COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

UNITED STATES SENTENCING COMMISSION

Concerning

PROPOSED AMENDMENTS TO § 2B1.1 OF THE U.S. SENTENCING GUIDELINES (ECONOMIC CRIMES)

(BAC 2210-40)

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Via Electronic Mail
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Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

RE: Proposed Amendments to § 2B1.1 of the U.S. Sentencing Guidelines

Dear Judge Saris:

Pursuant to the public notice published at 80 Fed. Reg. 2570 (January 16, 2015), Washington Legal Foundation (WLF) hereby submits these comments to the U.S. Sentencing Commission on the proposed amendments to § 2B1.1 of the U.S. Sentencing Guidelines (Theft, Property, Destruction, and Fraud) and related guidelines.

WLF applauds the Commission for recognizing the pressing need to reform the current Guidelines for white-collar defendants convicted of economic crimes. In past submissions to the Commission, WLF has identified troubling aspects of the Guidelines that produce sentences that are greater than necessary for many low-level, non-violent fraud offenses. WLF agrees with those practitioners, scholars, and judges who have long argued that § 2B1.1's narrow focus on monetary loss, when combined with the use of numerous overlapping enhancements (which are often an inappropriate measure of culpability), has resulted in unusually long sentences for first-time criminal defendants convicted of economic crimes. *See, e.g., United* States v. Parris, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) ("[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."). While the proposed amendments, on the whole, are a meaningful step in the right direction, WLF believes that only a comprehensive reevaluation of § 2B1.1 will yield the kind of clarity and fairness in federal sentencing that is so desperately needed.

Interests of WLF

Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center based in Washington, D.C. with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly litigates as *amicus curiae* in a wide variety of sentencing matters, to address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, especially to oppose the knee-jerk application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences. *See, e.g.*, *Dillon v. United States*, 560 U.S. 817 (2010); *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Rita*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to corporate criminal liability and federal sentencing. *See*, *e.g.*, Mark Osler, *Federal Sentencing for Fraud, DOJ, and the Role of Natural Law*, WLF LEGAL OPINION LETTER (October 2010); J. Brady Dugan & Catherine E. Creely, *Sentencing Guideline Amendments: What Impact on Regulated Enterprises?*, WLF LEGAL BACKGROUNDER (June 2010); Joe D. Whitley, *et al*., *The Case For Reevaluating DOJ Policies On Prosecuting White Collar Crime,* WLF WORKING PAPER (May 2002).

Since the Commission's creation over 30 years ago, WLF has regularly submitted comments and testimony on a variety of substantive issues regarding federal sentencing. WLF has also consistently urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy—and has taken the Commission to task (and to court) for failing to do so. *See Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993). Most recently, WLF called on the Commission to recognize the important role that corporate compliance programs should play in the antitrust context. *See* WLF Comments, *In re: The Role of Compliance Programs in Federal Sentencing for Antitrust Violations* (June 1, 2012).

The Proposed Amendments

A. Intended Loss

Under the current Guidelines, "intended loss" is 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)." This definition has produced a split among the federal courts of appeal over whether determining "intended loss" should be a subjective inquiry into the defendant's intent—or an objective inquiry into what harm the defendant could reasonably have anticipated.

The Commission's proposed amendment would clarify that determining "intended loss" is primarily a subjective inquiry to be measured by the harm "that the defendant purposely sought to inflict," rather than any objectively predictable consequences. (The Commission also proposes a revision that would account for the harm intentionally caused by a defendant's co-conspirators).

WLF agrees with the Commission that the Guidelines should evaluate the intended loss calculation relative to the defendant's actual subjective intent, rather than narrowly focusing on reasonable or potential loss. For that very reason, WLF believes that "intended loss" should be limited to the amount that only the defendant subjectively intended, without regard to amounts intended by other participants in the offense. What other participants intended would be relevant to assessing their subjective intent, but not the defendant's. Consistent with basic notions of fairness and due process, a defendant should not be further punished for the *intentions* of others, particularly if those intentions were not even known to, or shared by, the defendant.

Unfortunately, the fundamental problem in white-collar sentencing lies with the oversized role that loss *amount* plays in the loss calculation, a problem that remains wholly unaddressed by the Commission's proposed amendment. While a simple fraud case may be easy to calculate, "the issue becomes clouded in more typical white-collar cases involving a publicly traded company." *See* Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1019 (2010) (comparing the Bernie Madoff Ponzi scheme to Richard Adelson's concealment of fraud as president of Impath and observing that both would have resulted in similar sentences under the current Guidelines).

Determining the value of loss when multiple securities change hands throughout a certain period of time (and are subject to market fluctuation) is inherently difficult. The Commission should recognize this fact and seek to clarify how monetary loss is to be calculated, whether it is actual loss, intended loss, or something in between. And in cases where the actual loss was low or non-existent, but the intended loss was high, the current Guidelines still define the loss as "the greater of actual or intended loss." As a result, nothing in the proposed amendment prevents § 2B1.1 from recommending a sentence that is vastly disproportionate to the actual pecuniary harm caused by the defendant's conduct. Rather than ignore this lingering problem, the Commission should address it head on.

