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Honorable Patti B. Saris  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 2002-8002

**Re: Economic Offenses**

Dear Judge Saris:

Thank you for inviting representatives of the Federal Public and Community Defenders to participate in the 2013 Symposium on Economic Offenses. We understand that the Commission is aware of criticism of USSG §2B1.1 in cases with high loss amounts.<sup>1</sup> As the Commission moves forward in its work on economic offenses, the Defenders want to be clear about the significant problems with §2B1.1 as it applies to cases with lower loss amounts and lower-level offenders. Here we highlight those problems. In addition, we offer recommendations for change aimed at addressing the current problems with §2B1.1 across all loss amounts.

Our interest and experience in this topic runs deep. Defenders represent a significant number of the individuals charged with federal economic offenses. Our caseloads include a wide range of fraud charges, from those involving millions of dollars in securities, to social security fraud, to credit card theft, to false statements in Section 8 housing applications. Many of our clients are lower-level offenders and many of the cases involve lower loss amounts. Commission data indicate that more than half (53.9%) of all cases sentenced under §2B1.1 involve loss amounts of \$120,000 or less, and the vast majority, 83%, involve loss amounts of \$1

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<sup>1</sup> See, e.g., Transcript of U.S. Sentencing Comm'n Symposium on Economic Offenses, New York, NY, at 80 (Sept. 19, 2013) (Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n); Remarks of Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n at 12th Annual Compliance and Ethics Institute, Washington, DC, at 16 (Oct. 7, 2013).

million or less.<sup>2</sup> Sentences in these lower-level cases – not just in those at the top end of the loss table – routinely fall outside of the guideline recommended range. For example, in FY 2012, in cases involving loss amounts of more than \$30,000 and up to \$70,000, almost half (49.9%) of sentences fell outside of the guideline recommended range.<sup>3</sup> And in each of the next 4 loss categories, up to \$1 million, sentences fell outside the guideline recommended range well over half of the time (ranging from 59.7% to 65.6%).<sup>4</sup> Significantly, across all of these loss amounts, approximately one-third of the cases involved non-government sponsored sentences below the guideline range (ranging from 28.3% to 35.3%).<sup>5</sup> This is well above the national rate of non-government sponsored below guideline sentences for all offenses, which in FY 2012 was only 17.8%.<sup>6</sup> These statistics reflect our experience that for our clients – and for most of the fraud offenders – the current guideline often recommends unduly severe sentences. The problems with §2B1.1 are not limited to offenses involving high loss amounts.

### **A. Concerns With The Current Guidelines**

In past submissions to the Commission we have identified aspects of the guideline that have the most troubling impact on our clients, producing sentences that are greater than necessary for many low-level, non-violent fraud offenses.<sup>7</sup> We briefly highlight some of those issues below, and raise several new points, before addressing possible solutions.

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<sup>2</sup> USSC, Sentencing and Guideline Application Information for §2B1.1 Offenders, Symposium on Economic Crime, Sept. 18-19, 2013, at 6, [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Economic\\_Crimes/20130918-19\\_Symposium/Sentencing\\_Guideline\\_Application\\_Info.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Sentencing_Guideline_Application_Info.pdf) (“*Symposium Guideline Application Information*”).

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> USSC, *2012 Sourcebook of Federal Sentencing Statistics* tbl. N (2012) (*2012 Sourcebook*).

<sup>7</sup> Previous Defender submissions include: Statement of Kathryn N. Nester Before the U.S. Sentencing Comm’n, Washington, D.C., at 1-16 (Mar. 14, 2012); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7-9 (Aug. 26, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7-10 (July 23, 2012); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 15-21 (May 17, 2013).

## 1. Deterrence

The fraud guideline continues to rest on false assumptions about deterrence. The original Commission justified setting fraud sentences higher than past practice by asserting that “the definite prospect of prison, though the term is short, will act as a deterrent to many of these crimes.”<sup>8</sup> The evidence, however, shows no difference in deterrent effect between probation and imprisonment.<sup>9</sup> As mentioned by the experts at the Commission’s Recidivism Roundtable last month, it is well-supported and widely-accepted that deterrence is not linked to the severity of the penalty. Instead, the greatest deterrent effect is achieved through the certainty of getting caught and punished, not the severity of the punishment.<sup>10</sup> A good overview of the criminological research on certainty versus severity is available in an article by Valerie Wright, Ph.D., entitled *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010).<sup>11</sup>

## 2. Loss

**Loss table.** The loss table, which applies in the vast majority of §2B1.1 cases (85.3% in FY 2012<sup>12</sup>), significantly contributes to the problem of sentences that are greater than necessary for non-violent fraud offenders. First, it places too much emphasis on loss. The guideline should encourage more consideration of the real pecuniary harm done to victims, the gains

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<sup>8</sup> USSG, ch. 1, intro., pt. 4(d) (1987); see also USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004) (Commission sought to ensure that white collar offenders faced “short but definite period[s] of confinement”).

