

# The April 2015 Proposed Amendments to the Federal Sentencing Guidelines

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**O**n April 30, 2015, the United States Sentencing Commission adopted a series of proposed amendments to the federal Sentencing Guidelines. Among the most significant recommendations were those related to economic offenses, which should result in shorter sentences for most offenders. Another significant change was made to the guideline for a mitigating role in the offense. This article discusses those changes.

For those unfamiliar with the Sentencing Guidelines, each federal crime has a corresponding guideline establishing a Base Offense Level. Various upward and downward adjustments (called “enhancements”) are applied based on the specific facts and circumstances of the offense to determine the Final Offense Level. The recommended sentence derives from a table that correlates the Final Offense Level with the defendant’s Criminal History Category.

## Inflationary Adjustments To Economic Loss Enhancements

For crimes resulting in a monetary loss to an identifiable victim, the defendant’s sentence is enhanced based on the greater of the actual or intended amount of loss, according to a table in U.S.S.G. § 2B1.1. This guideline applies to nearly a hundred different offenses — 12.1% of all federal offenders sentenced in 2014 — so the net effect of the proposed amendments should be pervasive.

The loss table in § 2B1.1 was last updated in 2001, and the amendments note that \$1.00 in 2001 is worth \$1.34 in 2014. Accordingly, the figures in the loss table have been increased by amounts ranging from 125% to 150%, based on the Consumer Price Index.

Among the most significant changes are that no enhancement is required for losses of \$6,500 or less (a change also made to multiple other guidelines); a +12 level enhancement now requires a \$250,000 loss, an increase of \$50,000; and a +18 level enhancement is not triggered until \$3.5 million, up from \$2.5 million. The maximum loss enhancement of +30 levels,

formerly triggered at \$400 million, now is not triggered until \$550 million.

Similar inflationary adjustments were made to the loss tables for burglary (§ 2B2.1) and robbery (§ 2B3.1) offenses, with increases of between 188% and 200%. Changes were also adopted for the loss tables in § 2R1.1 applicable to antitrust offenses (adjustments of 100% to 125%) and § 2T4.1 applicable to tax offenses (adjustments of 125% to 150%).

The Commission estimates these changes will reduce resulting sentences on the average of 26%. During the first year in which the amendments will apply, the Bureau of Prisons should realize an increase of 224 available prison beds, with the figure rising to 956 available beds at the end of the fifth year. At an annual cost of nearly \$30,000 to incarcerate one individual, the net savings over a five-year period could approach \$88 million.

The Department of Justice opposed any inflationary-related adjustments to the loss tables. In written comments to the Commission, the Department argued that inflationary-related adjustments would lead to “unwarranted” reductions in sentences for many offenders. *See* U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 16, 2015 (March 9, 2015) at p. 12 (available at <http://tinyurl.com/q2n9cj6>). The Department asserted that “[l]essening penalties for economic crime would be contrary to the overwhelming societal consensus that exists around these offenses.” *Id.* at 13.

Obviously, the Commission was not persuaded by the Department’s arguments. In fact, during the vote adopting the amendments, the Commission’s Chair, Chief Judge Patti B. Saris from the District of Massachusetts, cited the amendments as a “key example of the Commission’s good government focus to ensure the Guidelines and federal sentencing work well.” *See* U.S. Sentencing Commission, Public Meeting – April 9, 2015 (available at <http://tinyurl.com/pyxp56g>).

The Commission also proposed adjustments to the tables for recommended fines for

both individuals (§ 5E1.2) and corporations (§ 8C2.4). Individual fines increased between 167% to 200%, while corporate fines increased between 150% to 207%. The amendments specifically provide that these adjustments are prospective only; thus, for any offense committed prior to November 1, 2015, the sentencing court should use the recommended fines from the pre-amendment tables. This cautionary language was necessary to avoid *ex post facto* concerns if the increased fines applied to offenses occurring before the amendments took effect.

## Other Changes To Economic Crime Guidelines

The Commission has proposed another series of amendments to § 2B1.1 that are likely to impact sentences for many offenders.

A +2 level adjustment will now apply to offenses that result in substantial financial hardship to one of more victims. “Substantial financial hardship” includes becoming insolvent; filing for bankruptcy; losing retirement, education, savings, or investment accounts; making substantial changes to employment (*e.g.*, postponing retirement) or living arrangements (*e.g.*, moving to a less expensive residence); and substantial harm to one’s ability to obtain credit. This list is explicitly noted to be non-exclusive.

The amendments propose to eliminate upward adjustments that formerly applied if the offense involved more than 50 victims (+4 levels) or more than 250 victims (+6 levels), or if it “substantially endangered the solvency or financial security of 100 or more victims” (+4 levels). However, under the amendments, if the offense results in substantial financial hardship to 5 or more victims, a +4 level enhancement is triggered, and if substantial financial hardship is caused to 25 or more victims, a +6 level enhancement applies.

In the commentary to § 2B1.1, the Commission has amended the meaning of “intended loss.” Formerly, intended loss included “pecuniary harm that was intended to result from the offense.” That language now reads “pecuniary harm the defendant purposely sought to inflict.” This change is intended to resolve disagreement over how to

construe the former language. According to the Commission, the new language reinforces that “intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant’s culpability.”

Application of the +2 level enhancement under § 2B1.1(b)(10)(C) for use of a sophisticated means has been narrowed. Now, this adjustment will apply only if “the defendant intentionally engaged in or caused the conduct constituting sophisticated means.” In so doing, the Commission intends for the focus to be on the scope of the individual’s personal conduct, rather than the nature of the offense itself. This could be particularly helpful to minor participants in conspiracies that otherwise employ sophisticated means.

#### **Mitigating Role in the Offense**

Pursuant to § 3B1.1 and § 3B1.2, a defendant’s role in the offense can result in an upward or downward adjustment of the Total Offense Level, depending on whether the role was aggravating or mitigating. The Commission has proposed amendments to the downward adjustment for a mitigating role that it believes will result in more defendants receiving this adjustment.

The pertinent changes appear not in the text of § 3B1.2 itself, but rather in the commentary of Application Note 3(C), which instructs sentencing courts to apply a fact-based determination in deciding whether the mitigating adjustment should be -4 levels (a “minimal” role), -2 levels (a “minor” role), or -3 levels (roles falling between minor and minimal). Specifically, the Commission has added text setting forth a non-exclusive list of factors to examine, including: the defendant’s understanding of the scope and structure of the crime; the degree of the defendant’s participation in planning or organizing the crime; the extent to which the defendant exercised or influenced decision-making authority; the nature and extent of the defendant’s participation in the offense itself; and the degree to which the defendant stood to benefit from the unlawful activity.

Significantly, Application Note 3(C) advises sentencing courts that merely because “a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in this criminal activity.” This language was added in specific response to cases that concluded a defendant’s indispensable role was incompatible with a mitigating role adjustment. *See, e.g., United States v. Skinner*, 690 F.3d 772, 873-84

(6th Cir. 2012) (holding that a “defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme”).

#### **Conclusion**

A complete copy of the amendments, which stretch approximately 70 pages and contain changes to several other guidelines, is available at <http://tinyurl.com/o7chnay>. Barring contrary action by Congress, the Commission’s proposed amendments will take effect on November 1, 2015. Although these amendments do not represent a sea-change in federal sentencing policy, they should nonetheless have a real and substantial impact on many of the most common federal offenses, particularly economic offenses.



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