the greatest impact on drug trafficking offenders because they often face higher statutory maximum penalties, and the career offender directive requires the Commission to set their guideline penalties at or near the statutory maximum. Commission research indicated that career offenders whose qualifying criminal conduct is limited to drug trafficking are not meaningfully different from other federal drug traffickers and should not categorically be subject to the significant increases in penalties required by the career offender directive.

Chair Saris stated that for these and other reasons, the Commission concluded that the career offender directive should be amended to differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one "crime of violence".

Chair Saris expressed the Commission's hope that Congress would consider these recommendations, as well as others it has made, as career offenders now account for more than

11 percent of the total Federal Bureau of Prisons (BOP) population. She noted that efforts to reduce the over population of the BOP has been an overarching policy priority of the Commission for the past several years.

Chair Saris reminded the public that earlier in the year the Commission voted unanimously to amend the definition of “crime of violence” in the federal sentencing guidelines. That amendment became effective August 1, 2016, and a new supplement to the Guidelines Manual has been distributed to the field and is also available on the Commission’s website. In the Commission’s recent report, she noted, was a recommendation to Congress to adopt a new, single definition of “crime of violence” that is consistent with the Commission’s revised approach.

Chair Saris announced that the Commission recently released the latest report on the implementation of Amendment 782 – the so-called “Drugs Minus Two” amendment which made comprehensive changes to federal sentences for drug-related offenses. Since the amendment was adopted unanimously by the Commission in 2014, federal courts have granted a motion for a sentence reduction in nearly 29,000 cases.

Chair Saris closed her report by observing how the Commission’s work continues to have an impact and thanked the numerous individuals and groups, including the Judicial Conference of the United States, Federal Public Defenders, Department of Justice, and advisory groups, who submitted thoughtful comments and recommendations during the most recent notice and comment period.

Chair Saris stated that the next item of business was a possible vote to amend the Commission’s Rules of Practice and Procedure and called on the General Counsel to advise the Commission on that matter.

Ms. Grilli explained that a notice of proposed amendments to the Commission’s Rules of Practice and Procedure was published in the Federal Register on March 31, 2016, and the Commission received and reviewed public comment pursuant to that notice. She stated that a motion to adopt the amended rules of practice and procedure, attached hereto as Exhibit A, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Vice Chair Breyer. The Chair called for discussion on the motion, and, hearing no discussion, the Chair called for a vote. The motion was adopted unanimously.

Chair Saris stated the next item of business was a vote on the final policy priorities for the 2016-2017 amendment cycle. She again called on the General Counsel to advise the Commission on that matter.

Ms. Grilli explained that a notice of possible policy priorities was published in the Federal Register on June 9, 2016, and the Commission received and reviewed public comment pursuant

to that notice. She stated that a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2016-2017 amendment cycle, attached hereto as Exhibit B, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Vice Chair Breyer seconding.

Chair Saris stated that, as a continuation of the Commission's work over the past decade, it intended to study possible approaches to simplify the operation of the guidelines that will promote proportionality and reduce sentencing disparities. As part of this effort, the Commission will look for ways for the federal sentencing guidelines to better account for a defendant's role, culpability, and relevant conduct. In doing so, she continued, the Commission expects to continue its examination of mandatory minimum penalties, including a review of the severity and scope of these penalties. To that end, the Commission will continue to review expansion of the so-called "safety valve" as well as the elimination of mandatory stacking penalties. Chair Saris stated that the Commission will look to see if there are any appropriate guideline amendments that may be necessary in response to any federal legislation as well as to continue its work with Congress on any statutory changes.

Chair Saris noted that the Commission's appointed Tribal Issues Advisory Group (TIAG) also released its findings and recommendations following a very comprehensive work period. This report reflected the hard work for over a year by the federal judges, tribal law experts and tribal members who are devoted to serving the tribal community. On behalf on the Commission, Chair Saris thanked those who participated – especially Judges Ralph Erickson, Roberto Lange, Diane Humetewa, Jeffrey Viken, Brian Morris, Robert Blaeser, and William Boyum – as well as all of those who worked so hard to provide a very thoughtful set of recommendations to inform the Commission's work. Last month, the Commission held a hearing on TIAG's recommendations and learned a great deal more about the group's work and recommendations. Chair Saris expressed the Commission's appreciation for the contributions of the TIAG to its ongoing discussions, especially regarding the importance of data collection on and how tribal court convictions should be considered in the criminal history section of the Guidelines Manual.

