

Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline



JAMES E. FELMAN*

Partner, Kynes, Markman & Felman, P.A., Tampa, Florida

Chair, American Bar Association's Criminal Justice Section

I. Introduction

The Sentencing Commission's 2015 proposed amendments to the federal sentencing guideline for economic crimes make a number of small but welcome changes that will have an overall ameliorative impact. But I had hoped that the Commission would do more to address the problems with the present guideline. The proposed amendments did not reduce the guideline's unwarranted emphasis on both loss and multiple specific offense characteristics that, alone and especially in combination, tend to overstate the seriousness of many offenses. The Commission should have amended the guidelines to permit consideration of *mens rea*, motive, and other circumstances that better reflect the culpability of the offender and the severity of the offense. And the Commission should have amended the guidelines for economic crimes to ensure that they "reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. . . ."¹

II. What the Sentencing Commission has Done in the Past

The Commission entered the 2015 amendment cycle with guidelines for economic crimes that had been criticized in recent judicial decisions as "patently absurd on their face,"² "a black stain on common sense,"³ and ultimately, "of no help."⁴ The result of relentless upward ratcheting, the guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. I told the Commission this year⁵ what I had told the Commission in 2002⁶ as it was considering the further increases in severity directed by the Sarbanes-Oxley Act—that history will reveal this period of our nation's history as a time of a failed experiment with the imprisonment of first-time nonviolent offenders for periods of time previously reserved only for those who had killed someone. In short, I felt the present guidelines for economic crimes, especially those with high loss amounts, were in need of significant change.⁷ It did not happen this year.

III. What the Sentencing Commission Did in 2015

To be sure, the Commission's proposed 2015 amendments are a welcome change. The Commission has proposed substantive amendments to the victims table and the

sophisticated means enhancement, and clarifying amendments to the definition of intended loss and the calculation of loss in "fraud on the market" cases. Although not limited to economic crimes, the Commission has also proposed changes to the mitigating role adjustment that will impact economic crime cases, and has proposed adjustments to all of the monetary tables in the guidelines to account for inflation, including the loss table in the economic crimes guideline. These are important and helpful changes, if modest in their overall impact.

A. The New Victims Table

The Commission amended the victims table to focus on the actual impact of the offense on victims rather than simply counting them. The present guideline provides tiered enhancements of two, four, and six levels as the numbers of victims moves from ten to fifty to 250 or more. The proposed amendment provides a two-level enhancement if the offense involved ten or more victims or mass-marketing, or if at least one victim suffered "substantial financial hardship," and tiered enhancements of four and six levels as the number of victims suffering such hardship moves from five to twenty-five or more. The amendment provides a nonexclusive list of factors to consider in determining whether a victim's financial hardship as a result of the offense was "substantial"—whether the offense resulted in the victim: (i) becoming insolvent; (ii) filing for bankruptcy; (iii) suffering substantial loss of a retirement, education, or other savings or investment fund; (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans; (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and (vi) suffering substantial harm to his or her ability to obtain credit.

I think focusing on the impact on the victims rather than their number is a good thing, but the specificity and complexity of the new table, and the need to delve into the details of the finances of numerous third parties to arrive at a guidelines range strikes me as out of step with the advisory nature of the guidelines. I would have preferred a more general directive to courts to consider the overall nature of the impact on the victims and to assess whether it generally was minimal, low, moderate, or high. I fear that one of the consequences of the Commission's continued adherence to very specific factual inquiries of the sort perhaps

Federal Sentencing Reporter, Vol. 27, No. 5, pp. 288–292, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2015 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2015.27.5.288.

appropriate in the context of binding guidelines will be a significant increase in sentencing litigation. This may be particularly true in the context of victim impact because much of this information may be unknown to the prosecution (and almost certainly to the defense) at the time of plea negotiations. The parties are understandably focused on evidence relating to guilt or innocence, and have no reason to focus effort on the details of the financial affairs of the victims when assessing whether the case should proceed to trial. Then when it comes to the sentencing proceedings, the procedural rules under which these third-party impacts will be litigated are wholly inadequate to the task. There are no rules requiring the government or victims to disclose to the defendant evidence relating to victim impact. Such information will likely come to defendants in the form of hearsay attributed to victims in the presentence investigation report. I envision significant difficulties and failures of fairness in the process by which defendants endeavor to challenge such victim assertions. I have advocated the need for procedural reform in federal sentencing for many years.⁸ I fear the new victims table, and the need to litigate, for example, whether the changes to twenty-five or more third parties' employment were "substantial," or whether the claims of twenty-five or more people to have postponed their retirement plans (by how long?) are accurate, will exacerbate the unfairness of the current procedural framework.

