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President

October 23, 2026

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Comments to the U.S. Sentencing Commission on Proposed Amendments to the Commission's Rules of Practice and Procedure

Dear Judge Reeves and Members of the Commission:

The National Association of Criminal Defense Lawyers (NACDL)[1] appreciates this opportunity to express its views on the U.S. Sentencing Commission's proposed amendments to its Rules of Practice and Procedure.

To begin, it would be helpful for stakeholders, commenters, and the public if the Commission would consider publicizing the impetus and rationale for proposed amendments. As the Commission knows, its Rules of Practice and Procedure are facially neutral but can have a significant impact on how the Commission acts and how stakeholders and the public may interact with the Commission. These Rules are changed relatively rarely. Here, some of the proposed amendments are potentially quite significant, yet the Commission provides little or no rationale or explanation for why they are being considered or why specific options are being proposed. Stakeholders and the public would surely be helped if they could suit their comments to the Commission's stated objectives and rationales for such important changes. Additionally, the Commission would no doubt welcome commentary that was more relevant and that directly addressed the Commission's specifically stated goals and concerns. We ask the Commission to consider providing these explanations with future proposals.

[1] NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

Part A: Changes to the Introduction

NACDL does not have a strong opinion about this proposed change but is generally supportive of the Commission's effort to make the Rules introduction more closely track the statutory language.

Part B: Voting Rules for Commission Action

NACDL has no concerns about the proposed amendment to Rule 2.2(a).

1. **The Commission should not change the number of votes required for retroactive application of a guideline amendment.**

NACDL is strongly opposed to the proposed amendment to Rule 2.2(b) which would require five votes to make an amendment available for retroactive application to defendants previously sentenced. As previously said, it is frustrating that stakeholders, commenters, and the public are left with no explanation as to why this is being proposed.

In any event, there are many reasons not to alter the voting threshold for retroactive application of an amended guideline. Retroactive application of guideline amendments is rare, carefully considered and substantiated, beneficial to affected persons and society at large, and readily administrable.

First, retroactive application is rare. A review of the Commission's retroactivity analyses shows that retroactive application has been used very sparingly in the past two decades despite a significant volume of overall guidelines changes during that time.[2] Given how rarely the Commission elects to make a guideline change apply retroactively even with the current four-vote threshold, it is clear that heightening this voting threshold is unwarranted.

Second, the Commission already only acts to make an amendment retroactive when the need is apparent and considerable. The bar for when to apply a guideline retroactively is high. The Commission considers "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively."[3] In practice, the Commission has generally only taken this action when a change is significant and either the need is great or the burden is low or both.

Third, when the Commission has taken the unusual action of making a guideline amendment retroactive, the change has benefited impacted persons, the criminal legal system, and society at large. This has most often occurred in drug sentencing, where the Commission has frequently revised the guidelines. In these instances, recognition of the harm to already-sentenced individuals has compelled the Commission to make the changes retroactive, and the impact on those individuals has been substantial.

[2] *See, e.g.*, U.S. Sent'g Comm'n, Retroactivity Analyses & Data Reports, https://www.ussc.gov/research/data-reports/retroactivity-analyses-and-data-reports.
[3] USSG §1B1.10, cmt. (background).

As just one example, over 31,000 of the roughly 51,000 petitions for resentencing were granted after the Commission made its 2014 Drug Guidelines Amendment ("Drugs Minus Two") retroactive.[4] A Commission analysis estimated that sentenced individuals would have their sentences reduced by an average of 25 months.[5] Back-of-the-envelope math indicates that this would save affected persons a combined more than 60,000 years of imprisonment, a staggering amount. Although it may pale in comparison to the human value of those years of avoided imprisonment, these resentencings also doubtless brought commensurate cost savings to taxpayers. In short, retroactivity has produced and can produce tremendous benefits and cost savings, even though it is infrequently used. There is no need for the Commission to restrict its own judicious use of this powerful tool in support of just sentencing outcomes.