Chair Saris announced that the Commission will further build upon TIAG's recommendations by examining the treatment of all youthful offenders in light of the evolving case law and scientific research relating to adolescent brain development.

Chair Saris observed that, based on the recommendations from the alternatives to incarceration policy team, the Commission will engage in a multi-year study focusing on which particular defendants would be appropriate for alternatives to incarceration as well as a deeper examination of the issues surrounding prior sentence terms served in prison. She stated that the Commission will also expand its study of certain illegal drugs including MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone) as part of ongoing efforts to ensure that the federal sentencing guidelines are both current and effective. The Commission will also begin another study relating to environmental offenses where the conduct involved knowing endangerment resulting

from the mishandling of hazardous or toxic substances, pesticides or other pollutants.

Chair Saris briefly addressed the Bipartisan Budget Act of 2015, enacted in November 2015, after the Commission's amendment cycle had commenced. She acknowledged the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee as well as the House Judiciary Committee to ensure aggressive implementation of these new penalties relating to Social Security fraud. The Chair explained that when new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

Chair Saris recounted that, in response to the Bipartisan Budget Act of 2015, the Commission voted last January to publish a proposed amendment, but received written comment from Members of Congress, the Justice Department and the Inspector General of the Social Security Administration, that led the Commission to conclude that additional study of this issue was warranted to ensure that the new legislation was adequately addressed. Accordingly, Chair Saris stated, the Commission plans to take action on the Act's provisions in this amendment cycle in addition to several other changes to the guidelines that reflect recent developments and evolving issues.

The Chair called for any additional discussion on the motion. Commissioner Morales expressed the thanks of the Attorney General to the Commission for prioritizing the study of synthetic drugs.

The Chair called for any additional discussion on the motion, and, hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris reminded the public about the Commission's upcoming annual National Training Seminar, which will be held in Minneapolis from September 7th to the 9th. She stated that the Commission looked forward to another successful event to update users of the guidelines on changes in the guidelines and emerging case law. The Chair noted that last year's seminar was attended by approximately 1,000 judges, probation officers, and practitioners and another great turnout was expected this year.

Chair Saris also reminded the audience that all of the Commission's policy priorities as well as the updated rules of practice and procedure will be on the website and how the Commission looked forward to working with all interested parties in the upcoming year. She closed by thanking everyone for attending the Commission's meeting.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Pryor made a motion to adjourn, with Vice Chair Breyer seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:17 p.m.

EXHIBIT A



RULES OF PRACTICE AND PROCEDURE

(As amended August 18, 2016)*

About the Commission

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are:

- (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;
- (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and
- (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.

PART I. PURPOSE OF RULES; RULES AMENDMENT PROCEDURE

Rule 1.1 – Application and Purpose

Pursuant to 28 U.S.C. § 995(a)(1) and other applicable provisions of its organizational statute, the United States Sentencing Commission (“the Commission”) has established these rules governing its usual operating practices.

The Commission, an agency within the judicial branch of government, is subject to only that provision of the Administrative Procedures Act, section 553 of title 5, United States Code, relating to publication in the *Federal Register* and a public hearing procedure, with regard to proposed sentencing guidelines or amendments thereto. *See* 28 U.S.C. § 994(x). The Commission is not subject to a variety of other statutes, such as the Federal Advisory Committee Act (5 U.S.C. App.), the Government in the Sunshine Act (5 U.S.C. § 552b), and the Freedom of Information Act (5 U.S.C. § 552), typically applicable to rulemaking agencies in the executive branch. The Commission nevertheless desires to involve interested members of the public in its work to the maximum extent practicable.

* *Editorial Note:* These rules were originally adopted by the Commission on July 11, 1997, and amended in August 29, 2007, and August 18, 2016.

Accordingly, these rules are issued for the purpose of more fully informing interested persons of opportunities and procedures for becoming aware of and participating in the public business of the Commission. These rules are not intended to create or enlarge legal rights for any person.

Rule 1.2 – Rules Amendment Procedure

- (a) Except as provided in subsection (b), amendment of these rules shall require the affirmative vote in a public meeting of a majority (and not less than three) of the voting members then serving. Any such amendment shall be adopted only after notice and reasonable opportunity for public comment.
- (b) The Commission temporarily may suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving.

PART II – ACTION BY THE COMMISSION

Rule 2.1 – Members

For purposes of the voting procedures set forth in these Rules, “member” of the Commission shall mean a voting member and shall not include an *ex-officio*, non-voting member. *Ex-officio* members may not vote or make or second motions.

