

CHAPTER TWO

The Sentencing Guidelines

Guideline Amendments.....

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 an 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Amendments Promulgated

Proposed amendments were published in the *Federal Register* on November 27, 2002, December 18, 2002, and January 17, 2003. The Commission received extensive written comment on the proposed amendments, and on March 25, 2003, the Commission conducted a public hearing on the proposed amendments. On May 1, 2003, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements, with an effective date of November 1, 2003.

In addition to these permanent amendments, the Commission promulgated temporary, “emergency” amendments in response to directives contained in the Bipartisan Campaign Reform Act of 2002, the Sarbanes-Oxley Act of 2002, and the PROTECT Act. Proposed amendments and issues for comment regarding the Commission’s response to the Bipartisan Campaign Reform Act and the Sarbanes-Oxley Act of 2002 were published in the *Federal Register* on November 27, 2002; and on January 22, 2003, the Commission published in the *Federal Register* the temporary, “emergency” amendments that were adopted in response to these directives. The Commission published in the *Federal Register* the temporary, “emergency” amendment adopted in response to the PROTECT Act on May 16, 2003. The temporary, emergency amendments became permanent amendments effective November 1, 2003. Finally, the Commission implemented direct amendments to the federal sentencing guidelines made by Congress in the PROTECT Act; these amendments were published in the *Federal Register* on May 16, 2003.

The amendments promulgated by the Commission in FY 2003 include amendments that respond to congressional directives and that address issues of congressional and Commission interest. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary, set out within these two categories.

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, DC — March 25, 2003

Chief Judge Lawrence E. Piersol

*Chief Judge, United States District Court for the District of South Dakota
Chair, Native Americans Advisory Group*

Paul K. Charlton

United States Attorney for the District of Arizona

Jon M. Sands

Assistant Public Defender for the District of Arizona

William Mercer

*United States Attorney for the District of Montana
Chair, Subcommittee on Sentencing Guidelines, Attorney General's Advisory Committee*

Lawrence S. Goldman

President, National Association of Criminal Defense Lawyers

Frank O. Bowman

M. Dale Palmer Professor of Law, Indiana University School of Law

James E. Felman and L. Barrett Boss

Co-Chairs, United States Sentencing Commission Practitioners Advisory Group

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, DC — August 19, 2003

William Mercer

*United States Attorney for the District of Montana
Chair, Subcommittee on Sentencing Guidelines, Attorney General's Advisory Committee*

Michael Goldsmith

*Professor, J. Reuben Clark Law School, Brigham Young University
Former Vice Chair, United States Sentencing Commission*

James E. Felman

Co-Chair, United States Sentencing Commission Practitioners Advisory Group

John P. Rhodes

Assistant Public Defender for the District of Montana

Jon M. Sands

*Assistant Public Defender for the District of Arizona
Chair, Federal Sentencing Guidelines Committee of the Federal Public and Community Defenders*

Judge David F. Hamilton

*Judge, United States District Court for the Southern District of Indiana
Member, Committee on Criminal Law, Judicial Conference of the United States*

Table 2

PUBLIC HEARING WITNESS LIST

Public Hearing on Implementing the Requirements of the PROTECT Act
Washington, DC — September 23, 2003

Judge Marilyn L. Huff

Judge, United States District Court for the Southern District of California

Steven Hubachek

Assistant Federal Public Defender for the Southern District of California

Judge Lourdes G. Baird

Judge, United States District Court for the Central District of California

Maria E. Stratton

Federal Public Defender for the Central District of California

Paul K. Charlton

United States Attorney for the District of Arizona

Frank O. Bowman

M. Dale Palmer Professor of Law, Indiana University School of Law

Congressional Directive and Interest Amendments

The amendments responding to congressional directives and addressing congressional interest—

- responded to the Sarbanes-Oxley Act of 2002 by increasing the penalties in section 2B1.1 (Theft, Fraud, and Property Destruction) for officers and directors of publicly traded companies who commit fraud and related offenses; increased the penalties for fraud offenses that endanger the solvency or financial security of a substantial number of victims; expanded the fraud loss table in section 2B1.1(b)(1) to punish adequately offenses that cause catastrophic losses; and increased the penalties in section 2J1.2 (Obstruction of Justice) for obstruction offenses that involve the destruction of evidence;
- responded to the Bipartisan Campaign Reform Act of 2002 by creating a new guideline (§2C1.8) to punish adequately offenses involving violations of the statutory prohibitions against “soft money”; restrictions on “hard money” contributions; contributions by foreign nationals; restrictions on “electioneering communications”; certain fraudulent misrepresentations; and “conduit contributions”;
- responded to the Homeland Security Act of 2002 by providing a graduated enhancement in section 2B1.1 for computer offenses that create a threat to, or that damage, critical infrastructures; expanding enhancements in sections 2B2.3 (Trespass) and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) to cover offenses involving computer systems used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security;
- responded to the 21st Century Department of Justice Appropriations Authorization Act by creating a new guideline (§3B1.5) for offenses involving the use of body armor in drug trafficking offenses and crimes of violence;
- implemented amendments to the guidelines made directly by the PROTECT Act, including amendments pertaining to child pornography offenses, downward departures, and acceptance of responsibility;
- implemented the directive pertaining to increased offense levels in section 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) as provided by the PROTECT Act; and
- responded to the USA PATRIOT Act by increasing the maximum offense level in section 2X3.1 (Accessory After the Fact) for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense; responded to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 by increasing the penalties for offenses involving tampering and threatened tampering with a public water system; and responded to the Terrorist Bombings Convention Implementation Act of 2002 by referencing new offenses created by this Act in Appendix A (Statutory Index).

