



Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

Official Audit Report – Issued November 7, 2019

Review of Chapter 211E of the Massachusetts General Laws

For the period July 1, 2017 through June 30, 2018





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Making government work better

November 7, 2019

Honorable Justice Jeffrey Locke, Chair
Massachusetts Sentencing Commission
John Adams Courthouse
One Pemberton Square—G-300
Boston, MA 02108

Dear Honorable Justice Locke:

I am pleased to provide this performance audit of the Massachusetts Sentencing Commission. This report details the audit objectives, scope, methodology, finding, and recommendation for the audit period, July 1, 2017 through June 30, 2018. My audit staff discussed the contents of this report with representatives of the commission, whose comments are reflected in this report.

I would also like to express my appreciation to the Massachusetts Sentencing Commission for the cooperation and assistance provided to my staff during the audit.

Sincerely,

A handwritten signature in blue ink, appearing to read "SMBump".

Suzanne M. Bump
Auditor of the Commonwealth

cc: Honorable Justice John T. Lu, Chair of the Massachusetts Sentencing Commission (2014–2018)
Honorable Justice Paula Carey, Chief Justice of the Trial Court
Mr. Edward Dolan, Commissioner of Probation

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LIST OF ABBREVIATIONS

EOTC	Executive Office of the Trial Court
MDAA	Massachusetts District Attorney Association
MSC	Massachusetts Sentencing Commission
OSA	Office of the State Auditor

EXECUTIVE SUMMARY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has conducted a performance audit of the Massachusetts Sentencing Commission (MSC) for the period July 1, 2017 through June 30, 2018. In this performance audit, we determined whether MSC developed revised sentencing guidelines and, if so, whether it submitted them to the state Legislature for enactment into law and to what extent (if any) they were used in the court system. During our audit, we encountered a scope limitation that prevented us from applying all of the audit procedures we considered necessary to reach a conclusion on our second objective, as discussed in detail in the “Audit Objectives, Scope, and Methodology” section of this report. The audit work we were able to perform in relation to this audit objective is discussed in the “Other Matters” section of this report.

Below is a summary of our finding and recommendation, with links to each page listed.

Finding 1 Page 7	MSC did not submit the revised sentencing guidelines it developed to the Legislature for enactment into law. As a result, the guidelines do not have the force and effect of law.
Recommendation Page 8	MSC should work with the Legislature and others as necessary on an amendment to Chapter 211E of the General Laws that establishes specific timelines by which MSC must submit any guideline revisions it approves to the Legislature.

OVERVIEW OF AUDITED ENTITY

The Massachusetts Sentencing Commission (MSC) was established in 1994 by the “truth in sentencing” law, Chapter 432 of the Acts of 1993, which was revised and codified as Chapter 211E of the Massachusetts General Laws. MSC is within the judicial branch of state government but is separate and apart from the Trial Court. According to Sections 1 and 2 of Chapter 211E of the General Laws, the commission was created to recommend sentencing policies and practices for the Commonwealth. In accordance with Section 3(a)(1) of that chapter, any sentencing policies or guidelines established by MSC are only effective when they are enacted into law by the state Legislature.

MSC’s *Report to the General Court* dated April 10, 1996 states,

The mission of the Sentencing Commission is to promote truth in sentencing by formulating uniform sentencing policies, developing systematic sentencing guidelines, and integrating intermediate sanctions within the sentencing guidelines. The commission adopted a comprehensive approach in developing these sentencing policies and guidelines with respect to the range of offenses covered and the scope of sanctions included.

MSC has nine voting members and six non-voting members. All voting members, including the chair, are appointed by the Governor in accordance with Section 1(a) of Chapter 211E of the General Laws:

There is established, as an independent commission in the judicial branch of the commonwealth, a Massachusetts sentencing commission which shall consist of nine voting members and six non-voting members. The governor shall appoint the voting members of the commission, and shall designate one member as chairman. Three of the voting members shall be present district court, Boston municipal court or superior court department judges, selected from a list of seven judges recommended by the chief justice of the trial court, and at least one district court judge or Boston municipal court and one superior court judge shall be appointed. Two of the voting members shall be assistant district attorneys, selected from a list of seven assistant district attorneys recommended by the Massachusetts District Attorneys' Association. One of the voting members shall be an assistant attorney general, selected from a list of three assistant attorneys general recommended by the attorney general. Two of the voting members shall be members of the Massachusetts Association of Criminal Defense Attorneys, selected from a list of five such members recommended by the Massachusetts Association of Criminal Defense Attorneys. One voting member shall be a public defender, selected from a list of three public defenders recommended by the committee for public counsel services. The non-voting members shall be the commissioner of corrections, or his designee; the commissioner of probation, or his designee; and the secretary of public safety, or his designee; the chairman of the Massachusetts parole board, or his designee; the president of the Massachusetts Sheriffs Association or his designee; a victim witness advocate selected by the victim witness board.

