REVISED DRAFT RULES - July 3, 1997

COMMENTARY RECEIVED ON PROPOSED RULES OF PRACTICE AND PROCEDURE

Submissions by

ICCA	International Community Corrections Association Mary Shilton, Washington D.C. Representative, wrote on 12/14/96
NACDL	National Association of Criminal Defense Lawyers Judy Clarke, President, wrote on 12/16/96
PAG	Practitioners' Advisory Group Fred Warren Bennett, Chairperson, wrote on 12/4/96
ABA	American Bar Association, Criminal Justice Section Committee on the U.S. Sentencing Guidelines Mary Lou Soller and Alan J. Chaset, Chairpersons, wrote on 12/11/96
JCUS	Judicial Conference of the United States Committee on Criminal Law Hon. George P. Kazen, Chair, wrote on 12/13/96
Gottlieb	Professor David J. Gottlieb University of Kansas School of Law Authored article submitted by Federal Sentencing Reporter on 12/16/96
Buffone	Samuel J. Buffone Partner, Ropes & Gray, Washington, D.C. Authored article submitted by Federal Sentencing Reporter on 12/16/96
FPCD	Federal Public and Community Defenders Tom Hutchison, Chief, Sentencing Guidelines Group, wrote on 12/16/96
Brown	Joe Brown, U.S. Trustees Office, Nashville, commented via Counsel Connect's Online Hearing on Simplifying the Guidelines on 10/30/96

Part I - PURPOSE ~~SCOPE~~ OF RULES; RULES AMENDMENT PROCEDURE

Rule 1.1 Application and Purpose

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. ~~While t~~ The Commission, an agency within the judicial branch of government, is ~~not~~ subject ~~as a general matter~~ 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 public hearing procedure. ~~and~~ The Commission is not subject to a variety of other statutes, such as the Federal Advisory Committee Act, the Sunshine Act, and the Freedom of Information Act, typically applicable to rulemaking agencies in the executive branch ~~agencies,~~. T~~t~~he 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 enlarge the rights of any person sentenced under the guidelines promulgated by the Commission or to otherwise create any private right of action.

Rule 1.2 ~~Suspension of Rules and Promulgation of Temporary Rules~~ Rules Amendment Procedure

~~The Commission in a public meeting at which a quorum is present may, by vote of a majority of members, promulgate, modify, or suspend any rule contained herein, or promulgate a temporary, supplemental, or superseding rule.~~

(a) Except as provided in subsection (b), amendment of these rules shall require affirmative vote of a majority in a public meeting (and not less than three) of the voting members then serving. Any such amendment shall be adopted only after notice and reasonable opportunity for public comment.

(b) The Commission temporarily may suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving.

Part II - ACTION BY THE COMMISSION

Rule 2.1 Members

For purposes of the voting procedures set forth in these Rules, "member" of the Commission shall mean a voting member and shall not include an *ex-officio*, non-voting member. *Ex-officio* members ~~may participate in all discussions of the Commission but~~ may not vote or make or second motions.

Rule 2.2 Voting Rules for Action by the Commission

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 public meetings from remote locations by electronic means, including, but not limited to, telephone, satellite and video conference devices.

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 ~~in the~~ **~~Federal Register~~** shall require the affirmative vote of at least two ~~three~~ members at a public meeting. Similarly, 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.

Action on miscellaneous matters may be taken without a meeting based on the affirmative vote, by written or oral communication, of a majority of the members then serving. Such matters may include, but are not limited to, the approval of budget requests, legal briefs, staff reports, analyses of legislation, and administrative and personnel issues.

A motion to reconsider Commission action may be made only by a Commissioner ~~who was~~ 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.

NACDL *recommends that the Commission require no more than 1 or at most 2 affirmative votes, rather than 3, to permit publication of a proposed amendment in the Federal Register. (5) Publication and Comment is the only systematic method to bring information to the Commission; consideration of such comments is an integral part of Commission's revisory role. See 28 U.S.C. § 994(n); whenever one Commissioner determines that an issue is sufficiently important for public comment, public input should be encouraged.*

JCUS *expresses support for provision requiring three votes to instruct staff to prepare retroactivity impact analysis (26)*

FPCD *Public participation in amendment process should be encouraged by making it relatively easy to get a proposed amendment published for comment; only two affirmative votes should be required. (52)*

[MOVE SECTION III TO END OF RULES]

Part ~~III~~ VI- INFORMATION ABOUT THE COMMISSION

Gottlieb *This guide to obtaining information and data from the Commission is helpful. (43)*

Rule ~~3~~6.1 Office(s)

The offices of the Commission are located in the Thurgood Marshall Federal Judiciary Building, Suite 2-500, South Lobby, One Columbus Circle, N.E., Washington, D.C. 20002-8002.