Finally, on the occasions when the Commission has made guideline changes retroactive, adjudicating petitions for resentencing has not been overly burdensome. Although some changes have led to significant numbers of petitions, these applications are naturally distributed appropriately to the original sentencing courts with greater resources. Judges and staff are used to handling and adjudicating these petitions, and retroactive application of guidelines is readily administrable. Even where resentencing petitions produce some burden, this is acceptable as the resentencings lead to fairer ultimate outcomes and conservation of resources on the back end.

2. The Commission should also not alter its voting threshold for other matters.

The Issue for Comment within Part B asks whether the Commission should increase the voting threshold for any other Commission action. NACDL strongly opposes this as well. The Commission and public are well aware of the statutory requirements regarding the partisan makeup of the Commission. In spite of this—or perhaps because of it—the Commission has frequently acted in an admirably bipartisan manner in conducting its work. At other times, the Commission has split on certain issues along partisan lines, a phenomenon that is frequently seen across our government, including in other branches and agencies. There are other agencies, in fact, where the partisan-balance requirements have rendered those bodies largely inert, particularly with respect to controversial issues or in times of greater partisan rancor or polarization. We urge the Commission not to adopt rules that could invite the same result. The Commission has remained productive and collegial with its current voting rules. A sweeping change is not necessary and could have significant consequences.

Part C: Participation of Committee on Criminal Law and Defender Representatives

NACDL supports Part C's core proposal to give the Federal Public and Community Defenders a seated presence in Commission meetings and hearings. Because Federal Public and Community Defenders represent a large share of criminal defendants in federal courts, they have direct, daily

[4] U.S. Sent'g Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report, tbl. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf.

[5] U.S. Sent'g Comm'n Office of Research & Data, Memo. to Chair Saris, Commr's & Kenneth Cohen re Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment, at 2 (July 25, 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf.

experience with how the Guidelines operate in practice. Their exclusion from the Commission's deliberative process has long been a gap in the Commission's stakeholder engagement.

The clearest way to fix that gap is to ensure the Defender representative is placed on the same footing the Commission already extends to the Department of Justice's ("DOJ") *ex officio* member: the same meetings, the same participation at public hearings, and the same materials. The recommendations below apply that parity principle to Rule 3.1(c) and Rule 3.4.

1. **The Defender representative should attend whatever meetings the DOJ *ex officio* member attends.**

Rule 3.1(c) brackets two versions of which meetings the designated representatives may attend: "public meetings and nonpublic briefing sessions" or "all Commission meetings at which Commission staff is present." Rather than choosing between these options, NACDL suggests that a more workable rule would tie the Defender representative's access directly to whatever access the DOJ *ex officio* member already has under Commission practice. If the *ex officio* member sits in on staff briefings and nonpublic sessions, the Defender representative should as well. Anything short of that leaves one side of the adversarial process working from a fuller picture than the other when the Commission votes.

2. **The Defender representative's role at public hearings should mirror the DOJ *ex officio* member's role.**

Rule 3.4 as proposed provides that the designated representatives "shall be permitted to actively participate in such a hearing alongside commissioners" and may, "as necessary and relevant to the proceeding," pose questions to "any witness called to testify during the hearing." That language is a good start, but it does not state that the Defender representative's role matches that of the DOJ *ex officio* member. The rule should state expressly that the Defender representative may participate in a public hearing on the same terms as the DOJ *ex officio* member, including presenting the Defenders' own analysis of a proposed amendment and responding to points raised by other participants, in addition to questioning witnesses.

3. **The Defender representative should receive the same materials as the Department of Justice *ex officio* member.**

Rather than defining the excluded category of "non-policy, non-data, or internal administrative matters" in the abstract, Rule 3.1(c) should provide that the Defender representative receives the same set of meeting materials made available to the DOJ *ex officio* member. This gives both sides of the adversarial process parity of information going into a Commission decision, and it avoids litigating a new redaction standard by tying disclosure to a practice the Commission already administers.

Part D: Ex Parte Communications

For this proposal, NACDL reiterates that it would be helpful if the Commission explained its impetus and rationale for proposing and considering these changes. With regard to the substantive proposed changes, NACDL is largely neutral. However, NACDL is strongly opposed

to the bracketed proposals barring the public at large from communicating ex parte with the Commission but exempting select institutional actors from those rules.