<sup>9</sup> 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).

<sup>10</sup> See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 *Criminology & Pub. Pol’y* 13, 37 (2011) (“The key empirical conclusions of our literature review are that at prevailing levels of certainty and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police.”), <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2010.00680.x/pdf>. A 2010 review of deterrence research concluded that there is “no real evidence of a deterrent effect for severity.” Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 *J. Crim. L. & Criminology* 765, 818 (2010). “[I]n virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity.” *Id.* at 817.

<sup>11</sup> <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

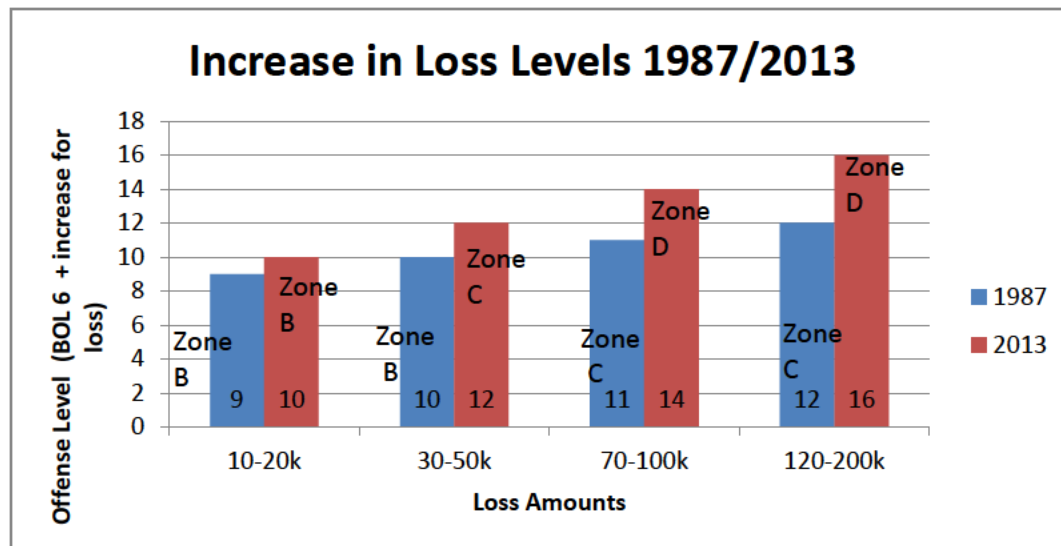
<sup>12</sup> *Symposium Guideline Application Information* at 6.

reaped by defendants, the defendant’s motive in committing the offense, and other factors relevant to the defendant’s culpability.

Second, for reasons unsupported by empirical evidence, the Commission repeatedly has increased the offense levels for various amounts. This is true across the entire loss table – for lower and higher loss amounts.

For example, in the bottom half of the loss table, as reflected below in Table A,<sup>13</sup> in 1987, a loss amount of more than \$10,000 and up to \$20,000 carried an increase of 3 levels, but now carries an increase of 4 levels. A loss amount of more than \$30,000 and up to \$50,000 carried an increase of 4 levels in 1987, but now carries an increase of 6 levels, pushing even first time offenders into Zone C. A loss amount of more than \$70,000 and up to \$100,000 has increased from 5 to 8 levels. A loss amount of more than \$120,000 and up to \$200,000 has increased from 6 to 10 levels.<sup>14</sup>

**Table A.**



<sup>13</sup> Table A shows the increase in offense levels for various loss amounts by comparing the 1987 and 2013 guidelines. The Zone references reflect available sentencing options for offenders in Criminal History Category I.