The office can be reached telephonically between 8:30 a.m. and 5:30 p.m. Monday through Friday. The main telephone number is 202/273-4500. The fax number is 202/273-4529.

Rule ~~3~~6.2 ~~Communications~~ Office of Legislative and Public Affairs

The ~~Communications~~ Office of Legislative and Public Affairs administers the Commission's policy on Public Access to Sentencing Commission Documents and Data. *See* 54 Fed. Reg. 238, 51279 (1989). This office also maintains *A Guide to Publications & Resources* that lists all publications and datasets available from the Commission. This document is available on request.

Generally, the ~~Communications~~ Office of Legislative and Public Affairs will maintain for public inspection by appointment official Commission documents, meetings and hearing schedules and agendas, approved minutes of Commission meetings and transcripts of public hearings, *[edited transcripts of Commission meetings,] public comment submissions, and other documents (or citations thereto) that inform Commission decisions or actions.

Rule ~~3~~6.3 Internet Site

The Commission maintains and updates information and documents on an Internet Web Site~~ and Electronic Bulletin Board~~. The Web Site is found at: *http://www.ussc.gov*. ~~The Electronic Bulletin Board can be accessed directly by computer via modem by dialing 202/273-4709.~~

This resource ~~shall~~ 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, ~~a list~~ the text of all reports and resources available from the Commission, and the text of the *Guidelines Manual* and Commission reports.

Rule ~~3~~6.4 Information at Federal Depository Libraries

All Commission publications printed by the Government Printing Office, and other selected documents, are available in hard copy or microfiched form through the Government Printing Office's Regional Depository Libraries (of which there are more than 600 nationwide). The location of the nearest Federal Depository Library can be determined in several ways: (1) request a free copy of the Directory of Depository Libraries from the U.S. Government Printing Office, Library Programs Services, Stop: SLLD, Washington, DC 20401; (2) ask your local library for the address of the nearest Federal Depository Library; or (3) use the Internet at *http://www.access.gpo.gov/su_docs*; Select: "Information Available for Free Public Use in Federal Depository Libraries." Search the listing by state or by area code.

Rule ~~3~~6.5 Access to Commission Data — Research Consortium

The Commission provides its various databases, excluding individual identifiers, to the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR). Researchers interested in studying federal sentencing practices through quantitative methods can access Commission sentencing data through this means. Contact ICPSR, P.O. Box 1248, Ann Arbor, MI 48106; or call 1-800-999-0960; or use the following Internet address: *http://www.ICPSR.umich.edu/NACJD/home.html*.

Part ~~IV~~III - MEETINGS AND HEARINGS

Rule ~~4~~3.1 Meetings

The Chair shall call and preside at Commission meetings. In the absence of the Chair, the Chair will designate a Vice Chair to preside.

Rule ~~4~~3.2 Public Meetings

The Commission shall ~~endeavor to~~ meet ~~publicly~~ on at least two ~~separate~~ occasions in each calendar quarter to discuss and act upon ~~inform the public and receive public comment on~~ matters before~~under consideration by~~ the Commission.

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 for public release.

At ~~In~~ the discretion of the Chair~~, and to the extent the Chair may deem appropriate,~~ members of the public may be afforded an opportunity to comment on any issue on the agenda of a public meeting.

PAG, ABA *Commission is required by statute to meet at least two weeks in each quarter (28 U.S.C. § 993). (15, 24) Thus, "endeavor" should be stricken from first line. (PAG only, 15)*

commend requirement of 7 day notice, the provision of information on purpose and agenda and related documents. (15, 24)

urge Commission to comply with Sunshine Act and publish notice of proposed meetings in Federal Register so it can reach individuals not connected to Commission via newsletters, mailings or web site. (15, 24)

JCUS *Commission is required by statute to meet for two weeks each quarter; this contrasts with the language in this provision that the Commission "shall endeavor" to meet on two separate occasions. (28)*

Gottlieb *Commission's failure to incorporate presumption in favor of public meetings is disappointing. (42) Major criticism in the past has been that its decisions have bee made in private without public participation, followed by a public meeting that merely ratifies what has already been decided. The need to work in public is particularly important because of the unusual position of the Department of Justice, which is both an interested party and, in contrast to defense bar, is granted a seat at the table as an ex officio member.*

Suggests advance notice of meetings should be published in the Federal Register, along with an advance agenda. (41)

Rule ~~4~~3.3 Executive Sessions

The Commission may hold executive sessions closed to the public to transact business of the Commission that is not appropriate for a public meeting, e.g., ~~including, but not limited to~~, discussion and resolution of personnel and budget issues.