B. Victim's Table

The current Guidelines include a series of tiered sentence enhancements that increase in severity based on the number of victims of any given economic crime. This provision has been criticized as being overly focused on the number of victims, regardless of the perpetrator's minor role in harming them or the varying degrees of individual harm.

The Commission's proposed amendment would curb the severity of some levels of enhancements based on the number of victims of a crime, taking into consideration whether the crime resulted in a "substantial hardship" for multiple victims. The Commission also proposes further enhancement for "substantial hardships" inflicted on more than 100 victims, and would cap the maximum enhancement based solely on the number of victims. The Commission's new proposal also adds an enhancement in cases where the offense caused a "substantial financial hardship"—a term that is never defined but for which a number of "factors" are supplied in the application note.

Although the desire to focus less on the counting of victims and more on the actual impact of the crime is commendable, WLF views the addition of the newly defined term "substantial financial hardship" in the Guidelines as a step in the wrong direction, especially given the high degree of complexity already inherent in economic crime sentencing calculations. Moreover, the financial losses suffered by victims are already adequately captured (and punished) by the loss table in its current form, without the need for an additional victims table that adds offense levels based on the number of victims affected. Because the victims table makes arbitrary distinctions without any empirical basis, WLF recommends that the victim's table be eliminated from § 2B1.1 altogether.

C. "Sophisticated Means" Enhancements

The current Guidelines recommend an enhancement for crimes committed using "sophisticated means." The lower federal courts have differed on whether this enhancement is aimed at punishing defendants whose conduct actually involves high levels of planning and deception or merely those defendants involved in the types of crimes that ordinarily require sophisticated means, such as crimes that require the creation of shell companies and fictitious entities or persons.

The Commission's proposed amendment would clarify that enhancements for "sophisticated means" should apply only where a defendant's conduct actually involves sophisticated means relative to other offenses of the same kind. The proposed amendment would remove altogether the existing language suggesting that certain types of offense are inherently accomplished by sophisticated means.

While the Commission's attempt to distinguish between truly complex crimes and unsophisticated offenses is admirable, WLF questions the need for the "sophisticated means" enhancement in the first place, especially in the white-collar context. It remains unclear why, as a matter of both law and logic, a defendant who employs purportedly "sophisticated means" is more culpable that one who does not. More importantly, rather than narrowly capture more serious offenses, the enhancement is often interpreted in a way that sets the bar for sophistication so low it could apply in potentially every fraud case. The enhancement is also overbroad because it applies whenever the scheme is deemed sophisticated, even though a particular defendant may have had no knowledge of the sophisticated nature of the scheme and was performing an unsophisticated role, such as driver or errand runner. Finally, although this enhancement is often unduly severe on its own, it becomes even more so when, for the same conduct, it overlaps with other related Guidelines enhancements, thus posing a significant risk of double-counting. *See, e.g.*, *United States v. Podio*, 432 Fed. App'x 308 (5th Cir. 2011); *United States v. Abulyan*, 380 Fed. App'x 409, 412 (5th Cir. 2010).

D. "Fraud-on-the-Market" Enhancements

The current Guidelines recommend enhancements in "fraud-on-the-market" cases based on the amount of losses incurred by investors who bought or sold inflated or deflated securities on public markets on the basis of false or misleading information disseminated by the defendant—even if those investors' losses were unintended by the defendant.

The Commission's proposed amendment would direct courts to focus on the defendant's gains, rather than investors' losses, in calibrating the fraud-on-the-market sentencing enhancement. But in doing so, the Commission also proposes a minimum enhancement of 14 to 22 levels for all fraud-on-the-market offenders—regardless of gain.

WLF believes that imposing a minimum 14-to-22-level enhancement on defendants who derived *no* pecuniary benefit from their conduct is not only arbitrary but unduly severe. Under the current loss table, a 14-to-22-level enhancement corresponds to a gain of more than $400,000 to over $20 million. Imposing such an extraordinary enhancement on defendants who gained little or nothing by their conduct far exceeds the proportional response necessary. Instead, the Commission should consider such factors as the actual loss relative to the defendant's intended gain from the offense, the motivation for the crime, the defendant's role as a principal or merely as a participant, the scope and duration of the offense, and the defendant's risk of recidivism. Prejudicing those relevant considerations with a blanket enhancement, as the Commission proposes, runs counter to the very notion of individualized sentencing that justice demands.

Conclusion

WLF appreciates the opportunity to share its views with the Commission on the proposed amendments to § 2B1.1 of the Guidelines. At the Commission's January 9, 2015 public meeting to announce the proposed amendments, the Commission indicated that it believes that "the fraud guidelines may not be fundamentally broken for most forms of fraud," and that most judges "are relatively satisfied with it for most types of fraud." *See* Remarks at the Public Meeting of the United States Sentencing Commission, www.ussc.gov.sites/default/files/pdf/amendment-process/public-hearings-and-meetings/ 20150109/Remarks.pdf. WLF finds it difficult to reconcile this conclusion with the Commission's own data revealing that *more than half* of all fraud sentences in 2013 were outside of the recommended Guidelines range. (In the Southern District of New York that same year, only 26 percent of fraud sentences were within the Guidelines range.) While the proposed amendments are a modest first step in the right direction, the gravity and breadth of the problem demand a much more comprehensive solution.

Respectfully submitted,

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