UNITED STATES SENTENCING COMMISSION

PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

PUBLIC MEETING

THURSDAY
APRIL 12, 2018

The United States Sentencing Commission met in the Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 11:30 a.m., the Honorable William H. Pryor, Jr., Acting Chair, presiding.

PRESENT
WILLIAM H. PRYOR, JR., Acting Chair
RACHEL E. BARKOW, Commissioner
CHARLES R. BREYER, Commissioner
DANNY C. REEVES, Commissioner
ZACHARY BOLITHO, Ex Officio Commissioner

ALSO PRESENT
KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel
ACTING CHAIR PRYOR: This meeting is called to order. Thank you for attending this public meeting of the United States Sentencing Commission. The Commission appreciates the attendance of those joining us here, as well as those watching our live-stream broadcast on our website. As always, we welcome and encourage the significant public interest in federal sentencing issues and the work of the Commission.

I would like to start by introducing the other members of the Commission. To my immediate left is Commissioner Rachel Barkow, who is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law and serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

To my immediate right is Judge Charles Breyer, who is a Senior District Judge for the Northern District of California and has served as
a District Judge since 1998.

To my far left is Judge Danny Reeves, who is a District Judge for the Eastern District of Kentucky and has served in that position since 2001.

Finally, to my far right, is Zachary Bolitho, who is the Ex Officio Commissioner from the Department of Justice. Commissioner Bolitho serves as Deputy Chief of Staff and Associate Deputy Attorney General to the Deputy Attorney General of the United States.

The first order of business today is a vote to adopt the January 19, 2018, public meeting minutes. Is there a motion to do so?

COMMISSIONER BREYER: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: Any discussion?

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The
The next item of business is the Report of the Chair. Before we begin our hearing, I would like to update the public briefly on some of the Commission's most recent publications and actions.

Since we last met in March for the second public hearing on proposed amendments, the Commission released two new publications. One publication is related to mandatory minimum penalties for federal firearms offenses. I discussed this publication at our last meeting and encourage you to read the report's full findings that are now available on the Commission's website.

Another new publication is titled “Recidivism Among Federal Offenders Receiving Retroactive Sentencing Reductions: The 2011 Fair Sentencing Act Guideline Amendment.” This study analyzes the recidivism rates for offenders who received the retroactive benefit of the guideline amendment implementing the Fair Sentencing Act of 2010.
2010, which reduced the statutory mandatory minimum penalties for crack cocaine offenses.

While Congress did not make the statutory changes retroactive, the Commission did make the ensuing 2011 guideline amendment retroactive. The publication compares the recidivism rates for those offenders who received a retroactive reduction in their sentences with the rates for those offenders who would have been eligible to seek a reduced sentence under the 2011 guideline amendment, but who served their full sentences before it went into effect. The Commission conducted a similar analysis of its retroactive 2007 "Crack Minus Two" amendment. In the latest publication, the Commission found that recidivism rates were virtually identical, 37.9 percent, for offenders who were released early through retroactive application of the Fair Sentencing Act Guideline Amendment and offenders who had served their full sentences before the guideline reduction retroactively took effect.

Turning to the business of the day,
the Commission would like to thank the numerous individuals and groups who submitted thoughtful comments and recommendations during our most recent public comment periods.

The next item of business is possible votes to promulgate proposed amendments. The General Counsel will advise the Commission on the first possible vote on the technical amendment.

MS. GRILLI: Thank you, Judge Pryor. This proposed amendment makes various technical changes to the Guideline Manual. First, it makes clarifying changes to Chapter One, Part A, Subpart 1, and Application Note 2(A) to §2B1.1.

Next, it makes technical changes to provide updated references to certain sections in the United States Code that were either restated in legislation or reclassified. Those are §2B1.5, Appendix A, §2A3.5, §2X5.2, §5B1.3, and §5D1.3.

