

HOT TOPICS IN FRAUD

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This presentation is intended to touch on challenging issues that arise throughout the handling of a fraud case – from pre-indictment through sentencing. While each of these issues would merit a full presentation on their own, our goal is merely to assist practitioners by encouraging them to think about these issues in advance and to provide some sources of information that may help in addressing these challenges as they arise.

PRE-INDICTMENT & DISCOVERY STAGE

I. Parallel Civil and Criminal Investigations/Proceedings

More and more often we are seeing government coordination of civil and criminal investigations and proceedings, including but not limited to civil investigations by the SEC, CFTC and the IRS, all of which create extreme challenges for the criminal defense practitioner. The representation of indigent clients is even more problematic, due to the fact that many of them cannot afford attorneys to represent them in their simultaneous civil proceedings, so they are responding *pro se* to complex and inculpatory discovery requests and participating in depositions with Fifth Amendment implications.

Some of the immediate issues you need to be prepared to address when you find yourself in overlapping civil and criminal investigations and/or court proceedings include:

- Should you enter a special appearance in the civil proceeding for the purpose of seeking a stay until the conclusion of the criminal matter?
- Should you enter a special appearance in the civil proceeding for the purpose of asserting Fifth Amendment rights in response to discovery requests or in order to attempt to quash a subpoena ?
- Should you attend and silently observe depositions to learn information that impacts the criminal investigation?
- Should you advise your client to assert the Fifth Amendment to all questions in his/her deposition?

- How involved should you be in the drafting of any settlement documents – especially if the SEC is demanding an admission of some sort of fraud?
- How involved should you be with Receivers and their demands for documents from your client?
- At what point does “coordination” between a US Attorney and a civil agency become bad faith sufficient to support motions to suppress and/or dismiss in the criminal matter?
- How do you handle your billing/budget issues with your District Court when you know substantial work will be involved in connection with the civil matter?

There are no hard and fast rules to any of these questions, but the failure to think through these issues may lead to missed opportunities to access valuable information at the beginning of your case or to devastating admissions on the part of your client. Attachment A is the case of *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), which contains a good summary of the law regarding the propriety of coordinated investigations and the boundaries of bad faith on the part of the Government and may come in handy as you are analyzing whether or not to file motions in the criminal case. We also refer you to an excellent article by Walter P. Loughlin, Esq., titled “Parallel Civil and Criminal Proceedings” and printed by the ABA in their *Practical Litigator* publication - the link to the article is Attachment B. Mr. Loughlin’s article fleshes out a lot of these dilemmas and provides numerous helpful case citations.

II. Handling Original Documents that may be Evidence

If you regularly handle fraud cases, it is inevitable that at some point you will come into possession of original client files – either paper or electronic. Or, alternatively, you will become aware that your client has such materials in his or her possession (like on a thumb drive in a box at home or in a random storage unit somewhere) and there is a strong likelihood that the Government would be very interested in seeing the documents in question. Some of the ethical questions raised in this scenario include:

- What should you advise your client about retention of records during the investigation phase but before Indictment? Does that change after Indictment?
- If the records come into your possession and you subsequently become aware they have evidentiary value, what is your duty (if any) to disclose to the Government?
- What is your duty if you become aware your client has destroyed records?
- If you become aware of records being stored digitally or otherwise, is it a good idea to bring them to your office to review them? Does it matter if you view them elsewhere?

As with all ethical dilemmas, it is always a good idea to start with the rules of professional conduct. The ABA's Model Rules of Professional Conduct contain multiple rules which may apply in this situation – some of which are in direct conflict. Of course, you begin with Rule 1.6, which lays out the Duty of Confidentiality to your client. However, you cannot stop there. Rule 3.4 which lays out your duty of Fairness to Opposing Counsel addresses your obligation not to block access to evidence and Rule 4.1, Truthful Statements to Others, also bears some relevance here. There is no clear guidance in the Model Rules for this tricky scenario. Therefore, a clearer avenue to a solution can be found in the ABA Standards of Criminal Justice, which deal specifically with the unique duties of criminal defense counsel. Standard 4-4.7 is very instructive and deals specifically with handling physical evidence that may have incriminating implications. A copy of the Standard is Attachment D, and a link to a very thorough article from the ABA's Criminal Justice magazine debating the ethical issues surrounding this topic is found on Attachment C.

