

Summary of 2012 Proposed Amendment to the Sentencing Guidelines

Sentencing Resource Counsel Project

On April 13, 2012, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2012. Barring congressional action, they will take effect November 1, 2012. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission's website at:

http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20120413_UNOFFICIAL_RFP_Amendments.pdf.

- 1. Safety valve for chemical precursors:** The Commission created a safety valve provision in the guideline for chemical precursors, §2D1.11, that parallels the safety valve provision in the drug guideline. Listed chemical offenses will now be eligible for a 2-level decrease if safety valve criteria are met. The Commission announced it will *not* consider retroactive application of this provision.
- 2. BZP assigned a marijuana equivalency:** Courts had been all over the map on how to handle BZP in the drug table, so the Commission took it up this cycle. The Commission adopted the ratio Defenders supported: 1 gm BZP = 100 gm marijuana. In doing this, the Commission rightly rejected the unduly punitive ratio DOJ sought.
- 3. Favorable change in calculation of drug trafficking predicates in illegal reentry cases:** The Commission adopted our suggested approach (along the lines of the 5th, 7th, 10th and 11th circuits), that a revocation sentence imposed *after* a defendant's deportation is *not included* in the "sentence imposed" for purposes of 2L1.2(b)(1). This is particularly good news in the Second circuit which had taken a different view. The bad news, however, is that the Commission announced it will *not* consider retroactive application of this provision.
- 4. Post-Sentencing Rehabilitation in §5K2.19 expunged:** Again consistent with the Defenders' proposal, the Commission deleted §5K2.19 which provided that post-sentencing rehabilitative efforts are "not an appropriate basis for a downward departure when resentencing the defendant for that offense."
- 5. Fraud:** Responding to directives from Congress to "review and, *if appropriate*, amend" the guidelines, the Commission made several changes to the fraud guideline, which only serve to further complicate an already overly complex guideline:
 - a. Mortgage Fraud – new rules:** The Commission decided to create not only a (very) special rule, but also change an existing one. Specifically, the Commission

added a special rule for credit against loss where the collateral has *not* been disposed of at the time of sentencing. With this amendment to Application Note 3(E) to §2B1.1, in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, two new rules apply (1) use the fair market value as of the date of plea or verdict (this is a change from the old rule which used date of sentencing); and (2) there is a rebuttable presumption that the most recent tax assessment value is a reasonable estimate of the fair market value (cannot think of another instance where the Commission instructed courts on how to value something as region and case-specific as real estate). Acknowledging that tax assessments are not a perfect measure, the Commission invites courts to consider factors such as: “the recency of the tax assessment and the extent to which the jurisdiction’s tax assessment practices reflect factors not relevant to fair market value.” Let the litigation begin.

- b. Securities Fraud – a rebuttable special rule for calculating loss:** The Commission decided to weigh in on the method a court should use when calculating actual loss in a securities fraud case. It selected the “modified recissory method” to determine actual loss (that is, the difference between the average price during fraud and the average price during the 90-day period after fraud disclosure, multiplied by number of shares). While the resulting figure is now the presumptive actual loss, it is also subject to rebuttal. There is helpful language that in assessing whether this figure is a reasonable loss amount, it may consider factors such as external market forces having nothing to do with the fraud.
- c. Insider Trading (§2B1.4) Enhancements:** The Commission made two changes related to insider trading. First it added a new specific offense characteristic providing a floor offense level of 14 “if the offense involved an organized scheme to engage in insider trading” and new commentary on factors that may be considered in deciding whether to apply this new SOC. It also broadened the application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases.
- d. Financial Institution Fraud – government bailout won’t save you from a sentencing enhancement:** The Commission broadened the application of §2B1.1(b)(15)(B) which provides a 4-level enhancement for specific financial harms such as jeopardizing a financial institution. The Commission amended Application Note 12 to indicate the enhancement may apply even if the offense did not cause the enumerated harm, so long as the harm “was likely to result

from the offense but did not result from the offense because of federal government intervention, such as a ‘bailout’.”

