

# Chapter Two

## The Sentencing Guidelines

The legislation creating the Sentencing Commission provides that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.” 28 U.S.C. § 994(o). Given this congressional direction, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, enactment of new statutes, and input from federal criminal justice practitioners. By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

### Policy Issues

#### Crack Cocaine Amendment Retroactivity

In FY 2008, pursuant to 28 U.S.C. § 994(u) and consistent with 18 U.S.C. § 3582(c)(2), the Commission voted to give retroactive effect to the 2007 amendment relating to crack cocaine offenses. This amendment modifies the drug quantity thresholds in the Drug Quantity Table for crack cocaine offenses. The amendment reduced the base offense levels for crack cocaine offenses by two levels, but the corresponding guideline ranges maintain consistency with the statutory minimum penalties. Specifically, the Commission voted to give retroactive effect to Amendment 706, as amended by amendment 711, effective March 3, 2008, and amended §1B1.10 [Reduction in Term of Imprisonment as a Result of Amended Guideline

Range (Policy Statement)] to clarify retroactive application of guideline amendments.

The Commission reviewed applicable legal authorities and analyzed the potential impact that retroactivity would have. The Commission published its findings on October 3, 2007, estimating that approximately 19,500 offenders could be eligible for a reduced sentence. In addition to its own analysis, the Commission published two issues for comment regarding whether the crack cocaine amendment should apply retroactively and received more than 33,000 letters from individuals and organizations expressing their views on retroactivity. The Commission also held a public hearing on November 13, 2007, at which it heard from judges, defense attorneys, prosecutors, professors, and interested members of the public about the potential impact of applying the crack amendment retroactively.

This process culminated on December 11, 2007, when the Commission voted unanimously to apply the crack cocaine amendment retroactively and set an effective date of March 3, 2008, in order to give the federal criminal justice system adequate time to prepare for the anticipated motions for reduction in sentence. During the intervening weeks, the Commission participated in two national summits to discuss how the motions might be processed more effectively. These summits were held January 17–18, 2008, in Charlotte, North Carolina, and January 24–25, 2008, in St. Louis, Missouri, and were attended by judges, probation officers, prosecutors, and defense attorneys. The Commission supplemented these national summits with training seminars that it conducted around the country. The Commission and the Criminal Law Committee of the Judicial Conference (“CLC”) also jointly created a one-page form for use by the courts to document the disposition of such motions. Other ongoing issues

Table 2

**PUBLIC HEARING WITNESS LIST**  
**Public Hearing on Retroactivity**  
**Georgetown University Law Center – Washington, D.C.**  
**November 13, 2007**

**Honorable Reggie Walton**

*Committee on Criminal Law of the Judicial Conference  
of the United States*

**Stephen Sady**

**Lisa Freeland**  
*Federal Public Defenders*

**David Debold**

*Practitioners Advisory Group to the United States  
Sentencing Commission*

**Barry Boss**

*American Bar Association*

**Carmen Hernandez**

*National Association of Criminal Defense Lawyers*

**Gretchen C. F. Shappert**

*United States Attorney  
Western District of North Carolina*

**Sylvester E. Jones**

*United States Marshals Service*

**Joe I. Cassily**

*National District Attorneys Association*

**Steve Chanenson**

*Villanova University School of Law*

**Anne Piehl**

*Rutgers University*

**Chuck Canterbury**

*Fraternal Order of Police*

**Wade Ikard**

*Pastor, North Carolina*

**Hilary Shelton**

*National Association for the Advancement of  
Colored People*

**Pat Nolan**

*Prison Fellowship Ministries*

**Marc Mauer**

*The Sentencing Project*

**Ocie L. Acoff**

*Varner Education and Training Facility*

**Julie Stewart**

**De-Ann Coffman**

*Families Against Mandatory Minimums*

**Table 2 (continued)**

**PUBLIC HEARING WITNESS LIST**  
**Proposed Amendments to the Sentencing Guidelines**  
**Washington, D.C.**  
**March 13, 2008**

**The Honorable Henry E. Hudson**

*United States District Judge, Eastern District of Virginia;*  
*Committee on Judicial Security, Judicial Conference of the United States*

**Diane J. Humetewa**

*United States Attorney*  
*District of Arizona*

**Maureen Franco**

*Deputy Federal Public Defender*  
*Western District of Texas*

**Marianne Mariano**

*Acting Federal Public Defender*  
*Western District of New York*

**Todd A. Bussert**

*Practitioners Advisory Group*  
*to the United States Sentencing Commission*

**Suzanne Ferreira**

*Senior United States Probation Officer*  
*Southern District of Florida*

were closely coordinated with the Administrative Office of the United States Courts, the United States Department of Justice (“DOJ”), and the Federal Bureau of Prisons.

