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DOJ Opposes Amendments to Economic Crime Sentencing Guidelines

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The ***U.S. Sentencing Commission*** has proposed several amendments to the federal sentencing guidelines for economic crimes. The amendments are designed to address criticism that § 2B1.1 of the Guidelines is vague, that it treats defendants who have secondary roles with undue harshness, and that it suggests disproportionately severe sentences for first-time offenders.

On March 18, 2015, the Sentencing Commission heard commentary and reviewed letters in response to a request for public comment on the proposed amendments. The Department of Justice asserted a vigorous opposition to several of the proposals, on the ground that they would result in unwarranted leniency for white-collar offenders. The DOJ also objected to adjusting victim losses for inflation in sentencing calculations, stating that any reduction would be contrary to "overwhelming societal consensus."

On the other end of the spectrum, members of the defense bar criticized the proposed amendments as falling short of their goals. Michael Caruso, the Federal Public Defender for the Southern District of Florida, expressed disappointment that the Commission did not conclude that § 2B1.1 is "fundamentally broken." He argued that "Defenders see a steady stream of government cases against individuals with no criminal history who played a low-level role in a larger scheme. . . . [T]he guidelines fail to provide courts with adequate guidance on the appropriate sentence for these individuals."

Several commissioners seemed unconvinced by some of the DOJ's positions. Commissioner William Pryor, a judge on the Court of Appeals for the Eleventh Circuit, found the DOJ's arguments against adjusting sentencing enhancements premised on victim losses to account for inflation "singularly unpersuasive." Judge Pryor asked, "how can it be that someone who was sentenced 30 years ago should get effectively, a lower sentence for the same crime that someone today commits?"

In addition to the proposed inflation adjustment, the DOJ opposed amendments to the following sections

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

"Intended loss" is currently defined in application note 3(A)(2) as "the pecuniary harm that was intended 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)." In the new amendments, the Commission has proposed an approach that focuses on the harm that the defendant "purposely sought to inflict," a more subjective inquiry.

The DOJ opposes this change, asserting that intended loss should be measured by determining the "objectively reasonable expectation of person in defendant's position at time of the fraud." *United States v. Innarelli*, 524 F.3d 286 (1st Cir. 2008); *see also United States v. Lacey,* 699 F.3d 710 (2d Cir. 2012). The DOJ argues that this framework represents a middle-ground, "goldilocks approach" that avoids undesirable subjective or objective extremes with the attendant potential for unjust outcomes. The DOJ also supports amending the section to clarify that defendants are responsible for the conduct of other participants in jointly undertaken criminal activity.

B. § 2B1.1(b)(2): Victims Table

The Sentencing Guidelines include a series of tiered enhancements that increase in severity based on the number of victims of an economic crime. The Sentencing Commission has proposed that the enhancements not be triggered until a defendant's actions either cause substantial hardship to 25 victims, or jeopardize the financial security of 100 victims. The DOJ opposes those modifications, urging that the enhancements be triggered at 10 and 25 victims, respectively. The DOJ also contends that the enhancements should apply even when the substantial hardship is not of a financial nature.

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

The Sentencing Guidelines recommend an enhancement for crimes committed using "sophisticated means." The DOJ opposes the Commission's proposal to gauge sophisticated means relative to other offenses of the same offense type, contending that the Sentencing Guidelines in their current form provide a more effective way to punish sophisticated schemes. The DOJ also seeks to apply the enhancement when only the defendant's co-conspirator used sophisticated means.

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

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 DOJ opposes a proposed limitation of those sentencing enhancements to the defendant's gains, without consideration of the losses caused by his or her conduct. The DOJ contends that the proposal is contrary to Congress's intent in the Dodd-Frank Act and to sound sentencing policy.