PAG, ABA *Only meetings that deal with personnel and budget should be closed. All other Commission business should be conducted in public. (16, 24)*

NACDL *All business except personnel should be public; especially any session that includes persons other than Commissioners and staff--the meetings should not be selectively open to some, but not others. (5)*

Rule 43.4 ~~Working~~ Briefing Sessions

The Commission ~~routinely~~ may hold briefing sessions that are not open to the public for the purpose of receiving in-depth information from staff and other persons. The Office of Legislative and Public Affairs will ~~others and for conducting in-depth discussions of matters before the Commission~~ make available a list of issues discussed.

PAG, ABA *The provision for "working sessions" only adds to criticism of the Commission that the appearance is that an issue is decided before its presentation in an open meeting with public comments. If working sessions drive the decisionmaking process, public meetings become perfunctory, cursory and non-substantial. (16, 24)*

JCUS *Private working sessions have increased; it often seem decisions have taken place at these sessions in advance of an issue being noticed on the public agenda. (28) There is little public record of non-public discussions and decisions; the Commission needs to guard against private sessions' dominating or becoming a substitute for significant public discussion of issues. JCUS suggests a provision that the Commission will "routinely" hold public meetings at which issues are discussed in-depth and, where necessary, supplement with non-public sessions. Also, a public record should be made of the substance and result of non-public sessions; this would enhance and assist the Commission's decisions, and maximize the opportunity for informed and useful public input, so long as the issues and materials are announced and distributed well in advance.*

Gottlieb *If rules to imposed on criminal defendants are discussed at closed "working sessions," this creates the appearance of an unlevel playing field. (42) Commission has never explained the circumstances under which it decides to close a meeting. (41) Urges Commission to adopt a rule analogous to the Sunshine Act, with a presumption in favor of open meetings, limited exceptions, and the requirement that the Commission articulate an exception if it decides to close a meeting. (42)*

Buffone *Rules should not permit decisions to be made at special or executive session meetings of the Commission that are closed to the public. (49)*

Guideline amendments or amendments to commentary or policy statements should only be considered at open meetings.

Rule ~~4~~3.5 Public Hearings ~~Generally~~

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. 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.

~~N~~The notice of a public ~~such~~ hearing shall~~will~~ be ~~placed in the **Federal Register**~~ given as soon as practicable. ~~and~~ T~~t~~he notice shall include, ~~if~~as applicable, information regarding a procedure for requesting ~~the~~an opportunity to testify, and the availability ~~for public inspection~~ of documents or reports relevant to the subject of the hearing.

~~The Communications Office shall make available by customary means the topic(s) that will be the subject of testimony and any other topics or issues about which only written submissions will be accepted.~~ The Commission reserves the right to select the format for public hearings, to invite witnesses, to choose witnesses from among those who request the opportunity to testify, and to 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.

PAG, ABA *"Customary means" should be defined, especially for the benefit of those who do not communicate regularly with the Commission. (16, 24)*

Rule ~~4~~3.6 Written Record of Meetings and Hearings

The Commission shall prepare and maintain [written minutes and edited transcripts] of public meetings and make them publicly available ~~by customary means within a reasonable time~~ after their approval by the Commission. The Commission shall tape record public meetings and make the recordings publicly available after the approval of the [minutes/transcripts] of such meeting. No such recording shall be copied or removed from the Commission's offices.

[*Note: modify the preceding and following sentences if transcripts are to be required for public meetings.]* The Commission shall maintain a written transcription of public hearings that shall be publicly available for inspection.

ICCA — *approves codification of public meetings and written record. (2) Recommends that written minutes be obtainable by those unable to attend*

PAG, ABA — *believe current "written minutes" of meetings are not sufficiently detailed; tape recordings of meetings should be preserved and access to the recordings by the public should be permitted. (16, 24)*

Gottlieb — *Summaries of meetings in the past have been very brief; Commission should make available tapes of prior meetings. (41-42)*

Buffone — *regards as a significant weakness that the proposed rules do not require transcription of meetings; there should be transcripts or tapes of all public meetings, executive sessions and working sessions that are directed at the guidelines amendment process. (49) Another weakness is that there is no requirement that any record be made of ex parte contacts or that all information, reports, working group reports, drafts, studies and other documents available to the Commission in reaching its decisions be made available to the public.*

Part ~~V~~IV - GUIDELINE AMENDMENT PROCESS

Rule ~~5~~4.1 Promulgation of Amendments

The Commission may promulgate and submit to Congress amendments to the guidelines between the beginning of a regular session of Congress and the first day of May that year. Amendments shall be accompanied by an ~~brief~~ 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).