<sup>14</sup> The increases are even more extreme in the top half of the loss table. For example, loss amounts of more than \$2.5 million up to and including \$5 million have increased 8 levels since 1987. Loss amounts of more than \$7 million and up to and including \$20 million have increased by 9 levels, and loss amounts of more than \$100 million have increased by 15 levels. These increases in the top half of the loss table are so extreme that in comparison, the increases in the bottom half of the loss table could look negligible. But increases of 2, 3 and 4 levels in the bottom half of the loss table are significant. Every single level increase affects a person’s liberty by increasing the guideline recommended sentence, and at these levels, can mean the difference between probation and imprisonment.

And, accepting the premise of the loss table, that loss is a proxy for offense seriousness, inflation has worked to further increase penalties. Since \$35,000 is worth less today than it was in 1987, a fraud involving an offense of \$35,000 is less severe today than it was in 1987, yet it is punished more severely than it was in 1987. But instead of adjusting the offense levels down to account for inflation, the Commission has only increased them, making punishments significantly more severe today than they were for comparable offenses in 1987, without any evidence that such increases are necessary to serve the purposes of sentencing.

**Intended loss.** Intended loss rules can be particularly unfair, increasing loss amounts well beyond the actual loss or the culpability of the defendant. First, when intended loss rules are combined with relevant conduct rules, loss amounts easily and quickly climb beyond the loss actually intended by the defendant to include greater amounts intended by co-conspirators (over whom our clients often have no control). Second, special rules, such as those for credit cards, drive up loss amounts in an arbitrary manner that is not sufficiently connected to the individual defendant's culpability. The guideline commentary provides that "loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 *per access device*." USSG §2B1.1, comment. (n. 3(F)(i)) (emphasis added). Some courts calculate intended loss as the credit *limit* of the credit card. These rules drive up loss amounts even if no evidence shows the defendant planned to reach either \$500 or the credit limit. Third, it makes no sense to say intended, but impossible-to-obtain loss amounts provide an accurate reflection of offender culpability, yet the current definition of "intended loss" includes "pecuniary harm that would have been impossible or unlikely to occur." USSG §2B1.1, comment. (n.3(A)(ii)). Before the 2001 amendments, some courts limited intended loss to that which was possible,<sup>15</sup> and the guidelines specified that a downward departure may be warranted when, for example, a defendant attempted "to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it." USSG §2F1.1, comment. (n.11) (1987).<sup>16</sup> The guideline's current use of impossible-to-obtain loss amounts to

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<sup>15</sup> See, e.g., *United States v. Watkins*, 994 F.2d 1192, 1196 (9th Cir. 1993) (loss in check kiting scheme was the \$13,100 defendant obtained, not the \$42,600 face amount on the checks).

<sup>16</sup> This example was included in the original guideline, §2F1.1, comment. (n.11) (1987), and remained until the amendments of 2001, at which point this example was omitted, USSG App. C., Amend. 617 (Nov. 1, 2001). No explanation was given for removing this example. At the same time, the Commission amended the guidelines to provide that "intended loss" includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." The reason given for this new definition was that the "amendment resolves the [circuit] conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender.... Accordingly, concepts such as 'economic reality' or 'amounts put at risk' will no longer be considerations in the determination of intended loss." USSG, App. C, Amend 617 (Nov. 1, 2001).

increase the guideline range, rather than mitigate it, does not accurately reflect offender culpability.<sup>17</sup>

### 3. Victims

The often-applied victim table also leads to guideline-recommended sentences that are greater than necessary. The victim adjustment began as a way of capturing offenses that were not “isolated crime[s] of opportunity,” and was not designed to account for financial harm to any victim. USSG §2F1.1 (backg’d) (Nov. 1, 1987). Due to a series of amendments, the victim adjustment has become untethered from this original purpose and serves to double count the pecuniary harm already captured in the loss table. In doing so, it overstates the seriousness of the offense.

Another way in which the victim table works to overstate the seriousness of the offense and culpability of the offenders is through the expanded definition of “victim” which, as of 2009, includes “any individual whose means of identification was used unlawfully or without authority,” even if those individuals suffered no loss and even if they were unaware that their identifying information had been obtained or misused. USSG §2B1.1, comment. (n.4(E)). The Commission expanded the definition because it determined that a victim of identity theft, “even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculation under the guidelines.” USSG App. C, Amend. 726, Reason for Amendment (Nov. 1, 2009). Research has since revealed that the Commission’s determination was wrong. According to a survey by the Department of Justice, “[f]or each type of identity theft, the greatest percentage of victims resolved the problem in a day or less.”<sup>18</sup> Only about 20% of victims spent more than a month trying to clear up problems.<sup>19</sup> But the guideline’s broad definition of victim increases offense levels at the same rate, with unfair uniformity, whether the victims were some of the few who