1. **Major changes to the Commission's policies on ex parte communications are not needed.**

In general, NACDL is satisfied with current Commission policy regarding ex parte communications and does not feel that major changes are needed. NACDL is supportive of the general policy of not soliciting communications outside the public comment process regarding the merits of a proposed amendment from outside parties. However, as the Commission knows, individuals' and groups' communications with commissioners frequently occur outside of that process and on other various topics. Those who serve as commissioners frequently have other professional positions and it is natural and common for lawyers, academics, impacted persons, and other members of the public to discuss Commission related matters such as past cases, implementation or evaluation of the guidelines, or other sentencing or legal matters with commissioners. These communications are valuable to the Commission and to the public and should not be restricted, even if they may sometimes touch on pending proposed amendments.

The proposed Option 1 would delete the current policy on ex parte communications in Rule 4.3. NACDL does not feel that this change is necessary. As the Commission is aware and as the current rule implies, there are good reasons for communications on proposed amendments or other stages in the rulemaking process to be made solely via the official comment process. This policy is sound from an administrative-law perspective and generally tracks the procedural rules of other agencies.

The main proposals in Options 2 and 3 to provide criteria and more firmly state that ex parte communications regarding the amendments process may be made public. We feel that these proposals would probably not be harmful but it is also not clear that they are necessary.

2. **The bracketed proposals permitting certain institutional actors to communicate with the Commission ex parte while barring all others from doing so would be unfair and undemocratic.**

We wish to address the bracketed proposals within Options 2 and 3. NACDL strongly opposes the proposed bracketed possibility within these options, which would exclude "communication with: (1) members of Congress, congressional staff, and legislative branch agencies; (2) members of the Federal Judiciary (including the Judicial Conference of the United States and its committees); (3) United States Probation Officers; (4) the Federal Bureau of Prisons; (5) the Criminal Division of the United States Department of Justice; and (6) representatives of the Federal Public and Community Defenders" from the rules on ex parte communications that would apply to all others. This would make a process that is open and transparent into one that is closed and opaque. Even if it does not, it would have the unmistakable appearance of doing so.

These enumerated groups understandably carry considerable institutional weight with the Commission. Given that weight, it is wholly unnecessary to exempt them from the Commission's ex parte rules. This proposal also seems to ignore the fact that these are not the only actors that have a stake in the Commission's actions and in communicating with the Commission. Impacted

persons and their families, lawyers who are not prosecutors or federal defenders, and numerous members of other groups would have their voices diminished. While it is appropriate that some who communicate with the Commission are given greater weight by virtue of their important institutional role, this proposal would needlessly relegate the voices of all others to an inferior tier.

The Commission, and this sitting Commission in particular, has rightly prided itself on hearing from a variety of voices and on being open and transparent in its decisionmaking and in its communications with those parties. This bracketed proposal to permit only certain parties to engage in ex parte communications would create the appearance that the Commission is cloistered and insular, listening only to a select few. We strongly oppose the bracketed proposal.

Part E: The Priorities-Setting Process

NACDL supports the restructuring of Rule 5.2 into a three-stage process of public submission, a hearing and deliberative session, and a final public vote tied to the statutory purposes in 28 U.S.C. § 991(b). NACDL offers the following comments on the bracketed options and the structure of the planning session.

1. **The Commission should select the later month and longer comment period options.**

Rule 5.2(a) brackets March, April, or May for the annual solicitation, and a submission period of 30, 45, or 60 days. NACDL recommends May and 60 days. A May notice with a 60-day submission period closes in July, and Rule 5.2(a) requires the Commission to post all submitted proposals within seven days after the period closes. NACDL therefore recommends that the planning session under Rule 5.2(b) be held in July or August, after the proposals are posted, and not in June. A longer window and a later start would give the defense bar time to identify recurring problems from the prior amendment cycle and to consult with practitioners before submitting proposed priorities.

2. **The line between the nonpublic deliberative session and the public vote needs a documentation requirement.**

Rule 5.2(b)(2) allows commissioners to refine proposed priorities in a nonpublic setting before adopting a final list at a public meeting. Given that Part F separately proposes disclosure of nonpublic meeting minutes, NACDL recommends that Rule 5.2 cross-reference that disclosure requirement directly, so that the public can see how priorities were narrowed or reformulated between the hearing and the final vote, not only the initial proposals and the final list.

