



July 15, 2013

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: NACDL Response to Request for Comment on Proposed Priorities

Dear Judge Saris:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we respectfully submit this letter in response to the Commission's request for comments on possible proposed priorities for the amendment cycle ending May 1, 2014. In this letter, we address two priorities, which we believe are most pertinent during this amendment cycle, and which were identified in the Commission's report *Continuing Impact of United States v. Booker on Federal Sentencing* as increasing in non-government below range sentences more than any other major offense category: (4) economic crimes and Section 2B1.1; and (12) child pornography offenses.

Priority 4: Economic Crimes and Section 2B1.1

NACDL commends the Commission's efforts to undertake a comprehensive study of § 2B1.1 and its consideration of amendments that might come out of such a study in light of the growing tendency of sentencing courts in cases of economic crimes to impose sentences well below the Guidelines range and the emerging consensus that the Guidelines consistently yield results that are unreasonably high both as a result of the loss table and the accretion of specific offense characteristics in the current § 2B1.1.

In undertaking this priority, we urge the Commission to consider the following:

1. **Overhaul.** We agree with comments from other organizations that the current Guideline should be replaced rather than amended because it is needlessly complicated, not based on empirical data or national experience, and when it was formulated the Commission failed to fulfill its characteristic institutional role. *See, e.g., United States v. Lenagh*, 2009 WL 296999 at *6 (D. Neb. Feb. 6, 2009) ("because the fraud offense Guidelines were promulgated pursuant to Congressional directive rather than by application of the Sentencing Commission's unique area of expertise, the court affords them less deference than it would to empirically-grounded

Guidelines”); Derrick R. Vollrath, *Note: Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 Duke L.J. 1001, 1032 (fraud Guidelines “resulted from a combination of the Commission’s policy determinations, reaction to public sentiment, and a desire to implement congressional policy”). Unreasonably long Guidelines sentences based on the combination of an inflated loss table and an accretion of overlapping specific offense characteristics have led courts to impose sentences outside the Guidelines with increasing frequency. Compare USSC 2012 Sourcebook of Federal Sentencing Statistics, Table 27A (23.8% of fraud sentences non-government sponsored below range) with USSC 2007 Sourcebook of Federal Sentencing Statistics, Table 27 (total of 12.8% of fraud sentences non-government sponsored below range). In particular, we ask the Commission to take note of the fact that the deterrence rationale for high sentences under the Guidelines cannot be supported by empirical data. See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”). Moreover, we urge the Commission to return to its original goal of “short but definite” terms of incarceration in most serious fraud cases in order to provide effective deterrence with sentences no longer than necessary to achieve the goals set forth in the Sentencing Reform Act, 18 U.S.C. § 3553(a)(2). See U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 56 (2004) [hereinafter *Fifteen Year Report*] (Commission sought to ensure that white collar offenders faced “short but definite period[s] of confinement”).

2. **Loss.** In formulating a new economic crimes guideline, the Commission should reduce the influence of loss on sentencing outcomes or acknowledge the need for increased flexibility for judges to consider loss among other aggravating and mitigating factors. Loss is a flawed measure of the seriousness of the offense. See *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing “the inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss” without any explanation of “why it is appropriate to accord such huge weight to [this] factor[]”). The amount of loss is often “a kind of accident” and thus “a relatively weak indicator of [] moral seriousness . . . or the need for deterrence.” *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004).
3. **Factor Creep.** In formulating a new economic crimes guideline, the Commission should safeguard against the accretion of overlapping specific offense characteristics, which has reached patently absurd levels under the current § 2B1.1. The Commission has recognized the problem of “factor creep,” in which as “more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.” *Fifteen Year Report* at 137. Many of the other seventeen specific offense characteristics in § 2B1.1 are “closely correlated” with each other and with loss. See Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds*

After Booker, 20 Fed. Sent. R. 167, 170, 2008 WL 2201039, at *6 (Feb. 2008). “In effect, what the Guidelines have done over time is to tease out many of the factors for which loss served as a rough proxy and to give them independent weight in the offense-level calculus... The result is that many factors for which loss was already a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table where sentencing ranges are wide.” *Id.* at *6-7. See also Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L. Rev. 1611, 1648-49 (2007) (factors such as sophisticated means and large number of victims “double-count because they are captured by other enhancements or by the loss calculation.”); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011) (“the loss table often overstates the actual harm suffered by the victim,” and “[m]ultiple, overlapping enhancements also have the effect of „double counting” in some cases,” while “the guidelines fail to take into account important mitigating offense and offender characteristics.”).