Amendments Addressing Issues of Commission Interest

The amendments addressing issues of Commission interest—

- increased the penalties for involuntary manslaughter offenses;
- responded to proportionality concerns regarding the sentencing of oxycodone trafficking offenses by changing the Drug Equivalency Tables in section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (including Possession with Intent to Commit These Offenses)) to provide sentences using the weight of the actual oxycodone instead of calculating the weight of the entire pill;
- clarified the meaning of certain terms in section 2L1.2(b)(1) (Unlawfully Entering or Remaining in the U.S.), including “crime of violence” and “sentence of imprisonment”;
- clarified the rule for application of section 5G1.3(b) (mandating a concurrent term of imprisonment) and how section 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked; and provided a new downward departure provision (§5K2.23) regarding the effect of discharged terms of imprisonment;
- added red phosphorus to the Chemical Quantity Table in section 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) in response to the classification of red phosphorus as a List I chemical; and
- amended section 2G2.2(b)(5) to include receipt and distribution in the enhancement for use of a computer in offenses involving trafficking in material involving the sexual exploitation of a minor.

Policy Teams

As part of its continuing analysis of the sentencing guidelines and related sentencing issues, the Commission annually identifies a number of priorities for the coming year and beyond. Selected priority areas are examined and analyzed by interdisciplinary policy teams, each consisting of a cross section of the Commission staff (*e.g.*, legal staff, policy analysis staff, and training staff).

Policy teams generally study a specific subject area, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group typically reviews legislative history and recent legislative enactments; relevant court decisions; sentencing data regarding current practices; case files of sentenced defendants; reports of frequent questions about guideline application related to that specific area (based on HelpLine calls from probation officers, judges, and attorneys); and public comment. The teams also solicit input from the Practitioners Advisory Group, the Probation Officers Advisory Group, and other interested persons and government agencies as appropriate.

Campaign Finance Policy Team

The Commission established a policy team to address directives contained in the Bipartisan Campaign Reform Act of 2002 (BCRA). The BCRA increased statutory penalties for various violations of the laws that govern the ways political contributions are raised, the amounts that may be accepted from individual sources, and the reporting requirements that must be observed with political fundraising.

The Campaign Finance Policy Team analyzed sentencing data, reviewed relevant case law and legislative history, met with representatives of the Public Integrity Division of the Department of Justice and the Federal Election Commission, and solicited comment from the Department of Justice, defense bar, federal probation officers, and other interested parties. The new guideline created by the Commission was crafted to carefully calibrate sentences in accordance with factors identified in the directive.

Corporate Fraud Policy Team

In fiscal year 2003, the Corporate Fraud Team focused on implementation of several emergency directives to the Commission contained in the Sarbanes-Oxley Act of 2002. The act contained several emergency directives to the Commission generally pertaining to fraud and obstruction of justice offenses that required implementation by January 25, 2003.

During the abbreviated time frame mandated by Congress, the team (1) reviewed the legislative history of the act, (2) conducted a detailed data collection and analysis of obstruction of justice and fraud offenses, with an emphasis on securities fraud and other large-scale corporate fraud offenses, (3) analyzed public comment, (4) compiled a “legislative history” of the guidelines pertaining to corporations and other organizations, and (5) developed several approaches for consideration by the Commission.

On January 8, 2003, the Commission unanimously approved a multi-part emergency amendment implementing the congressional directives by making several modifications to the sentencing guidelines for fraud, theft, and property destruction as well as obstruction of justice offenses. The effective date of the emergency amendment was January 25, 2003. In accordance with the act, the amendments were accompanied by a comprehensive report to Congress: *Increased Penalties Under the Sarbanes-Oxley Act of 2002*.

Subsequent to promulgation of the emergency amendment, the team continued to develop additional options for further implementation of the directives to be considered as part of the permanent amendment, which was passed unanimously by the Commission on April 16, 2003, and became effective November 1, 2003.