Rule 2.2 – Voting Rules for Action by the Commission

- (a) Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed “present” and may participate and vote in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.
- (b) Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. *See* 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting.

Approval of a notice of priorities shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

Adoption or revision of the minutes of a public meeting shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

- (c) Action on other matters may be taken (1) at a nonpublic meeting; or (2) without a meeting by written or oral communication (*e.g.*, by “notation voting”), and shall be based on the affirmative vote of a majority of the members then serving. Such matters include the approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, decisions on workshops and training programs, decisions on publishing reports and making recommendations to Congress, decisions to hold hearings and call witnesses, decisions on litigation and administrative proceedings involving the Commission, decisions relating to the formation and membership of advisory groups, the approval pursuant to 28 U.S.C. § 994(w) of a statement of reasons form, notices of proposed priorities, extensions of public comment periods, notices of proposed amendments to these rules, approval of technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting. The Commission is not precluded from acting on such matters at a public meeting.
- (d) A motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter. Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required.

PART III – MEETINGS AND HEARINGS

Rule 3.1 – Meetings

The Chair shall call and preside at Commission meetings. *See* 28 U.S.C. § 993(a). In the absence of the Chair, the Chair will designate a Vice Chair to preside.

Members may participate in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

Rule 3.2 – Public Meetings

The Commission shall meet on at least two occasions in each calendar quarter to conduct business. *See* 28 U.S.C. § 993(a). Except as provided in Rule 3.3, meetings of the Commission with outside parties shall be conducted in public.

To the extent practicable, the Chair shall issue, through the Office of Staff Director, a public notice of any public meeting at least seven days prior to the date of the meeting. The public notice, to the extent practicable, shall indicate the general purpose(s) of the meeting and include an agenda and any related documents approved by the Chair for public release. The notice shall be made available to the public on the Commission’s website.

Any related documents approved for public release shall be made available to the public as soon as practicable (*e.g.*, if not in advance of the meeting, then at the start of the meeting or in a timely manner after the meeting), on the Commission's website.

At the discretion of the Chair, members of the public may be afforded an opportunity to comment on any issue on the agenda of a public meeting.

Rule 3.3 – Nonpublic Meetings

The Chair may call nonpublic meetings for purposes of the following:

- (1) To take actions on other matters (*see* Rule 2.2(c)).
- (2) To receive information from, and participate in discussions with, Commission staff or any person designated by an *ex officio* Commissioner as support staff for that Commissioner.
- (3) To receive information from, and participate in discussions with, (A) members of advisory groups; (B) interested parties within the judicial branch (*e.g.*, federal judges; the Criminal Law Committee; the Federal Public and Community Defenders); or (C) interested parties within the executive or legislative branches.
- (4) Upon a decision by a majority of the members then serving, to receive or share information, from or with any other person, that is inappropriate for public disclosure (*e.g.*, classified information; privileged or confidential information; trade secrets; or information the disclosure of which would interfere with law enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, compromise a confidential source, disclose law enforcement investigative techniques and procedures, endanger the life or safety of judicial or law enforcement personnel, or be likely to significantly frustrate implementation of a proposed agency action).
- (5) Upon a decision by a majority of the members then serving, to receive information from, and participate in discussions with, outside experts, on matters unrelated to the merits of any pending proposed amendment to the guidelines, policy statements, or commentary (*e.g.*, to hold a symposium, convene an expert roundtable, or discuss local practices with a locality's judges and practitioners). At the discretion of the Chair, such a meeting may be held under "Chatham House Rule." Subject to the discretion and control of the Chair, one or more persons may be permitted to attend such a meeting as outside observers. Where the number of outside observers is limited, the Chair may give priority to individuals referred to in subdivision (3).

Rule 3.4 – Public Hearings

The Commission may convene a public hearing on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission's business. *See* 28 U.S.C. § 995(a)(21). A request for comment on a proposed matter does not necessarily mean that a public

hearing will be held on the matter or that a public hearing, if scheduled, will pertain to all issues raised in the request for comment.

Notice of a public hearing shall be given as soon as practicable. The notice shall include, as applicable, information regarding a procedure for requesting an opportunity to testify, and the availability of documents or reports relevant to the subject of the hearing.

The Commission may specify the format for public hearings, invite witnesses, choose witnesses from among those who request the opportunity to testify, and require that written testimony be submitted in advance of the hearing.

