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U.S. Sentencing Commission Proposes Amendments to Widely Criticized Economic Crime Sentencing Guidelines

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In recent years, a growing chorus of federal judges and defense attorneys have protested that the Federal Sentencing Guidelines for economic crimes regularly recommend inconsistent and unjust sentences. Critics claim that § 2B1.1 of the Guidelines suffers from a lack of clarity, that it treats defendants who have secondary roles in large schemes with undue harshness, and that it produces suggested prison terms that are disproportionately severe for first-time offenders who are not likely to reoffend. There is no dearth of examples to fuel those fires, as seemingly inconsistent outcomes abound. Last year, Judge Jed S. Rakoff of the Southern District of New York stated that "[the] arithmetic behind the sentencing calculations is all hocus-pocus —it's nonsensical."

Last week, the U.S. Sentencing Commission responded with proposed amendments to § 2B1.1 that are designed to remediate some of those shortcomings. The Sentencing Commission has also solicited input from interested parties on a broad range of associated issues. The relevant provisions up for amendment are:

A. 2B1.1 cmt. 3(A)(ii): Intended Loss Defined

As it stands, "Intended loss" is defined in application note 3(A)(2) as: "the pecuniary harm that wasintended to result from the offense," including "intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." This definition has resulted in disagreement among several Circuit Courts over whether determining "intended loss" should be a subjective inquiry focused on the defendant's intent or an objective inquiry focused on what harm could reasonably have been anticipated.

The Sentencing Commission's proposed amendment would clarify that determining "intended loss" is a subjective inquiry to be measured by the harm "that the defendant purposely sought to inflict," instead of the objectively predictable consequences. The Sentencing Commission also proposed an optional revision that would account for harm caused by a defendant's co-conspirators.

B. §2B1.1(b)(2): Victim's Table

Currently, the Sentencing Guidelines include a series of tiered sentence enhancements that increase in severity based on the number of victims of an economic crime. This provision has been criticized as overly focused on the number of victims, regardless of the perpetrator's role in harming them and the varying degrees of individual harm.

The proposed amendment would curb the severity of some levels of enhancements based on the number of victims of a crime, take into consideration whether the crime resulted in substantial hardship for multiple victims, impose a further enhancement for substantial hardship inflicted on over 100 victims, and cap the maximum enhancement based solely on the number of victims.

C. §2B1.1(b)(10)(C): Sophisticated Means Enhancement

At this time, the Sentencing Guidelines recommend an enhancement for crimes committed using "sophisticated means." Courts have come to different conclusions regarding whether the enhancement is intended to target individual defendants whose conduct involves high levels of planning, deception, and complexity or merely those involved in types of crimes that ordinarily require sophisticated means, such as complex interstate telemarketing-fraud schemes or accounting fraud that requires the creation of shell corporations and fictitious entities or persons.

The proposed amendment clarifies that enhancements for sophisticated means should apply where a specific defendant's conduct involves sophisticated means relative to other offenses of the same kind and not simply where the type of offense is ordinarily sophisticated.

D. §2B1.1(b)(1): Fraud-On-The-Market Enhancement

Currently, the Sentencing Guidelines recommend enhancements in "fraud-on-the-market" cases based on the amount of losses incurred by investors (even those unintended by the defendant) who traded inflated or deflated securities on public markets because the defendant disseminated false or misleading information.

The proposed amendment would instead direct courts to use the defendant's gains, rather than investors' losses, to calibrate the fraud-on-the-market sentencing enhancement.

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The Sentencing Commission is soliciting comments on all of these proposed amendments. Interested parties have until March 18, 2015 to submit comments. The Sentencing Commission has scheduled a hearing on the proposed amendments for March 12th, and must submit them to Congress by May 1st. Regardless of their ultimate form, the amendments, if passed, could result in reductions to the average sentencing ranges for economic crimes. We will be sure to follow this important development in white-collar sentencing.

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