~~The Commission may promulgate amendments a~~At other times pursuant to special statutory enactment ~~(*e.g.*, the "emergency" amendment authority under section 730 of the Antiterrorism and Effective Death Penalty Act of 1996).~~, 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.

~~Except as necessary to implement enacted legislation or to address other matters determined by the Commission to be urgent and compelling, the Commission shall, after May 1, 1997, promulgate or amend the guidelines no more frequently than biennially. No amendments shall be issued in the annual amendment cycle beginning on May 2, 1997 except as provided in this rule.~~

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, it shall review whether to make the amendment retroactive by May 1 of that year ~~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*.

Biennial Cycle

ICCA — *2 year cycle is reasonable, but amendments should be considered each year in order to expedite the process. (2)*

NACDL — *opposes biennial cycle. (9) Commission can decelerate the rate of amendments through deferral instead of a hard and fast rule. This provision restricts the Commission's discretion without a benefit. For example, amendments concerning cocaine base or money laundering, if not adopted now, could not become effective under proposed biennial review until November 1999, absent extraordinary action by Commission. This provision imposes an arbitrary restriction.*

PAG, ABA — *have serious concerns about the change to a 2-year cycle: the move will not cure perceived current defects because it will not change the way in which amendments are considered, i.e., there will be no lengthening of the comment period, no longer gestation period for amendments. (13, 22) Also, due to having shelved various issues in favor of simplification process, now is not the time to take a year off. The "breathing space" concern for judges, lawyers, etc., is less of a concern now than during the first several years of guidelines' existence. While it may be beneficial to consider an amendment for two years, the provision should not preclude promulgation of amendments in the earliest year that they are ready for implementation.*

JCUS — *Considering all the Commission has on its plate, including drive for simplification, Congressional directives, list of priorities, and proposals from outside, it is premature to rule out a 1998 amendment cycle at this time. (27) Consideration of this option should be postponed until it is clear what can and cannot be accomplished in 1997. Rigid cycle should not be imposed as there may be unanticipated needs; better to bypass a particular cycle than go to a pre-ordained timetable.*

Gottlieb — *The practice of enacting an amendment in the year it is first considered is made more difficult by the breadth of some proposed amendments. (37) Commission sometimes seeks comments on an issue without identifying concrete proposals. A common practice is to suggest "all reasonable options" for changing a proposal. Some options, submitted from outside, are not likely to receive serious consideration by the Commission. In these situations, it is only after the public hearings in March and ensuing meetings that specific proposals to be sent to Congress will be clearly identified. In these cases, the Commission should schedule a second round of hearings, a practice that is the norm in other agencies when a proposal is not the logical outgrowth of an initial proposal. The Commission's current time schedule does not permit this, unless the amendment is delayed for a year. Alternatively, the Commission could more narrowly focus the initial review process by giving more detailed notice of priority areas in the summer before it gives notice of the proposed rules.*

The move to a 2 year cycle does little to cure the weaknesses in the Commissions's current notice and comment system because it does not change the way amendments are considered and does not lengthen the comment period. (28) Lengthy gestation for complex proposals may be wise but refraining from any amendment in a given year may be counterproductive. For example, if the Commission wished more consideration for a proposal in this year's cycle, its choice would be between a potentially hasty decision to publish in 1997 or to wait until 1999. Spending up to two years considering an amendment may be beneficial but there is no reason to cease promulgating amendments in the earliest year they are ready to be submitted.

Buffone — *The proposed change to a biennial cycle would mark a significant alteration in prior practice that should be the subject of public commentary; the Commission needs to adopt rules of practice so that these types of issues can be addressed under regularized rulemaking procedures. (50)*

FPCD *Providing for biennial cycle is unnecessarily restrictive. (55) Commission should maintain maximum flexibility to regulate its schedule based on nature and number of projects undertaken. If work on an amendment can be completed in a relatively short period, no reason to wait to promulgate it. However, FPCD does not advocate that Commission commit itself to complete action on all proposals in the cycle in which they are proposed; complexity or controversy may call for longer period of consideration. The exceptions to the two-year cycle provide the Commission with no effective escape from the rule's rigidity: an amendment not mandated by Congress may be good policy but not urgent and compelling. Commission can control its schedule more effectively by maximizing discretion.*