The Commission may exclude from such a hearing any electronic devices that record the voice or image of any or all witnesses, as well as cameras of any kind.

At the request of any witness to turn off any such electronic device(s) during that person's testimony, the Chair of the Commission may order, at his or her discretion, that use of such devices be discontinued during the testimony of that witness.

Rule 3.5 – Live Webcasts and Written Records

To the extent practicable, and at the discretion and control of the Chair, the Commission shall provide a live webcast or audiocast of its public meetings and public hearings, and shall make available a recording of the webcast or audiocast through the Commission's website.

The Commission shall prepare and maintain written minutes of public meetings and make them publicly available after their approval by the Commission. The Commission shall make an audio recording of public meetings and make the recordings publicly available after the approval of the minutes of such meeting. No such recording shall be copied or removed from the Commission's offices.

The Commission shall maintain a written transcription of public hearings that shall be publicly available for inspection.

PART IV – GUIDELINE AMENDMENT PROCESS

Rule 4.1 – Promulgation of Amendments

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p).

At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year.

Rule 4.1A – Retroactive Application of Amendments

Generally, promulgated amendments will be given prospective application only. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants (*see* 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall—

- (1) at the public meeting at which it votes to promulgate the amendment, or in a timely manner thereafter, vote to publish a request for comment on whether to make the amendment available for retroactive application;
- (2) instruct staff to prepare a retroactivity impact analysis of the amendment, if practicable, and make such an analysis available in a timely manner to Congress and the public;
- (3) hold a public hearing on whether to make the amendment available for retroactive application; and
- (4) at a public meeting held at least 60 calendar days before the effective date of the amendment, vote on whether to make the amendment available for retroactive application.

Rule 4.2 – Prison Impact of Amendments

Prior to promulgating amendments to the guidelines, the Commission shall consider the impact of any amendment on available penal and correctional resources, and on other facilities and services. *See* 28 U.S.C. § 994(g). Prison and sentencing impact assessments of amendments to the guidelines shall be made available to the public as soon as practicable, through the Commission’s website.

Rule 4.3 – Notice and Comment on Proposed Amendments

In proposing and promulgating guidelines and amendments thereto, the Commission shall comply with the requirements of section 553 of title 5, United States Code, relating to publication in the *Federal Register* and public hearing procedure. 28 U.S.C. § 994(x).

The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x). Nevertheless, the Commission will endeavor

to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments.

Where appropriate, the Commission may divide a comment period into an original comment phase and a reply comment phase. For example, the Commission may divide a comment period of 60 calendar days into an original comment phase of 40 calendar days and a reply comment phase of 20 calendar days. Comments during a reply phase are limited to issues raised in the original comment phase.

Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment phase, may not be considered.

The Commission does not intend to solicit *ex parte* communications (*i.e.*, communications outside the public comment process) on the merits of a proposed amendment from outside parties.

Rule 4.4 – Federal Register Notice of Proposed Amendments

A vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the *Federal Register* shall be deemed to be a request for public comment on the proposed amendment. At the same time the Commission votes to publish proposed amendments for comment, it shall request public comment on whether to make any amendments retroactive.

The notice of proposed amendments also shall provide, to the extent appropriate and practicable, reasons for consideration of amendments and a summary of or reference to publicly available information that is relevant to the issue(s). In addition, the publication notice shall include a deadline for public comment and may include a notice of any scheduled public hearing(s) or meetings on the issue(s).

In the case of proposed amendments to guidelines or issues for comment that form the basis for possible guidelines amendments, the Commission shall allow, to the extent practicable, a minimum period of public comment of at least 60 calendar days prior to final Commission action on the proposed amendments.

Rule 4.5 – Public Hearing on Proposed Amendments

In the case of “emergency” amendments issued pursuant to special statutory authorization, the Commission ordinarily will not conduct a public hearing on the proposed amendments but will afford such opportunity for written comment as time allows.

In the case of other amendments to guidelines or policy statements issued pursuant to 28 U.S.C. § 994, the Commission shall conduct a public hearing on the proposed amendments, unless the Commission determines that time does not permit a hearing or that a hearing will not substantially assist the amendment process. Notice of the hearing shall be given in the *Federal Register* and by other means designed to inform persons likely to be interested in participating in such a hearing.

PART V – PUBLIC PARTICIPATION IN GUIDELINE AMENDMENT PROCESS

Rule 5.1 – Public Comment File

The Office of Legislative and Public Affairs shall receive and maintain public comment and public hearing testimony received by the Commission. As soon as practicable after the close of the comment period (or the comment phase, as applicable), public comment and public hearing testimony shall be made available to the public through the Commission’s website.