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<sup>17</sup> See, e.g., *United States v. Corsey*, 723 F.3d 366, 378-79, (2d Cir. 2013) (Underhill, D.J., concurring) (“This was a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars.... Appellants’ conduct was not dangerous because they had absolutely no hope of success.... This conspiracy to defraud involved no actual loss, no probable loss, and no victim. The scheme was treated as sophisticated, but could be more accurately described as a comedic plot outline for a “Three Stooges” episode. Because the plan was farcical, the use of intended loss as a proxy for seriousness of the crime was wholly arbitrary: the seriousness of this conduct did not turn on the amount of intended loss any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars. By relying unquestioningly on the amount of the intended loss, the District Court treated this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts.”).

<sup>18</sup> Lynn Langston & Michael Planty, Dep’t of Justice, *Victims of Identity Theft*, 2008 5 (2010).

<sup>19</sup> *Id.*

had to spend over a month resolving the problem, or were never notified or otherwise aware of the theft.

The combination of this expanded definition of victim with the special loss rules can create recommended sentences in credit card cases that far exceed what is appropriate for the seriousness of the offense and the culpability of the offender. As mentioned above, whether the access device is used or not, the guidelines set the minimum loss amount of \$500 per access device, and many courts count the loss amount as the maximum credit limit on the card. On top of that, every person linked to a stolen access device counts as a victim, even if that person was unaffected or unaware of the theft. The cumulative impact of these rules can be sizable, even for low- or mid- level offenders, who operate skimmers or run errands for little remuneration.

#### 4. Other Specific Offense Characteristics

Other specific offense characteristics operate to further increase penalties beyond what is necessary and just in many cases.

**Sophisticated means.** The enhancement in §2B1.1(b)(10) for offenses involving sophisticated means has proven to be particularly troubling. The enhancement fails to narrowly capture more serious offenses and is often interpreted in a way that sets the bar for sophistication so low it could apply in every fraud case. For example, in a case where the defendant pled guilty to false use of a social security number, probation applied the sophisticated means enhancement where the defendant, who suffered from bipolar disorder, in an effort to obtain a student loan, presented an obviously torn and taped together Social Security card with her name and her son's Social Security number, and a letter purporting to be from the Social Security Administration confirming that her son's number belonged to her. The student loan organization saw right through this, confirmed the defendant's actual Social Security number, and denied the loan application.<sup>20</sup>

The enhancement is also overbroad because it applies whenever the scheme is sophisticated, even though a particular defendant may have no knowledge of the sophisticated scheme and is performing an unsophisticated role, such as driver or errand runner. Finally, although this enhancement is often unduly severe on its own, it becomes even more so when, for the same conduct, it is piled on top of the enhancement for possession or use of device-making equipment.<sup>21</sup>

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<sup>20</sup> The sentencing court, accepting the parties Rule 11(c)(1)(C) plea agreement, did not address whether the enhancement applied in this case.

<sup>21</sup> See, e.g., *United States v. Podio*, 432 Fed. App'x 308 (5th Cir. 2011); *United States v. Abulyan*, 380 Fed. App'x 409, 412 (5th Cir. 2010).

**Substantial part of scheme committed outside United States.** The enhancement in §2B1.1(b)(10) for offenses where “a substantial part of the scheme was committed from outside the United States” also produces guideline recommended sentences that overstate the seriousness of the offense and the culpability of the offender. This enhancement was added to “provide[ ] an increase for fraud offenses that involve conduct . . . that makes it difficult for law enforcement authorities to discover or apprehend the offenders.” USSG App. C, Amend. 577, Reason for Amendment (Nov. 1, 1998). At the time of the amendment the Commission was “informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States.” *Id.* Thus, the enhancement was designed to reflect increased seriousness and culpability where an offender has taken steps to make it difficult to be detected and captured. But now it is being applied more broadly than this, to less serious offenses, with less culpable offenders, where activities outside the United States do not reflect increased seriousness or culpability. We have seen this enhancement applied in cases where the defendant lived abroad, and the offense conduct targeted people both within and outside the United States. For example, in one case, the court applied this enhancement where the defendant was in the United Kingdom, not to evade U.S. law enforcement, or to make it difficult for law enforcement to detect the fraud, but because that is where he lived, having recently relocated there from Nigeria seeking education and work.<sup>22</sup> The charged fraud was operating in the United Kingdom, targeting people there as well as in the United States. And the United Kingdom investigated and prosecuted the fraud, until the United States reached out and extradited the defendant to face charges in the United States as well. A defendant’s residence in a different country at the time of the offense is not an offense characteristic that warrants the enhancement that applies to offenses where there has been an effort to avoid detection and capture.