Drug Policy Team

In fiscal year 2003, the Commission made two amendments to the drug guidelines. Penalties for trafficking the drug oxycodone were increased, and red phosphorus was added to the Chemical Quantity Table in section 2D1.11 (Unlawfully Distributing, Importing, Exporting or

Possessing a Listed Chemical; Attempt or Conspiracy). The Drug Policy Team, in advising the Commission, received information from the Drug Enforcement Administration, the Department of Justice, Purdue Pharma (manufacturer of Oxycontin), the American Academy of Pain Medicine, and the National Institute on Drug Abuse.

Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and Oxycontin. The oxycodone amendment responds to proportionality issues in the sentencing of oxycodone trafficking. Red phosphorus has been recently classified as a List I chemical which – when combined with hydriodic acid and ephedrine, psuedoeephedrine, or phenylpropanolamine – produces methamphetamine or amphetamine. The penalty level was set using information provided by the Drug Enforcement Administration citing data from the *Drug Yield Calculator*, version 3.2. This guide is developed by the Clandestine Laboratory Investigative Chemists Association as a tool for forensic chemists to calculate lab capacities of seized laboratories.

Cybersecurity Policy Team

The Commission's review of the cybersecurity area was prompted by passage of the Homeland Security Act of 2002. That act directed the Commission to review and amend, if appropriate, guidelines and policy statements relating to computer crimes, in recognition of the serious nature and growing incidence of such offenses and the need for effective deterrence and appropriate punishment.

In developing its response to the act, the Cybersecurity Policy Team analyzed sentencing data, reviewed relevant case law and legislative history, and examined commentary from the Department of Justice, defense attorneys, probation officers, academics and other experts in the field of computer crime. As a result of its study and analysis, the Commission decided to increase penalties for certain violations of 18 U.S.C. § 1030, the computer crime statute. Enhanced penalties were provided for offenses involving important government computer systems, malicious intent to cause damage, or the intent to obtain personal information. In addition, the amendment particularly targets offenses resulting in a substantial disruption of a critical infrastructure by roughly doubling the sentence that offenders causing this sort of disruption will receive. For those extreme cases in which a disruption to a critical infrastructure has a debilitating impact on national security, national economic security or national public health and safety, or in which death results, the amendment makes clear that an upward departure will be appropriate.

Involuntary Manslaughter Policy Team

The team was charged with examining sentences for involuntary manslaughter offenses to respond to concerns raised by the Department of Justice, some members of Congress, and the Commission's Native American Ad Hoc Advisory Group. The primary concern was that the federal sentencing guidelines do not adequately reflect the seriousness of involuntary manslaughter offenses. Current data as well as information from previous studies confirmed that most federal involuntary manslaughter cases involve vehicular homicides, and further indicated that federal sentences appear to be under-punished, particularly when compared to comparable state cases. In addition, the guideline has not been amended since Congress doubled the statutory maximum penalty from three to six years' imprisonment in 1994. The amendment increases the base offense level in section 2A1.4 (Involuntary Manslaughter) at (a)(1) for criminally negligent conduct from base offense level

10 to base offense level 12, and increases the base offense level at (a)(2) for reckless involuntary manslaughter from base offense level 14 to base offense level 18.

Section 5G1.3 Policy Team

In its work during the prior amendment cycle, this policy team determined that there were a number of additional circuit conflicts that had arisen under section 5G1.3 in addition to the one raised by the Criminal Law Committee of the Judicial Conference of the United States. For this reason, the Commission extended the life of this policy team and directed it to continue to work on those additional issues.

Following the policy team's work, the Commission amended section 5G1.3 which involves imposing a sentence on a defendant who is subject to a prior undischarged term of imprisonment.

Terrorism Policy Team

The Terrorism Policy Team continued work begun during the previous amendment cycle in response to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001. The team was also asked to respond to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 and the Terrorist Bombings Preparedness and Response Act of 2002. The team consulted with the Department of Justice and considered public comment in developing several amendment proposals for Commission consideration.

The Commission amended the money laundering and structuring guidelines to complete work begun in 2002 to address the provisions of the USA PATRIOT Act. It also raised the maximum offense level in section 2X3.1 (Accessory After the Fact) from level 20 to level 30 for offenses involving the harboring or concealing of a fugitive involved in a terrorism offense. In responding to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, the Commission amended the guidelines to refer certain new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials (§2M6.1; Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy). Finally, the Commission responded to the Terrorist Bombings Convention Implementation Act of 2002 by referring the different provisions of the new offense at 18 U.S.C. § 2339C to appropriate guidelines.

Immigration Policy Team

In fiscal year 2003, the Immigration Policy Team focused on clarifying specific terms and definitions regarding the application of section 2L1.2 (Unlawfully Entering or Remaining in the United States).

