



March 18, 2015

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments to the Sentencing Guidelines

Dear Judge Saris,

We write on behalf of the board, staff and over 30,000 members of Families Against Mandatory Minimums to share our perspective on amendments proposed to the Guidelines for the 2014-2015 amendment cycle.

3. Jointly Undertaken Criminal Activity

The relevant conduct rule for jointly undertaken criminal activity at 3B1.3(a)(1)(B) has been among the most difficult of guidelines to explain to our members. Many cannot fathom how a person can be sentenced for the acts of others; acts they did not commit, and of which they were neither charged nor convicted. We can hardly blame them.

Anything that can allay the confusion for defendants, and, more importantly the courts that have to administer this troubling guideline, is welcome. The amendment would explicitly set out the three parts of the inquiry judges are to undertake in administering the guideline rather than having judges rely on the commentary for edification. It would also add some helpful guidance on the concept of “reasonable foreseeability.” FAMM supports the amendment because it sets out a coherent test for whether another’s conduct is so relevant to the defendant’s that it should be reflected in the sentence.

4. Inflationary Adjustments

FAMM agrees with the Commission that it is time to adjust the monetary tables to account for inflation. Loss drives (and it appears from this set of proposed amendments, will continue to drive) sentence lengths for a variety of crimes, especially economic offenses. As such, getting the numbers right is critical to ensure that defendants are not subject to longer terms based on outdated monetary tables.

As pointed out in the impact analysis, the difference in buying power from the time the tables were adopted or amended to today can be striking. The fraud and tax tables were last amended in 2001. By 2012, the buying power of the 2001 dollar had risen roughly 1/3 to \$1.34. The buying power of the dollar has almost doubled (to \$1.91) since the loss tables that govern

burglary and robbery were established in 1989. Adjusting the tables to account for these changes is a straightforward, commonsense, and fair proposal which we support. Doing so would reflect the reality of loss or gain in contemporary terms. Leaving the tables untouched would be tantamount to increasing the sentencing ranges – which have experienced a *de facto* rise in some instances absent the Commission’s intervention. This means some offenses today are punished much more severely than was intended when the tables were adopted.

We find the Justice Department’s opposition to this adjustment remarkable and insupportable. The Department asserts that the dollar amounts were fixed to “reflect distinctions in criminal activity ‘that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.’”¹ As such, the Commission “should only adjust the guidelines’ monetary amounts when they are no longer in step with their motivating social value judgments and no longer serve the purposes of sentencing.”² Assuming for the sake of argument that the community believed that the monetary tables at issue were properly calibrated when they were adopted many years ago, there is no question that they are no longer properly calibrated. This state of affairs means that sentences for certain offenses are longer than the community believed necessary when the tables were adopted. Far from producing an outcome “contrary to the overwhelming societal consensus that exists around these sentences,”³ adjustments for inflation assure the community that sentences are not greatly inflated beyond those intended when the tables were promulgated. Clearly, Congress would not direct the Commission today to establish outdated tables based on dollar valuations years, or even decades, old. And yet, those tables govern some sentencings today.

Given the stark differences in sentencing outcomes, due to the changes in the dollar over time, we would encourage the Commission to adjust for inflation as frequently as feasible and no less frequently than every four years. This is the standard that Congress imposes on agencies calculating civil penalties. Certainly the deprivation of liberty based on a monetary table should receive at least the same conscientious attention accorded a civil penalty. Contrary to the Department’s position, getting the tables right is certainly worth the effort.⁴

FAMM supports the second approach for making the adjustment. It accounts for dollar amounts greater than \$1,000,000 and reflects the reality of high loss sentencing ranges, something the first option cannot do or does only crudely, stopping as it does at \$200,000.

5. Mitigating Role

FAMM supports the proposals to amend the mitigating role adjustment. The changes suggested will simplify the courts’ approach, resolve differences between methods of measuring mitigating role, and focus the guidance on the measurable and knowable question of the defendant’s role relative to others participating in the defendant’s crime. Evaluating the

¹ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 13 (Mar. 9, 2015)(*Wroblewski Letter*).

² *Id.*

³ *Id.* at 13.

⁴ *Wroblewski Letter* at 14.

defendant's role against that of others involved in his or her specific crime is preferable to measuring it against a more amorphous standard of the typical offender. The proposed approach focuses the court on the specifics of the crime and the defendant's personal culpability vis-à-vis the other participants. Given that a "typical" offender can vary from crime to crime and geographically, clarifying that role is measured in the context of specific offense ensures that the defendant is evaluated for his or her role.

