

Summary of 2011 Proposed Amendments to the Sentencing Guidelines

On April 6, 2011, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2011. Barring congressional action, they will take effect November 1, 2011. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments, which is available at www.fd.org.

Fair Sentencing Act: The Commission repromulgated the 2010 emergency amendments, with one pro-government addition regarding maintaining a premises. In Application Note 28, the Commission added that “maintaining a premises” includes “storage of a controlled substance for the purpose of distribution.” The Commission will hold a hearing on June 1, 2011 regarding the retroactivity of the FSA amendments that have the effect of lowering guideline ranges.

Illegal Reentry: The Commission reduced, but did not eliminate, enhancements based on stale convictions or convictions that do not receive criminal history points under Chapter 4. As set forth in §2L1.2(b)(1)(A) and (B), a defendant is subject to a 16- or 12-level enhancement *if the conviction receives criminal history points under Chapter 4*, and an alternative 12- or 8-level enhancement, respectively, if it does not. The Commission also provided for an upward departure if the new 12- or 8-level enhancement “does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction.”

This amendment is less of a reduction than the one the Commission originally proposed, which would have provided for an 8-level enhancement for defendants with stale convictions who would otherwise have been subject to the 16-level enhancements. The reason is unclear. Commissioner Friedrich stated she did not support the original proposal, but did so now. She also expressed the view that the immigration guideline should be addressed in a more comprehensive fashion. Judge Hinojosa stated that the change brought 2L more in line with the career offender provision and other guidelines that contain offense level enhancements based upon criminal history.

You should argue that while the amendment moves in the right direction, it still unfairly counts stale convictions when they are not counted elsewhere in the guidelines. There is

no empirical evidence that supports the Commission's decision to treat stale convictions under 2L1.2 differently than anywhere else in the guidelines.

Mitigating Role:

The Commission voted to delete two sentences from the Application Notes to §3B1.2 (Mitigating Role), recognizing that these now-deleted sentences have had “the unintended result of discouraging courts from applying the adjustment.” Proposed Amendment: Role. The Commission struck (1) from Application Note 3(C) the statement that the court “is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted,” and (2) from Application Note 4 the statement that “It is intended that the downward adjustment for minimal participant will be used infrequently.” With these changes, you can argue the Commission is signaling that a court can, and should, give an adjustment when the only evidence of role rests upon circumstantial evidence and the defendant's statement about his or her participation in the offense. The Commission is also encouraging greater use of the minimal role adjustment.

Another positive change is the Commission's addition to Application Note 3(A), providing that “a defendant who is accountable under §1B1.3 (Relevant Conduct) for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline.”

Note: the first two changes to §3B1.2 are found in the proposed amendment on Role; the latter is found in the proposed amendment on Fraud.

Supervised Release: The Commission's changes to §5D1.1 also are helpful to defendants.

No supervised release for deportable aliens. In a move that will benefit deportable clients, the Commission added subsection (c) providing: “The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” In Commentary regarding this new subsection, the Commission stated:

“The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.”

In the synopsis of this proposed amendment, the Commission acknowledges that removal is nearly automatic for a broad class of noncitizen offenders. It also observed that deported offenders “likely would face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States.”

Lesser terms of supervised release. The Commission also lowered the minimum term of supervised release under §2D1.2 from three (Class A and B felonies) and two years (Class C and D felonies) to two years and one year, respectively.

Guidance on imposing terms of supervised release. The Commissions inserted commentary into §§5D1.1 and 5D1.2 on the factors a court should consider in determining whether to impose supervised release, and for how long. In addition to the statutory factors set forth in 18 U.S.C. § 3583, the Commission specifically mentioned criminal history and substance abuse.

Early termination of supervised release. The Commission also added commentary to §5D1.2, which specifically encourages courts to consider early termination of supervised release “in appropriate cases.” The amendment provides as an example a substance abuser who successfully completes a treatment program, “thereby reducing the risk to the public from further crimes of the defendant.”

Firearms: The Commission amended both §2K2.1, and §2M5.2. These changes are not as bad as DOJ wanted them to be, but they are not good.

§2K2.1:

The Commission increased penalties for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) based on uncharged conduct where the defendant “committed the offense with knowledge, intent or reason to believe that the offense would result in the transfer of a firearm to a prohibited person.”

The Commission added a 4-level enhancement (and floor of 18) where a defendant “possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any

firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States.”

Finally, the Commission invited a downward departure for straw purchasers convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A) where “(A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

§2M5.2: The Commission raised penalties for cases involving small arms crossing the border, increasing the base offense level from 14 to 26 in cases involving more than two (it used to be ten) non-fully automatic small arms. The Commission also specifically addressed ammunition (on which the Guidelines had previously been silent), specifying that a defendant is subject to the lower level 14 if the offense involved 500 rounds or less of ammunition for non-fully automatic small arms. Level 14 is also to be applied where the offense involved both small arms and ammunition in the quantities specified above.

Fraud: Responding to directives in recent health care legislation, the Commission made two amendments to §2B1.1 that apply where a “defendant was convicted of a Federal health care offense involving a Government health care program.” First, the Commission added tiered enhancements for loss amounts more than \$1 million. Second, the Commission added a rebuttable special prima facie evidence rule for loss amount in health care fraud cases: “the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.” The proposed amendment also defines “Federal health care offense” and “Government health care program.” The latter definition is broader than the directive may have required. For a further analysis of the issue, see the Defender Comments on the 2011 Amendments, available at fd.org.

Child Support: The Commission resolved a circuit conflict in a manner favorable to defendants. Defendants convicted under 18 U.S.C. §228 for the willful failure to pay court-ordered child support are not subject to the 2-level enhancement under §2B1.1(b)(8)(C) (which applies where the offense involves a violation of any prior order). Back in 2004 and 2005, the Eleventh and Second circuits, respectively, held the enhancement did apply, so this amendment changes the law in those circuits. (The Seventh Circuit got it right in 2010, and held the enhancement did not apply.)

Drug Disposal Act: The Commission amended Application Note 8 to §2D1.1 to expand the list of people who may be subject to an enhancement for abuse of position of trust or use of special skill. The addition states: “Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.”