Summary of 2015 Proposed Amendments to the Sentencing Guidelines

National Sentencing Resource Counsel Project[1]

April 10, 2015

On April 9, 2015, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2015. Barring congressional action, they will take effect November 1, 2015. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission's website at: http://bit.ly/1ar7IMX.

Because none of these amendments will become effective until November 1, 2015, any arguments based upon them before that date must be done in the form of a variance. Although some of the amendments will reduce sentences, the Commission declined to consider whether they should be made retroactive.

1. Mitigating Role

The Commission made some modest changes to the mitigating role guideline that clarify its operation and that should result in more defendants receiving a mitigating role adjustment. First, it addressed a circuit split on the meaning of "average participant," adopting the approach of the Seventh and Ninth, which defines "average participant" by reference to those persons who participated in the criminal activity at issue in the defendant's case. It rejected the approach of the First and Second Circuits, which required a court to consider the defendant's culpability relative to his co-participants and to the typical participant in a similar crime.

Second, it added a non-exhaustive list of factors for the court to consider in determining whether to apply a -4, -2, or intermediate adjustment:

i. the degree to which the defendant understood the scope and structure of the criminal activity;
ii. the degree to which the defendant participated in planning or organizing the criminal activity;
iii. the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
iv. the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
v. the degree to which the defendant stood to benefit from the criminal activity.

[1] Sentencing Resource Counsel Project is a national project of the Federal Public & Community Defenders.

Third, the commentary now states by way of example that "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." It also provides that "[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative." This latter change rejects the approach of many circuits, which have held that a defendant who plays an indispensable or essential role does not qualify for a mitigating role adjustment.

Fourth, the commentary discussing individuals who perform limited functions has been changed to state that they "may receive" a mitigating role adjustment rather than that they "are not precluded" from receiving an adjustment.

2. Jointly Undertaken Criminal Activity

The Commission voted to promulgate an amendment to §1B1.3, restructuring the guideline and its commentary to "set out more clearly the three-step analysis the court applies in determining whether the defendant is accountable for acts of others in the jointly undertaken criminal activity."

The three step analysis requires that before a court may consider the acts and omissions of others under §1B1.3(a)(1)(B), it must find that those acts and omissions were (1) "within the scope of the jointly undertaken activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity." The commentary to §1B1.3 also makes clear that if one of those criteria is not met, the conduct is "not relevant conduct" under the "jointly undertaken provision."

The Commission had requested commented on whether it should replace the reasonable foreseeability requirement with a higher mens rea, but it declined to take up the issue this amendment cycle. For a potential variance argument on why "reasonable foreseeability" is a negligence standard that does not satisfy the statutory purposes of sentencing, see the Defender comments to the Commission, available on fd.org at http://bit.ly/1yZ6nTw.

3. Inflationary Adjustments

The Commission, for the first time in the history of the guidelines, voted to amend the monetary tables to account for inflation. This means it will take larger loss amounts to trigger enhanced offense levels. For example, it will take a loss amount of more than $40,000 instead of $30,000 to trigger a +6 enhancement under USSG §2B1.1.

This amendment also increases the fines tables. The Commission added a special note to §5E1.2 providing that for "offenses committed prior to November 1, 2015, use the applicable guideline range that was set forth in the version of §5E.12(c) that was in effect on November 1, 2014." This note presumably is intended to avoid ex post facto problems.

It is worth noting that with this amendment, the Commission treats the various monetary tables in the guidelines differently, using different time frames for different guidelines. For example, §2B1.1 is adjusted for inflation since 2001, whereas the monetary tables in §2B2.1 and §2B2.3 are adjusted for

inflation since 1989. The Commission claims this takes "into consideration the year each monetary table was last amended" but ignores, as the Commission has admitted, that the monetary values in the Chapter Two offense guidelines have "never been revised specifically to account for inflation." For more on this, and arguments to use in support of variances in cases involving the monetary tables that received less favorable treatment, see the Statement of Michael Caruso.[2]

4. Economic Crime

a. Intended Loss

The Commission amended the definition of intended loss at §2B1.1 comment. (n.3(A)(ii)) to limit intended loss to the pecuniary harm "that the defendant purposely sought to inflict."

b. Victims Table

The Commission made several changes to the victims table. First, with these amendments, the only enhancement based solely on the number of victims is now a +2 for 10 or more victims. The enhancements for 50 or more, and 250 will be eliminated effective Nov. 1, 2015. Second, the amendments brings new victim enhancements. Starting Nov. 1, 2015, when the offense resulted in "substantial financial hardship" to victims, the following enhancements will apply:

+2: substantial financial hardship to **one** or more victims.

