

MEMORANDUM

To: Kathleen Grilli
General Counsel, United States Sentencing Commission

From: James Felman
Reporter, American Bar Association Criminal Justice Section Task Force on the Reform of
Federal Sentencing for Economic Crimes

Re: Second Draft of Proposed Guideline

Date: May 15, 2014

Please find attached a Report on behalf of the ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes containing a revised draft of our proposal. We hope that it will be of assistance to the Commission as it continues its work on this important issue.

What is new in this draft

After presenting our initial draft at the Commission's Symposium last Fall in New York, the Task Force published the draft in the ABA CJS *Criminal Justice* magazine and the NACDL *Champion* magazine. We also distributed the draft informally to a number of individuals and groups. Through the publications and distributions, we sought and received comment and input on the draft.

Some of the comments we received caused us to try our hand at applying our draft guideline to specific case scenarios. We met in the Spring for that purpose and discussed how our draft would apply to seven different fact patterns. We were very comforted by this exercise, and it did not result in any changes to the text of the draft guideline itself. The discussion did, however, result in a number of modifications to the Application Notes and the addition of the Reporter's Notes following the Application Notes.

In the Application Notes, we tried to clarify the culpability factors, and the ways in which they relate to and overlap with loss, victim impact, and role in the offense. We made some clarifications to the victim impact note, particularly as that consideration relates to loss and institutional victims. Finally, we added to the note regarding the offense level cap for offenses that are not "otherwise serious" to clarify that this consideration should encompass both the offense as a whole and the defendant's individual contribution to the offense.

The Reporter's Notes contain the principles on which the members of the Task Force reached and continue to have consensus in support of the proposal, and they explain the emphasis we have placed in our work on the structure of the proposal. We continue to include offense levels in the proposal, but they remain in brackets and in some cases in a range to reflect the lack of empirical basis for these levels and our recognition of the inherently political component to determinations of punishment severity.

The Reporter's Notes further explain the intent of the proposal as a free-standing substitution for the existing Guideline Section 2B1.1, recognizing that this would require conformity with certain Congressional directives. We also wish to make clear that as with all guidelines in Chapter two, the proposal is intended to address offense characteristics, recognizing that offender characteristics are addressed in other portions of the Guidelines as well as under 18 U.S.C. § 3553(a). Finally, the Reporter's Notes explain why we believe our proposal complies with the "twenty-five percent rule" in 28 U.S.C. § 994(b)(2) once the offense levels presented as a range in brackets are reduced to a specific offense level.

What the Task Force will do next

In the coming months we will set forth the case scenarios we considered and explain how our proposal would apply to them. We hope these illustrations will further demonstrate the manner in which the proposal addresses the various factors we believe are most relevant in the sentencing of economic crimes, the relative weight that should be afforded those factors, and the manner in which our proposal effectuates a rank ordering of various types of economic offenses in relation to one another.

We also look forward to reviewing and considering any materials published by the Commission for comment. The Task Force is committed to participating in the Commission's ongoing work on these issues in any ways that can be of assistance to the Commission.