Priority 12: Child Pornography Offenses

NACDL applauds the Commission on its comprehensive work reflected in its report to Congress entitled *Federal Child Pornography Offenses* (the “Report”). The Report will undoubtedly be of enormous assistance to the Courts in better understanding the nature of child pornography offenses as well as crafting sentences consistent with the parameters set forth at 18 U.S.C. § 3553(a). As the Report is the first step in what likely will be a fundamental overhaul of USSG §2G2.2, and at least some substantive changes to USSG §2G2.1, NACDL believes it is of paramount importance for the Commission to give Courts and practitioners additional guidance in the interim with respect to these guidelines as it continues to study how best to amend them.

Accordingly, NACDL recommends that the Commission seek emergency amendment authority from Congress to delete USSG §2G2.2 until that time the Commission is able to promulgate a new guideline consistent with the findings of the Report and its continuing research and input from the public. Such a request is consistent with prior Commission action when recommending fundamental changes to a particular guideline. See, e.g., U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* at 9 (May 2007)(seeking “emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines” that the Commission had recommended to Congress). As it stands, the continuing validity of USSG §2G2.2, as well as portions of USSG §2G2.1, have been called into question by the Report. Thus, it is unclear whether USSG §2G2.2, at the very least, still is to be accorded any weight by the Courts, or even to be considered when imposing a sentence. Given this uncertainty, Courts might use the Report to disregard USSG §2G2.2 completely, or, as has occurred in at least one reported case, simply disregard selected portions of USSG §2G2.2. See *United States v. Abraham*, 2013 U.S. Dist. LEXIS 69151, *20-27 (D. Neb. 2013)(imposing a modified §2G2.2 framework based upon the Report: holding that for all future cases, the presumptive base offense level will be 20, the enhancement for use of a computer will never be applied and the enhancement for number of images will be “recalibrate[d] . . . to the realities of today”).

As a result, continued application of USSG §2G2.2 in its current form by district courts will contribute not only to increasing unwarranted sentencing disparity, but also uncertainty in sentencing. Indeed, courts now are imposing sentences within the range dictated by USSG §2G2.2 a mere 32.3% of the time, which is by far the lowest compliance rate of any major offense category. *See* U.S. Sentencing Comm’n, *2012 Sourcebook of Federal Sentencing Statistics* tbl. 28 (reporting 50.5% within guideline sentences under §2B1.1, 42.4% under §2D1.1, 50.5% under §2B1.1, 61% under §2K2.1, and 54.5% under §2L1.2; sentences under these guidelines constitute 79.8% of all federal sentences).

That the report already is having a significant impact not only on district courts, but on appellate courts, is evident. *See, e.g., United States v. Robinson*, 714 F.3d 466, 468 (7th Cir. 2013)(referencing the Report in support of finding that distribution enhancement requires proof defendant knew files could be downloaded by others). Thus, NACDL believes the most prudent approach is for the Commission to provide definitive guidance to the Courts by removing USSG §2G2.2 in its current iteration as soon as practicable via emergency amendment authority. Such an action will make it clear to the Courts and practitioners that USSG §2G2.2 is in the process of being overhauled, and that the (current) iteration of that guideline no longer is effective. *See, e.g., U.S. Sentencing Comm’n, Report to Congress: Cocaine and Federal Sentencing Policy* at 9 (May 2007)(“Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.”).

In the interim, Courts will be able to sentence child pornography offenses as if no such guideline existed pursuant to USSG §2X5.1. This approach, after all, is most consistent with the very purpose of the Report inasmuch as “most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously outmoded.” U.S. Sentencing Comm’n, *Report to Congress: Federal Child Pornography Offenses* iii (2012). Finally, NACDL encourages the Commission to hold regional hearings on child pornography offenses and sentencing considerations. Live testimony from stakeholders in various regions of the country will greatly assist the Commission in obtaining the most useful evidence and commentary as it continues its important work in revising and re-promulgating a new guideline for non-production child pornography offenses.

CONCLUSION

On behalf of the members of NACDL, we appreciate the opportunity to provide our observations regarding the above tentative priorities. We look forward to working with the Commission on these and other priorities during this amendment cycle.

Respectfully,



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