+4: substantial financial hardship to **five** or more victims

+6: substantial financial hardship to **twenty-five** or more victims

It is important to note that these new enhancements for substantial financial hardship are **not** cumulative to the enhancement for 10 or more victims, but rather alternatives.

The Commission also amended the commentary to provide a list of factors the "court shall consider, among other factors" in determining whether the offense "resulted in substantial financial harm to a victim." Specifically, 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

[2] Attached to Defender comments to the Commission, available on fd.org at http://bit.ly/1yZ6nTw.

vi. suffering substantial harm to his or her ability to obtain credit.

The amendments made three other victim related changes:

- The Commission removed the 4-level enhancement at 2B1.1(b)(16) for offenses that "substantially endangered the solvency or financial security of 100 or more victims"
- The Commission changed one of the special rules for undelivered United States Mail. An undelivered mail case that involved a relay box, collection box, or the other listed containers shall be considered to have involved at least 10, instead of 50, victims. This lowers the increase in offense level from +4 to +2.
- Because substantial harm to a person's credit record is now a factor to be considered for purposes of the victim enhancements, the Commission deleted the upward departure provision based on substantial harm to a victim's credit record, or the inconvenience of repairing that record.

c. Sophisticated Means

The Commission's amendment "narrows the scope of the specific offense characteristic to cases in which the defendant intentionally engaged in or caused (rather than the offense involved) sophisticated means." USSG §2B2.1(b)(10)(C) as amended provides: "the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means."

d. Fraud on the Market

Although the Commission just amended the guidelines in 2012 to add a rebuttable presumption that loss should be calculated in a specific way in cases involving the fraudulent inflation or deflation of a publicly traded security or commodity, this year, the Commission changed course. With these amendments, the Commission now advises courts to "use any method that is appropriate and practicable under the circumstances." The previously recommended method is now just "one… method the court may consider."

5. "Single Sentence" Rule

The Commission voted to promulgate an amendment that makes several changes to USSG §4A1.2, addressing a circuit split between the Eighth and Sixth Circuits about whether sentences counted as a "single sentence" qualify as a predicate conviction under the career offender guideline, §2K1.3 (explosives), and §2K2.2 (firearms). While the Eighth Circuit had the better approach,[3] the Commission voted to "generally follow[]" the Sixth Circuit. This means that a prior considered as part

[3] *See* Statement of Jon M. Sands, attached to Defender comments to the Commission, available on fd.org, here: http://bit.ly/1yZ6nTw.

of a "single sentence" for purposes of criminal history points counts as a predicate for career offender and other guidelines "if it independently would have received criminal history points." If more than one prior within a group of offenses considered as a single sentence is a "crime of violence" or a controlled substance offense under §4B1.2, only one may count as a predicate offense.

In addition to this change, the Commission made several stylistic changes to §4A1.1 and 4A1.2 so that references to sentences "counted" as a single sentence" are changed to "treated" as a single sentence.

6. Hydrocodone

In response to the DEA's rescheduling of hydrocodone from Schedule III to Schedule II and the FDA's approval of "single-entity" hydrocodone products that are not combined with acetaminophen or similar substances, the Commission decided to change the drug equivalency table so that hydrocodone is treated like oxycodone: 1 gram of hydrocodone (actual) is equivalent to 6700 grams of marijuana.

The Commission adopted this amendment despite substantial evidence that the oxycodone guideline is not based on empirical evidence and other evidence that hydrocodone does not have the same abuse potential as oxycodone. For information that may help challenge the new hydrocodone guideline, see the Defender comments and Statement of Lex Coleman, available on fd.org at http://bit.ly/1yZ6nTw.