B. The Revised Sophisticated Means Enhancement

The present guideline provides for a two-level enhancement where "the offense otherwise involved sophisticated means." The Commission has proposed amending this enhancement to limit its application to cases in which the defendant personally and intentionally engaged in or caused the sophisticated means. This change will permit greater proportionality by meting out more severe penalties for those defendants whose unlawful conduct was especially sophisticated, and providing lesser penalties for defendants whose conduct was unsophisticated (even if it contributed to an offense where the conduct of others was sophisticated). I do not know whether this change will impact a significant number of cases, but it is a welcome improvement to the guideline.

C. The Clarification of Intended Loss

The guidelines direct that courts use the greater of actual or intended loss in applying the loss table. There has been some disagreement in the cases about whether the determination of intended loss requires a subjective or objective inquiry. Those courts using an objective inquiry appeared at times to stray into an inquiry of "risk of loss"—what funds were placed at risk as a result of the offense without regard to whether the defendant actually wished or intended that such losses take place. The Commission clarified that which I always found to be the better view—that intended loss means just that: losses that the defendant subjectively and purposely sought to inflict.

This clarification is helpful so far as it goes, but I had hoped the Commission would instead either eliminate or cap the impact of intended loss. In my view, in many, if not most, circumstances there exist palpable differences in culpability between offenses that cause actual loss to real people—and thus also potential actual gains to the defendant—and offenses in which the losses exist only in the mind of the defendant. This disparity in impact is exacerbated by the fact that intended losses may be quite large as they are limited only by the imagination of the offender. Losses that are merely intended count under the guideline even if were unlikely and indeed impossible to occur. The Commission's clarification that intended loss requires a subjective inquiry does nothing to address the frequent and unwarranted disparities in the sentencing of offenses causing actual loss as compared with offenses involving losses that are solely intended.

D. The Clarification of Loss in "Fraud on the Market" Cases

Securities fraud cases involving false statements or material omissions in connection with the purchase or sale of securities present particularly compelling examples of excessive severity in the application of the economic crime guideline because the loss figures in such cases, combined with other specific offense characteristics in the guideline, frequently dictate sentences at or near life without possibility of parole. They are also complex loss calculation cases because many factors may contribute to changes in stock price in addition to the offense, and teasing out the losses attributable to the offense can be difficult. The Commission had recently amended the guideline to provide a detailed special rule for determining such losses involving a formula using differences between average prices of the securities during and after the offense. During this amendment cycle, the Commission published for comment an amendment providing for the use of the defendant's gain as an alternative to loss in these types of cases. This proposal evidently failed to gain sufficient support within the Commission, and it instead opted for a broad invitation that courts "may use any method that is appropriate and practicable under the circumstances" to calculate loss, and that its recent detailed formula is now only "one such method the court may consider."⁹ The ball is now in the Courts' court to determine what other methods are "appropriate and practicable." I submit that under some circumstances, the amount of the defendant's gain may be an appropriate method of estimating loss, but whether that methodology will be employed remains to be seen.

E. The Revised Mitigating Role Adjustment

Although not specifically addressed to economic crimes, the Commission's revisions to the mitigating role adjustment could have an impact on such offenses because they expand the criteria to qualify for a mitigating role. This is a welcome development given that a paltry 6 percent of economic crime defendants receive a mitigating role

adjustment under the present guideline.¹⁰ The most significant aspect of the Commission's mitigating role amendment for economic crimes is the addition of a non-exhaustive list of factors to be considered in applying the adjustment. Included in this list is "the degree to which the defendant stood to benefit from the criminal activity."¹¹ And the Commission added a specific example: "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline."¹² I believe this language may be applicable in an array of economic crimes where the defendant derived minimal or zero personal gain from the offense.

The Commission made a few smaller changes to the mitigating role adjustment that may also increase its application in economic offenses. The adjustment directs courts to consider whether the defendant's role was "substantially less culpable than the average participant."¹³ The Commission clarified that "average participant" means only those who participated in the instant offense, and rejected the more restrictive test used by some courts that had required the defendant's conduct to be "minor" or "minimal" as compared to the entire set of offenders who commit similar crimes. The Commission further clarified that a defendant may receive a mitigating role adjustment even if he or she "performs an essential or indispensable role in the criminal activity."¹⁴ These changes also may be expected to increase the percentage of economic crime defendants who receive a mitigating role adjustment.

