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# Proposed Amendments to the Rules of Practice and Procedure

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March 31, 2016

*Closing Date for Public Comment:*  
**June 1, 2016**

This document contains unofficial text of proposed amendments to the Commission's Rules of Practice and Procedure, and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendment can be found on the Commission's website at [www.ussc.gov](http://www.ussc.gov) and will appear in the **March 31, 2016**, edition of the *Federal Register*.

Written public comment should be received by the Commission not later than **June 1, 2016**, and should be sent to the Commission by electronic mail or regular mail. The email address for public comment is **Public\_Comment@ussc.gov**. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs. For further information, see the full contents of the official notice published in the *Federal Register* (available at [www.ussc.gov](http://www.ussc.gov)).

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## SUPPLEMENTARY INFORMATION

Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. The Commission originally adopted the Rules of Practice and Procedure in July 1997 and now proposes to make amendments to these rules. In accordance with Rule 1.2 of its Rules of Practice and Procedure, the Commission hereby invites the public to provide comment on the proposed amendments.

Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions on whether the proposed provision is appropriate.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at [www.ussc.gov](http://www.ussc.gov).

## **PROPOSED AMENDMENT: RULES OF PRACTICE AND PROCEDURE**

**Synopsis of Proposed Amendment:** *This proposed amendment revises the Commission’s Rules of Practice and Procedure. The rules were issued in 1997 “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.” See Rule 1.1 of the Commission’s Rules of Practice and Procedure. The Commission is conducting a review of its rules to determine whether any updates or revisions are appropriate, such as to reflect current technologies, take into account practices of other rulemaking agencies and recommendations of the Administrative Conference of the United States (“ACUS”), and better promote the purpose of the rules. The Commission is publishing this proposed amendment to inform that review.*

### **A. Actions and Meetings**

*This part of the proposed amendment amends Rules 2.2 and 3.3 to clarify and enumerate the types of Commission actions that are taken in public meetings, the types of actions that may be taken in nonpublic meetings or without a meeting, and the types of discussions with outside parties that may be held in nonpublic meetings. Cf. ACUS Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014) at ¶ 6.*

*Rule 2.2 identifies certain types of actions that must be taken in a public meeting and a number of other types of actions, described as “miscellaneous matters,” as actions that may be taken without a meeting. Many other types of Commission actions are not specifically enumerated. The proposed amendment revises Rule 2.2 to clarify and enumerate the actions that must be taken in public meetings and the actions that may be taken in nonpublic meetings or without a meeting. Specifically, votes on final priorities and votes to approve or revise the minutes of public meetings must be taken at public meetings, and a number of other actions may be taken at nonpublic meetings or without a meeting. It also clarifies that the actions authorized to be taken in nonpublic meetings or without a meeting are not precluded from being taken in public meetings.*

*Rule 3.3 identifies the purposes for holding nonpublic meetings: to transact certain types of Commission business, to hold discussions with Commission staff, and to discuss with outside parties certain types of sensitive information. The proposed amendment revises Rule 3.3 to clarify and enumerate the purposes for holding nonpublic meetings. As revised, Rule 3.3 identifies five purposes for holding nonpublic meetings and provides more clarity and specificity about these different purposes. To summarize, they include: (1) to take action on other matters pursuant to Rule 2.2; (2) to hold discussions with Commission staff and ex officio staff; (3) to hold discussions with advisory groups, with persons within the judiciary, or with persons in the executive or legislative branches; (4) to discuss sensitive information with outside parties (with a number of examples); and (5) to hold discussions with outside experts, such as in a roundtable or symposium, on matters unrelated to the merits of any pending proposed amendment.*

*For nonpublic meetings covered by purpose (5), it adds that such meetings may be held under “Chatham House Rule” and may include outside observers.*

*Finally, it amends Rule 6.2 to delete language requiring the Office of Legislative and Public Affairs to maintain certain information about nonpublic meetings.*

## **B. Public Meetings and Hearings**

*This part of the proposed amendment amends Rules 3.2 and 3.5 to provide more information to the public about public meetings and hearings. Cf. ACUS Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014).*

*Rule 3.2 currently provides that notice of a public meeting shall be issued at least seven days prior to the date of the meeting and, where practicable, shall include an agenda and any documents approved for public release. The proposed amendment specifies that any documents approved for public release shall be posted to the website and made available by other means, “as soon as practicable” — if not before the meeting, then at the start of the meeting or in a timely manner afterward.*

*Rule 3.5 provides for the Commission to “tape record” public meetings and maintain a written transcription of public hearings. The proposed amendment specifies that the Commission may provide a live webcast or audiocast of its public meetings and public hearings and make the recordings available through the website.*

## **C. Decisions on Retroactivity**

*This part of the proposed amendment makes substantive and clerical changes to the rules on considering retroactivity. First, as a clerical change, it moves the provision on retroactivity from the end of Rule 4.1 to a new Rule 4.1A. Second, it changes the provision on retroactivity to state that when the Commission wishes to consider whether to make an amendment available for retroactive application, it shall publish a request for comment, make a retroactivity impact analysis available to the public, hold a public hearing, and then vote on whether to make the amendment retroactive at a public meeting at least 60 days before the effective date of the amendment.*

