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Via comment.ussc.gov

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Ste. 2-500, South Lobby
Washington, D.C. 20002

Re: Proposed Amendments to the U.S. Sentencing Guidelines

Washington Legal Foundation (WLF) appreciates the opportunity to comment on the Commission’s 2025–26 proposed amendments to the Sentencing Guidelines. WLF is a public-interest law firm and policy center promoting free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF regularly comments on revisions to the Sentencing Guidelines,¹ files as amicus curiae in important sentencing cases,² and has long published commentary on various legal issues tied to federal sentencing.³

Free markets best contribute to human flourishing and sustained wealth creation when they are undergirded by a legal regime that consistently and fairly punishes wrongdoers. A society where corporations were not secure in their papers or effects,⁴ where the ancient crime of fraud went unpunished, or where courts heaped “arbitrary punishments upon arbitrary convictions”⁵ would not only be less just, it would be far poorer. Predictable, proportionate, and uniform sentencing rules have the opposite effect—ensuring that law-abiding “investors and commercial

¹ *E.g.*, WLF Comment, *Proposed Amendments to § 2B1.1 of the U.S. Sentencing Guidelines* (Mar. 18, 2015).

² *E.g.*, *Gall v. United States*, 552 U.S. 38 (2007).

³ Brian M. Heberlig & Amy Lester, *U.S. v. Kandirakis: A Bellwether Ruling on Sentencing Guidelines?*, 16 WLF Legal Op. Ltr. 29 (Nov. 3, 2006).

⁴ U.S. Const., amend. IV.

⁵ The Federalist, No. 83.

enterprises” may “cross state lines with confidence”⁶ because they can rationally comprehend and assess risk in compliance planning.

Predictable Sentencing

WLF commends the Commission’s proposal to adjust the Guidelines for inflation. “Congress enacted the sentencing statutes in major part . . . to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences.”⁷ That goal is undone when the same conduct gets a longer sentence merely because today’s dollar is worth far less than 2015’s—the last time the Commission adjusted the Guidelines to account for inflation.

What’s more, inflation adjustments ought to be a permanent fixture of the Guidelines, updated on an annual basis. The federal campaign finance laws require a regular inflation adjustment for contribution and expenditure limits, to ensure that the regular work of inflation does not fritter away the First Amendment rights of donors.⁸ The Commission ought to show even more concern for dollar thresholds that can affect the total amount of time an offender spends in prison—the ultimate deprivation of liberty for the living.

Relatedly, WLF supports the rational changes to the § 2B1.1(b)(1) loss table.⁹ Providing for no increase in offense level for economic crime losses valued between \$6,500 and \$15,000 recognizes that while an \$8,000 embezzlement is certainly serious today—it’s just not as severe a harm as it was ten years ago. That math will only continue with the passage of time unless fixed now.

The quintile-based enhancement recalculation also serves predictability interests, by broadly grouping economic crime loss into empirical zones of severity. This will stave off the “cliff effect” of a sudden jump in sentencing based off a modest difference in a calculated loss amount. And this will likely encourage sentencing that aligns more with the Guidelines because the jumps will “feel” intuitively more correct—which, in turn, creates risk predictability for market actors.

⁶ Charles J. Cooper & Howard C. Nielson, *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J.L. & Pub. Pol’y 295, 304 (2014).

⁷ *United States v. Booker*, 543 U.S. 220, 255 (2005).

⁸ Fed. Election Comm’n, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 90 Fed. Reg. 8526 (Jan. 30, 2025).

⁹ Proposed Changes at 59.

Proportionate Sentencing

Predictability is a necessary but insufficient virtue in a sentencing regime. To state the obvious, applying the death penalty to all crime would be predictable—you step out of line, you step into the injection chamber. But that wouldn't be just because such a regime isn't proportionate.¹⁰ And so inflation adjustments and tier reduction not only make the law more predictable, but they also ensure that sentencing is fairly proportionate to the offense.

WLF applauds those proposed changes that emphasize proportionality by recognizing that intent matters in the American criminal justice system. Level reductions make sense where an offender committed the crime because she was under serious duress to do so—blackmailed or threatened and “otherwise unlikely to commit such an offense.”¹¹ Similarly, the seriously physically disabled or mentally impaired should have that condition taken into consideration where it resulted in their inducement into committing the offense.