In 2014, the Governor appointed a new MSC chair. At that time, MSC began developing new proposed sentencing guidelines for all criminal offenses. In addition to the standard criminal history and offense level, the new guidelines take into consideration disparate racial, ethnic, and socioeconomic impacts when considering sentencing. On August 16, 2017, the final new proposed sentencing guidelines were completed and approved by MSC by a six-to-two board vote, with one member abstaining. The guidelines were published and made available by MSC on November 9, 2017.

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor (OSA) has conducted a performance audit of certain activities of the Massachusetts Sentencing Commission (MSC) for the period July 1, 2017 through June 30, 2018.

In May 2018, after MSC finished developing revised sentencing guidelines, members of the Massachusetts District Attorney Association (MDAA) questioned MSC's process for implementing these guidelines. Members of MDAA alleged, among other things, that the guidelines were never submitted to the state Legislature for enactment into law but were used in the court system. Based on these concerns, OSA initiated an audit of MSC to determine whether MSC revised its sentencing guidelines and submitted them to the Legislature for enactment into law and to what extent, if any, the guidelines were used in the court system.

We performed this audit in accordance with generally accepted government auditing standards, except Section 7.11 of Chapter 7 of the US Government Accountability Office's *Government Auditing Standards*, which pertains to obtaining sufficient, appropriate evidence to meet the audit objective. See "Scope Limitation" below for details on the constraints imposed on the audit team that prevented us from being able to meet Objective 2. For the other objectives, we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Below is a list of our audit objectives, indicating each question we intended our audit to answer; the conclusion we reached regarding each objective; and, if applicable, where each objective is discussed in this report.

Objective	Conclusion
1a. Did MSC revise its sentencing guidelines during our audit period?	Yes
1b. Have those guidelines been sent to the Legislature for enactment?	No; see Finding 1
2. Are the sentencing guidelines that are not enacted into law by the Legislature used in the Commonwealth's court system?	Objective not achieved; see Other Matters

We gained an understanding of the internal controls we deemed significant to our audit objectives through interviews and observations. In addition, we performed the following procedures to obtain sufficient, appropriate audit evidence to address our audit objectives.

Scope Limitation

Section 7.11 of the US Government Accountability Office's *Government Auditing Standards* states,

Auditors should . . . report any significant constraints imposed on the audit approach by information limitations or scope impairments, including denials or excessive delays of access to certain records or individuals.

To meet our second audit objective, we requested that the Executive Office of the Trial Court (EOTC) provide us with certain data on all the cases closed in the Superior Courts during fiscal year 2018 for which sentences were imposed. We wanted this information to establish a universe of transactions from which we could select a sample of case files to review and determine to what extent, if any, MSC's most recently developed guidelines were used in the court system. However, EOTC denied our request for this information, citing as its reason that it believed obtaining and reviewing this information was not within the scope of our audit. As a result, we could not obtain documentary evidence to conduct substantive testing in order to determine to what extent the newly revised sentencing guidelines were used in the court system.

Guidelines Revised during the Audit Period

We obtained various documents from MSC related to meetings it held during our audit period, including meeting minutes and agendas. We reviewed these documents to determine whether the sentencing guidelines were appropriately discussed among members and whether there was a vote by all MSC members regarding their approval. During our review of these records, we noted that, although MSC held seven meetings, it only maintained minutes for four of them and only had agendas for three. However, there was documentation to substantiate that the revised guidelines were discussed and a vote was taken regarding their approval.

Guidelines Sent to Legislature

We conducted interviews with the current and former MSC chairs to determine whether the revised sentencing guidelines were submitted to the Legislature for enactment into law in accordance with Chapter 211E of the General Laws.

We interviewed officials from both the Office of the Clerk of the House of Representatives and the Office of the Clerk of the Senate. We obtained the *Journal of the House of Representatives of the Commonwealth of Massachusetts* and *Journal of the Senate of the Commonwealth of Massachusetts*¹ and reviewed them to determine when MSC last submitted sentencing guidelines to the Legislature for enactment into law.

1. These are the official records of the proceedings of the House, Senate, and joint sessions, kept by the Clerks of the House and Senate.