## **D. Public Comment and Priorities**

*This part of the proposed amendment addresses issues relating to public comment on amendments, as well as the Commission’s consideration of priorities.*

*First, Rule 4.3 addresses the public comment process for amendments to the Guidelines Manual. The proposed amendment makes two additions to Rule 4.3. The first addition provides that the Commission may divide a public comment period into an original comment phase and a reply comment phase. Cf. ACUS Recommendation 2011-2, “Rulemaking Comments” (adopted June 16, 2011). The second addition addresses how, if at all, the Commission considers public comment that arrives late and reply comment on issues not raised during the original comment phase, and states that such late or non-responsive comment may not be considered. Cf. ACUS Recommendation 2011-2, “Rulemaking Comments” (adopted June 16, 2011).*

*Second, Rule 5.1 identifies the Office of Legislative and Public Affairs as the repository for the Commission’s public comment and public hearing testimony. The proposed amendment adds a sentence to Rule 5.1 to provide that the public comment and public hearing testimony shall be made available to the public “through the Commission’s website” and that this shall occur “as soon as practicable after the close of the comment period.” Cf. ACUS Recommendation 2011-2, “Rulemaking Comments” (adopted June 16, 2011). The proposed amendment also clarifies that, where appropriate, the Commission may decline to make available public comment that is duplicative and may redact sensitive information from public comment.*

Finally, the proposed amendment makes several additions to Rule 5.2 to set forth certain matters to be considered by the Commission in setting its priorities. It also establishes a new Rule 5.6 to address petitions filed by defendants under 28 U.S.C. § 994(s). *Cf.* ACUS Recommendation 2014-6, “Petitions for Rulemaking” (adopted December 5, 2014).

The first addition relates to the Commission’s responsibility under 28 U.S.C. § 994(g) to consider the impact on available penal and correctional resources. Currently, Rule 4.2 requires the Commission to consider prison impact before it promulgates an amendment. The proposal would revise Rule 5.2 to include a similar requirement that the Commission consider prison impact in setting its priorities. Relatedly, the proposal would state that, in setting its priorities, the Commission shall also consider, among other factors, the number of defendants potentially involved and the magnitude of the potential impact.

The second addition to Rule 5.2 is a set of factors to be considered by the Commission in determining which, if any, circuit conflicts to resolve. These factors were originally published by the Commission in the Federal Register in August 2000, *see* 65 FR 50034 (August 16, 2000).

The final addition to Rule 5.2 would clarify how written submissions and section 994(s) petitions relate to the priorities. Although the Commission provides a specific period each year for public comment on the priorities, suggestions about priorities have been made at other times of the year. An outside party may submit a suggestion immediately before the comment period on the priorities has opened, or long after it has closed, or during a different comment period (such as the comment period on a proposed amendment). The proposed amendment would provide for these mis-timed submissions to be carried over to the next priorities cycle and considered during that priorities cycle.

Similarly, defendants may submit petitions under section 994(s) at any time of the year. The proposed amendment would provide for section 994(s) petitions to be treated in the same way, *i.e.*, they would be carried over to the next priorities cycle and considered during that priorities cycle. In addition, the proposed amendment would establish a new Rule 5.6 for section 994(s) petitions. The new rule would incorporate section 994(s) into the Rules of Practice and Procedure and provide that the Commission will give due consideration to the petitions when it sets its priorities.

#### **E. Input from Outside Parties; Ex Parte Communications**

This part of the proposed amendment provides guidance on the Commission’s practices relating to input from outside parties. *Cf.* ACUS Recommendation 2014-4, “‘Ex Parte’ Communications in Informal Rulemaking” (adopted June 6, 2014); ACUS Recommendation 80-6, “Intragovernmental Communications in Informal Rulemaking Proceedings” (adopted December 12, 1980). The Commission’s practice of soliciting input from outside parties is currently contained in a single sentence at the end of Rule 5.4 (which generally relates to the Commission’s established advisory groups). It states that “the Commission expects to solicit input, from time to time, from outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups.”

The proposed amendment moves this principle to a new Rule 5.5 and revises it to clarify that the Commission, individual Commissioners, and Commission staff may consult with such outside groups, and that the consultation may involve any matter affecting the Commission’s business.

In addition, the proposed amendment provides specific guidance on *ex parte* communications on the merits of a proposed amendment, during the pendency of the proposed amendment, from outside parties.