TRIAL STAGE

I. Dangerous Catch Phrases

The Government loves to throw around ominous-sounding catch phrases such as “Ponzi scheme”, “fraudster”, “sham”, “scam”, “con-man”, “predator”, “tax protester”, “sovereign citizen” etc. etc., when describing the defendant or

the case to the Jury. The use of such terminology is prejudicial pursuant to Rule 403 of the Federal Rules of Evidence and without a basis in the law and serves no other purpose than inciting outrage and bias in the jury. As defense counsel, we should push back against the use of this sort of damaging rhetoric and consider motions *in limine* seeking their exclusion at trial. Sometimes, even more subtle phrasing can be used – such as emphasizing that a company is a “limited liability corporation” to insinuate that such a designation is improper or used to protect a defendant from consequences of illegal or wrongful conduct.

II. Overly Simplified Demonstrative Exhibits

An often used Government tactic in complex fraud cases is to attempt to “summarize” thousands of pages of discovery materials with some sort of oversimplified chart or spreadsheet, which is actually nothing more than a map of the Government’s theory of the case without the context or details that would generate a true summary. Often, the Government seeks to refer to such damaging exhibits without having laid the proper foundation of evidence to support the summary. Furthermore, many of these demonstrative exhibits are replete with legally conclusory statements such as “evidence of fraudulent statements”, etc.

Attached as Exhibit E is a fairly recent Tenth Circuit case of *United States v. Irvin*, which gives a great summary of the law and a compelling argument as to why these types of Exhibits are so damaging and improper at trial.

III. Exploring the Defense of Solvency

“Solvency is entirely a matter of temperament and not of income.” Logan P. Smith

In a large complex fraud case, the government routinely relies on a “money trail” to prove the element(s) of “scheme”, “artifice” “misrepresentation” or “omission.” The government also routinely uses the transfers of proceeds within an entity as evidence of “materiality.” To whom is money NOT material? Fraud cases are difficult to simplify and the government must always carry this piano on their back.

The government routinely attempts to accomplish this difficult task of simplifying sometimes years of financial transactions and machinations by reducing a business - real, half-baked or ethereal - to the concept of a person with a bank account, a computer and maybe a credit card. Through the use of forensic accountants, receivers, IRS agents and others, the government will inevitably attempt to show victim money entering the scheme and then those proceeds being allocated for incorrect (read illegal) purposes. Some blatant examples:

1. The use of "LIFO" accounting principles (Last in first out) to prove the scheme.
2. The use of a bank statement, or worse a 1006 exhibit, to bolster the term "ponzi."
3. The fact that the defendant profited - maybe even like a CEO - as evidence of criminality.

Juries must be disenfranchised of the concept that every business decision is subject to scrutiny. The real issue that a jury should determine is whether an entity is, can or could be solvent and whether the business transactions were just that- TRANSACTIONS - even if they are risky, undocumented, or just plain dumb. Even those types of decision are not in and of themselves criminal.

In short, consider analyzing your evidence in terms of discussing a business and not a person. Use business terms and business experts. Discuss how difficult it is to define solvency. So many things can come into play such as company assets (tangible or intangible), the ability to borrow, accounts receivables (maybe just outstanding loans that are undocumented..). And yes, even goodwill - ask your expert. A business that is even potentially profitable can be justified in expending new money to cover an old debt. A business with working capital can do just that: work its capital. If a company can, in some form or fashion, be deemed solvent, the company will more than likely be given more deference in its actions by the jury. Solvency is a malleable term that can give space for many questionable business decisions.

SENTENCING

I. 2015 Amendments to the Guidelines

The United States Sentencing Commission voted to promulgate several amendments that will affect, and oftentimes may reduce, sentences in fraud cases. If Congress does not disapprove the amendments, they will go into effect on November 1, 2015. Attachment F provides you with a summary of the amendments and the complete, redlined versions of the proposed Amendments with commentary attached. The commission addressed Mitigating Role, Jointly Undertaken Criminal Activity, Inflationary Adjustments, Intended Loss, Victims Table, Sophisticated Means and Fraud on the Market. Interestingly, at the public hearing on the proposed amendments the Department of Justice opposed most of the amendments arguing that any move to reduce the sentences in fraud cases would ignore the “overwhelming societal consensus” in favor of harsh punishment for these crimes.