Brown *believes longer amendment cycles with input from all sides is needed on changes. (58) Also, the Commission too often reacts too quickly to a decision with a quick fix; there needs to be some development to know whether a fix is needed.*

Retroactivity

NACDL *opposes presumption against retroactivity. Proposed Rule 5.1 is inconsistent with Congress's purpose in passing the Sentencing Reform Act. (6) The statute requires Commission to amend the guidelines presumably because it believes the new guideline better and old one is flawed, unjust, etc.; if that is so then there is no presumption against retroactivity.*

Also militating against a presumption of nonretroactivity, 28 U.S.C. § 994(u) requires a retroactivity determination in each instance where an amendment reduces term of imprisonment; Congress also provided for resentencing when defendants' sentences are reduced due to retroactive amendment; Congress passed this provision, 18 U.S.C. § 3582(c)(2), even as it otherwise restricted the jurisdiction of district courts to modify or reduce sentences. (6)

Commission has noted that Congress disfavored retroactivity only for a limited class of cases--expressio unius est exclusio alterius. (6)

Thus far, the case-by-case retroactivity determination has proved workable; of 20 retroactive amendments, no information published indicates adverse effects; experience of this group is that resentencing based on retroactive amendments is not unduly complicated. (7)

The determination to amend should be followed by retroactivity determination using §1B1.10, p.s., comment. (backg'd). (7)

The proposal to make a retroactivity determination at same meeting at which Commission decides to promulgate a new amendment conflicts with the language of enabling legislation which excepts retroactivity determinations from the schedule for promulgation and submission of amendments. 28 U.S.C. § 994(p). (7) This provision will unduly complicate the retroactivity determination by burdening the resources of Commission and diluting the quality of public commentary pertaining to retroactivity. (8) Much information the Commission uses is not available to public; an impact study is essential to meaningful public comment.

Recommends adoption of rule that single Commissioner can initiate the preparation of retroactivity impact study. (8)

PAG — *opposes rule that Commission make retroactivity determination at same meeting at which it decides to promulgate an amendment. (15) Such a requirement deprives Commission of the flexibility to conduct its business in the way best suited to a situation. Both matters should be included in the final package forwarded to Congress; however, decisions on each should be made separately in time so as not to inappropriately impact or influence the other.*

PAG, ABA — *Rules appear to contemplate that at the time the of publication of a proposed amendment, the Commission will indicate a tentative decision on retroactivity based on staff analysis. (14, 23) Commentators will not have access to analysis, but should have some idea which amendments the Commission is seriously considering making retroactive. Intelligent commentary would be aided by a fuller explanation of the particular factors considered relevant by the Commission in arriving at retroactivity decisions that depart from the general rule that amendments are prospective only. (15, 23)*

recommend that only one Commissioner, not three, be required to initiate retroactivity analysis. (15, 23)

recommend adding language permitting Commission to make retroactive amendments from previous years' cycles. (15, 23)

JCUS — *approves provision that retroactivity decision on new guideline be made before May 1 of the year of enactment; however, requiring that the question of retroactivity be decided at the same meeting in which the*

Commission decides to promulgate amendment may be unnecessarily restrictive and may deprive Commission of flexibility. (27) Suggests striking "at same meeting" language and substituting "prior to May 1 of that year."

Gottlieb — *The proposed changes on retroactivity open the process. (41) Commentators will have an idea of those amendments the Commission is seriously considering making retroactive when comments are submitted. Intelligent commentary is still hampered by the Commission's failure to explain the particular reasons for deciding on prospective or retroactive application.*

Buffone — *Rules of Practice are an inappropriate vehicle for articulating policy determinations such as retroactivity. (50) The Commission's retroactivity policy is particularly complex and warrants independent rulemaking and substantial input from practitioners and judges.*

FPCD — *Requiring three votes for retroactivity analysis is unduly restrictive. (53)*

Requiring the Commission to make a decision on retroactivity at the same time as a decision on an amendment is unduly restrictive. (53) The factors listed in §1B1.10 on determining retroactivity cannot be reliably determined until the amendment has been approved in final form. (54) Determination of retroactivity impact at initial stage will be speculative since subject to change before final promulgation.

Presumption against retroactivity unnecessary in view of Commission practice of designating only certain amendments as retroactive; such a presumption is inconsistent with the Commission's obligations under the SRA, the history of which contemplates individualized retroactivity evaluation of each amendment promulgated. (55)

Rule ~~5~~4.2 Prison Impact of Amendments

Prior to ~~In~~ 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.

