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SENTENCING GUIDELINES AMENDMENTS' IMPACT ON WHITE-COLLAR DEFENSE

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Linda Dale Hoffa, The Legal Intelligencer
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The 2015 Federal Sentencing Guidelines amendments, effective last month, reflect the U.S. Sentencing Commission's interest in better accounting for victim harm and individual culpability to make sentencing more proportionate and fair. Those with the most impact on white-collar crimes are the amendments to economic crimes (Section 2B1.1), mitigating role (Section 3B1.2), jointly undertaken criminal activity (Section 1B1.3), and adjustments to all monetary tables. Given the significance of these amendments, criminal counsel practicing in federal court should be familiar with these changes, as well as the commission's reasons for them, to effectively advocate at sentencing.

1. Section 2B1.1: Major Changes to Economic Crimes

The commission directed a multiyear study of economic crimes and offenders. This included holding symposiums to hear from stakeholders, and collecting sentencing data and conducting extensive analyses. Overall, the commission determined that the fraud guidelines generally work well, except in high loss cases and first-time, low-level offenders who gained little or no benefit from the criminal activity. (See the keynote address from U.S. District Chief Judge Patti B. Saris, chair of the commission, at the Regulatory Offenses and Criminal Law Conference on April 14: <http://bit.ly/1XOebmP>.) This led the commission to focus on better methods to account for victim harm and individual culpability. The 2015 amendments for economic crimes made changes to the Victims Table, the definition of intended loss, the sophisticated means enhancement, and fraud-on-the-market offenses.

• The Victims Table now considers victims' substantial financial hardship.

The commission decided the previous guidelines "overemphasize[d] the number of victims to the detriment of qualitative harms that a smaller number of victims may suffer." The 2015 amendments to the Victims Table in Section 2B1.1(b)(2), therefore, now afford enhancements for just one victim provided that the offense caused "substantial financial hardship" to the victim. Specifically, two added levels apply for one or more victims, four added levels apply for five or more victims, and six

added levels apply for 25 or more victims when substantial financial hardship can be shown. To help the courts determine whether the financial hardship to the victims was sufficiently substantial, the commission added a list of non-exhaustive factors, including victims becoming insolvent, filing for bankruptcy, suffering substantial loss of retirement funds, postponing retirement, substantial changes to living arrangements, and inability to obtain credit.

Nonetheless, the amended Victims Table maintains a two-level enhancement for offenses that involve 10 or more victims even without a showing of substantial financial hardship.

• **Intended loss and sophisticated means are now more limited by defendant's specific intent.**

The commission next shifted its focus to better gauge an offender's individual culpability in two major ways: redefining intended loss and sophisticated means.

The commission amended commentary language for intended loss at Section 2B1.1 to more narrowly focus on the defendant's specific intent rather than the earlier standard, which was "pecuniary harm that was intended to result from the offense." The commentary at Section 2B1.1 now states that intended loss means "pecuniary harm that the defendant purposely sought to inflict." This will considerably increase the burden of proof on the prosecution at sentencing.

Along the same vein, the specific offense characteristic for the use of sophisticated means at Section 2B1.1(b)(10)(C) under the new amendment will focus on the defendant's own conduct rather than the level of sophistication in the overall scheme. The amendment narrows the specific offense characteristic to apply only to cases in which the offender "intentionally engaged in or caused" conduct constituting sophisticated means. Previously, this enhancement more broadly applied where "the offense otherwise involved sophisticated means" without a determination of whether the defendant's own conduct was "sophisticated." Those less culpable should now be able to escape from an unfair application of this enhancement.

• **Fraud-on-the-market guidelines are more flexible for calculating loss.**

Without getting into too much detail for these highly complex and fact-intensive cases involving fraudulent inflation or deflation in the value of a publicly traded security or commodity, the amendment for Application Note 3(F)(ix) simply makes clear that courts are free to use any method to determine loss that is appropriate for such cases and that the special rule at this particular application note should no longer be considered as a starting point for a rebuttable presumption of a loss calculation methodology.

2. Section 3B1.2: Mitigating Role To Apply In More Cases

The commission found that Section 3B1.2 mitigating-role reductions were applied inconsistently and too sparingly. Specifically, the commission reported the reduction was applied in just 7.6 percent of prosecutions and that three-quarters of those matters were drug cases. According to Saris, "the commission never intended for mitigating-role reductions to apply so rarely or to apply primarily in drug offenses."

To correct this, the commission amended the mitigating-role adjustment by adding a list of non-exhaustive factors for determining whether an offender is a minor or minimal participant. These factors go to the crucial question of the offender's individual culpability. They include the degree to which the defendant understood the scope and structure of the criminal activity, participated in its planning or organizing, exercised decision-making authority, and had a proprietary interest in the criminal activity, as well as the nature and extent of the defendant's participation and level of his discretion.

Section 3B1.2 provides a 2 to 4 level adjustment for offenders who commit an offense that makes him or her "substantially less culpable than the average participant." The 2015 amendments change the definition of "average participant" to refer only to those who actually participated in the criminal activity at issue. This means that the defendant's relative culpability is determined only by comparison to his or her co-participants in the criminal activity charged and not to the universe of all criminals participating in similar crimes. Moreover, even if the defendant's task in the criminal activity was integral or indispensable, the 2015 amendments permit a defendant to still qualify for a mitigating-role adjustment if, in comparison to the other participants in the criminal activity charged, the defendant's role is determined by the court to be limited in nature.

3. Section 1B1.3: Jointly Undertaken Criminal Activity Given Greater Clarity

Jointly undertaken criminal activity under the sentencing guidelines determines when an offender should be accountable for the criminal acts of others in imposing a sentence. This amendment restructures the Section 1B1.3 guideline and its commentary to make clear the three-step analysis to be applied because the earlier guideline had all three steps in the commentary but only two steps in the text of the guideline itself.

4. Monetary Tables Adjusted to Account for Inflation

Finally, the 2015 amendments provide inflationary adjustments using a specific multiplier derived from the Consumer Price Index to the monetary figures in monetary tables found in Sections 2B1.1 (theft and fraud), 2B2.1 (burglary), 2B3.1 (robbery), 2R1.1 (bid-rigging), 2T4.1 (tax), 5E1.2 (fines for

individuals) and 8C2.4 (fines for organizations).

Impact of the 2015 Guidelines on White-Collar Defense

The 2015 amendments steer away from the simple total count of victims in a crime and rightly focus on the substantial financial hardship suffered by victims. This, however, can result in harsher sentences for white-collar crimes in cases that involve just one victim. But the amendments also encourage sentencing courts to take into consideration the individual culpability of the offender by focusing on the offender's individual intent, knowledge and role in the offense in multiple ways. As such, the amendments allow for more proportionate and fairer sentencing, and are a much-needed correction to our federal sentencing system.