“Public comment” means (1) any written comment submitted by an outside party, including an agency represented by an *ex-officio* commissioner, pursuant to or in anticipation of a request for public comment by the Commission; and (2) any other written submission, from an outside party, that the Chair or a majority of the members then serving has not precluded from being made available to the public. “Public comment” does not include any internal communication between and among commissioners, Commission staff, and any person designated by an *ex-officio* commissioner as support staff for that commissioner.

Where appropriate, the Commission may decline to make available public comment that is duplicative and may redact sensitive information from public comment.

Rule 5.2 – Notice of Priorities

- (a) The Commission shall publish annually in the *Federal Register*, and make available to the public, a notice of the proposed priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary. Any such notice shall include an invitation to, and deadline for, the submission of written public comment on the proposed priorities.

Subsequent to the deadline for comment on the proposed priorities, the Commission shall publish in the *Federal Register*, and make available to the public for inspection, a notice of priorities for Commission inquiry and possible action.

- (b) In setting its priorities, the Commission shall consider the impact of the priorities on available penal and correctional resources, and on other facilities and services. *See* 28 U.S.C. § 994(g). The Commission shall also consider, among other factors, the number of defendants potentially involved and the potential impact.
- (c) The Commission’s priorities may include resolution of circuit conflicts, pursuant to the Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts. The Commission will consider the following non-exhaustive list of factors in deciding whether a particular guideline circuit conflict warrants resolution by the Commission:

- (1) potential defendant impact;
 - (2) potential impact on sentencing disparity;
 - (3) number of court decisions involved in the conflict and variation in holdings; and
 - (4) ease of resolution, both as a discrete issue, and in the context of other agenda matters scheduled for consideration during the available amendment cycle.
- (d) There may be circumstances in which the Commission receives — before the comment period on the next year’s priorities begins — a written submission from an outside party or a petition of a defendant under section 994(s) of title 28, United States Code (*see* Rule 5.6), that raises an issue more appropriately considered for the next year’s priorities. In such circumstances, the Commission shall consider that issue when it sets the next year’s priorities.

Rule 5.3 – Information Relevant to the Amendment Process

To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data, reports, and other information for consideration by the Commission. Upon authorization by the Staff Director, the Office of Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.

Rule 5.4 – Advisory Groups

Upon authorization of the Commission, the Staff Director may facilitate the creation, membership, and periodic meeting at the Commission offices and elsewhere, of advisory groups of defense attorneys, academics, probation officers, judges, prosecutors, and others, to facilitate formal and informal input to the Commission.

Two types of advisory groups are authorized: standing and ad hoc. The following groups are standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, the Tribal Issues Advisory Group, and the Victims Advisory Group.

Upon creating an advisory group, the Commission may prescribe such policies regarding the conduct of meetings and operation of the group as the Commission deems necessary or appropriate. The Commission also may delegate to an advisory group the responsibility for developing such policies.

Rule 5.5 – Petitions Filed By Defendants Under Section 994(s)

Pursuant to section 994(s) of title 28, United States Code, a defendant may file a petition with the Commission requesting a modification of the guidelines used in sentencing that defendant. To be

covered by section 994(s), the petition must be on the basis of changed circumstances unrelated to the defendant, including changes in (1) the community view of the gravity of the offense; (2) the public concern generated by the offense; and (3) the deterrent effect particular sentences may have on the commission of the offense by others. *See* 28 U.S.C. § 994(s).

The Commission shall give due consideration to petitions covered by section 994(s) when it sets its priorities under Rule 5.2.

As soon as practicable after submission, petitions covered by section 994(s) shall be made available to the public through the Commission's website. Where appropriate, the Commission may redact sensitive information from such petitions.

PART VI – INFORMATION ABOUT THE COMMISSION

Rule 6.1 – Office(s)

The offices of the Commission are located in the Thurgood Marshall Federal Judiciary Building, Suite 2-500, South Lobby, One Columbus Circle, N.E., Washington, D.C. 20002-8002.

The office can be reached by telephone between 8:30 a.m. and 5:30 p.m., Monday through Friday. The main telephone number is (202) 502-4500. The fax number is (202) 502-4699. The e-mail address is pubaffairs@ussc.gov.

Rule 6.2 – Availability of Materials for Public Inspection; Office of Legislative and Public Affairs

The Office of Legislative and Public Affairs is the repository of all materials that are available to the public.