~~To the extent practicable, the Commission shall consider and, make available to the public by customary means, information describing the prison impact of any amendments that significantly impact on prison population.~~

ICCA *favors prison impact statements. Approves language referring to "other facilities"; it should also refer to "community correctional facilities." (3)*

PAG, ABA *Rule should more completely track language of 28 U.S.C. § 994(g) to include the directive to formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," as determined by the Commission. (17, 23) Also, prison impact information should be included as part of statement of reasons provided by Commission to explain changes it adopts.*

Gottlieb *The Commission should include a brief synopsis of prison impact in proposed amendments, at least when it is likely to be substantial. (40)*

Rule 5~~4~~.3 Notice and Comment on Proposed Amendments

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.

Buffone *Given the substantial importance of policy statements and commentary to the guideline process, they should not be exempted from the notice and comment procedures. (47) There would be little additional burden to the Commission should it elect to formalize the process by which policy statements are adopted.*

Rule 5~~4~~.4 Federal Register Notice of Proposed Amendments

As stated in Rule 2.2, *supra*, upon the affirmative vote of two ~~three~~ voting members, the Commission may authorize publication in the **Federal Register** of a proposed amendment to a guideline, policy statement, or official commentary. A vote to publish 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. ~~As stated in Rule 5.1, *supra*, generally, amendments will be given prospective application only.~~

The notice of proposed amendments also shall provide, where appropriate and practicable, reasons for consideration of amendments, a summary of or reference to publicly available information that is relevant to the issue(s)~~, and whether the Commission possesses information on the issue(s) that is publicly available~~. 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, to the extent practicable, there shall be a minimum period of public comment of at least 60 calendar days prior to final Commission action on the proposed amendments.

NACDL *recommends that the Commission require no more than 1 or at most 2 affirmative votes, rather than 3, before permitting publication of a proposed amendment in Federal Register. (5) Publication and Comment is the only systematic method to bring information to the Commission; consideration of such comments integral part of Commission's revisory role; whenever one Commissioner determines issue sufficiently important for public comment, it should be published.*

opposes requiring comment on retroactivity at the same time comments are required for proposed amendments. (8) Will waste effort as many proposed amendments may not even be promulgated, yet the public must comment; for example, if multiple options are proposed, must there be retroactivity comments on all? Comments on retroactivity should only be solicited with respect to promulgated amendments.

JCUS *approves provision requiring Commission to solicit public comments on retroactivity of any amendments published for comment. (26)*

FPCD *Public participation in amendment process should be encouraged by making it relatively easy to get a proposed amendment published for comment; only two affirmative votes should be required, especially since the Commission often does not have seven voting members. (52) Publication does not imply Commission endorsement.*

Rule ~~5~~4.5 Public Hearing on Proposed Amendments

In the case of "emergency" amendments issued pursuant to special statutory authorization, the Commission ordinarily will not conduct a public hearing on the proposed amendments but will afford such opportunity for written comment as time allows.

In the case of other amendments to guidelines or policy statements issued pursuant to 28 U.S.C. § 994, the Commission shall conduct a public hearing on the proposed amendments, unless the Commission determines that time does not permit a hearing or that a hearing would not substantially assist the amendment process. Notice of the hearing shall be given in the Federal Register and by other means designed to inform persons likely to be interested in participating in such a hearing.

~~The hearing shall be noticed in the **Federal Register** and otherwise announced by customary means~~.

Part ~~VI~~V - PUBLIC ~~INPUT TO~~ PARTICIPATION IN GUIDELINE AMENDMENT PROCESS

PAG *notes in general that proposals track existing practices, but urges other way to improve and focus public input, (12) such as:*

Many amendments are proposed from outside the Commission and will not receive subsequent "serious" consideration; however, only after public comment sessions in March and following Commission meetings are specific proposals to be sent to Congress identified. (13) There should then be a second round of hearings. In traditional agencies, this is the norm whenever the proposed changes are not the logical outgrowth of the proposals and comments. The Commission's current time schedule would not permit such a process unless the Commission voted to delay an amendment for the year and resubmit it in the next cycle.

suggests the need for a more focused initial review process that provides for an opportunity to narrow issues. (13) This notion is supported by congressional language requiring "more extensive procedures than those required by section 553 of the APA, at an earlier stage in the guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines."

Although the Commission now provides notice of priority areas for staff research and amendment consideration, notice tends to be very general in

character. (13) Other agencies must specify with particularity the details of rulemaking initiatives. If the Commission cannot give a more detailed account of issues it intends to consider, especially of possible approaches in which it is interested, it should consider implementing some type of initial review allowing for broader input.

