

**United States Sentencing Commission Public Meeting Minutes**  
**August 15, 2013**

Chair Patti B. Saris called the meeting to order at 1:05 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Ricardo H. Hinojosa, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner

The following Commissioners were not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following staff participated in the meeting:

- Tobias Dorsey, Special Counsel

The Chair called for a motion to adopt the April 10, 2013, public meeting minutes. Vice Chair Hinojosa made a motion to adopt the minutes, with Vice Chair Jackson seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote with Vice Chair Breyer and Commissioners Barkow and Pryor abstaining.

Chair Saris introduced the Commission's three new commissioners. Vice Chair Charles R. Breyer is a Senior District Court Judge for the Northern District of California. Before joining the bench in 1998, he was in private practice and served as Chief Assistant District Attorney in San Francisco. Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy and Faculty Director of the Center on the Administration of Criminal Law at the New York University School of Law, where she has been a faculty member since 2002. Professor Barkow has written extensively on criminal law and sentencing. Commissioner William H. Pryor, Jr., is a circuit court judge on the United States Court of Appeals for the Eleventh Circuit where he has served since 2004. He also taught federal jurisdiction at the University of Alabama School of Law and has served as an adjunct professor at the Cumberland School of Law at Samford University. Prior to joining the bench, Commissioner Pryor served as the Attorney General of the State of Alabama and as a Deputy Attorney General. He was also instrumental in establishing the Alabama Sentencing Commission.

Chair Saris called on Mr. Dorsey to inform the Commission on a possible votes to amend the

sentencing guidelines and a possible vote to publish in the *Federal Register* a final notice of policy priorities for the amendment cycle ending May 1, 2014.

Mr. Dorsey stated that the first proposed amendment, attached hereto as Exhibit A, amends the Commission's policy statement at §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), which provides that the court should apply the *Guidelines Manual* in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause. The proposed amendment updates the Background Commentary to §1B1.11 to reflect the Supreme Court's decision in *Peugh v. United States*, 133 S. Ct. 2072 (2013), which held that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." *Id.* at 2078. The amendment inserts new language to refer to the Supreme Court's decision in *Peugh* and deletes obsolete language.

Mr. Dorsey advised the commissioners that a motion to promulgate the proposed amendment would be in order, with a November 1, 2013, effective date, and with staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Dorsey. Vice Chair Jackson made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Dorsey stated that the proposed amendment, attached hereto as Exhibit B, makes certain technical and conforming changes to commentary in the *Guidelines Manual*. First, the proposed amendment amends Application Note 3 to §1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence. Second, the proposed amendment amends Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order. Third, the proposed amendment amends the Background Commentary to §8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to §8D1.2 (Term of Probation - Organizations) to correct typographical errors in citations to certain statutes.

Mr. Dorsey advised the commissioners that a motion to promulgate the proposed amendment would be in order, with a November 1, 2013, effective date, and with staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Dorsey. Vice Chair Breyer made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Dorsey stated that the Commission in May 2013 published in the *Federal Register* a notice

of possible policy priorities for the amendment cycle ending May 1, 2014. He noted that the Commission received and reviewed public comment pursuant to that notice. Mr. Dorsey advised the commissioners that a motion to publish in the *Federal Register* the Commission's final notice of policy priorities for the upcoming amendment cycle would be in order.

Chair Saris asked if there was a motion to adopt and publish in the *Federal Register* the final notice of policy priorities for the Commission's 2012-2013 amendment cycle, attached hereto as Exhibit C. Commissioner Pryor made such a motion, with Vice Chair Breyer seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris announced that the Commission will hold an Economic Crimes Symposium in New York City on September 18-19, 2013, and a Recidivism Roundtable in October 2013. She noted that the Commission is also holding regional training programs and suggested that interested parties should consult the Commission's webpage for details.

Chair Saris stated that ex officio Commissioner Wroblewski was unable to attend the meeting, but asked that the Chair read the following statement on his behalf:

I sincerely apologize for not being able to be with you at today's public meeting. But I didn't want to let this moment pass without expressing, on behalf of the Attorney General, the Department of Justice, and myself, how thrilled we all are to have Judge Breyer, Professor Barkow and Judge Pryor as new members of the Commission. Each has had an accomplished legal career, devoted to improving our criminal justice system and ensuring justice for all. I have had the great pleasure of getting to know each of them over the last several months, and I cannot express enough how fortunate I think we are to have them join the Commission.

As I wrote in our annual report to the Commission earlier this summer, and as the Attorney General expressed earlier this week, we think there is much to be done to improve federal sentencing and corrections. Moreover, we think the Commission has a very big role to play in shaping that reform. Having our new commissioners in place, joining our distinguished colleagues, Judges Saris, Hinojosa, Jackson and Commissioner Friedrich, we are confident that the reforms the Commission will develop and support over the coming months and years will contribute mightily to genuine, meaningful and sustainable improvement to federal criminal justice.

Judge Breyer, Professor Barkow and Judge Pryor - Welcome to Washington and to the Commission! And thank you for your willingness to serve the American people. I am genuinely looking forward to working with you and to the great things ahead.

Chair Saris introduced Kenneth P. Cohen as the Commission's new Staff Director. The Chair noted that Mr. Cohen had served as the Commission's General Counsel before his selection as

Staff Director.

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. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:15 p.m.