FAMM also supports the change in language to state that when certain factors are present the defendant may benefit from the reduction. This strikes us as preferable to the mixed message sent by saying that a reduction is not foreclosed when those factors are present. While we do not know if it will prompt a more robust use of the adjustment, it is hoped that the signal sent will exert a gravitational pull in favor of accounting for minimal or minor participation more frequently.

8. Economic Crime

We were encouraged when the Commission commenced the multi-year review of economic crime sentencing. FAMM has long taken an active interest in how the guidelines treat sentencing in this area. We have raised the need to address problems in this area with the Commission on a number of occasions.⁵ FAMM was an active member of the ABA Task Force on the Reform of Federal Sentencing for Economic Crimes, participated in the Commission's 2013 Symposium on Economic Crime, and fully endorsed the report and recommendations the Task Force produced and presented to the Commission in 2013 and updated in 2014.⁶

The Guidelines' mechanical reliance on loss, the accumulation of enhancements, and the steady creep upward in sentence lengths has resulted in guidelines that judges are less and less inclined to follow. While the problem is especially acute in the upper registers, it is evident throughout the loss amounts. In FY 2012, judges imposed a within-guideline sentence in only 50.6% of cases sentenced under U.S.S.G. § 2B1.1.⁷ In 2013, sentences for fraud offenses fell within the recommended range in only 47.4% of cases⁸ and preliminary figures from 2014 show the compliance rate falling to 43.4%.⁹ This caps a compliance free fall that started in 2004.¹⁰

⁵ See, e.g., Letter from Mary Price and Julie Stewart to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n 4 (Aug. 26, 2011) (encouraging study), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110826/FAMM_PubCom_2012_proposed_priorities.pdf; see also, Letter from Mary Price and Julie Stewart to the Honorable Patti B. Saris 12 (Jul. 23, 2012), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20120815/FAMM_priorities_comment.pdf (same).

⁶ The symposium devoted a panel discussion to the ABA proposal at the Symposium on Economic Crime (Sep. 18-19, 2013), <http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commissionsymposium-economic-crime>.

⁷ U.S.S.C. *Economic Crime Public Data Briefing* Fig. 1 (Jan. 9, 2015).

⁸ U.S.S.C., *2013 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 27, p. S-77, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013>.

⁹ U.S.S.C., *Fourth Quarter FY 15 Sentencing Update* tbl. 3, p. 8 (Dec. 22, 2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-4th-Quarterly-Report.pdf>.

¹⁰ *Id.*

While the variance rate and extent is particularly stark the higher the loss category, within-guideline sentencing falls to below 50% starting with losses of more than \$30,000 and settles in the mid-30% range for loss amounts greater than \$120,000.¹¹ And while the extent of variance appears minor in the lower loss categories, the charts do not account for the influence of pre-sentencing factors, such as plea agreements and the influence of charge and perhaps fact bargaining. All such practices are made possible by excessive sentence lengths under § 2B1.1.

Now, following extensive study and input, the Commission has taken the position that far from broken, § 2B1.1 is simply maladjusted in the very high loss categories. This is because the Commission has concluded that sentences are considered to “hew fairly closely to the guidelines for all but the highest dollar values, over \$1 million in loss.”¹² The few modest proposals to emerge from the multi-year study are, for the most part, fine as far as they go. But they do little to address the underlying problems we and others identified with the guideline. Moreover, as Frank Bowman demonstrates,¹³ the proposed amendments do even less to address the problems the Commission acknowledges exist at the high end.

This failure is particularly puzzling because these amendments leave in place key structural features of the guideline that have long come under criticism – i.e., undue reliance on loss that triggers significant sentencing ranges for high loss, and the multiple enhancements that can pile on to drive sentences higher still -- while not making key adjustments that could ameliorate excessive sentences at least at the very top end. Meanwhile, the Commission has brushed aside our recommendation that it comply with the directive from Congress in 28 U.S.C. § 994 (j) that the Commission “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” The need for some adjustment in this area is perhaps evident from the rise in the percentage of prison only sentences for economic crimes since 2003 and the corresponding fall in probation only sentence in the same period.¹⁴ While some of this may reflect the increasing loss figures, more needs to be done to address this neglected directive. The failure to do so is insupportable and readily fixable, whether by a cap, as the ABA Task Force proposed,¹⁵ or a departure provision.