Generally, the Office of Legislative and Public Affairs will maintain for public inspection the following: (1) agendas and schedules for Commission public meetings and public hearings; (2) approved minutes of Commission public meetings; (3) transcripts of public hearings; (4) public comment as defined in Rule 5.1; and (5) data, reports, and other information made available pursuant to Rule 5.3.

The Office of Legislative and Public Affairs also will make available upon request: (1) information available pursuant to the Commission's policy on public access to Commission data; and (2) *A Guide to Publications & Resources* that lists all publications and datasets available from the Commission.

Rule 6.3 – Internet Site and Other Electronic Resources

The Commission maintains and updates information and documents on an Internet website. The website is found at <http://www.ussc.gov>. This resource includes general information, such as

background information about the Commission and Commissioners, notices for scheduled meetings and hearings, minutes of recent meetings, transcripts of public hearings, listings of Commission priorities and projects, outstanding public comment solicitations, recently promulgated amendments, the text of numerous reports and resources available from the Commission, and the text of the *Guidelines Manual* and Commission reports.

To the extent practicable, the Commission shall use a variety of electronic means to distribute public meeting notices and provide other information about the Commission. For example, the Office of Legislative and Public Affairs shall, where practicable and appropriate, use social media platforms (such as Twitter) and electronic distribution mechanisms (such as an email listserv). Information about these platforms and mechanisms shall be posted to the Commission's website.

Rule 6.4 – Information at Federal Depository Libraries

Commission publications printed by the Government Printing Office, and other selected documents, are available in hard copy or microfiched form through the Government Printing Office's Depository Library system. The location of the nearest Federal Depository Library can be determined in several ways: (1) by requesting a free copy of the *Directory of Depository Libraries* from the U.S. Government Printing Office, Library Programs Services, Stop: SLLD, Washington, DC 20401; (2) by asking at any local library for the address of the nearest Federal Depository Library; or (3) by using the Internet at http://www.access.gpo.gov/su_docs/locators/findlibs/index.html.

Rule 6.5 – Access to Commission Data

The Commission collects and analyzes a broad array of data from federal courts concerning sentences imposed, and maintains a comprehensive, computerized data collection system of federal sentencing information. The Commission makes various datasets of sentencing information, without individual identifiers, available to the public through the Commission's website.

In addition, the Commission provides its various datasets, excluding individual identifiers, to the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR). Researchers interested in studying federal sentencing practices through quantitative methods can access Commission sentencing data through this means. Contact ICPSR, P.O. Box 1248, Ann Arbor, MI 48106; or call 1-800-999-0960; or use the following Internet address: <http://www.ICPSR.umich.edu/NACJD/archive.html>.

EXHIBIT B

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In June 2016, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2017. See 81 FR 37241 (June 9, 2016). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant

to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2017. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2017. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2017.

As so prefaced, the Commission has identified the following priorities:

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, including its recommendations regarding the severity and scope of mandatory minimum

penalties, consideration of expanding the “safety valve” at 18 U.S.C. § 3553(f), and elimination of the mandatory “stacking” of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation.

(2) Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate. As part of this examination, the Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant’s role, culpability, and relevant conduct.

(3) Continuation of its study of approaches to encourage the use of alternatives to incarceration.

(4) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

(5) Continuation of its comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and promote effectiveness of reentry programs; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(6) Study of the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(7) Study of the treatment of youthful offenders under the Guidelines Manual.

(8) Examination of Chapter Four, Part A (Criminal History) to (A) study the treatment of revocation sentences under §4A1.2(k), and (B) consider a possible amendment of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a conviction counted under the Guidelines Manual.

(9) Study of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate in light

of the information obtained from such study.

(10) Possible consideration of whether the weapon enhancement in §2D1.1(b)(1) should be amended to conform to the “safety valve” provision at 18 U.S.C. § 3553(f) and §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

(11) Study of environmental offenses involving knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(12) Implementation of the Bipartisan Budget Act of 2015, Pub. L. 114–74, and any other crime legislation enacted during the 114th or 115th Congress warranting a Commission response.

(13) Resolution of circuit conflicts, pursuant to the Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(14) Consideration of any miscellaneous guideline application issues coming to the Commission’s attention from case law and other sources, including possible consideration of whether a defendant’s denial of relevant conduct should be considered in determining whether a

defendant has accepted responsibility for purposes of §3E1.1.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris

Chair