**Floors.** We are also concerned that the floors or minimums that accompany the specific offense characteristics often overstate the seriousness of the offenses and culpability of the offenders. They set high floors for non-violent offenses, particularly when compared with the offense levels for violent offenses. For example, under §2A2.3, for an assault where physical contact is made, or use of a dangerous weapon is threatened, the guidelines provide for an offense level of 7, and even if there is bodily injury, the guidelines provide for an offense level of 9, well below the minimum offense level of 12 that accompanies the non-violent specific offense characteristics in §2B1.1(b)(10)-(12). This floor of 12 that applies to many of the non-violent fraud offenses is the same offense level that applies to someone who has obstructed an officer where the victim sustained bodily injury. *See* USSG §2A2.4. It is also the same as the offense level for involuntary manslaughter that involved criminally negligent conduct. *See* USSG §2A1.4.

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<sup>22</sup> *United States v. Olumuyiwa*, 406 Fed. Appx. 243 (9th Cir. Dec. 21, 2010).



## **B. Suggestions For Possible Changes To The Guidelines**

Over the years, on multiple occasions, the Commission has considered changes that would improve the guideline for economic offenses by addressing some of the concerns raised above.<sup>23</sup> The Commission has not yet implemented any of these changes. The time has come. The Commission's data shows that sentencing courts find the recommended guidelines too high, not just for cases at the top end of the loss table, but across all loss amounts. Sentencing courts have also provided feedback that the current guideline does not adequately capture the myriad factors relevant to the purposes of sentencing economic crime offenders. Consistent with that data and feedback, we offer a few suggestions below that would move the guideline in the right direction without fundamentally changing its structure.

### **1. Deterrence and Alternatives**

Because the current fraud guidelines do not serve the purposes of deterrence, and under 28 U.S.C. § 994(g), the Commission has an obligation to consider costs of incarceration and overcapacity of prisons, we urge the Commission to (1) encourage the use of alternatives to incarceration and (2) reduce the recommended terms of imprisonment.

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<sup>23</sup> See, e.g., Notices, United States Sentencing Commission, Sentencing Guidelines, 62 Fed. Reg. 152, 173 (Jan. 2, 1997) (inviting comment on whether loss should be “based primarily on actual loss, with intended loss available only as a possible ground for departure” and whether “the magnitude of intended loss should be limited by the amount that the defendant realistically could have succeeded in obtaining”); *id.* at 174 (inviting comment on “whether to specify that where the loss amount included through §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic or special rule to reduce the offense level in such cases.”); Notices, United States Sentencing Commission, Sentencing Guidelines 63 Fed. Reg. 602, 620 (Jan. 6, 1998) (inviting comment on downward departure or specific offense characteristic where loss amount is “far in excess of the benefit personally derived (or intended) by the defendant”); *id.* (inviting comment on “whether and in what circumstances gain should be used in lieu of loss, whether gain should play a part in the loss calculation, and whether there should be some adjustment or departure if gain differs significantly from the loss figure”); *id.* (inviting comment on whether loss should be based on actual loss, “with intended loss available only as a possible ground for departure, or whether some downward adjustment for defendants whose actual loss is greater than their intended loss is warranted”); Notices, United States Sentencing Commission, Sentencing Guidelines, 66 Fed. Reg. 7962, 7995 (Jan. 26, 2001) (proposing downward departure where “primary objective of the offense was a mitigating, non-monetary objective” and where loss exceeds defendant's actual or intended personal gain); *id.* at 8005 (proposing consideration of several mitigating factors).

## 2. Loss and mitigating factors

**Loss table.** The loss table should be reduced at least as low as its original levels established in 1987. As noted, those levels were set to produce sentences higher than past practice. No evidence shows that the subsequent increases are necessary to serve any of the purposes of sentencing. And, due to inflation, even if the offense levels had remained constant over the years, the penalties would be substantially more severe today than in 1987 for similarly serious conduct.