In March 2008, the Commission voted to make technical changes to the crack cocaine amendment, effective May 1, 2008, in order to resolve unexpected application issues, and at the same time, the Commission voted to apply these technical amendments retroactively as well. By the end of FY 2008, the Commission had received data showing 15,993 motions for a sentence reduction, 11,409 of which had resulted in a reduction.

### **Disaster Fraud**

The Commission formed a policy team to study the directive in the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, (“Disaster Fraud Act”) Pub. L. No. 110–179. Section 5(a) of the Disaster Fraud Act contained a 30-day directive to the Commission requiring the Commission to review the guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration or an emergency declaration. The Commission responded to the directive by promulgating an emergency amendment with an effective date of February 6, 2008. The emergency amendment added a new two-level enhancement to the fraud guideline, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency and added commentary concerning the definition of loss in these cases. The emergency amendment also referenced the new offense created by the Disaster Fraud Act, 18 U.S.C. § 1040, to the fraud guideline in Appendix A (Statutory Index) to the *Guidelines Manual*.

The Commission considered input from the DOJ, organizations victimized by disaster fraud, the Federal Public Defenders (“FPD”), and other interested parties. The Commission conducted an analysis of disaster fraud cases and other types of fraud cases sentenced under §2B1.1, and a case law and literature review. The Commission promulgated a permanent amendment to §2B1.1 that became effective on November 1, 2008. The permanent amendment expanded the scope of the enhancement to include all conduct described in 18 U.S.C. § 1040, and modified the enhancement to include a minimum offense level of 12. The amendment also added a downward departure provision that may apply in certain cases and deleted commentary relating to the definition of loss that was promulgated in the emergency amendment.

### **Alternatives to Incarceration**

The Commission established a policy team to study alternatives to incarceration. The team conducted a literature review and solicited input from the criminal justice community, among others, concerning the current use of alternatives to incarceration. Informed by this work, the Commission organized a two-day symposium on alternatives to incarceration, which included plenary and breakout sessions exploring alternatives to incarceration in the state and federal systems. The symposium featured 65 speakers, including federal and state court judges; federal and state prosecutors; defense attorneys; probation officers; academics; representatives of federal, state, and local correctional facilities and sentencing commissions; among others. Approximately 250 invitees attended, and included judges, DOJ representatives, the Commission’s advisory groups (Practitioners Advisory Group, Probation Officers Advisory Group, and Victims Advisory Group), defense attorneys, the Judicial Conference’s Criminal Law Committee (“CLC”), the American Bar Association Commission on Effective Criminal Sanctions, congressional staff, representatives of advocacy groups (*e.g.*, FAMM, NAACP, and La Raza), and academics. Following the symposium,

the Commission compiled and published a 700-page proceedings book, which included transcripts of each session, along with written materials submitted by the speakers.

### **Animal Fighting**

The Commission formed a policy team to study provisions of the Animal Fighting Enforcement Act of 2007, Pub. L. No. 110–22 (the “Act”). The Act amended the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses involving animal fighting ventures and to create a new animal fighting offense. The Commission reviewed the legislative history of the Act, previous prosecutions under the Animal Welfare Act, and public comment before promulgating the amendment that became effective November 1, 2008.

The Commission changed the guideline reference of the previously existing offenses, all of which had been misdemeanors before passage of the Act, to §2E3.1 (Gambling Offenses). The new offense at 7 U.S.C. § 2156(e) was also referenced to §2E3.1. An alternative base offense level was created for offenses involving animal fighting ventures at §2E3.1(a)(2). The Commission referenced these offenses to the gambling guideline because its study revealed that these offenses are generally motivated by illegal gambling activity.