F. The Inflationary Adjustment to the Monetary Tables

Much of the criticism of the economic crimes guideline has focused on the loss table and the manner in which it swiftly increases the severity of the sentences advised by the guideline, but a number of other guidelines also contain similar monetary tables. None of these tables have ever been adjusted to account for the effects of inflation. This year the Commission did so, with the result that some economic crimes will now fall at a point on the loss table that is two offense levels lower than at present. Remarkably, the Department of Justice opposed this change (along with virtually all of the others discussed above), but the Commission viewed it as a simple exercise of good government. Indeed, Congress has generally required executive branch agencies to adjust the civil monetary penalties they impose to account for inflation every four years.¹⁵ This change was long overdue, and it will have a mildly mitigating impact on a significant percentage of economic offenses.

G. The 2015 Amendments are likely to take effect on November 1, but are not likely to be made retroactive

Although the Department of Justice opposed nearly everything the Commission did regarding economic crimes, I do not think it is likely that the Congress will reject any of these amendments. Congress has done this only once in the history of the Commission, and I do not sense any movement to intervene in the amendment process here.

The Commission's changes are exceedingly modest and the result of lengthy and careful deliberation. Thus, I expect that they will take effect on November 1, 2015. Defendants may be well advised to seek continuances of their sentences until after that date unless the government and the court agree to apply the amendments early.

On the other hand, I think it is unlikely that the Commission will vote to make any of these amendments retroactive. The Commission generally does this only where the record of the sentencing hearing or the pre-sentence report prepared for the hearing would likely contain the factual information necessary to apply the amended guideline. That does not appear to be the case regarding these revisions. Indeed, retroactive application of the inflationary adjustment would seem justified only if the loss table were adjusted to the period at issue in each case, which would seem mathematically daunting.

IV. What the Sentencing Commission Did Not Do in 2015

Unfortunately what the Commission did not do in 2015 was address the fundamental and profound deficiencies in the structure of the economic crimes guideline. The guideline's overemphasis on loss, cumulative piling on of specific offense characteristics, and overall excessive severity remain largely unaffected by the Commission's tweaks. And the new amendments do virtually nothing to allow courts to consider the host of culpability considerations absent from the guideline. I had hoped that the Commission would make more significant structural revisions to the guideline and do more to bring the guideline into compliance with the statutory directive to ensure that guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment."¹⁶ except in the most serious cases. The Commission had signed a willingness to consider a significant overhaul and had explicitly focused on the need to re-examine the operation of the guideline in high-loss cases. But as pointed out by Professor Frank Bowman at the Commission's hearing on the proposed amendments,¹⁷ the Commission's actions do not target the difficulties presented by high-loss cases at all. Although the inflationary adjustment and the small modifications to mitigating role, the victims table, and sophisticated means may lower a significant number of cases by a handful of levels, in the end this guideline will continue frequently to advise sentencing ranges that are "patently absurd on their face."

V. What the Sentencing Commission Might Do by 2020

I do not think it is very likely that the Commission will return to the economic crime guideline in isolation for comprehensive review in the near term. It appears the Commission focused on the issues, gave it their full attention, and this is the most its members have agreed upon at this time. But I do think many of the Commissioners, given that the current manual was written for a binding system, believe that advisory guidelines need not be so complex or require such elaborate fact finding and extensive litigation

as the current manual. Over the next five years I would not be surprised to see the Commission consider fundamental change not simply to the economic crimes guideline, but also to the manual as a whole. Perhaps in the context of this broader structural review we can obtain the more fundamental overhaul of this guideline that I believe our system of justice sorely needs.

VI. What the Courts Should Do Starting Now

In the meantime, it is my hope that courts will find helpful sentencing advice not only in the new proposed amendments by the Commission, but also in the work of the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes. Knowing that our exhortations for reform to the Commission would benefit from concrete suggestions, the ABA Criminal Justice Section formed a special Task Force to draft a model economic crime guideline that would effectuate the reforms we believe are needed. We are very proud of our Task Force, which consisted of five professors,¹⁸ three judges,¹⁹ six practitioners,²⁰ two organizational representatives,²¹ and observers from the Department of Justice and the Federal Defenders.²² We presented an initial draft of our Task Force work at the Commission's symposium on economic crimes in the fall of 2013. After additional meetings and drafts, the Task Force arrived at a consensus final proposal for the Commission's consideration in November 2014.²³

Our Task Force Final Report reflects a proposed guideline that would reduce the weight placed on loss, eliminate the use of loss that is purely "intended" rather than actual, and introduce the concept of "culpability" as a measure of offense severity working in conjunction with loss. Through the culpability factor, the Task Force proposal would permit consideration of numerous matters ignored by the current guideline, including the defendant's motive, the nature of the offense, the correlation between the amount of the loss and the amount of the defendant's gain, the duration of the offense and the defendant's participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The Task Force proposal also sets forth a simplified approach to victim impact, recognizing that in many instances the harm to victims is fully captured by consideration of the amount of the loss caused by the offense, and that in some circumstances the nature of the harm suffered by the victims will be more significant than their number. Finally, the Task Force proposal would implement the statutory directive of 28 U.S.C. § 994(j) by providing an offense level cap where the offense is not "otherwise serious."