**Intended loss.** For the reasons discussed above, intended loss should be eliminated from the definition of loss, so that only actual loss is counted for purposes of applying the loss table. If, however, the Commission decides to keep this troublesome aspect of the guideline, at a minimum, the definition should be narrowed, so that intended, yet impossible-to-obtain loss amounts are not counted, and an example should be added to Application Note 19(C) making clear that a downward departure is warranted if intended loss greatly exceeds actual loss. In addition, if the Commission declines to exclude impossible-to-obtain loss from the definition of loss, Application Note 19(C) should be amended to specify that a downward departure may be warranted in such circumstances. For example, §2F1.1 used to provide that a downward departure may be appropriate where the “defendant attempts to pass a negotiable instrument so obviously fraudulent that no one would seriously consider honoring it.” USSG §2F1.1, comment. (n.11) (2000).

**Mitigating factors.** Even after the table is adjusted and intended loss is excluded, loss amounts need to be mitigated by a variety of factors. Below are a few ideas on how this could be accomplished within the structure of the current guideline.

- Clarify and/or expand the mitigating role adjustment in §3B1.2. Defenders recommend the following change to §3B1.2, which would affirmatively encourage use of the adjustment:

Likewise, **an adjustment under this guideline should generally be considered for** a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme ~~is not precluded from consideration for an adjustment under this guideline.~~ For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, ~~is not precluded from~~ **should generally be considered** ~~for an adjustment under this guideline.~~ **Similarly, a defendant who received little personal gain relative to the loss amount, and whose role was limited to such tasks as running errands, making**

deliveries, and other similar activities, with little or no control over the loss amount, should generally be considered for an adjustment under this guideline.

- Impose an offense level cap of 10 and encourage courts to consider alternatives to incarceration for offenders within Criminal History Category I, where mitigating circumstances exist. Common mitigating factors include (but are not limited to):
  - Mitigating role (with suggested revisions to §3B1.2);
  - Defendant received little personal gain relative to loss;
  - Defendant's motive was to retain a job and/or defendant gained nothing other than a salary;
  - Defendant committed the offense to supplement a meager income and/or to meet basic needs;
  - Defendant did not actively participate in fraudulent misrepresentations;
  - Defendant began with good intentions, such as a real investment plan, or an intent to repay the loan;
  - Defendant's conduct was anomalous, and followed a stressful life event;
  - Defendant's conduct was due to mental health problems and/or addiction;
  - Defendant was coerced or under duress;
  - External factors, such as market forces significantly increased loss;
  - Victim was negligent or otherwise significantly contributed to the loss amount;
  - Defendant has taken steps to mitigate the harm and/or has stopped participating in the offense;
  - Intended loss greatly exceeds actual loss (this example is only necessary if the Commission rejects Defenders' suggestion to eliminate "intended loss");
  - Defendant's conduct was so obviously fraudulent, no one would have seriously considered it real, and/or the intended loss would have been impossible to obtain (this example is

only necessary if the Commission rejects Defenders' suggestion to eliminate or at least narrow the definition of "intended loss").

- Specify in Application Note 19(C) that, whether or not the defendant qualifies for the offense level cap, mitigating factors like those listed for the cap, may warrant a downward departure.

### **3. Victim table**

We recommend eliminating the victim table. Its application is confusing – resulting in a much higher rate of appellate reversals than occurs for other §2B1.1 enhancements<sup>24</sup> – and it produces unfair sentences by often double counting pecuniary harm, and by sometimes counting as victims those who have not suffered any adverse consequences. Enhancing sentences due to the number of victims is simply not necessary to further the purposes of sentencing. When there are adverse consequences for some or all of the victims, this is not captured by ticking off the number of victims, but instead can be addressed by deciding where within the range to sentence the defendant, and application of the vulnerable victim adjustment, §3A1.1, when appropriate. In addition, in serious cases where the offense substantially endangered the solvency or financial security of 100 or more victims, §2B1.1(b)(15)(B) already provides for a 4-level increase with a minimum offense level of 24. And, when there is an otherwise serious impact on victims, the guideline already provides for an upward departure when the offense level “substantially understates the seriousness of the offense.” USSG §2B1.1, comment. (n.19(A)). Finally, because retributive punishment can only go so far in vindicating victims’ interests, restitution may be a better mechanism than prison time for addressing pecuniary harm to victims.

