

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to the Sentencing Commission's Rules of Practice and Procedure. Request for public comment.

SUMMARY: This notice sets forth proposed amendments to the Commission's Rules of Practice and Procedure and a related issue for comment. The Commission invites public comment on these proposed amendments.

DATE: Public comment should be received by the Commission not later than March 28, 2008.

ADDRESS: Send comments to: United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. The Commission originally adopted the Rules of Practice and Procedure in July 1997 and now proposes to make amendments to these rules as they pertain to retroactivity consideration. In accordance with Rule 1.2 of its Rules of Practice and Procedure, the Commission hereby invites the public to provide comment on the proposed amendments.

Authority: 28 U.S.C. § 995(a)(1); USSC Rules of Practice and Procedure 1.2.

Ricardo H. Hinojosa,

Chair

1. **Synopsis of Proposed Amendment:** This proposed amendment modifies the Commission's Rules of Practice and Procedure pertaining to retroactivity consideration. Currently, Rule 4.1 (Promulgation of Amendments) provides that "in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment.". Deciding whether to make an amendment retroactive at the same meeting at which the

amendment is promulgated, however, often is impracticable. A complete retroactivity analysis typically cannot be prepared until the Commission has decided to promulgate a specific amendment option, which may not occur until the meeting at which the amendment is promulgated. Similarly, the public often cannot provide fully informed comment on possible retroactivity until the Commission has narrowed its consideration of a proposed amendment to a specific option, again a decision which may not occur until the meeting at which the amendment is promulgated. As a result, the proposed amendment deletes the requirement in Rule 4.1 that the retroactivity decision be made at the same meeting as promulgation of an amendment.

The proposed amendment also amends Rule 4.1 to more clearly set forth the Commission's statutory requirement to consider retroactivity under 28 U.S.C. § 994(u).

The proposed amendment also modifies the process by which the Commission instructs staff to prepare a retroactivity impact analysis. Currently, Rule 2.2 (Voting Rules for Action by the Commission) provides that "[t]he 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." The proposed amendment would delete this requirement by amending Rule 4.1 to provide that "[p]rior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment". The proposed amendment therefore, deletes the procedural requirement that the Commission instruct staff to prepare

a retroactivity analysis and instead requires that such an analysis be prepared prior to final action on retroactivity.

Finally, one issue for comment follows the proposed amendment.

Part II of the Rules of Practice and Procedure is amended in Rule 2.2 is amended in the third paragraph by striking the last sentence.

Part IV of the Rules of Practice and Procedure is amended in Rule 4.1 in the second paragraph by striking the last two sentences and inserting the following:

"The Commission shall, however, consider whether to give retroactive application to an amendment that reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. See 28 U.S.C. § 994(u). Prior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment."

Issue for Comment

Should the Commission amend the Commission's Rules of Practice and Procedure to provide a specified time frame governing final action with respect to retroactive application of an amendment pursuant to 28 U.S.C. § 994(u), and , if so, what should the time frame be? For

example, should the rules provide a time frame that begins at the date of promulgation or the effective date of the amendment? Should the time frame specify a certain period of days by which final action should be taken, or should the time frame be more general in nature?