The Commission should likewise adopt, at the maximal bracket option of a six-level reduction, its proposal to recognize the “self-motivated rehabilitation”¹² of a defendant who, “prior to . . . knowledge of the criminal investigation or prosecution for the offense . . . made a good faith effort to return to the maximum extent possible to return the money or property to the victim.”¹³ That rule will incentivize economic criminals to repudiate their crimes and compensate their victims. And providing for a reduction where the offender self-rehabilitates without knowledge of an investigation or indictment will reward “turnaround[s]” that are “genuine, as distinct from a transparent attempt to build a mitigation case.”¹⁴

Uniform Sentencing

As noted, the Guidelines exist to reduce disparities in sentencing.¹⁵ All else being equal, the same crime should get the same time. While many of the above proposed changes also serve that uniformity interest, others risk upending it.

¹⁰ 18 U.S.C. § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary . . .”)

¹¹ Proposed Changes at 70.

¹² *Gall*, 552 U.S. at 59.

¹³ Proposed Changes at 70–71.

¹⁴ *Gall*, 552 U.S. at 57.

¹⁵ *Booker*, 543 U.S. at 255.

The proposed definition of “sophisticated means” merits two cheers. By emphasizing that sophistication goes to “increas[ing] the scale of the offense” or “mak[ing] especially difficult the detection of the defense or the detection of the defendant’s participation in the offense,”¹⁶ the new Guidelines would clarify that “sophisticated means” merit an enhanced sentence because it made the crime more heinous or the criminal likely to escape justice. That justifies treating a bog-standard fraud differently than a “sophisticated means” fraud—because the two frauds are genuinely different in kind to both victims and society.

But the Commission should balk at suggesting that judges should levy a sophisticated-means enhancement because the scofflaw “us[ed] advanced or emerging technologies” in a non-routine or “unusual way.”¹⁷ This seems aimed at recent advances in computer programming, commonly labeled as “artificial intelligence” (AI). To the extent that’s so, the Guidelines should at least expressly say that and explain why AI makes the difference. While that’s still suboptimal, planned obsolescence in the Guidelines is far preferable to creating an evergreen definition that could cause a disparate sentence because a future fraudster used, say, a newly fuel-efficient car to assist her in her crimes.¹⁸

Likewise, the Commission should reconsider its proposal to whole-cloth introduce non-economic harms into the Guidelines for economic crimes. The provided list of such harms is capacious (“such harms as physical harm, psychological harm, emotional trauma, harm to reputation or credit rating, and invasion of privacy interest”),¹⁹ and many of those phrases sound in federal and State criminal law, or even in tort.

This carries the risk that prosecutors might decline to charge defendants for their (perhaps difficult-to-prove) federal misconduct, try to get federal vengeance for a state-law violation, or step in the shoes of a complainant in a state tort case²⁰ by advocating for a post-conviction enhancement because the economic “offense resulted in” a relevant “non-economic harm.”²¹ But the “core meaning” of the “Fifth Amendment due-process clause . . . was to require lawful indictment or presentment

¹⁶ Proposed Changes at 68.

¹⁷ *Id.*

¹⁸ *Cf. Bond v. United States*, 572 U.S. 844, 866 (2014) (rebuffing Department of Justice effort to charge “a local assault with a chemical irritant as the deployment of a chemical weapon”).

¹⁹ Proposed Changes at 66.

²⁰ *See supra* at n.17.

²¹ Proposed Changes at 66.

by a grand jury,”²² while the Sixth Amendment ensures the case will be directly taken to a petit one. The Guidelines should avoid—even by implication—from offering a route around that constitutional mandate.

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As Antonin Scalia famously observed, the rule of law must be a law of rules.²³ Where the Guidelines provide for predictable, proportionate, and uniform sentencing, they accomplish that mission. Where they don’t, they risk taking judges on frolics and detours away from fundamental fairness. The Constitution demands the former and denounces the latter.

Respectfully submitted,

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²² Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96 (Yale Univ. Press 1998).

²³ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989).