

SENTENCING COMMISSION AMENDS FRAUD GUIDELINES

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On April 9, 2015, the U.S. Sentencing Commission (Commission) adopted changes to the sentencing guidelines addressing fraud. In doing so, the Commission confronted previously held concerns regarding harm to victims, individual culpability for “bit” players in a fraud scheme and an individual offender’s intent. These proposed adjustments to the guidelines include more significant penalties for white collar crimes that “resulted in substantial financial hardship to one or more victims,” and where “the defendant intentionally engaged in or caused the conduct constituting sophisticated means,” according to [Commission materials](#). The proposed change, if adopted by Congress, would increase the severity of the offense by four levels at five or more victims (currently 50 or more victims), with an increase of six levels where 25 or more victims are harmed (currently 250 or more victims). The Commission also revised the guidelines addressing offenders who are “bit” players in a fraudulent scheme. These individuals are typically eligible to receive a reduced sentence. This was done by revising the definition of “intended loss.” Previously, it meant “... the pecuniary harm that was intended to result from the offense.” The “loss” definition now focuses on the pecuniary harm “the defendant purposely sought to inflict...” (Emphasis added.) “ [This change is intended to encourage courts to ensure that the least culpable offenders, such as those who have no proprietary interest in the fraud, receive a sentence commensurate with their own culpability without reducing sentences for leaders and organizers,](#)” said Chief Judge Patti B. Saris, Chair of the Commission. The Commission also made changes addressing fraud-on-the-market cases. In doing so, it took away the previous rebuttable presumption that the actual loss attributable to any change in value of a security or commodity can be calculated by a method specifically set forth in the guidelines. The revised language allows courts to “use any method that is appropriate and practicable under the circumstances, ...” This “method” may also include the suggested method contained in the guidelines. This presents a potential difficulty in that courts could end up utilizing a wide variety of valuation methodologies to determine actual loss. While this may afford counsel an opportunity to be very creative in addressing such calculations, it could result in severe contravention of the uniformity traditionally sought through application of the guidelines. “We found through comprehensive examination that the fraud guideline provides an anchoring affect in the vast majority of cases, but there were some problem areas, particularity at the high end of the loss table,” Saris said. “These amendments emphasis substantial financial harms to victims rather than simply the mere number of victims and recognize concerns regarding double-counting and over-emphasis on loss.” Clients who perform small roles in fraud cases will

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benefit from the “intended loss” amendment, allowing for lower sentencing ranges. Conversely, offenders who play a more central role in fraudulent activity could see higher sentences with the proposed guideline revisions. By law, these proposed amendments will be forwarded to Congress on or before May 1, 2015. Should Congress not act to disprove some or all of the amendments, they will go into effect November 1, 2015.