Finally, the proposed amendment makes clerical changes to various listed guidelines in Appendix A. A motion to promulgate the proposed
amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is appropriate at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BREYER: Second.

ACTING CHAIR PRYOR: Any discussion?

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

The General Counsel will advise the Commission on a possible vote on the marijuana equivalency amendment.

MS. GRILLI: This proposed amendment makes technical changes to §2D1.1, specifically replacing the term "marijuana equivalency" as the
conversion factor for determining quantity penalties for controlled substances that are either not specifically referenced in the drug quantity table or when combining differing controlled substances.

The term "marijuana equivalency" is replaced with the new term "converted drug weight." This new conversion factor is added to all provisions of the drug quantity table and changed the title of the Drug Equivalency Table to Drug Conversion Table. In addition, there are technical changes made throughout §2D1.1.

A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is appropriate at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER REEVES: I'll make the motion.

ACTING CHAIR PRYOR: Is there a
second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion?

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

The General Counsel will advise the Commission on the first possible vote on the miscellaneous amendment.

MS. GRILLI: Yes. This amendment responds to recently enacted legislation and miscellaneous guideline issues. It contains five parts. Part A responds to the Transnational Drug Trafficking Act by amending §2B5.3.

Part B responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of the Traveling Sex Offenders Act by amending §2A3.5, §2A3.6, and Appendix A.

Part C responds to the Frank R.
Lautenberg Chemical Safety for the Twenty-First Century Act by amending Appendix A. And Part D amends §2G1.3 to clarify how the computer enhancement at Subsection (b)(3) interacts with its correlating commentary.

Part E responds to the Justice for All Reauthorization Act of 2016 by amending §5D1.3. A motion to promulgate the amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is in order at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BREYER: So moved.

ACTING CHAIR PRYOR: And is there a second?

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: Is there any discussion? Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The
motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

The General Counsel will now advise the Commission on a possible vote on the Tribal Issues amendment.

MS. GRILLI: Yes. This proposed amendment is the result of the Commission's study of the May 2016 report of the Commission's ad hoc Tribal Issues Advisory Group and contains two parts.

Part A would amend the Commentary to §4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether and to what extent an upward departure based on a tribal court conviction is appropriate.

Part B would amend the Commentary of §1B1.1, which are application instructions, to provide a definition of “court protection order” that is derived from federal statute. It also makes technical and conforming changes to the Commentary of §2B1.3 and §2L1.1.
A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and with technical and conforming amendment authority to staff is appropriate at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER REEVES: So moved as to both parts.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BREYER: Second.

ACTING CHAIR PRYOR: Any discussion? Vote on the motion -- before we do that, I want to say a few words about it. Let me start by thanking the members of the Tribal Issues Advisory Group for their recommendations in their 2016 report to the Commission and their expertise regarding this amendment.

The six factors outlined in the amendment provide a framework for courts to use when determining whether an upward departure is
appropriate to account for prior tribal convictions. Collectively, these factors balance the rights of defendants and the unique and important status of tribal courts. The amendment also provides a definition for the term "court protection order," which incorporates the statutory definition of "protection order."

By adopting a clear definition, the guidelines will ensure that court protection orders issued by tribal courts receive treatment consistent with that of other jurisdictions.

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the amendment.

The General Counsel will now advise the Commission on a possible vote on the Acceptance of Responsibility amendment.

MS. GRILLI: This proposed amendment amends the Commentary to §3E1.1 to clarify how a
defendant's challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility.

Specifically, the proposed amendment would revise Application Note 1(A) to state that “the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous.”

A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is in order at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER Breyer: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion?

The Commission has heard concerns that some courts have interpreted the current commentary to
§3E1.1 as automatically precluding the reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct.

This amendment clarifies that the unsuccessful nature of a challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous.

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

The General Counsel will advise the Commission on a possible vote on the Bipartisan Budget Act amendment.