In fiscal year 2001, the Commission comprehensively revised section 2L1.2 to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions. In response to application issues raised by a number of judges, probation

officers, defense attorneys, and prosecutors – particularly along the southwest border between the United States and Mexico – the Immigration Policy Team reviewed the changes provided in the 2001 amendment and examined the issues surrounding application of these new amendments.

As a result, the Commission added definitions for certain terms such as “alien smuggling,” “child pornography,” and “human trafficking” to resolve litigation regarding the meaning and scope of these terms. Also, the amendment makes clear that the specified offenses enumerated within the definition of “crime of violence” are always classified as “crimes of violence,” regardless of whether the offense has as an element “the use, attempted use, or threatened use of physical force against the person of another.” Finally, the Commission added language to include the Chapter Four definitions regarding “sentence imposed” as well as instructions consistent with Chapter Four regarding the use of offenses committed before the defendant was 18 years of age.

Advisory Groups

The Commission has established several advisory groups in an effort to obtain systematic input on ways to improve the guidelines. The two standing advisory groups to the Commission are the Practitioners Advisory Group and the Probation Officers Advisory Group. In 2003, the Organizational Guidelines Ad Hoc Advisory Group and the Native American Ad Hoc Advisory Group continued their work.

Practitioners Advisory Group

The Practitioners Advisory Group (PAG) provides defense bar perspectives on Sentencing Commission policies, sentencing procedures, and proposed guideline amendments. The advisory group, consisting of approximately 50 criminal defense attorneys, also disseminates information regarding sentencing issues to the criminal defense community through its membership. In 2003, the Practitioners Advisory Group had co-chairs: Mr. Barry Boss, a partner in the law firm of Cozen O'Connor, and Mr. James Felman, a partner in the law firm of Kynes, Markman & Felman.

Probation Officers Advisory Group

The Probation Officers Advisory Group (POAG) was established by the Commission to assist the Commission in carrying out its statutory responsibilities under the Sentencing Reform Act of 1984 and to represent U.S. probation officers in the area of sentencing. Throughout the year, the group continued to assist the Commission by providing input on guideline application and sentencing-related issues. The group consists of approximately 15 probation officer representatives, including one representative from the Federal Probation/Pretrial Services Officers Association and one representative from the Office of Probation and Pretrial Services in the Administrative Office of the U.S. Courts. In 2003, the POAG chair was Ms. Cathy Battistelli, sentencing guidelines specialist for the District of New Hampshire.

Organizational Guidelines Ad Hoc Advisory Group

In February 2002, the Commission established an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations. The Commission asked the group to place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law. With the arrival of the tenth anniversary of the organizational guidelines, the Commission decided to form the ad hoc advisory group after soliciting public comment on the need, scope of work, and membership of the group.

The advisory group – composed of industry representatives, scholars, and experts in compliance and business ethics – presented its final report to the Commission on October 8, 2003. While the report concludes that the organizational guidelines have induced many organizations to focus on compliance and to create programs to prevent and detect violations of the law, it also recommends amending the existing organizational guidelines in order to reflect contemporary legislative, regulatory, and corporate governance requirements. Mr. B. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, served as chair of the group.

Native American Ad Hoc Advisory Group

In May 2002, the Sentencing Commission formed the Native American Ad Hoc Advisory Group to consider viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act. The Native American advisory group was composed of 16 members representing a variety of interested groups, including the National Congress of American Indians, the U.S. Commission on Civil Rights, the Bureau of Indian Affairs, tribal members, the federal judiciary, and law enforcement officials. The Native American advisory group was chaired by the Honorable Lawrence Piersol, chief judge of the U.S. District Court of South Dakota. The group's final report, issued November 4, 2003, concludes that the impact on Native Americans resulting from federal criminal jurisdiction and the application of the federal sentencing guidelines varies both from offense to offense and between jurisdictions.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. To fulfill this responsibility, the Commission in 2003 continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses. Commissioners met with members of Congress throughout the year regarding a variety of matters.

During 2003, the Commission routinely responded to congressional requests for federal sentencing and criminal justice data, provided technical assistance in drafting legislation, and provided explanations of guideline application. The Commission also corresponded with members of Congress regarding proposed legislation, the most significant of which was the PROTECT Act, which was enacted on April 30, 2003. Throughout the year, the Commission provided regular updates on Commission action in response to recently enacted crime and sentencing-related legislation, including the PROTECT Act, which required Commission implementation by October 27, 2003.

The Commission supplied publications and resource materials (*e.g.*, the *Guidelines Manual* and the *Sourcebook of Federal Sentencing Statistics*) to members of Congress and their staffs. The Commission also provided to Congress its report entitled *Downward Departures from the Federal Sentencing Guidelines* published in the fall of 2003.