3. **The Commission should state its rationale for priority selection.**

The proposed rule directs the Commission to adopt priorities that, viewed collectively, best further the purposes in Section 991(b). NACDL recommends adding a requirement that the notice of final priorities briefly explain, for each adopted priority, which statutory purpose or purposes it serves and why it was selected over other submitted proposals. A bare list of final priorities, without that explanation, does not let submitters understand why their proposal was or was not adopted.

Part F: Disclosure of Meeting Materials and Minutes

NACDL supports the disclosure requirements added by Part F to Rule 5.3, subject to the following comments on the bracketed timing, the scope of the redaction standard, and an additional end-of-cycle disclosure.

1. **Meeting materials should be released before the meeting, not after.**

Rule 5.3(b)(1) brackets release of the notice, agenda, and related materials either "at least seven days prior to the scheduled date of the meeting" or "no later than seven days following the adjournment of the meeting." NACDL recommends the pre-meeting option. Advance access is what allows practitioners to identify issues before a vote is taken rather than after the fact. Post-meeting disclosure serves a historical record function but does not support the kind of public engagement the Commission states is its goal.

2. **Draft amendment language should be disclosed as meeting material, not withheld as deliberative.**

Issue for Comment 1 on Part F notes that Commission meeting materials sometimes include preliminary working drafts of proposed amendments and asks whether those should be released. NACDL recommends that draft guideline text be treated as a disclosable meeting material once it is circulated to commissioners for a scheduled meeting, distinct from staff memoranda analyzing the draft or recording individual commissioner positions, which may properly be withheld as deliberative. Early visibility into draft text, even in preliminary form, is what allows the defense bar to prepare informed comments once a matter reaches the formal amendment process.

3. **Nonpublic meeting minutes should record the substance of the discussion, not only the topics and the vote.**

As drafted, Rule 5.3(b)(2) requires that minutes for both public and nonpublic meetings include a list of attendees, a summary of topics discussed relevant to priorities or the amendment process, and the final vote. For nonpublic meetings, a summary limited to naming the topic discussed, without describing the substance of the discussion, will not give the public a meaningful window into how a guideline amendment took shape. NACDL recommends that the rule require a substantive summary of the positions and reasoning presented at a nonpublic meeting, redacted only for the categories already listed in Rule 5.3(c): commissioner deliberations, legal opinions, and confidential or privileged information.

4. **The redaction categories in Rule 5.3(c) need definition.**

Rule 5.3(c) provides that released documents "shall not include, or shall be redacted to prevent disclosure of," information inappropriate for public disclosure, including "commissioner deliberations," without defining that term. Because the exclusion is mandatory, an undefined "commissioner deliberations" could swallow the disclosure requirement, since most of what occurs at a nonpublic meeting could be characterized as deliberation. NACDL recommends that the rule define the term as the individual positions and votes of specific commissioners, leaving the substantive content of the guideline issue discussed disclosable.

5. The Commission should publish a written explanation when it considers but does not promulgate a proposed amendment.

Rule 5.3 as proposed governs what the Commission discloses before and during the amendment process, but not what it discloses at the end of a cycle about published proposals that were not adopted. In recent cycles, the Commission has published proposed amendments, received comment, and held hearings, and then taken no action on certain proposals without stating a reason. Participants cannot tell whether the Commission rejected a proposal on the merits, found the record insufficient, deferred it for further study, or lacked time to reach it.

NACDL recommends that Rule 5.3 require the Commission, at the close of each cycle, to publish a written statement for each proposed amendment and issue for comment that was not promulgated. The statement should identify the proposal, state whether the Commission declined, deferred, or referred it for further study, and state the reasons, including any unresolved concerns raised in comments or testimony. Practitioners could then address those concerns in later cycles with data, research, or revised proposals. The statement may accompany the final amendment package or be published separately and need not include material within the redaction categories in Rule 5.3(c).

Respectfully Submitted,

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