Although the Commission did not adopt the structural reforms proposed by the Task Force, this does not mean that courts may not draw advice from the proposal. Indeed, a few courts have already done so.²⁴ The work of the Task

Force provides a specific framework for the evaluation of the full array of potentially relevant considerations in the sentencing of economic crimes. I believe courts will accomplish greater compliance with the purposes of sentencing and the avoidance of unwarranted disparity using the Task Force proposal as an alternative sentencing framework.

Notes

- * (Also serving as the American Bar Association's liaison to the U.S. Sentencing Commission, and as Reporter to the ABA's Task Force on the Reform of Federal Sentencing for Economic Crimes; former co-chair of the Practitioners' Advisory Group to the U.S. Sentencing Commission.)
- 1 28 U.S.C. § 994(j).
 - 2 *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).
 - 3 *United States v. Parris*, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).
 - 4 *United States v. Watt*, 707 F.Supp.2d 149, 151 (D. Mass. 2010).
 - 5 U.S. Sentencing Commission, Public Hearing On Proposed Amendments to the Federal Sentencing Guidelines (transcript), at 203 (Mar. 12, 2015), available at <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/transcript.pdf>.
 - 6 Minutes of the November 19, 2002, U.S. Sentencing Commission Public Meeting, available at <http://www.uscc.gov/amendment-process/public-hearings-and-meetings/20021119-20/minutes-november-19-2002>.
 - 7 See, e.g., James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23(2) Fed. Sent'g Rep. 138 (2010).
 - 8 See, e.g., James E. Felman, *The Need for Procedural Reform in Federal Criminal Cases*, 17(4) Fed. Sent'g Rep. 261 (2005).
 - 9 U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines*, at 30 (Apr. 30, 2015), available at http://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf.
 - 10 U.S. Sentencing Commission, *Economic Crime Public Data Briefing*, at Fig. 9 (Jan. 9, 2015), available at http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.
 - 11 U.S.S.C., *supra* note 9, at 48.
 - 12 *Id.*
 - 13 *Id.* at 47.
 - 14 *Id.* at 48.
 - 15 See Section 4 of the Federal Civil Penalties Inflationary Adjustment Act of 1990, 28 U.S.C. § 2461 note.
 - 16 28 U.S.C. § 994(j).
 - 17 U.S. Sentencing Commission, *supra* note 5, at 175.
 - 18 Stephen Saltzburg (George Washington University Law School), Chair of the Task Force; Sara Sun Beale (Duke University School of Law); Nancy Gertner (Harvard Law School); Jane Anne Murray (University of Minnesota Law School); and Kate Stith (Yale Law School).
 - 19 John Gleeson (Eastern District of New York); Gerard Lynch (Court of Appeals for the Second Circuit); and Jed Rakoff (Southern District of New York).
 - 20 James Felman (Kynes, Markman & Felman), Reporter to the Task Force; Barry Boss (Cozen O'Connor); David Debold (Gibson, Dunn & Crutcher); Gary Lincenberg (Bird, Marella, Boxer, Wolpert, Nessim, Brooks & Lincenberg); Marjorie Peerce (Ballard, Spahr, Stillman & Friedman); and Neal Sonnett (Neal R. Sonnett, P.A.).

- ²¹ Kyle O'Dowd (National Association of Criminal Defense Lawyers); and Mary Price (Families Against Mandatory Minimums).
- ²² Jonathan Wroblewski (DOJ Office of Policy and Legislation); and A.J. Kramer (District of Columbia).
- ²³ American Bar Association, *A Report on Behalf of the ABA Criminal Justice Section, Task Force on the Reform of Federal Sentencing for Economic Crimes, Final Draft* (Nov. 10, 2014),

available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf.

- ²⁴ See, e.g., *United States v. Litvak*, Case No. 3:13cr19 (D. Conn. 2014); *United States v. Rivernider*, Case No. 3:10cr222 (D. Conn. 2013); *United States v. Ponte*, Case No. 3:10cr222 (D. Conn. 2013).