New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

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An ALM Publication

VOLUME 253—NO. 19

THURSDAY, JANUARY 29, 2015

Outside Counsel

2015 Proposed Amendments to Fraud Sentencing Guidelines: a Good Start

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This month marks the 10-year anniversary of *United States v. Booker*,[1] the landmark case that transformed the federal Sentencing Guidelines into advisory sentencing rules. In the years following *Booker*, observers have recognized that the Sentencing Guidelines for white-collar fraud cases are not working as "guidelines." The Guidelines often recommend sentences that are simply out of step with what most courts are willing to mete out.[2] As a result, judges are frequently varying from the sentences recommended by the Guidelines, often substantially.[3] This in turn often leads to significant disparities among defendants who have committed similar crimes and who have similar criminal records, a result that judges are instructed to avoid.[4]

The Guidelines cannot be said to provide useful guidance to district court judges if judges are varying from them at a high frequency and to a significant degree.[5] For defendants, a plea offer from the government that is based on an extremely high Guidelines range creates what may be an undue incentive to proceed to trial: it is hard to accept a plea offer of 15 or 20 years. The existence of the high Guidelines range often forces the government to take harsher positions at sentencing than they know will be ordered, further depriving the district court of what might be useful insights about a particular case. In short, the fraud sentencing guidelines are broken. Since judges must give due credence to the Guidelines,[6] the sentencing guideline framework needs to be fixed in order for the federal sentencing system to work.

On Jan. 9, 2015, the Sentencing Commission took a small but productive step in the right direction when it promulgated a series of proposed amendments to Section 2B1.1 of the Guidelines, which governs sentencing in fraud cases.[7] While the individual impact of these revisions is small, together they amount to a welcome first step—perhaps a down payment on a more substantive revision in the future. A period of notice and comment will now begin, running through March 18, 2015, with a public hearing on the proposed amendments to be held on March 12, 2015. This article briefly reviews the proposed amendments.

1. Inflationary Adjustments. The fraud sentencing guidelines are driven first and foremost by the loss calculations made by the district court. This myopic focus on loss amount has been the subject of criticism.[8] The loss table has not been amended since 1987 to take into account inflation, even though $1 in 1991 has the same buying power as $1.74 in 2014.[9] The commission has proposed two possible adjustments based on inflation. Each adjustment is based on the Consumer Price Index, but the two proposals employ different rules for rounding.

The effect of both proposals is to significantly raise the level of loss required for a specific increase in levels. For example, the current Guidelines call for a 14-level increase when the loss amount is more than $400,000, while the proposals would require a loss amount of either $525,000 or $550,000 for a 14-level increase.[10] Notably, at the end of this proposed amendment, the commission asks for comment about whether there should be "any other changes to the monetary tables, such as to promote proportionality or reduce complexity."[11]

2. Intended Loss.[12] The commission proposed amendments to the definition of intended loss, which often drives the calculation of the Guidelines range in cases where there has been little or no actual loss. The commission also raised a number of issues for comment concerning how intended loss is calculated and how it is used in determining the Guidelines range. First, the commission asked whether intended loss should be limited to the amount that the defendant personally intended, or whether it should also include amounts intended by other participants in the offense.

Second, the commission asked whether courts should always use the greater of actual loss or intended loss (the existing rule) or whether intended loss should be limited in some fashion.[13] This raises further questions about the proper sentence in cases where the actual loss was low or non-existent, but the intended loss was high. One solution may be to consider both facts, as opposed to only the higher number, during sentencing.

3. Victims. The current Guidelines provide for increases in offense level of 2, 4, or 6 levels if the offense involved 10, 50, or 250 victims (or more), respectively. The proposed amended Guidelines would limit

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these increases to 1, 2 or 3 levels, but add a possible enhancement for cases in which the offense caused a substantial financial hardship, a new term defined in a proposed application note.[14] Although the desire to focus less on the "counting" of victims and more on the actual impact of the crime is commendable, the addition of newly defined terms in the Sentencing Guidelines seems like a step in the wrong direction given the high level of complexity already inherent in calculations under the Guidelines.

4. Sophisticated Means. Courts have long pondered the correct interpretation of this enhancement, which aims to address a legitimate issue of culpability but does so in a manner that is often less than intuitive.[15] The proposed amendment is meant to clarify this provision. First, it would change the rule to require that the defendant himself engaged in the conduct that is deemed "sophisticated." The current rule, in contrast, applies the enhancement when the offense involves sophisticated means. Second, the proposed amendment removes the language suggesting that certain types of conduct inherently involve sophisticated means.

Some of these presumptively "sophisticated" means, such as the use of "offshore accounts," are often, in fact, quite simplistic. Third, the proposed amendment states that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means."[16] This attempt to draw distinctions between truly complex and unsophisticated offenses is a welcome revision, particularly in the white collar context.[17]

5. Fraud on the Market. The commission proposed a new amendment for securities offenses involving "fraud on the market" (i.e., offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity and the submission of false information to the Securities and Exchange Commission or another regulator). This amendment would base the Guideline on the gain to the defendant rather than the loss sustained by victims of the offense, but in no event would the enhancement under the loss table be less than a specified number of Guideline levels (somewhere between 14 and 22 levels). Here, the real content is in the issues identified by the commission, which recognize that these are serious cases but ones in which it can be difficult to measure gain and loss, thus leading both to under- and over-punishment.[18] The notice and comment on these provisions figure to be worth following.