### **Court Security Improvement**

The Commission formed a policy team to study the Court Security Improvement Act of 2007 (“Court Security Act”), Pub. L. No. 110–177. The Court Security Act created a new offense prohibiting the public disclosure of restricted personal information about certain individuals and members of their immediate family, including federal officers or employees, jurors, informants, and witnesses, with intent to threaten or facilitate a crime of violence. The Commission promulgated an amendment that referenced this offense in Appendix A to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The amendment added a two-pronged enhancement.

The first prong increases the sentence for a conviction under this new offense, and the second prong further increases the sentence for a conviction under this new offense if the offense involved the use of a computer or an interactive computer service.

The Court Security Act also created a new offense prohibiting the filing of a false lien or encumbrance against the property of federal officers or employees or of any agency of the federal government. The Commission promulgated an amendment which referenced this offense in Appendix A to §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens). The amendment added an enhancement if the offense involved more than two false liens or encumbrances, and an upward departure provision if the offense involved substantial pecuniary harm to a victim. The Commission received testimony at a public hearing from a representative of the Committee on Judicial Security for the Judicial Conference of the United States and received and considered public comment from the DOJ, the FPD, and other interested parties. The Commission also considered the results of a case law analysis and a literature review.

### **Food and Drugs**

The Commission formed a policy team to study the Prescription Drug Marketing Act of 1987 (the “PDMA”), Pub. L. No. 100–293; certain provisions of the Federal Food, Drug, and Cosmetic Act (the “FDCA”), (21 U.S.C. § 301 et seq.); and 21 U.S.C. § 333(e) (Prohibited distribution of human growth hormone) (“hGH”). Public comment received by the Commission expressed concerns that the guidelines did not adequately address violations of the PDMA and repeat violations of the FDCA. Additionally, public comment noted that the guidelines do not explicitly address offenses involving the illicit trafficking of hGH.

The Commission undertook an analysis of the cases sentenced under §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food,

Drug, Biological Product, Device, Cosmetic, or Agricultural Product), performed a case law and literature review, and conducted outreach to interested parties. Based on this work, the Commission voted to amend §2N2.1 effective November 1, 2008. The amendment modified the guideline in two ways. First, it added a new specific offense characteristic at §2N2.1 that is applicable in the case of a second or subsequent violation of the FDCA. Second, it expanded the upward departure provision at §2N2.1 to cover offenses, including PDMA violations, that involve the substantial risk of death or serious bodily injury. The Commission took no action on offenses involving human growth hormone.

### **Immigration**

The Commission continued a multi-year effort to examine and review the illegal reentry guideline, §2L1.2, specifically focusing on clarifying terms and definitions regarding the application of §2L1.2.

This effort was informed by public comment and concerns expressed at roundtable discussions with judges, prosecutors, public defenders, and probation officers on September 10, 2007, in Houston, Texas. Staff undertook an analysis of immigration sentencing data and analyzed illegal reentry case law. Staff reviewed the historical development of both the illegal reentry statute and the illegal reentry guideline to assess the sentencing impact of proposed amendments.

The Commission amended the definition of “crime of violence” in the illegal reentry guideline. Specifically, the Commission clarified that “forcible sex offense” includes conduct “where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.”

Additionally, the term “offer to sell” was included in the definition of “drug trafficking offense” to resolve confusion regarding some state statutes that define trafficking offenses more broadly than the federal definition.

Finally, the Commission addressed concerns that the “categorical approach” of the reentry guideline applies too broadly in some cases and too narrowly in others. The Commission addressed both of these concerns by adding a departure provision that may apply in a case in which “the applicable offense level substantially overstates or understates the seriousness of a prior conviction.”

### **Amendments Promulgated**

Proposed amendments were published in the *Federal Register* on January 28, 2008. The Commission received written comment on the proposed amendments from a variety of sources. The Commission also conducted two public hearings during the 2007-2008 amendment cycle, the first on November 13, 2007, concerning retroactivity of the 2007 crack cocaine amendment and the second on March 13, 2008, on all proposed amendments. See Table 2. The Commission also held a public briefing session on February 13, 2008. On May 1, 2008, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2008.