- e. **Downward Departure – example added:** The Commission added an example to the downward departure provision for cases where the offense level substantially overstates the seriousness of the offense. The new language is as follows: “a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims.”
 - f. **Upward Departure – example added:** The Commission likewise added an example to the upward departure provision for an offense that “created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).” The example is: “such as a risk of a significant disruption of a national financial market.”
6. **Multiple counts (5G1.2) with mandatory minimum:** Over opposition from Defenders, the Commission rejected the approach taken by the Ninth and D.C. circuits and amended §5G1.2 to provide that when any count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range, the effect on the guideline range applies to all counts.¹ As evidence that the Commission opted for the more complicated approach, the Commission had to add a “special rule on resentencing” to address the situation where a defendant successfully appeals a case such that the mandatory minimum sentence no longer applies. Under the special rule, courts are directed that the guideline range for the remaining counts shall be “redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.”
7. **Human Rights and New SOC for Immigration Fraud that involves uncharged human rights offenses:** Although there has only been one prosecution in the United States for a serious human rights offense as defined by the Commission, the Commission created a new Chapter Three adjustment, §3A1.5, adding enhancements from 2-4 levels, and setting a floor of level 37 for most serious human rights offenses. The Commission also added new enhancements for immigration and naturalization fraud offenses sentenced under §2L2.2. Under the new amendments, if the defendant committed the charged

¹ The Commission takes the position that it is adopting the holding of the Fifth Circuit. As explained in Defender comments (available at www.fd.org), however, the Commission misconstrues a casual statement in a Fifth Circuit opinion about the appropriate sentence on remand as a “holding” about the application of §5G1.2(b).

fraud “to conceal” participation in a human rights offense, the offense level is increased by 6-10 levels, depending on the offense, and has a floor of level 25. In addition, a 2-level increase and floor of level 13 applies if the defendant committed the fraud “to conceal the defendant’s membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense.”

- 8. Driving While Intoxicated always counts for criminal history:** The Commission amended Application Note 5 in §4A1.2 to make clear that contrary to the interpretation by the 2nd circuit, and consistent with the interpretation of the 7th and 8th circuits, a defendant’s prior sentence for driving while intoxicated or under the influence is *always* counted toward the defendant’s criminal history score, regardless of how it is classified (felony, misdemeanor or petty offense).
- 9. Cell phones in prison:** The Cell Phone Contraband Act, which amended 18 U.S.C. §1791, made it a class A misdemeanor to provide a mobile phone to an inmate, or for an inmate to possess one. The Commission amended §2P1.2 to assign mobile phones and similar devices a base offense level of 6. (This is much better than the other option the Commission was considering which would have set a BOL of 13 for this offense, thereby equating a cell phone with a weapon.)
- 10. Prevent All Cigarette Trafficking Act (PACT):** The PACT Act imposes strict restrictions on the ‘delivery sale’ of cigarettes and smokeless tobacco. The Commission amended Appendix A to reference violations of the act under 15 U.S.C. § 377 to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses), and amended commentary in both of those provisions to indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. The PACT Act also created a new Class A misdemeanor at 18 U.S.C. § 1716E for shipping cigarettes through the mail. The Commission amended Appendix A to reference those violations to §2T2.2.
- 11. Animal Crush Videos:** The Commission amended Appendix A to reference the crime of creating or distributing an animal crush video under 18 U.S.C § 48 to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).
- 12. Indian Arts and Crafts:** The Commission amended Appendix A to reference offenses under 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to §2B1.1. The Commission also amended Appendix A to reference offenses under 18

U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark) to both §2B1.1 and §2B5.3 (Criminal Infringement of Copyright or Trademark).

Notably Absent from the Amendment List

Despite publishing several options for “burglary of a non-dwelling” and “categorical approach to priors,” the Commission made no changes. The Commission made clear, however, that these issues are on the front burner for next year. In light of this, if anyone has any specific issues in these two areas you would like to bring to SRC’s attention, we encourage you to do so.