Buffone *notes this section as a strength in the proposed rules. (48) One lack is the failure to provide for a formal rulemaking docket. A docket would be a central repository for all information available to an agency making rulemaking decisions; serves ancillary purpose of permitting interested parties to monitor and respond to comments. Once closed, it would serve as authoritative history on promulgation of specific guidelines. Currently, the Commission does not maintain a guideline-specific history accessible to the public. The docket should include not only public comments and hearing testimony but all information considered by the Commission in making these decisions.*

Rule 65.1 Public Comment File

As stated in Rule 3.2, *supra*, the ~~Communications~~ Office of Legislative and Public Affairs shall receive and maintain public comment and public hearing testimony received by the Commission. This public comment file will be available during normal business hours for public inspection pursuant to written or telephonic request and with reasonable notice**.**

JCUS *Public comment file should include submissions by the public and response groups at times other than during the official amendment response cycle; such file should be maintained in or near the front office for inspection and copying, to avoid need for specific requests. (27) Also, Commission should keep a list of submissions by topic, issue or guideline of responses. Similarly, there should be a list of anything the Commission has published in the Federal Register, arranged by topic and date.*

Rule 65.2 Notice of Priorities

Annually, ~~following the submission to Congress of any guideline amendments,~~ the Commission shall publish in the **Federal Register** and make available to the public ~~by customary means,~~ a notice of the tentative 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.

Buffone *Annual notice of priorities for future Commission inquiry/action sets admirable first stage in rulemaking process. (47)*

Rule 65.3 Data and Reports Relevant to the Amendment Process

To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data and reports for consideration by the Commission. Upon authorization ~~by the Commission~~, the ~~Communications~~ Office of Legislative and Public Affairs shall make the data and reports available to the public ~~by customary means~~, as soon as practicable.

Buffone *The Rules should mandate, not merely permit, disclosure/public availability of data and reports considered by the Commission. (48)*

Rule ~~6~~65.4 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 the standing advisory groups: the Practitioners' Advisory Group and the Probation Officers' Advisory Group. The Commission may create additional standing advisory groups.

Upon creating an advisory group, the Commission shall 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.

The Commission also may create *ad hoc* advisory groups as needed.

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

ICCA *Community correctional facilities should be included as part of the Probation Officers' Advisory Group or another standing group should be created to address this need. (3)*

PAG, ABA *Commission should voluntarily comply with Federal Advisory Committee Act which mandates open advisory committee meetings, which proposed rules 6.4 and 6.5 fail to do. (17, 25) Rule 6.5 does not even establish a preference, much less a requirement, for open meetings; it should be amended to do so.*

JCUS *Submissions of advisory groups should be maintained for inspection and copying by the public. (27)*

~~Rule 6.5 Advisory Group Meetings and Reports~~

~~Subject to such limitations as the Commission may deem necessary, each advisory group shall establish appropriate policies regarding the conduct of their meetings.~~

~~Except as otherwise authorized by the Commission, final reports of *ad hoc* advisory groups, if any, shall be provided to the Commission and, after necessary time for Commission review, shall be made available for public inspection.~~

Buffone *While ad hoc advisory committee reports are made available for public inspection after review by the Commission, each advisory group is permitted to establish its own policies regarding conduct of its meetings. (48) Lack of public access to internal workings of advisory groups will generate controversy. (49) Full docketing procedure should make available all advisory committee reports, working group and other advisory committee records; would facilitate public comment and permit after the fact examination of the basis for Commission decisions.*

Gottlieb *Commission advisory committee rules provide for a greater degree of secrecy than is permitted similar groups by more traditional agencies. (42) Other groups are subject to the Federal Advisory Committee Act which requires open advisory committee meetings. Secret deliberations contribute to unnecessary and unhelpful controversy, such as occurred with environmental guidelines. While the Commission is not legally bound to follow the FACA, it should voluntarily do so; at least a preference for open meetings should be adopted. (43)*

General Comments

NACDL *agrees generally with the comments submitted by the ABA, Federal Public and Community Defenders and the Practitioner's Advisory Group. (9)*

The enabling legislation must be amended to include a representative of the defense bar as ex officio member of the Commission; the Commission should take the initiative in proposing this amendment to Congress. (9)

PAG/ABA *commends the Commission for issuing proposed rules; however, the Commission should look more carefully at practices followed by other rulemaking agencies, not just codify existing practices. (12, 20-21) In function, Commission is similar to other rulemaking agencies, in that it is responsible to Congress, exercising essentially legislative authority, and is comprised of Presidential appointees removable for cause. Other rulemaking procedures, while not perfect, represent a reasonable accommodation reached over time between the need for agency efficiency and the need for public accountability.*