MS. GRILLI: This proposed amendment responds to the Bipartisan Budget Act of 2015 which, among other things, amended three existing criminal statutes concerning fraudulent claims under certain Social Security programs.

The Act added new subdivisions
prohibiting conspiracy to commit fraud for substantive offenses contained in 42 United States Code §§ 408, 1011, and 1383a. The proposed amendment would amend Appendix A so that these sections are referenced not only to §2B1.1 but also to the conspiracy guideline, §2X1.1.

The Act also amended those sections to add increased penalties for certain specified persons who commit fraud offenses under the relevant Social Security programs.

A person who meets these statutory requirements and are convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than 10 years, which is double the otherwise applicable five-year penalty for other offenders.

The proposed amendment would amend §2B1.1 to address cases in which a defendant was convicted under these specified statutes and the maximum term of 10 years imprisonment applies by adding an enhancement of four levels and a
minimum offense level of 12 for such cases.

It also adds commentary specifying that if the enhancement applies, the court should not apply an adjustment under §3B1.3, the abuse of position of trust enhancement. The proposed amendment also makes clarifying technical and conforming changes to other provisions of §2B1.1 and its commentary.

A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BREYER: So moved.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER REEVES: Second.

ACTING CHAIR PRYOR: Any discussion?

Before I comment on this amendment, I'd like to
note the Commission's appreciation for the constructive comment it received from the Senate Committee on Finance, the House Ways and Means Committee, the House Judiciary Committee as well as the Social Security Administration regarding the Bipartisan Budget Act of 2015.

We value their past and current important work on this topic. This amendment ensures that the guidelines reflect the Bipartisan Budget Act's increased penalties related to fraudulent claims under certain Social Security programs.

The proposed sentencing enhancement, in particular, reflects the seriousness with which both Congress and the Commission view violations by defendants in positions of trust engaged in these sophisticated fraudulent schemes.

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that
four Commissioners voted in favor of the motion.

The General Counsel will advise the Commission on a possible vote on Illegal Reentry Guideline Enhancements amendment.

MS. GRILLI: This proposed amendment contains two parts, Parts A and B. Part A responds to a suggestion that the illegal reentry guideline enhancements for prior convictions contain a gap in coverage.

Specifically, neither Subsection (b)(2) nor Subsection (b)(3) provide for an increase in the defendant's offense level in a situation where a defendant engaged in criminal conduct before being deported or ordered removed from the United States for the first time but did not sustain a conviction or convictions for that criminal conduct until after he or she was first deported or ordered removed.

Part A of the proposed amendment would amend §2L1.2 to cover this situation by revising Subsection (b)(2) so that its applicability turns on when the defendant engaged in the criminal
conduct before he or she was first removed or ordered deported rather than whether the defendant sustained the resulting conviction before that event.

Part A also makes other non-substantive conforming changes to the language of Subsection (b)(3). Part A would also amend the commentary to §2L1.2, adding an application note to provide that in the event that the conduct occurs both before and after deportation, only Subsection (b)(2)'s enhancement should be applied.

Part B of the proposed amendment responds to an issue that has arisen in litigation concerning how §2L1.2’s enhancement for prior convictions apply in a situation where defendant's prior conviction included a term of probation, parole, or supervised release that was subsequently revoked and an additional term of imprisonment imposed.

Part B would revise the definition of “sentence imposed” in Application Note 2 of the
commentary to §2L1.2 to clarify that, consistent with the meaning of “sentence of imprisonment” under §4A1.2, the phrase "sentence imposed" as used in §2L1.2 includes any term of imprisonment given upon revocation of probation, parole, or supervised release regardless of when that revocation occurred.

A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is appropriate.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER REEVES: I’ll make the motion.

ACTING CHAIR PRYOR: Is there a second?

COMMISSIONER BARKOW: Second.

ACTING CHAIR PRYOR: Any discussion? As many of you know, the Commission passed a comprehensive amendment to the illegal reentry
 guideline in 2016.