In addition to the permanent amendments that took effect on November 1, 2008, the Commission promulgated various amendments that took effect before November 1, 2008. First, on December 11, 2007, the Commission promulgated two permanent amendments with an effective date of March 3, 2008. The first was an amendment to policy statement §1B1.10 [Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)] clarifying when, and to what extent, a sentencing reduction is considered consistent with the policy statement and therefore authorized under 18 U.S.C. § 3582(c)(2). The second was an amendment to policy statement §1B1.10 that designates Amendment 706, as amended by Amendment 711, (pertaining to crack cocaine offenses) for inclusion in subsection (c) as an amendment that may be applied retroactively.

Second, the Commission also promulgated one temporary, “emergency” amendment in response to the Emergency Disaster Assistance Fraud Penalty Enhancement Act of 2007, (“Disaster Fraud Act”), Pub. L. No. 110–179. The emergency amendment added a two-level enhancement to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) if the offense involved fraud or theft in connection with a declaration of a major disaster or emergency, as those terms are defined in 42 U.S.C. § 5122, and modified the commentary to provide that for purposes of determining loss under §2B1.1(b)(1), reasonably foreseeable pecuniary harm includes certain administrative costs in such cases. On January 18, 2008, the Commission published in the *Federal Register* the temporary, “emergency” amendment that was adopted in response to the directive in the Disaster Fraud Act. The effective date of the amendment was February 6, 2008.

Finally, the Commission modified the commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to revise the manner in which combined offense levels are determined in cases involving cocaine base (“crack cocaine”) and one or more other controlled substance. The Commission did so to address a certain sentencing anomaly in which some offenders were not receiving the benefit of the two-level reduction provided by crack amendment that took effect on November 1, 2007, (Amendment 706). The Commission also voted to amend §1B1.10 [Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)] to provide retroactive effect to this amendment to §2D1.1. On April 30, 2008, the Commission published these amendments to a policy statement and commentary in the *Federal Register*. The effective date of the amendments was May 1, 2008.

The amendments promulgated by the Commission in fiscal year 2008 include amendments responding to congressional directives and enacted legislation and other areas of Commission interest. Specifically, the Commission —

- amended the Introduction to the *Guidelines Manual* in Chapter One. This amendment removed the introduction from the editorial note to Subpart I of Chapter One and restored it as it first appeared in 1987, with the inclusion of amendments occasionally made thereto between 1987 and 2000. The amendment also supplemented the original introduction with an updated discussion of the guidelines, their evolution, and Supreme Court case law; and redesignated §1A1.1(Authority) as §1A3.1.
- amended §2L1.2 in consideration of input received from federal judges, prosecutors, defense attorneys, and probation officers concerning the operation of §2L1.2. First, the amendment clarifies the scope of the term “forcible sex offense” as that term is used in the definition of “crime of violence” in §2L1.2, Application Note 1(B)(iii). Second, the amendment clarifies that an “offer to sell” a controlled substance is a “drug trafficking offense” for purposes of subsection (b)(1) of §2L1.2. Finally, the amendment added a departure provision that may apply in a case “in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction.”

In addition, the Commission promulgated amendments in fiscal year 2008 that responded to congressional directives or otherwise addressed recently enacted legislation. Specifically, the Commission —

- responded to the Court Security Improvement Act of 2007, Pub. L. No. 110–177, by (1) referencing the new offenses created by the act to the appropriate guidelines in Appendix A;