The rules should provide that a representative of the defense bar meet with the Commission at working sessions and sit at the Commission table in an ex-officio capacity. (17, 25)

Gottlieb *The degree of controversy surrounding the Commission's work is exacerbated by the Commission's perceived lack of public accountability: first, the lack of detailed procedures leads to the perception that Commission decisions are based solely on the normative judgments of Commissioners, instead of on empirical research; second, the lack of process cuts off the Commission from information and expertise of those in the field. (33-34)*

While the Commission's conclusion that it is not obligated to employ procedures followed by executive branch agencies is correct, the Commission should look to traditional procedures as a guide. (35) Congress did not place the Commission in the judicial branch to enable it to operate more covertly or informally, but because Congress recognized that sentencing is a judicial function and that placing the Commission in the executive branch would improperly meld prosecutorial and judicial power.

Traditional agency administrative procedures are an appropriate model because the Commission is an independent agency exercising essentially legislative authority delegated by Congress, similar in function to other agencies. (34) It is similar in form to other agencies, too: comprised of Presidential appointees (no more than 4 from the same party) removable for cause. (35) Also, its decisions are as intensely political and policy-driven as those of any other agency. Thus, an administrative process similar to those employed by traditional agencies makes sense.

The Commission should comply with section 553 of the APA and incorporate a statement of basis and purpose in amendments it adopts. (38) While the Commission has improved its procedures in recent years, in many areas its justifications for amendments fail to meet the standard of examining the relevant data and articulating a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. For example, the enhancements for various kinds of conduct enacted in 1995 did not explain why a particular level of enhancement was selected; the Commission has not explained, generally, its reasons for making amendments retroactive. (39) Decisions aimed at resolving circuit conflict often do not explain why one option was chosen over another. Providing such explanations would enable the public to understand the justifications for policies and thus increase confidence. Also, more thoughtful rules might result as the agency is forced to focus on the connection between its proposed rules and its statutory mandate.

The act of proposing rules is an extremely significant step in creating an agency more open to public input, but a more public, formal and deliberate process will further improve the quality of the Commission's decisions and enhance public confidence. (43) These changes can be made at low cost and without tying the Commission's hands.

Buffone *The proposed Rules fall short of the type of comprehensive procedures recommended by commentators. (46) While much of controversy around Commission is endemic to the sentencing guidelines process, its task is further complicated by its operation under less rigorous procedures than face other federal agencies and the resultant public perception of lack of accountability. Other rulemaking agencies have developed over time a recognized set of procedures that, while not perfect, is fair to participants, open to the public and produces rules based on a fixed record and clearly articulated reasons. The Commission's proposed rules fail to meet the minimum standards promulgated by the Administrative Conference of the United States, recognized as an authoritative source for agency rulemaking standards.*

One shortcoming is the failure to specify a petition process for the amendment or repeal of rules. (47) The Commission has issued no rules to effectuate 28 U.S.C. § 994(s), which provides for amendment of guidelines based upon petitions filed by defendants; no provisions for solicitation and disposition of such petitions; no formal procedures by which an individual can petition for rulemaking. While the Department of Justice and the ABA submit proposed amendments, they do so under a

limited and non-public process. Rules should require the maintenance of a public petition file and some explanation for rejection of any petitions.

Another shortcoming is the failure to include the requirement of APA section 553 that if a final rule is not the logical outgrowth of an initial proposal, there must be a new notice and comment cycle. (48) The current time schedule set forth would not permit such a second amendment process. Past Commission experience in areas like organizational sanctions and environmental guidelines demonstrate the need for such procedures.

The proposed rules fail to address ex parte contacts. (49) Given presence of ex officio members and the statutory mandate to seek out comments from components of the criminal justice system, there will be significant ex parte contacts regarding rulemaking. The Commission should find a way to make a record of these contacts and publicly disclose the information obtained from them. See recommendation 77-3 of the Administrative Conference of the United States' Recommendation on Ex Parte Communications in Informal Rulemaking Procedures.

Consistent with section 553(c) of the APA, the Commission should include a rule that requires a concise statement of a rule's basis and purpose. (50) The Commission's current practice of issuing terse, conclusory statements of the basis for rulemaking decisions is at odds with the general requirements that an agency examine the relevant data and articulate a satisfactory explanation for its rules, including a connection between the facts found and the choices made.

Proposed rules merely codify existing practices without an effort to heighten the level of rational decisionmaking. (50) While the Commission is correct that it is free of the constraints of the APA, this is inadequate justification for the proposed rules. The Commission should focus on rules that will inspire public confidence and ensure rational decisionmaking.