   This amendment clarifies certain discrete application issues that have arisen in litigation and that have been brought to our attention through the Department of Justice. The amendment makes clear that the prior criminal conduct enhancement should apply regardless of when an illegal reentry offender's conviction is final.

   This amendment also makes clear that defendants who commit criminal conduct before their first order of removal, but who are not convicted until after that order is issued, are subject to the relevant sentencing enhancements.

   Vote on the motion by saying aye.

   MEMBERS: Aye.

   ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

   The General Counsel will advise the Commission on a possible vote on the Synthetic
Drugs amendment.

MS. GRILLI: This proposed amendment is a result of the Commission's multi-year study involving synthetic drugs, fentanyl, and fentanyl analogues. The proposed amendment contains three parts.

Part A would amend the drug equivalency tables in §2D1.1 to adopt a class-based approach to account for synthetic cathinones, setting forth a single marijuana equivalency of 1 gram to 380 grams of marijuana and making this class-based marijuana equivalency also applicable to methcathinone by deleting the specific reference to that drug from the drug equivalency tables.

It also sets a minimum base offense level of 12 for cases involving synthetic cathinones and provides a departure provision based on the potency of the synthetic cathinone.

Part B would amend the drug equivalency tables in §2D1.1 to adopt a class-based approach to account for synthetic
cannabinoids. It sets a single marijuana equivalency applicable to cannabinoids to 1 gram is equal to 167 grams of marijuana.

It adds a provision defining the term synthetic cannabinoid, provides for a minimum base-offense level of 12, and a departure provision for certain cases involving synthetic cannabinoids.

Finally, Part C of the proposed amendment would amend §2D1.1 in several ways to account for fentanyl and fentanyl analogues. It provides a definition of the term, "fentanyl analogue," sets forth a single marijuana equivalency applicable to fentanyl analogue of 1 gram is equal to 10 kilograms of marijuana, and specifies in the drug quantity table that the penalties relating to fentanyl apply to the substance identified by that specific chemical name applicable to fentanyl in statute.

In addition, Part C of the proposed amendment amends §2D1.1 to provide a four-level enhancement in cases in which fentanyl or
fentanyl analogue is misrepresented or marketed as another substance.

A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and conforming amendment authority to staff is appropriate.

ACTING CHAIR Pryor: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER Reeves: So moved.

ACTING CHAIR Pryor: Is there a second?

COMMISSIONER Breyer: Second.

ACTING CHAIR Pryor: Any discussion?

The Commission will now vote on a multi-part amendment regarding synthetic drugs which includes, but is not limited to, synthetic cathinones, otherwise known as bath salts; synthetic cannabinoids, including but not limited to K2 or spice; fentanyl and fentanyl analogues.

This amendment draws upon public comment, expert testimony, and data analysis gathered during a
multi-year study of synthetic drugs.

Currently, many new synthetic drugs are not referenced in the Federal Sentencing Guidelines. As a result, courts have faced expensive and resource-intensive hearings. The amendment pending before the Commission today reflects the evolving nature of these new drugs.

In addition, it will simplify and promote uniformity in federal sentencing.

The amendment will also create a new guideline definition of the term "fentanyl analogue." The change effectively raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure.

To address the severe dangers posed by fentanyl, the amendment also creates a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance, which equates to an approximate fifty percent increase in sentence length.
The new amendment also establishes drug ratios and minimum offense levels for two new classes of synthetics drugs: synthetic cathinones and synthetic cannabinoids. Following a multi-year study and series of public hearings with experts, the Commission has determined that synthetic cathinones possess a common chemical structure that is sufficiently similar to treat as a single class of synthetic drugs.

The Commission also found that, while synthetic cannabinoids differ in chemical structure, the drugs induce similar biological responses and share similar pharmacological effects. In proposing these new drug ratios, the Commission also considered, among other factors, the severity of the medical harms to the user, the current ratios applied in similar cases, known trafficking behaviors, and concerns for public safety.

