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WLF Critiques Proposed Changes to Sentencing Guidelines for White-Collar Defendants

(In re: Proposed Amendments to § 2B1.1 of the U.S. Sentencing Guidelines.)

“The U.S. Sentencing Commission’s proposed amendments, on the whole, take a meaningful step in the right direction ... [but] only a more comprehensive re-evaluation of § 2B1.1 will provide the clarity and fairness that federal sentencing desperately needs.”—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—In formal **comments** filed today, WLF applauds the U.S. Sentencing Commission for recognizing the urgent need to reform the current sentencing guidelines for white-collar defendants convicted of economic crimes, but it points out some areas where the agency’s proposed amendments do not go far enough.

Section 2B1.1 of the U.S. Sentencing Guidelines provides the federal courts with guidance on sentencing defendants convicted of certain economic crimes. In providing a methodology for evaluating economic loss, § 2B1.1 currently defines “loss” as the greater of “actual loss” or “intended loss.” WLF agrees with the Commission’s proposal to evaluate the “intended loss” calculation relative to the defendant’s actual subjective intent going forward, rather than narrowly focusing on reasonable or potential loss as the guidelines do now.

However, WLF’s comments point out, the fundamental problem in white-collar sentencing lies with the disproportionate role that loss amount plays in the economic loss calculation, a problem that the Commission’s proposed changes leave wholly unaddressed. While the loss in a simple fraud case may be easy to calculate, determining the amount of loss when multiple securities change hands during a certain time period (and are subject to market fluctuations throughout) is inherently difficult.

WLF urges the Commission to clarify how monetary loss should be calculated—whether it is actual loss, intended loss, or something else. Because the current Guidelines define economic loss as “the greater of actual or intended loss,” nothing in the proposed amendments prevents § 2B1.1 from (still) leading to a sentence that is vastly disproportionate to the actual pecuniary harm caused by the defendant’s conduct. Rather than ignore this festering problem, WLF’s comments encourage the Commission to address it head on.

Upon filing its comments, WLF issued a statement by Senior Litigation Counsel Cory Andrews:

“The U.S. Sentencing Commission’s proposed amendments, on the whole, take a meaningful step in the right direction. WLF agrees with those practitioners, scholars, and judges who have long complained that § 2B1.1’s narrow focus on monetary loss, combined with the use of numerous overlapping sentencing enhancements, result in unduly long sentences for first-time criminal defendants convicted of economic crimes. Only a more comprehensive re-evaluation of § 2B1.1 will provide the clarity and fairness that federal sentencing desperately needs.”

WLF is a public interest law firm and policy center concerned with overcriminalization, including excessive sentences for non-violent criminal defendants.