The new battleground arising out of these Amendments is the definition of loss amount. “Intended loss” is now directly tied to what the defendant purposefully sought to inflict. It is no longer what “could have been” the result. Defense counsel should carefully review the changes to the definition and try to craft a defense around their client’s specific intent.

II. Restitution

An oft repeated battle cry of lawyers defending mortgage fraud cases is that downstream lenders are getting a windfall when the Court uses the original mortgage amount as a starting point for determining proper

restitution. It is commonly known in the industry that downstream lenders are able to purchase the original mortgages at a much reduced cost. A recent case in the 10th Circuit held that in mortgage fraud cases where the “victim” owed restitution was a downstream lender who purchased the mortgage from the original lender for less than its original amount, the “actual amount” of loss subject to a restitution order is the amount the downstream lender ACTUALLY PAID the original lender, less the amount received from the foreclosure sale. Attachment G is a copy of the case, *United States v. Roger Keith Howard*. This type of analysis may come in handy in other types of restitution arguments as well.

III. White Collar Registries

The Utah Legislature recently passed a measure to build the nation’s first white-collar offender registry, which will include a recent photograph of the offender along with their date of birth, height, weight, eye and hair color. A copy of the legislation is Attachment H. While this is a fairly new idea and has not yet been adopted in other states, it is definitely a trend to watch and to think about as your client ponders their options.

Below is the link to an excellent article about Parallel Civil and Criminal Proceedings contained in the ABA's Practical Litigator publication.

http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT1103-Loughlin_thumb.pdf

Attachment B

A good article examining the ethical obligations of attorneys who come into possession of documents which may have evidentiary value to the Government.

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_uphoff.authcheckdam.pdf

Attachment C

Standard 4-4.7 Handling Physical Evidence With Incriminating Implications

(a) *Counseling the client:* If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. Counsel should then competently advise the client about lawful options and obligations.

(b) *Permissible actions of the client:* If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) *Confidentiality:* Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client's possession or disposition of, such physical evidence.

(d) *Receipt of physical evidence:* Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) *Compliance with legal obligations to produce physical evidence:* If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer

Attachment D

who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

(f) *Retention of producible item for examination.* Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

(g) *Testing physical evidence.* If defense counsel determines that effective representation of the client requires that such physical evidence be submitted for forensic examination and testing, counsel should observe the following practices:

(i) The item should be properly handled, packaged, labeled and stored, in a manner designed to document its identity and ensure its integrity.

(ii) Any testing or examination should avoid, when possible, consumption of the item, and a portion of the item should be preserved and retained to permit further testing or examination.

(iii) Any person conducting such testing or examination should not, without prior approval of defense counsel, conduct testing or examination in any manner that will consume the item or otherwise destroy the ability for independent re-testing or examination by the prosecution.

(iv) Before approving a test or examination that will entirely consume the item or destroy the prosecution's opportunity and ability to re-test the item, defense counsel should provide the prosecution with notice and an opportunity to object and seek an appropriate court order.

(v) If a motion objecting to consumptive testing or examination is filed, the court should consider ordering procedures that will permit independent evaluation of the defense's analysis, including but not limited to:

(A) permitting a prosecution expert to be present during preparation and testing of the evidence;

(B) video recording the preparation and testing of the evidence;

(C) still photography of the preparation and testing of evidence; and

(D) access to all raw data, notes and other documentation relating to the defense preparation and testing of the evidence.

(h) *Client consent to accept a physical item.* Before voluntarily taking possession from the client of physical evidence that defense counsel may have a legal obligation to disclose, defense

counsel should advise the client of potential legal implications of the proposed conduct and possible lawful alternatives, and obtain the client's informed consent.

(i) *Retention or return of item when law permits.* If defense counsel reasonably determines that there is no legal obligation to disclose physical evidence in counsel's possession to law enforcement authorities or others, the lawyer should deal with the physical evidence consistently with ethical and other rules and law. If defense counsel retains the evidence for use in the client's representation, the lawyer should comply with applicable law and rules, including rules on safekeeping property, which may require notification to third parties with an interest in the property. Counsel should maintain the evidence separately from privileged materials of other clients, and preserve it in a manner that will not impair its evidentiary value. Alternatively, counsel may deliver the evidence to a third-party lawyer who is also representing the client and will be obligated to maintain the confidences of the client as well as defense counsel.