## EXHIBIT A

### PROPOSED AMENDMENT: §1B1.11

**Synopsis of Proposed Amendment:** *The Commission's policy statement at §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) provides that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause, in which case the court shall apply the Guidelines Manual in effect on the date the offense of conviction was committed. See §1B1.11(a), (b)(1).*

*This proposed amendment updates the Background Commentary to §1B1.11 to reflect the Supreme Court's decision in Peugh v. United States, 133 S. Ct. 2072 (2013), which held that "there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." Id. at 2078. The amendment inserts new language to refer to the Supreme Court's decision in Peugh and deletes obsolete language.*

#### Proposed Amendment:

#### §1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

- (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
- (b)
  - (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.
  - (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.
  - (3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

#### Commentary

#### Application Notes:

1. *Subsection (b)(2) provides that if an earlier edition of the Guidelines Manual is used, it is to be used in its entirety, except that subsequent clarifying amendments are to be considered.*

*Example:* A defendant is convicted of an antitrust offense committed in November 1989. He is to be sentenced in December 1992. Effective November 1, 1991, the Commission raised the base offense level for antitrust offenses. Effective November 1, 1992, the Commission lowered the guideline range in the Sentencing Table for cases with an offense level of 8 and criminal history category of I from 2-8 months to 0-6 months. Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4-10 months (final offense level of 9, criminal history category of I). Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2-8 months (final offense level of 8, criminal history category of I). If the court determines that application of the 1992 edition of the Guidelines Manual would violate the ex post facto clause of the United States Constitution, it shall apply the 1989 edition of the Guidelines Manual in its entirety. It shall not apply, for example, the offense level of 8 and criminal history category of I from the 1989 edition of the Guidelines Manual in conjunction with the amended guideline range of 0-6 months for this offense level and criminal history category from the 1992 edition of the Guidelines Manual.

2. Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (*i.e.*, the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guidelines Manual took effect).

*Background:* Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. ~~Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date generally have~~ However, the Supreme Court has held that the ex post facto clause ~~does apply~~ applies to sentencing guideline amendments that subject the defendant to increased punishment. See *Peugh v. United States*, 133 S. Ct. 2072, 2078 (2013) (holding that "there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense").

Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (*e.g.*,

related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the *ex post facto* clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. See *United States v. Ykema*, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed); ~~cert. denied, 493 U.S. 1062 (1990)~~; *United States v. Allen*, 886 F.2d 143 (8th Cir. 1989) (similar); see also *United States v. Cusack*, 901 F.2d 29 (4th Cir. 1990) (similar).

Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The *ex post facto* clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress's directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a "cohesive and integrated whole" rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range — the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.

**EXHIBIT B**

**PROPOSED AMENDMENT: TECHNICAL**

**Synopsis of Proposed Amendment:** *This proposed amendment makes certain technical changes to Commentary in the Guidelines Manual. The changes amend—*

- (1) *Application Note 3 to §1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence;*
- (2) *Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order; and*
- (3) *the Background Commentary to §8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to §8D1.2 (Term of Probation - Organizations) to correct typographical errors in citations to certain statutes.*

**Proposed Amendment:**

**§1B1.8. Use of Certain Information**

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Commentary

Application Notes:

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- 3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(f) (Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (~~Inadmissibility of Pleas, Plea Discussions, and Related Statements~~) of the Rules of Evidence.*

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**§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government**

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Commentary

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Application Notes:

1. *"Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order ~~12958~~13526 (50 U.S.C. § 435 note).*

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**§8B2.1. Effective Compliance and Ethics Program**

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Commentary

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*Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(~~2~~)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."*

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**§8D1.2. Term of Probation - Organizations**

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Commentary

Application Note:

1. *Within the limits set by the guidelines, the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation. The terms of probation set forth in this section are those provided in 18 U.S.C. § 3561(~~b~~)(c).*

## EXHIBIT C

### UNITED STATES SENTENCING COMMISSION

#### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of final priorities.

**SUMMARY:** In May 2013, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2014. See 78 FR 32533 (May 30, 2013). 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:** Jeanne Doherty, Public Affairs Officer, 202-502-4502, [pubaffairs@ussc.gov](mailto:pubaffairs@ussc.gov).

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent commission 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, 2014. 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, 2014. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2014.

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

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.

Review, and possible amendment, of guidelines applicable to drug offenses, including possible consideration of amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) across drug types.

Continuation of its work with the congressional, executive, and judicial branches of government, and other interested parties, with respect to the Commission’s December 2012 report to Congress, titled The Continuing Impact of *United States v. Booker* on Federal Sentencing, and development of appropriate guideline amendments in response to any related legislation.

Continuation of its work on economic crimes, including (A) a comprehensive, multiyear study of § 2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines, including examination of the loss table and the definition of loss, and (B) consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.

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,” and “drug trafficking 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.

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 (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

Undertaking a multi-year review of federal sentencing practices pertaining to violations of conditions of probation and supervised release, including possible consideration of amending the policy statements in Chapter Seven of the Guidelines Manual.

Possible consideration of amending the policy statement pertaining to “compassionate release,” §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

Continuation of its work with Congress and other interested parties on child pornography offenses to implement the recommendations set forth in the Commission’s December 2012 report to Congress, titled Federal Child Pornography Offenses, and to develop appropriate guideline amendments in response to any related legislation.

Implementation of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, and any other crime legislation enacted during the 112th or 113th Congress warranting a Commission response.

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.

Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

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

Patti B. Saris

Chair