We are disappointed and expect judges will continue to find that the guidelines result in sentences that are too long in 50% or more of the cases presented them. But we remain hopeful

¹¹ *Id.* at Fig. 5.

¹² Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, Remarks for Public Meeting (Jan. 9, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf>.

¹³ Frank O. Bowman, III, *Comment on Proposed Amendments to Economic Crime Guideline, §2B1.112-13* (Feb. 19, 2013), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf>.

¹⁴ U.S.S.C., Symposium on Economic Crime, *Sentencing and Guideline Application Information for §2B1.1 Offenders 5* (Sept. 18 – 19, 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sentencing_Guideline_Application_Info.pdf.

¹⁵ American Bar Association, *A Report on Behalf of the American Bar Association Task Force on the Reform of Federal Sentencing For Economic Crimes 1*, 6-7 (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/unclassified/criminal_justice/economic_crimes.authcheckdam.pdf.

that the Commission will take a lesson from the work of the ABA Task Force and use our observations and suggestions to eventually tackle the deep-seated problems with USSG § 2B1.1.

Intended loss.

We urge the Commission to end the use of intended loss. It would be better to use intent not as a way to accumulate loss but as a lens on culpability and *mens rea* as the ABA Task Force recommended. To the extent that intended loss remains a factor in calculating loss, certainly the Commission's proposal that the loss have been *purposely* intended by the defendant as discussed in Option 1 is preferable. We encourage the Commission not to borrow intent from other participants by way of the inference proposed in Option 1 or by the use of co-participant relevant conduct in Option 2. Because loss will continue to be the chief proxy for culpability and carries such overbearing influence, intended loss should be used prudently and sparingly. It should be calculated only when it is apparent and personal. Borrowing the intent of others to inflate a sentence above that called for using actual loss or in a case where no loss occurred should be abandoned.

Victims Table.

We appreciate the Commission's work to recalibrate the victim inquiry from simply counting the victims to assessing how the crime affected them. The proposed amendment halves the increases for sheer number of victims and introduces a new enhancement. While we don't think the proposal does enough, we nonetheless support limiting the enhancement for number in this fashion. We believe that counting victims does not get to the problem of impact in an appropriate fashion and would support the elimination of the practice entirely. The proposed new enhancement would focus on the question of substantial hardship to the victims and would increase sentencing by as much as six levels if 25 victims suffered substantial hardship.

If the Commission is to retain the overbearing influence of loss in the guidelines, which this set of amendments does not disturb, then it strikes us that adding an enhancement because some number of victims suffered substantial financial losses should be limited to the smaller enhancements (1, 2 and 3 rather than 2, 4, and 6). The financial loss is already captured by the loss table and would then be recaptured in the assessment of financial hardship under this proposal. We urge the Commission to therefore limit the enhancement so that it does not amount to double counting loss.

We oppose adding a non-economic loss enhancement, given that such impact is well covered by application notes that provide for an upward departure for non-economic impact. Application Note 20(A) clearly provides for an increased sentence where the offense was intended to cause, for example, emotional harm; caused or risked substantial non-monetary harm, substantial harm to reputation or credit; led to the victim's arrest or loss of employment, and so forth.¹⁶ This comprehensive illustrative note should provide judges all they need to address substantial harm other than substantial financial harm.

¹⁶ U.S.S.G. § 2B1.1 comment n.20 (A).

FAMM also supports eliminating the enhancement at (17)(B)(iii) of 4 levels for substantially endangering the solvency or financial security of 100 or more victims, as the proposed amendment would do.

Sophisticated Means.

FAMM supports the amendment to the extent it changes the sophisticated means inquiry to focus on the defendant's sophisticated conduct and clarifies that the conduct must involve a significantly greater level of planning or employ significantly more advanced methods than conduct common to offenses of the same kind. Better still would be the elimination of the enhancement altogether. That someone is able to employ sophisticated means doesn't tell us much about the harm caused or even the defendant's culpability. It means she used her skills to engage in and/or evade detection for criminal conduct. As long as loss leads the sentence, sophisticated means will likely always be a feature of the crime. This strikes us as another example of potential double counting.

Conclusion

Thank you for considering our views.

Sincerely,

Handwritten signature of Julie Stewart in blue ink, including the initials 'MS' at the end.

Julie Stewart
President

Handwritten signature of Mary Price in blue ink.

Mary Price
General Counsel