- (2) expanding §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to enhance penalties for offenses involving the filing of false liens against the real or personal property of specified government employees, (3) expanding §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to enhance penalties for offenses involving the public disclosure of restricted personal information about a federal officer or employee or other specified individuals;
  - repromulgated as a permanent amendment the temporary, “emergency” amendment promulgated in response to the Disaster Fraud Act. The permanent amendment differed from the “emergency” amendment in that it (1) expanded the scope of the disaster fraud enhancement added to §2B1.1 by the emergency amendment; (2) established a minimum offense level for disaster fraud cases; (3) added a departure provision for certain cases in which the defendant was also a victim of the disaster; and (4) deleted commentary relating to the definition of loss;
  - responded to the Honest Leadership and Open Government Act of 2007, Pub L. No. 110–81 by referencing the new offense created by the act to the appropriate guideline in Appendix A;
  - responded to the Animal Fighting Prohibition Enforcement Act of 2007, Pub L. No. 110–22 by (1) deleting the existing reference for the pertinent statute in Appendix A; (2) referencing both the offenses whose penalties were increased and the offense created by the act to the appropriate guidelines in Appendix A; (3) creating a new alternative base offense level to §2E3.1 (Gambling Offenses); and (4) adding an upward departure provision to §2E3.1 for an offense involving extraordinary cruelty to an animal;
  - responded to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (the “FDCA”) and the Prescription Drug Marketing Act of 1987, Pub L. No. 100–293 (the “PDMA”) by amending §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). The amendment added a new specific offense characteristic to this guideline for repeat violations of the FDCA and expanded an existing upward departure provision to include an offense that created a substantial risk of bodily injury or death.
- Other guideline amendments promulgated in fiscal year 2008 made various technical and conforming changes to the guidelines that —
- expanded the scope of Application Note 1 of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) to include local excise taxes within the meaning of “taxes evaded” and amended the background commentary to §2E4.1 to include local excise taxes to reflect a statutory change made by section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, which expanded the definition of “contraband cigarette” in subsection (2) of 18 U.S.C. § 2341 to include the failure to pay local cigarette taxes.
  - implemented technical corrections made by section 553 of Pub. L. No. 110–161 by changing the statutory references in §2X7.1 (Border Tunnels and Subterranean Passages) from “18 U.S.C. § 554” to “18 U.S.C. § 555,” and by amending Appendix A (Statutory Index) to refer violations of 18 U.S.C. § 555 to §2X7.1.
  - addressed a statutory redesignation made by section 202 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, by changing statutory references in §3C1.4 (False Registration of Domain Name) from “18 U.S.C. § 3559(f)(1)” to “18 U.S.C. § 3559(g)(1).”



- addressed statutory changes to 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant) made by the 21<sup>st</sup> Century Department of Justice Appropriations Act, Pub. L. No. 107–273, by deleting in Appendix A the references to §§2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for violations of 18 U.S.C. § 1512(b), and adding those guidelines as references for violations of 18 U.S.C. § 1512(a). The amendment also added a reference to §2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by that subsection.
- changed the reference in Appendix A for offenses under 18 U.S.C. § 1091 (Genocide) from §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), which no longer exists as a result of a guideline consolidation (*see USSC, Guidelines Manual, Appendix C, Amendment 521*), to §2H1.1 (Offenses Involving Individual Rights).

### Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In fiscal year 2008, the Commission worked closely with members of Congress and their staffs, providing them with sentencing-related information and analyses.

The Commission continued to provide Congress real-time data collection, analysis, and reporting on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission's website in order to assist Congress in its own analysis of the impact *Booker* and subsequent Supreme Court decisions have had on criminal justice issues. The Commission also held numerous briefings with congressional staff to explain the Commission's amendment process; developing sentencing case

law; the case law's impact on the work of the Commission and on federal sentencing generally.

On February 12, 2008, the chair of the Commission testified before the Senate Judiciary Committee's Crime and Drugs Subcommittee; and on February 26, 2008, the chair of the Commission testified before the House Subcommittee on Crime, Terrorism, and Homeland Security. During both hearings, the chair testified about federal cocaine sentencing policy, the 2007 amendment to the guidelines for crack cocaine offenses, and an analysis of the potential impact of the retroactive application of the crack cocaine amendments.

The Commission also conducted numerous congressional briefings on its work in the area of cocaine sentencing. These briefings included presentation of the Commission's data and research in the area of federal cocaine sentencing, discussion of the Commission's May 2007 *Report to Congress: Cocaine and Federal Sentencing Policy*, the 2007 amendment to the guidelines for crack cocaine offenses, and an analysis of the retroactive effect of the cocaine amendment.

In fiscal year 2008, the Commission also responded to congressional requests for other federal sentencing and criminal justice data (including prison impact analyses) and provided technical assistance in drafting legislation. The Commission also corresponded with members of Congress about proposed legislation, offered explanations and training on guideline application to congressional staff, and provided regular updates on Commission action in response to recently enacted crime and sentencing-related legislation.

The Commission also routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports, and other published materials.

