

**United States Sentencing Commission Public Meeting Minutes  
January 13, 2009**

Acting Chair Ricardo H. Hinojosa called the meeting to order at 11:35 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Acting Chair
- William B. Carr, Jr., Vice Chair
- Judge Ruben Castillo, Vice Chair
- Judge William K. Sessions, III, Vice Chair
- Dabney L. Friedrich, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Edward F. Reilly, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Ken Cohen, General Counsel

The Acting Chair called for a motion to adopt the minutes of the November 20, 2008, public meeting. Commissioner Howell made the motion to adopt the minutes, with Vice Chair Castillo seconding the motion. Hearing no further discussion, the Acting Chair called for a vote and the motion was adopted by voice vote.

Acting Chair Hinojosa reported that he resigned as Chair of the Commission effective January 2, 2009. Prior to the effective date of his resignation, he delegated the duties of the Chair of the Commission to an Acting Chair to be selected by the Commission, and the Commission selected him to be the Acting Chair pending the nomination and confirmation of a new Chair.

Acting Chair Hinojosa announced that Michael E. Horowitz's term as a member of the Commission has expired. The Acting Chair and other commissioners expressed their appreciation for Mr. Horowitz's service on the Commission. Mr. Horowitz stated that it was an honor to have served on the Commission.

Acting Chair Hinojosa reported that William B. Carr, Jr., has been appointed as a Vice Chair to the Commission and welcomed him to the Commission. The Acting Chair noted it was Vice Chair Carr's first public meeting, having been confirmed in November 2008.

The Staff Director announced that the Commission will hold its Annual National Seminar on the Federal Sentencing Guidelines on June 10-12, 2009, in New Orleans, LA. Ms. Sheon also noted that the Commission has added several new publications to its webpage, including Overview of Federal Criminal Cases, Fiscal Year 2007 and Changing Face of Federal Criminal Sentencing: Seventeen Years of Growth in the Federal Sentencing Caseload.

Acting Chair Hinojosa called on Mr. Cohen to inform the Commission on possible votes to publish in the Federal Register a set of proposed guideline amendments and issues for public comment.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, would implement the Identity Theft Restitution and Enforcement Act of 2008 (“the Act”), Title II of Pub. L. 110–326, and other related issues arising from case law. The Act includes a directive to the Commission to study 13 factors relevant to identity theft offenses. The proposed amendment includes options to amend §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), and 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to account for various factors listed in the directive. The proposed amendment also includes several issues for comment regarding what amendments to the guidelines may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, would implement the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (the “Act”), Pub. L. 110–465. The Act, in relevant part, amends the Controlled Substances Act (21 U.S.C. § 801 et seq.) to create two new offenses involving controlled substances, amends the statutory penalties for Schedule III, IV, and V controlled substance offenses, and adds a sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.” The proposed amendment includes options to amend §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) to account for the new offenses and changes to the statutory penalties. The proposed amendment also includes several issues for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and

conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Carr seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, would implement the Drug Trafficking Vessel Interdiction Act of 2008 (the “Act”), Pub. L. 110–407. The Act creates a new offense at 18 U.S.C. § 2285 (Operation of Submersible Vessel or Semi-Submersible Vessel Without Nationality), which prohibits the use of a submersible or semi-submersible vessel in international waters that is not registered with any nation’s maritime authority. The proposed amendment amends §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to include a sentencing enhancement for the use of a submersible or semi-submersible vessel in drug trafficking. The proposed amendment also creates a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. Three issues for comment also are included. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the proposed issues for comment, attached hereto as Exhibit D, concern the Court Security Improvement Act of 2007 (the “Act”), Public L. 110–177. The Commission responded to the two new offenses created by the Act during the amendment cycle ending May 1, 2008 (*see* USSG Supp. to App. C, Amendment 718). The three issues for comment are outlined regarding what additional amendments may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed issues for comment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed issues for comment, with Commissioner Friedrich seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed issues for comment, attached hereto as Exhibit E, concern the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (the “Act”), Public L. 110–177. The Act creates two new federal offenses, amends a number of

federal statutes, and contains a directive to the Commission relating to certain alien harboring offenses. The three issues for comment are outlined regarding what amendments to the guidelines may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed issues for comment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed issues for comment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues. The proposed amendment also includes one issue for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.<sup>1</sup>

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit G, includes three possible options to address a circuit conflict regarding the undue influence enhancement at §§2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Year (Statutory Rape) or Attempt to Commit Such Acts) and 2G1.3(b)(2)(B) (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). The proposed amendment also includes one issue for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit H, clarifies

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<sup>1</sup>Commissioner Howell abstained from the vote on Part K of the proposed amendment.

Application Note 1 in §3C1.3 (Commission of Offense While on Release) regarding how the court is to determine the applicable guideline range. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit I, clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving “bleached notes.” Bleached notes are genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Treasury. Courts in different circuits have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The proposed amendment resolves this issue to provide that offenses involving bleached notes are to be sentenced under §2B5.1. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit J, is a multi-part amendment that makes various technical and conforming changes to the guidelines. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Acting Chair Hinojosa called on Mr. Cohen to inform the Commission on a possible vote to adopt a new charter for the Commission’s Practitioners Advisory Group and the publication of a solicitation for applications for membership on the Practitioners Advisory Group.

Mr. Cohen stated that a motion was in order to adopt the proposed new charter for the Commission's Practitioners Advisory Group and for the publication of a solicitation for membership on Practitioners Advisory Group. Mr. Cohen stated that a 60-day period for accepting applications would be appropriate.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to adopt the proposed motion, with Vice Chair Carr seconding. Commissioner Howell thanked the past and present members of the Practitioners Advisory Group for their service to the Commission. Hearing no further discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Acting Chair Hinojosa noted that the Sentencing Reform Act of 1984 was enacted twenty-five years ago and that to mark the event, the Commission will hold several regional hearings to hear the views of judges, practitioners, and other interested parties on federal sentencing. The first such regional hearing will be held February 10-11, 2009, in Atlanta, GA.

Acting Chair Hinojosa asked if there was any further business before the Commission. Ex-officio Commissioner Wroblewski stated that the Department of Justice fully supports the Commission's work and believes that the Commission is fulfilling all of its responsibilities.

The Acting Chair asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Howell made a motion to adjourn, with Commissioner Friedrich seconding. The Acting Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 12:15 p.m.