6. Relevant Conduct. The commission proposes to amend Section 1B1.3, which defines the relevant conduct for which a defendant is held responsible when determining the correct Guidelines range. While this provision applies to all of the Sentencing Guidelines, not only the fraud-related guidelines, it may have an impact on how loss amount is calculated. The amendments are quite extensive and their full extent is beyond the scope of this article.

One amendment that bears noting is the addition of express language stating that relevant conduct committed by others is not to be imputed to a defendant unless he specifically agreed jointly to undertake that particular criminal activity.

One amendment that bears noting, however, is the addition of express language stating that relevant conduct committed by others is not to be imputed to a defendant unless he specifically agreed jointly to undertake that particular criminal activity. The fact that the conduct was committed in furtherance of jointly undertaken criminal activity is not sufficient, even if the acts of others were reasonably foreseeable to the defendant. The "issues for comment" draw attention to the question of whether the term "jointly undertaken criminal activity" should be beefed up, either to require a higher state of mind or to require a conviction for conspiracy.[19]

One cautionary note about the prospect of future amendment: remarks given by Judge Patti B. Saris, the commission's chair, at the Jan. 9, 2015, public meeting of the Sentencing Commission indicate that the commission believes that "the fraud guideline may not be fundamentally broken for most forms of fraud." She also states that most judges "are relatively satisfied with it for most types of fraud."[20] It is hard to reconcile this conclusion with the fact that more than half of all fraud sentences in 2013 were outside of the recommended Guideline range. Regardless of the chair's comments, these are generally positive steps that should make sentencing more reasonable and the Guidelines more relevant. Hopefully, further steps will be taken in this direction.

1. *United States v. Booker*, 543 U.S. 220 (2005).
2. See *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006); *United States v. Ovid*, No. 09-CR-216, 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010).
3. See *United States v. McDonnell*, No. 3:14-CR-00012 (E.D. Va. Jan. 6, 2015) (two-year sentence imposed after Guidelines recommended more than 10 years' imprisonment); *United States v. Gupta*, 904 F.Supp.2d 349 (S.D.N.Y. 2012) (two-year sentence imposed after district court determined a Guidelines range of six-and-a-half to eight years).
4. 18 U.S.C. §3553(a)(6) (2011). See Peter Lattman, "2 Defendants Sentenced in Insider Trading Case," N.Y. TIMES, Sept. 21, 2011, http://dealbook.nytimes.com/2011/09/21/2-defendants-sentenced-in-insider-trading-case/.
5. In fiscal year 2013, more than half of all fraud sentences were outside the Guideline range. U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2013, Southern District of New York, Table 10, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2013/nys13.pdf. In the Southern District of New York, only 26.1 percent of fraud sentences were within the Guideline range. Id.
6. See *Gall v. United States*, 128 S. Ct. 586, 594 (2007).
7. In addition to fraud, Section 2B1.1 covers offenses involving theft, embezzlement, forgery, counterfeiting, insider trading, transactions in stolen goods, and simple property damage or destruction. U.S. SENTENCING GUIDELINE MANUAL, ch. 2, pt. D, introductory cmt. (2014).
8. Leah McGrath Goodman, "Nonsensical Sentences for White Collar Criminals," NEWSWEEK, June 26, 2014, http://www.newsweek.com/2014/07/04/nonsensical-sentences-white-collar-criminals-256104.html#.U7FqSajPNNs.email (quoting Judge Jed S. Rakoff commenting that "the arithmetic behind the sentencing calculations is all hocus-pocus—it's nonsensical, and I mean that sincerely. It gives the illusion of something meaningful with no real value underneath.").
9. Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Inflationary Adjustments at 2 (Jan. 9, 2015), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150109_PRELIM_RF_amendments.pdf.
10. Id. at 1-3. The proposed amendment would do likewise for a number of other loss-driven Guidelines calculations, including the loss tables for insider trading and tax fraud, and the fine tables for individual defendants in Section 5E1.2. The multipliers vary, but the goal is to reflect an inflationary adjustment.
11. Id. at 16.
12. The provisions relating to intended loss, victims, sophisticated means, and fraud on the market are packaged as a single proposed amendment on "economic crime." Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Economic Crime at 1.
13. Id. at 4.
14. Id. at 6.
15. See *United States v. Lewis*, 93 F.3d 1075 (2d Cir. 1996) (recognizing that the term "def[ies] precise definition" and is an "open-ended phrase" requiring judicial construction).
16. Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Economic Crime at 11-12.
17. A similar amendment should be promulgated for Section 2T1.1, which also states that "the use of…offshore financial accounts ordinarily indicates sophisticated means." U.S. SENTENCING GUIDELINES MANUAL §2T1.1, cmt. n.5 (2014). It is hard to think of anything less sophisticated than opening a bank account in an offshore tax haven and failing to report the income earned in that account.
18. Id. at 15-17.
19. Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Jointly Undertaken Criminal Activity at 2, 4, 10.
20. Chief Judge Patti B. Saris, Remarks at the Public Meeting of the United States Sentencing Commission 2 (Jan 9, 2015), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf.