

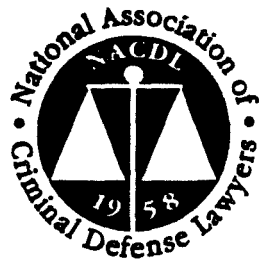
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December 16, 1996

The Honorable Richard P. Conaboy  
and Commissioners  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the Commission's proposed rules of practice and procedure.

The NACDL is a nationwide organization comprised of more than 8600 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes law professors and law students. NACDL is also affiliated with 73 state and local criminal defense organizations, allowing us to speak for more than 25,000 criminal defense lawyers nationwide.

The NACDL commends the Commission for undertaking to establish rules of practice and procedure pursuant to its authority under 28 U.S.C. § 995(a)(1). The proposed rules will make it easier for members of the bar and the public who are interested in the workings of the criminal justice system to submit their comments to the Commission. We believe that the congressional purpose in requiring the periodic review and revision of the guidelines will be well served if the Commission has available to it commentary informed by the "empirical experience" of those of us who daily practice under the guidelines but do not otherwise have a voice before the Commission.

In this vein, NACDL requests that the Commission consider our concerns about some of the proposed rules of practice and procedure.

**REPORT TO NACDL BOARD OF DIRECTORS**  
Exhibit 2

**I. PUBLICATION OF PROPOSED AMENDMENTS - RULES 2.2 and 5.4**

We recommend that the Commission require no more than one or, at most, two affirmative votes, rather than the proposed three, before it will permit publication of a proposed amendment in the Federal Register.

Publication of amendments and the resulting public comment is the only systematic method for interested persons to bring information to the attention of the Commission. Congress made consideration of such comments an integral part of the Commission's revisory role. See 28 U.S.C. § 994(n). We believe the Commission should encourage public input whenever any one Commissioner determines that an issue is sufficiently important to warrant public comment.

**II. EXECUTIVE AND WORKING SESSIONS - RULES 4.3 and 4.4.**

We recommend that the Commission conduct all its business, except that which involves personnel issues, in public. In particular, any session that includes persons other than Commissioners and Commission staff should not be selectively open to some but not to the public at large.

A policy of open meetings is consistent with the congressional design for "honesty in sentencing".

"Imposing a criminal sanction on defendants is a grave matter -- perhaps the most serious act in our judicial system, which appropriately surrounds it with a wide array of procedural protections." United States v. Anderson, 82 F.3d 436, 450 (D.C. Cir.), cert. denied, 117 S.Ct. 375 (1996) (Wald, J., dissenting). The process of getting there, especially under the mandatory guideline scheme, should be surrounded with a similarly wide array of procedural protections. We therefore ask the Commission to conduct all business that relates to the consideration and promulgation of the sentencing guidelines in public.

**III. RETROACTIVITY OF AMENDMENTS - RULES 2.2. and 5.4.**

We recommend that the Commission not establish a presumption against the retroactivity of amendments and that it continue to consider and determine retroactivity separate from its decision to adopt and transmit particular amendments to Congress.

**A. Presumption Against Retroactivity - Rule 5.1 & 5.4**

First, the congressional purpose in passing the Sentencing Reform Act is inconsistent with the Commission's proposed rule that "[g]enerally, promulgated amendments will be given prospective application only." Rule 5.1; see also Rule 5.4. Congress charged the Commission with establishing guidelines that "provide just punishment", "adequate deterrence", "protect the public" and "provide treatment" to the defendant. 18 U.S.C. § 3553(b); 28 U.S.C. § 991(b)(1)(A). It also required the Commission to ensure that the guidelines "provide certainty and fairness" and "reflect ... advancement in knowledge of human behavior." 28 U.S.C. § 991(b)(1)(B)&(C). The Commission must also "periodically ... review and revise [the guidelines] in consideration of comments and data coming to its attention." 28 U.S.C. § 994(n). Under this statutory scheme, the Commission amends the guidelines presumably because it believes that it has devised a better guideline and that the old one was somehow flawed, unjust or otherwise not meeting the purposes of sentencing.

Congress also provided for a retroactivity determination by the Commission in each instance where an amendment "reduces the term of imprisonment." 28 U.S.C. § 994(u). Congress further provided for the resentencing of defendants whose sentences may be reduced due to the Commission's decision to designate an amendment for retroactive application. 18 U.S.C. § 3582(c)(2). Congress passed § 3582(c)(2) even as it was otherwise restricting the jurisdiction of district courts to modify or reduce sentences. Compare FED.R.CRIM.P. 35 and as applicable to offenses committed prior to Nov. 1, 1987 (prior to amendment by Pub.L.98-473). Congress's actions do not reflect an aversion to retroactivity as would support the Commission's proposed blanket presumption against retroactivity.

The Commission itself has noted that Congress disfavored retroactivity only for a limited class of cases. In the background commentary to its retroactivity policy statement the Commission cites the relevant legislative history:

It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when the guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines.

U.S.S.G. § 1B1.10, p.s., comment. (backg'd.). Under the maxim *expressio unius est exclusio alterius*, one must conclude that Congress did not intend that the Commission adopt an across the board presumption against retroactivity.

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Second, the Commission's case-by-case retroactivity determination has proved to be workable. The Commission has designated only 20 retroactive amendments out of the 536 amendments that have been promulgated. The Commission has not published any information that indicates that these few retroactive amendments have adversely affected the administration of the criminal justice system.

Indeed, our experience has been that § 3582(c)(2) hearings to reduce a defendant's sentence based on a retroactive amendment have not been unduly complicated. We have been aided in this regard by probation officers and the federal Bureau of Prisons. In particular cases, district judges have exercised the discretion granted to them under § 3582(c)(2) to deny a reduction when they have deemed it appropriate.