If the Commission declines to eliminate enhancements based on only the number of victims, the Commission should, at minimum, limit their application to cases where there is evidence that the offense substantially endangered the solvency or financial security of the counted victims. It simply makes no sense to count as victims people who were fully reimbursed or who never suffered even a temporary monetary loss. In addition, to reflect the original intent of the enhancement, the Commission should provide that it does not apply if the offense was an isolated crime of opportunity. If the enhancements remain, we also encourage the Commission to provide an invited downward departure where application of the victim table double counts loss.

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<sup>24</sup> 2012 *Sourcebook* tbl. 59 (Affirmance rate for challenges to the number of victims was 79% compared with 93.3% for challenges to loss amount/calculation, 93.6% for challenges to sophisticated means enhancement, and 96.5% for other fraud and deceit issues.).

#### 4. Other Specific Offense Characteristics

**Sophisticated means.** We recommend eliminating the enhancement for sophisticated means. It is too ambiguous and subjective to meaningfully and consistently distinguish more serious offenses and offenders. In addition, sufficient sentencing options exist within the ranges and through Chapter Three adjustments to address the relative sophistication of a defendant's actions. For example, as the background to §2B1.1 makes clear, this enhancement is targeted primarily at addressing efforts to conceal and difficulty of detection, so may be addressed with the adjustment for Obstruction, §3C1.1. Similarly, truly aggravated circumstances can be sufficiently addressed with the adjustments for Aggravating Role, §3B1.1, and Abuse of Position of Trust or Use of a Special Skill, §3B1.3.

While we believe "sophisticated means" is too ambiguous for meaningful application, if the Commission insists it be a part of the guideline, it would be a step in the right direction to replace the specific offense characteristic with two departure provisions: an invited upward departure where the defendant used particularly sophisticated means, and a companion downward departure where the lack of sophistication is notable. But if the concept remains, as either a specific offense characteristic or a departure, it must be narrowed. First it should apply only where a *defendant* uses sophisticated means, rather than the current, broader enhancement where the *offense* involved sophisticated means. Second, the commentary needs to be amended because the current definition does not provide sufficient guidance that this enhancement applies only to a subset of offenders – those who engage in highly sophisticated conduct that is not common in fraud offenses.<sup>25</sup> Finally, it should provide that it does not apply when the device-making enhancement at §2B1.1(b)(11) is applied.

**Substantial part of scheme committed outside United States.** We recommend the Commission amend §2B1.1(b)(10) to exclude what are largely foreign offenses, and that are not as serious as those where the location reflects an intent to avoid detection and capture. We propose amending the enhancement as follows:

If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) **the defendant committed** a substantial part of a fraudulent scheme ~~was committed~~ from outside the United States **to evade United States' law enforcement or regulatory officials and targeted a substantial number of persons located in the United States;** or (C) the offense otherwise involved sophisticated means, increase by 2 levels.

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<sup>25</sup> The difficulty of this task supports our position that the enhancement needs to be eliminated because it cannot reliably distinguish more serious offenses and offenders.

**Floors and caps.** We urge the Commission to cap the cumulative effect of the enhancements in §2B1.1(b)(3)-(19), to avoid disproportionate cumulative adjustments. In addition, for the reasons discussed above, Defenders recommend that the floors be eliminated for the non-violent offenses.

### 5. Safety-Valve

The Commission may also wish to consider crafting a safety-valve for fraud cases. The Commission took this step in the drug guideline to mitigate the harsh effects of using drug quantity as the measure of culpability. The Commission could likewise amend the guidelines to better account for the mitigating factors present in fraud cases. Such a “safety-valve” could apply to low-level defendants who disclose to the government the names of other participants of the scheme in exchange for a reduction in their offense level.

### C. Conclusion

We thank the Commission for its attention to economic offenses, and for considering our concerns about the application of the current guidelines in cases with lower loss amounts and lower-level offenders. Defenders are hopeful improvements can be made to the current guidelines that will address the problems that exist for a wide variety of offenses and offenders, not just those who fall at the high end of the loss table. We look forward to working with the Commission as it moves forward on its work on economic offenses.

Very truly yours,  
/s/ Marjorie Meyers  
Marjorie Meyers  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

### Enclosures

cc (w/encl.): Hon. Ricardo H. Hinojosa, Vice Chair  
Hon. Ketanji Brown Jackson, Vice Chair  
Hon. Charles R. Breyer, Vice Chair  
Dabney Friedrich, Commissioner  
Rachel E. Barkow, Commissioner  
Hon. William H. Pryor, Commissioner  
Jonathan J. Wroblewski, Commissioner *Ex Officio*  
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