## **F. Use of Social Media Platforms**

*This part of the proposed amendment expands Rule 6.3, which relates to the Commission’s website and the information available there. Specifically, the proposed amendment would expand Rule 6.3 to also encompass other electronic resources offered by the Commission, including social media platforms (such as Twitter) and electronic distribution mechanisms (such as email listservs). It would add to Rule 6.3 a requirement that the Commission “use a variety of electronic means to distribute public meeting notices and provide other information about the Commission,” such as social media platforms and electronic distribution mechanisms. Cf. ACUS Recommendation 2014-2, “Government in the Sunshine Act” (adopted June 5, 2014) at ¶ 3.*

## **G. Clerical Changes**

*Finally, the proposed amendment makes certain clerical changes to the Rules. It provides an introductory provision about the Commission, updates the name of the Office of Legislative and Public Affairs, provides relevant statutory citations, and inserts subdivision designations to divide rules into separate parts.*

### **Proposed Amendment:**

#### **(A) Actions and Meetings**

#### **Rule 2.2 – Voting Rules for Action by the Commission**

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(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. ~~The decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment 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 ~~miscellaneous~~ 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, ~~by written or oral communication~~, of a majority of the members then serving. Such matters include the approval of budget requests, ~~legal briefs, staff reports, analyses of legislation~~, 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 regarding Commission amendment~~ 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.

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### **Rule 3.3 – Nonpublic Meetings**

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~~The Commission may hold nonpublic meetings (i.e., meetings closed to the public) for purposes of the following: (1) to transact business of the Commission that is not appropriate for a public meeting (e.g., discussion and resolution of personnel and budget issues); (2) to receive information from, and participate in discussions with, Commission staff and any person designated by an *ex officio* commissioner as support staff for that commissioner; and (3) 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 (one example of which would be information from a law enforcement agency, the public disclosure of which would reveal confidential investigatory techniques or jeopardize an ongoing investigation).~~

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).

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

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

Generally, the Office of Publishing 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; and (6) with respect to nonpublic meetings described in Rule 3.3(3), a list of outside parties attending the meeting, a list of issues upon which the Commission was briefed, and, unless otherwise directed by the Chair or a majority of the members then serving, copies of written materials submitted by outside parties.

The Office of Publishing 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.

### **(B) Public Meetings and Hearings**

## **Rule 3.2 – Public Meetings**

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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.

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### **Rule 3.5 - ~~Written Record of Meetings and Hearings~~ Live Webcasts and Written Records**

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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 ~~tape record~~ **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.

#### **(C) Decisions on Retroactivity**

### **Rule 4.1 - Promulgation of Amendments**

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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.

**[insert the following heading before the last paragraph of Rule 4.1 to establish it as a new Rule 4.1A]**

**Rule 4.1A - Retroactive Application of Amendments**

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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 ~~it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. Prior to final Commission action on the retroactive application of an amendment, the Commission shall review the retroactivity impact analysis prepared pursuant to Rule 2.2, *supra*.~~

(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.

**(D) Public Comment and Priorities**

**Rule 4.3 - Notice and Comment on Proposed Amendments**

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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 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.

#### **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.

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#### **Rule 5.1 – Public Comment File**

The Office of Publishing and 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 solicitation 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 tentative 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 tentative 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.

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#### **Rule 5.6 – Petitions Filed By Defendants Under Section 994(s)**

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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.

**(E) Input from Outside Parties; “Ex Parte” Communications**

**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, 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.

~~In addition, the Commission expects to solicit input, from time to time, from outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups.~~

**Rule 5.5 – Outside Consultations and Ex Parte Communications**

(a) From time to time, the Commission, individual Commissioners, and Commission staff may consult with outside parties representing judges, prosecutors, defense attorneys, crime victims, and other interested parties. The consultation may involve any matter affecting the Commission’s business, including matters relating to the Commission’s priorities.

(b) However, during the pendency of a proposed amendment:

(1) The Commission does not intend to solicit ex parte communications (*i.e.*, communications outside the public comment process) on the merits of the proposed amendment from outside parties, except where it can be done in an equitable manner.

(2) Outside parties should not make unsolicited ex parte communications on the merits of the proposed amendment to an individual Commissioner or to the Commissioners collectively.

(3) If any communication covered by subdivision (2) is received by an individual Commissioner or the Commissioners collectively, [and the communication involves significant information or argument on the merits,] the communication shall be treated as public comment and disclosed accordingly. If it is an oral communication, a summary of the communication shall be treated as public comment and disclosed accordingly.

[(c) Subsection (b) does not apply to communications with—

(1) an *ex officio* Commissioner or any person designated by an *ex officio* Commissioner as support staff for that Commissioner;

(2) Members of Congress, congressional staff, and legislative branch agencies;

(3) the Executive Office of the President; and

(4) Justices of the Supreme Court, federal judges, and the leadership staff of the Judicial Conference of the United States or its committees.]

## **(F) Use of Social Media Platforms**

### **Rule 6.3 – Internet Site and Other Electronic Resources**

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The Commission maintains and updates information and documents on an Internet ~~web site~~ website. The ~~web site~~ 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.

## **(G) Clerical Changes**

### **About the Commission**

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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

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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.

¶ 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.

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### Rule 3.1 – Meetings

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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.

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### Rule 3.4 – Public Hearings

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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.

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#### **Rule 4.2 – Prison Impact of Amendments**

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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 and shall make such information available to the public. *See 28 U.S.C. § 994(g).*

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#### **Rule 5.3 – Information Relevant to the Amendment Process**

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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 Publishing, Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.

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