For these reasons, we believe that once the Commission determines to amend a guideline, it should make the retroactivity determination on the merits of the particular amendment based on factors it has identified: "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." U.S.S.G. § 1B1.10, p.s., comment. (backg'd.). The Commission's decision should be amendment-specific and should be informed by the congressional directive that the guidelines promote fairness and just punishment without the unwarranted constraint that would be imposed by the proposed presumption against retroactivity.

**B. Timing of Retroactivity Determination - Rules 2.2, 5.1 and 5.4**

We recommend that the Commission retain its past practice of making the retroactivity determination after it has promulgated an amendment.

In a change from past practice, proposed Rule 5.1 requires the Commission to "decide whether to make [an] amendment retroactive at the same meeting at which it decides to promulgate the amendment." This conflicts with the express language of the enabling legislation which excepts retroactivity determinations from the schedule for promulgation and submission of amendments. 28 U.S.C. § 994(p). In conjunction with the other proposed rules on retroactivity, this proposal will (1) unduly complicate the retroactivity determination; (2) unnecessarily burden the resources of the Commission and the interested public; and (3) will dilute the quality of the public commentary pertaining to retroactivity.

We further recommend that the Commission not adopt the clause of Rule 5.4 which requires the Commission to request comments pertaining to retroactivity at the same time that it publishes a proposed amendment for comment. Under this proposal, the public will be required to address retroactivity with respect to all amendments first published for comment even though some or many of them may ultimately not be promulgated by the Commission. Further, at the comment phase, the Commission often publishes for comment multiple options to a single proposed amendment. Under the proposed rules, the public would be required to address the retroactivity implications of all amendments and their multiple options if it wished to impact the Commission's retroactivity determination. We believe that the limited resources of the public and the Commission will be better served if comments relating to retroactivity were solicited only with respect to those amendments that have in fact been promulgated by the Commission.

We also recommend that the Commission adopt a rule that will permit a single Commissioner, rather than the three now proposed under Rule 2.2, to initiate the preparation of a retroactivity impact study. Because much of the information which the Commission deems relevant to the retroactivity determination is not available to the public at large, a retroactivity impact study by Commission staff is essential to any meaningful public comment of the issue. See e.g., 28 U.S.C. § 994(w) (requiring district judges and probation officers to provide information to the Commission concerning sentenced defendants); cf. 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines that minimize prison overcrowding). If the Commission is going to require public comment concerning retroactivity for each published amendment, it should make available to the public, before its comments are due, all information relevant to an informed discussion of the issue. Under the proposed rule, this would not be the case.

This proposed clause hinders the ability of the public to provide informed commentary to the Commission and is not compatible, therefore, with the revisory scheme of the Sentencing Reform Act. It should not be adopted.

We believe that the proposed rules concerning the timing and consideration of retroactivity will impair the Commission's ability to make a reasoned retroactivity determination. Retroactivity will be routinely denied not because the Commission will have had an adequate opportunity to assess its merits but rather because it will not have before it a suitable, informed, and considered analysis of the issue. We do not believe that the Commission should make the retroactivity analysis more difficult yet less effective. We believe that these proposed rules will unduly frustrate, without any discernible benefit, the congressional purpose in providing for the reduction of a defendant's sentence based on a retroactively-designated guideline.

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#### IV. BIENNIAL AMENDMENT PROCESS - RULE 5.1

We recommend that the Commission not adopt a rule that limits amendments to the guidelines "no more frequently than biennially".

Congress provided for an annual revision of the guidelines in the course of business not merely when the Commission deems that a matter is "urgent and compelling", as the Commission now proposes. See 28 U.S.C. § 994(p). If the Commission wishes to decelerate the rate at which the guidelines are being amended it may do so merely by rejecting or deferring action on any particular amendment. By establishing a hard and fast rule, the Commission unduly restricts its discretion without any discernible benefit.

A case in point is the matter of the guideline for cocaine base. For several years now, Congress and the Commission have questioned, studied and determined that the penalty structure for this offense is in need of revision. Recently, the Journal of the American Medical Association published a study critical of the penalties for cocaine base. D.K. Hatsukami & M.W. Fischman, Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?, 20 JAMA 1580 (Nov. 20, 1996). At this stage of this year's amendment cycle, a guideline amendment in this area has yet to be adopted for publication by the Commission. If this matter is not resolved in this cycle no amendment to the cocaine base guidelines could become effective, under the proposed biennial review, until November 1, 1999 absent extraordinary action by the Commission. The money laundering guideline, which has also been under consideration for some time, faces the same delayed prospect for revision.

We recommend that the Commission not impose this arbitrary restriction on the amendment process.

#### V. OTHER COMMENTS

NACDL agrees generally with the comments submitted by the ABA's Criminal Justice Section's Committee on the United States Sentencing Guidelines, the Federal Public and Community Defenders and the Practitioner's Advisory Group.

As a final matter, NACDL wishes to express our shared concern about the need for an amendment to the enabling legislation to include a representative of the defense bar as an ex officio member of the Commission. We recommend that the Commission take the initiative in proposing such change.

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VI. CONCLUSION

In conclusion, we wish to emphasize that we believe the rules proposed by the Commission, with the changes we have proposed, will have a salutary effect on the amendment process by providing more due process and by making it easier for the public to provide informed comments to the Commission.

Thank you for your consideration.

Very truly yours,

 *Judy Clarke* by con

Judy Clarke

President,

National Association of Criminal Defense Lawyers