

White-Collar Crime

An ALM Publication

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MONDAY, SEPTEMBER 28, 2015

Federal Sentencing: The Impact of **ABA Report** And **Amendments to Guideline** For Economic Crimes



On April 9, 2015, the U.S. Sentencing Commission (USSC) issued preliminary amendments to the federal sentencing guideline applicable to economic crimes (2B1.1), which are slated to take effect this November 1. The Task Force had hoped that the USSC would make significant structural changes to the economic crime guideline going well beyond the modest changes that will be implemented in November. While the 2015 amendments seek to fix certain of the smaller issues addressed by the Task Force, they fail to address the fundamental criticisms raised by the Task Force—along with many judges, scholars, and practitioners—that loss (rather than culpability) unfairly drives the guidelines range.

ABA Task Force Report

The Task Force report centers on a proposed substitution for the existing guideline §2B1.1 (the economic crimes guideline).¹ Among the Task Force's chief concerns was the outsized impact of the loss calculations in the current guideline.²

As a starting point in its proposed guideline, the Task Force recommends slimming down the loss table from 15 tiers to six tiers, and reducing the enhancement for the highest loss amount from 30 offense levels to 14 offense levels.³ The Task Force also sets forth various culpability factors bearing on a "culpability level" for each defendant.⁴ These include the defendant's motive, the correlation between the amount of loss and the defendant's gain, the sophistication of the offense and the defendant's contribution to it, the duration of the offense and the extent of the defendant's participation, any extenuating circumstances, whether the defendant ini-

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In April 2013, the Criminal Justice Section of the American Bar Association formed a Task Force to evaluate reforms needed in federal sentenc-

ing for economic crimes and to draft a proposed sentencing guideline to effectuate the reforms. The Task Force—which included distinguished judges, scholars, and practitioners—released a draft report and proposed guideline in September 2013. The Task Force's final report, issued in November 2014, calls for an offender's culpability to play a greater role in shaping the guideline's sentence for economic crimes, and for the loss calculations that currently have an outsized impact on the guidelines range to be de-emphasized.

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tiated the offense, and whether the defendant took any steps to mitigate the harm from the offense.⁵ Applying these factors, the offense level of the lowest culpability offender would be reduced six to 10 levels, while the offense level of the highest culpability offender would be increased six to 10 levels.⁶ The culpability factor would not impact the offense level of a moderate culpability offender, and a three to five level adjustment up or down, respectively, would be applied to the offense levels of high and low culpability offenders.⁷

To address the issue of guideline sentences of incarceration for first-time offenders, the Task Force recommended an offense level cap of 10 for non-serious offenses by first-time offenders.⁸ In other words, if a first-time offender committed a non-serious offense, his or her offense level would be no greater than 10 and a sentence other than imprisonment would generally be appropriate under the Task Force's proposed guideline.⁹

Although the USSC did not adopt the more significant structural changes proposed by the Task Force, the Task Force report arguably did influence the 2015 amendments to the economic crime guideline to some extent. The USSC sought in those amendments to address some of the smaller issues addressed by the Task Force, as will be further described below.

The Task Force report also in its own right has influenced some sentencing decisions, and likely will continue to do so. Even before the Task Force issued its final report, two federal district judges had explicitly referenced the preliminary Task Force report or its methodology as instructive in determining a fair sentence for a white-collar defendant. For example, U.S. District Judge Robert N. Chatigny, in *United States v. Rivernider*, applied the methodology of the Task Force's proposed guideline before awarding a sentence at the upper end of the Task Force range (12 years) as opposed to the sentence he calculated pursuant to the USSC guideline (more than twice that, i.e., 324 to 405 months).¹⁰ Chatigny noted that the "guidance provided by the [Task Force] approach is preferable to what emerge[d] from the existing guideline," which he believed "significantly overstate[d] the defendant's] culpability for a number of reasons."¹¹ U.S. District

Judge Janet C. Hall, while not applying the Task Force's proposed guideline wholesale, observed, in *United States v. Litvak*, that the Task Force's discussion of the factors impacting a defendant's culpability was very helpful in her determination of a fair sentence.¹²

2015 Amendments

Absent congressional action, the USSC's 2015 amendments to the economic crimes guideline will take effect this November 1. These include, inter alia, revisions to the definition of intended

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loss, to the criteria for the victim table, and to the definition of sophisticated means.