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The
motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

The General Counsel will advise the Commission on a possible vote on the Alternatives to Incarceration for Nonviolent First Offenders amendment.

MS. GRILLI: This proposed amendment is a result of the Commission's continued study of alternatives to incarceration. The proposed amendment amends the Commentary to §5C1.1 to add a new application note stating that if a defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than imprisonment.

The application note defines the term “nonviolent first offender” as “a defendant who has no prior convictions or any other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction.”
In addition, the proposed amendment amends the Commentary to §5F1.2 to remove language instructing that electronic monitoring ordinarily should be used in connection with home detention. Alternative means of surveillance may be used, so long as they are effective as electronic monitoring and surveillance necessary for effective use of home detention ordinarily requires electronic monitoring.

Finally, the proposed amendment makes conforming changes to other provisions in Chapter Five. A motion to promulgate the proposed amendment with an effective date of November 1, 2018, and technical and confirming amendment authority to staff would be in order at this time.

ACTING CHAIR PRYOR: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BARKOW: So moved.

ACTING CHAIR PRYOR: Is there a second?
COMMISSIONER BREYER: Second.

ACTING CHAIR PRYOR: Is there any discussion?

I'd like to discuss the Commission's reason for considering this new application note. The new application note provides that judges should consider alternative sentencing options for "nonviolent first offenders" whose applicable guideline range falls within Zones A or B.

Eligible defendants must not have any prior convictions and must not have used violence, credible threats of violence, or possessed a firearm or other dangerous weapon in the offense. This narrowly-tailored amendment is consistent with the directive to the Commission in 28 U.S.C. § 994(j).

Vote on the motion by saying aye.

MEMBERS: Aye.

ACTING CHAIR PRYOR: Any nays? The motion is adopted and let the record reflect that four Commissioners voted in favor of the motion.

I would like to acknowledge the unique
challenge that the Commission faced during the current amendment cycle. The Sentencing Reform Act of 1984 contemplates that there will be seven voting members on the Commission appointed by the President and confirmed by the Senate.

While setting sentencing policy is always difficult because it impacts the liberty of our fellow citizens, reaching consensus was particularly challenging and critical this amendment cycle. Under the statute, we need an affirmative vote of four Commissioners to approve any pending amendments.

Among the four of us here today, the unanimous agreement on this slate of amendments reflects even more collaboration and compromise than in a typical amendment cycle. I would like to thank my fellow Commissioners for their time and service.

We worked together to develop solutions that improve the Federal Sentencing Guidelines in a manner that balances fairness, justice, fiscal responsibility, and public
safety.

I look forward to working with my colleagues to strengthen and to simplify the guidelines. Working together, we can continue our efforts to ensure clear and effective guidance for federal courts across the country.

As one important part of that ongoing work, I would like to mention an upcoming event, the Commission's National Seminar on the Federal Sentencing Guidelines in San Antonio, Texas.

The seminar will take place from May 30th through June 1st. These annual trainings provide specialized instruction to probation officers, prosecutors, and defense attorneys on the guidelines. I look forward to seeing many of you there.

Is there any further business before the Commission?

COMMISSIONER BREYER: Just this. I think I speak on behalf of the three Commissioners here to thank you for your leadership. Without your leadership, it would
have been impossible to arrive at a consensus on these amendments, so thank you.

    ACTING CHAIR PRYOR: Thank you.

    Is there a motion to adjourn?

    COMMISSIONER BARKOW: Yes. So moved.

    ACTING CHAIR PRYOR: Is there a second?

    COMMISSIONER REEVES: Second.

    ACTING CHAIR PRYOR: Vote on the motion by saying aye.

    MEMBERS: Aye.

    ACTING CHAIR PRYOR: Anyone opposed? The motion is adopted by voice vote and the meeting is adjourned. Have a great day.

    (Whereupon, the above-entitled matter went off the record at 12:02 p.m.)