DETAILED AUDIT FINDINGS WITH AUDITEE'S RESPONSE

1. The Massachusetts Sentencing Commission did not submit the revised sentencing guidelines it developed to the state Legislature for enactment into law.

Although the primary purpose of the Massachusetts Sentencing Commission (MSC) is to develop sentencing guidelines to submit to the state Legislature for enactment into law, it has not submitted its latest guidelines, which it approved on August 16, 2017, to the Legislature. As a result, these guidelines do not have the force and effect of law.

Authoritative Guidance

Section 2 of Chapter 211E of the Massachusetts General Laws states, "The [purpose] of the Massachusetts sentencing commission shall be to recommend sentencing policies and practices for the commonwealth."

In addition, Section 3(a)(1) of that law states,

The commission, by affirmative vote of at least six members of the commission and consistent with all pertinent provisions of this chapter and existing law, shall recommend sentencing guidelines, which shall take effect only if enacted into law.

Finally, Section 3(g) states,

Beginning in the calendar year following the effective date of the sentencing guidelines, the commission, at or after the beginning of a regular session of the legislature, but not later than the first day of October, may submit to the legislature proposed amendments to the sentencing guidelines. Such amendments shall be accompanied by a report stating the reasons therefor. The amendments to the guidelines shall take effect only if enacted into law.

We note that some states' Legislatures have established specific timeframes by which their sentencing commissions must submit any guidelines they have developed to the Legislatures for approval, which we believe is a good practice to ensure timely enactment. For instance, the Minnesota Sentencing Guidelines Commission is required by its enabling statute (Section 244.09 of the Minnesota Statutes) to submit to its state Legislature any modifications to its sentencing guidelines by January 15 of any year in which it makes changes.

Reasons for Issue

The current and previous MSC chairs cited a lack of a specific mandate to submit the guidelines in Chapter 211E of the General Laws.

Recommendation

MSC should work with the Legislature and others as necessary on an amendment to Chapter 211E of the General Laws that establishes specific timelines by which MSC must submit any guideline revisions it approves to the Legislature.

Auditee's Response

At the end of our audit, we gave MSC a draft copy of this audit report for review and comment. MSC informed us that it would not provide any written comments on the report.

OTHER MATTERS

Massachusetts Sentencing Commission guidelines are used in an advisory capacity in the court system.

As noted in the “Audit Objectives, Scope, and Methodology” section of this report, one of the concerns raised by the Massachusetts District Attorney Association is that the most recent Massachusetts Sentencing Commission (MSC) guidelines, although not enacted into law by the state Legislature, are used in the court system. As previously noted, our ability to fully examine and conclude on this was limited by the Executive Office of the Trial Court not providing us with the information we requested. However, we noted the following:

- We attended two sessions of the Appellate Division of the Superior Court and observed 11 appeals. We observed that defense attorneys and assistant district attorneys referred to the current MSC sentencing guidelines.
- We obtained and reviewed 38 Sentencing Guideline Forms that were completed by the Franklin Superior Court and submitted to MSC. We found that all 38 of the forms were completed by the probation officers and 34 were signed by the judges. Four of the forms had no signatures.
- On June 6, 2018, the Flaschner Judicial Institute² held a training program on revised sentencing guidelines for judges, cosponsored by MSC. The executive director of the institute gave us an agenda for the training program. We reviewed this information and found that judges attended this training and were informed that the revised sentencing guidelines were available for use.
- We obtained and reviewed training session materials for probation officers, provided by the Massachusetts Probation Services, on how to use the sentencing guidelines. We found that the training was performed periodically for probation officers who were being trained on how to complete the Sentencing Guideline Form.
- During our interviews with the current and former MSC chairs, both chairs confirmed that the revised guidelines were used in the court system, but only in an advisory capacity.

Further, in summer 2019, MSC conducted a survey entitled “A Survey of Sentencing Guideline Use.” Invitations to participate in this survey were sent to all judges in the Boston Municipal, District, and Superior Court Departments. Of the 259 judges who received the survey, 149 responded. The results of the survey indicated that 79 (53%) of the 149 responding judges reported using the revised sentencing guidelines in some capacity during the sentencing process. The majority of these respondents—44 (56%)

2. The Flaschner Judicial Institute is a nonprofit organization established in 1978 to provide continuing education and professional development programs for Massachusetts judges.

of the 79—indicated that they consulted the guidelines while determining their sentences. Other judges stated that they did not use the guidelines because they were “not required” or the judges “disagree[d] with sentencing guidelines.”