Intended Loss. Because loss can have such an outsized effect under the guideline, the definition of "loss" is particularly important. The economic crimes guideline provides that loss is generally "the greater of actual loss or intended loss."¹³ The amendment defines "intended loss" to include "the pecuniary harm that the defendant purposely sought to inflict."¹⁴ This new definition calls for a subjective inquiry, in the wake of a circuit split concerning whether the existing definition calls for subjective or objective analysis.

The USSC failed to heed the Task Force's recommendation to define loss only as "actual loss."¹⁵ However, the Task Force nonetheless supported the USSC's definitional change as preferable to an objective inquiry.¹⁶ The Task Force argued to the USSC that, if intended loss were to factor into the guideline calculation at all, "[t]o better individualize the culpability of each criminal participant in an offense, the losses intended to be inflicted by each participant should be used as the measure of culpability,

rather than considering such intended losses in the aggregate."¹⁷

In amending the definition, the USSC dismissed concerns from the U.S. Department of Justice that the change would "effectively eviscerate use of the intended loss criterion in determining loss."¹⁸ Specifically, the DOJ had argued:

Application of the subjective standard adopted in the proposed amendment will make it difficult, if not impossible, to prove any amount of intended loss, even in cases where the evidence shows grossly reckless conduct that evidences genuine culpability, and will lead to the adoption of an actual loss standard in the great majority of criminal fraud cases.¹⁹

Despite the DOJ's arguments, we expect intended loss to continue to factor into sentencing for economic crimes in certain cases. Although accepting the Task Force recommendation to define "loss" as "actual loss" would better ensure that the loss calculations are aligned with the defendant's culpability, the subjective inquiry is a welcome shift, which should enable some defendants to cabin the loss amount attributed to their conduct at sentencing.

Victim Table. The USSC's amendment introduces a concept of "substantial financial hardship" to the offense characteristic for impact on victims (also known as the victim table).²⁰ The existing guideline provides for a two-level enhancement if the offense involved 10 or more victims or was committed through mass-marketing; a four-level enhancement if the offense involved 50 or more victims; and a six-level enhancement if the offense involved 250 or more victims.²¹

The amendment provides that the two-level enhancement also will apply if the offense results in substantial financial hardship to one or more victims.²² The four- and six-level enhancements will be changed to require a showing that the offense resulted in substantial financial hardship for at least five or at least 25 victims, respectively.²³

The amendment sets forth a non-exhaustive list of factors that a court should consider in determining whether a victim has sustained "substantial financial hardship."²⁴ These include

becoming insolvent, filing for bankruptcy, suffering substantial loss of a retirement, education, or other savings or investment fund, making substantial changes to employment (e.g., postponing retirement plans), making substantial changes to living arrangements (e.g., relocating to a less expensive home), and suffering substantial harm to the ability to obtain credit.²⁵

The Task Force had recommended that the victim table be removed from the guideline, because “[u]nder ordinary circumstances the harm suffered by the victims of an economic crime is fully accounted for by consideration of the amount of the loss caused by the offense.”²⁶ Nevertheless, the Task Force supported as an alternative the USSC’s amendment to introduce the concept of substantial financial harm into the existing victim table.²⁷

Although eliminating the victim table altogether would avoid the double-counting that often occurs when the loss table and victim table calculations are combined, the amendment’s requirement of substantial financial hardship at least seeks to ensure some culpability as a prerequisite to the greater enhancements for impact on a victim, which is a positive step.

Sophisticated Means. The existing guideline provides for an enhancement if “the offense otherwise involved sophisticated means.”²⁸ Courts have applied this enhancement even if the defendant’s own conduct was not sophisticated. The amendment narrows the scope of this enhancement so that it applies only in cases in which “the defendant intentionally engaged in or caused the conduct constituting sophisticated means.”²⁹

The Task Force had recommended that the USSC eliminate the standalone sophisticated means enhancement, and that the use of sophisticated means impact the offense level only as one of the factors bearing on the defendant’s culpability. The Task Force nonetheless supported the definitional change to be made through the amendment as an improvement to the existing language. The Task Force argued to the USSC that “defendants’ culpability is much more justifiably increased when they are themselves responsible for the sophistication of the offense.”³⁰

In adopting the amendment, however, the USSC dismissed the concerns of the DOJ, which had

argued that the sophisticated means enhancement “should not be limited to cases in which the defendant personally used the sophisticated means.”³¹ Specifically, the DOJ observed that “[h]olding the defendant liable for foreseeable conduct of accomplices done in furtherance of ... jointly undertaken activity is hardly novel,” and “most courts to have considered the issue have held that the sophisticated means enhancement applies to a particular defendant so long as the use of sophisticated means by other criminal associates was reasonably foreseeable to the defendant.”³²

As the Task Force argued, the amendment’s narrowing the sophisticated means enhancement is an appropriate step toward better linking the defendant’s culpability to his or her offense level, and an improvement to the existing guidelines.

Implications

Although the Task Force report and other calls for reform in sentencing policy for economic crimes have not yet led the USSC to significantly amend the economic crimes guideline, this is an area to continue to watch closely as the guidelines continue to evolve in coming years. In the meantime, the 2015 amendments to the guideline for economic crimes will give courts additional latitude within the sentencing guideline regime, in appropriate cases, to lessen the historically harsh impact of the guideline for economic crime. Courts should continue to heed the advisory nature of the guidelines, particularly in cases involving economic crime, where the combination of the loss table and specific offense characteristics sometimes leads to double- or triple-counting of certain factors, causing the defendant’s offense level to exceed his or her culpability. As they seek to fashion appropriate sentences, we expect additional judges, in appropriate cases, to rely on the Task Force report or its methodology in sentencing offenders covered by the economic crimes guideline. Over time, we expect the USSC to adopt additional reforms proposed in the Task Force report, including a slimming-down of the loss table to include fewer tiers and other amendments to better match the offense level to the defendant’s culpability.

1. American Bar Association Criminal Justice Section, Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (Nov. 10, 2014) (ABA Report), at i.

2. Id. at 1-6.

3. Id. at i.

4. Id. at 1-5.

5. Id. at 1.

6. Id. at i.

7. Id.

8. Id. at i, 6.

9. Id.

10. Tr. of Sentencing Hearing, *United States v. Rivernider*, No. 3:10CR222 (D. Conn. Dec. 18, 2013), at 200:4-7, 212:5-20, 216:17-18.

11. Id. at 206:10-13, 212:5-14.

12. Tr. of Sentencing Hearing, *United States v. Litvak*, No. 3:13cr19 (D. Conn. July 23, 2014), at 136:12-137:2.

13. U.S. Sentencing Commission, Guidelines Manual, §2B1.1 (Nov. 1, 2014) (2014 Guidelines Manual), cmt. (n.3(A)).

14. U.S. Sentencing Commission, Amendments to the Sentencing Guidelines (Preliminary) (April 9, 2015) (Preliminary Amendments), §2B1.1, cmt. (n.3(A)(ii)).

15. ABA Report, supra note 1, at 1.

16. Testimony of James E. Felman on behalf of the American Bar Association before the U.S. Sentencing Commission for the Hearing on Proposed Amendments to the Federal Sentencing Guidelines Regarding Economic Crimes (March 12, 2015) (Felman Testimony), at 14-15.

17. Id.

18. Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Department of Justice to the Honorable Patti B. Saris, Chair, U.S. Sentencing Commission (March 9, 2015) (Wroblewski Letter), at 28.

19. Id. at 29.

20. Preliminary Amendments, supra note 14, §2B1.1(b)(2).

21. 2014 Guidelines Manual, supra note 13, §2B1.1(b)(2).

22. Preliminary Amendments, supra note 14, §2B1.1(b)(2).

23. Id.

24. Id., §2B1.1, cmt. (n.4(F)).

25. Id.

26. Felman Testimony, supra note 16, at 15.

27. Id.

28. 2014 Guidelines Manual, supra note 13, §2B1.1(b)(10).

29. Preliminary Amendments, supra note 14, §2B1.1(b)(10).

30. Felman Testimony, supra note 16, at 15.

31. Wroblewski Letter, supra note 18, at 33.

32. Id.