(j) *Adoption of judicial and legislated procedures for handling physical evidence.* Courts and legislatures, as appropriate, should adopt procedures regarding defense handling of such physical evidence, as follows:

(i) When defense counsel notifies the prosecution of the possession of such evidence or produces such evidence to the prosecution, the prosecution should be prohibited from presenting testimony or argument identifying or implying the defense as the source of the evidence, except as provided in Standard 3-3.6;

(ii) When defense counsel reasonably believes that contraband does not relate to a pending criminal investigation or prosecution, counsel may take possession of the contraband and destroy it.



U.S. Sentencing Commission

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NEWS RELEASE

April 9, 2015

U.S. SENTENCING COMMISSION ADOPTS ECONOMIC CRIME AMENDMENTS *Increases Penalties for Hydrocodone Trafficking*

WASHINGTON, D.C. (April 9, 2015) — The United States Sentencing Commission voted today to adopt changes to the fraud guideline to address longstanding concerns that the guidelines do not appropriately account for harm to victims, individual culpability, and the offender's intent. The Commission also voted to change the drug quantity table to account for the rescheduling of hydrocodone.

The Commission altered the victim enhancement in the fraud guideline to ensure that where even one victim suffered a substantial financial harm, the offender would receive an increased sentence. It also made changes to refocus economic crime penalties toward the offender's individual intent, while maintaining an underlying principle of the fraud guideline that the amount of loss involved in the offense should form a major basis of the sentence.

"We found through comprehensive examination that the fraud guideline provides an anchoring effect in the vast majority of cases, but there were some problem areas, particularly at the high-end of the loss table," said Chief Judge Patti B. Saris, chair of the Commission. "These amendments emphasize substantial financial harms to victims rather than simply the mere number of victims and recognize concerns regarding double-counting and over-emphasis on loss."

The Commission also acted today to provide additional guidance as to which offenders are eligible to receive a reduced sentence as a minor or minimal participant in an offense. "This change is intended to encourage courts to ensure that the least culpable offenders, such as those who have no proprietary interest in a fraud, receive a sentence commensurate with their own culpability without reducing sentences for leaders and organizers," Saris said.

The Commission voted to increase penalties associated with hydrocodone, a prescription narcotic. In October 2014, the Drug Enforcement Administration (DEA) rescheduled some forms of hydrocodone from Schedule III to the more serious Schedule II. Schedule II drugs include cocaine, oxycodone, and morphine. The Commission heard testimony from scientific experts as to the abuse potential of new stronger formulas of hydrocodone and that hydrocodone is virtually identical in effect to oxycodone, which already is widely abused.

Attachment F

“The DEA has expressed its concern, and input from the scientific and medical community and law enforcement makes clear, there is a growing risk associated with illegal use of hydrocodone,” Saris said. “Today’s amendments are the right policy decision to make penalties for hydrocodone and oxycodone equivalent.”

The Commission also made an adjustment to monetary tables to account for inflation. This good-government measure derives from a methodology provided by Congress and will have an effect on both penalty and fine tables.

The amendments will be transmitted to Congress by May 1, 2015. If Congress does not act to disapprove some or all of the amendments, they will go into effect November 1, 2015. More information about this process and the amendments approved today will be available on the Commission’s web site at www.ussc.gov.

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines structure the courts’ sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

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Summary of 2015 Proposed Amendments to the Sentencing Guidelines
National Sentencing Resource Counsel Project¹
April 10, 2015

On April 9, 2015, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2015. Barring congressional action, they will take effect November 1, 2015. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission's website at: <http://bit.ly/1ar7IMX>.

Because none of these amendments will become effective until November 1, 2015, any arguments based upon them before that date must be done in the form of a variance. Although some of the amendments will reduce sentences, the Commission declined to consider whether they should be made retroactive.

1. Mitigating Role

The Commission made some modest changes to the mitigating role guideline that clarify its operation and that should result in more defendants receiving a mitigating role adjustment. First, it addressed a circuit split on the meaning of "average participant," adopting the approach of the Seventh and Ninth, which defines "average participant" by reference to those persons who participated in the criminal activity at issue in the defendant's case. It rejected the approach of the First and Second Circuits, which required a court to consider the defendant's culpability relative to his co-participants and to the typical participant in a similar crime.

Second, it added a non-exhaustive list of factors for the court to consider in determining whether to apply a -4, -2, or intermediate adjustment:

- i. the degree to which the defendant understood the scope and structure of the criminal activity;
- ii. the degree to which the defendant participated in planning or organizing the criminal activity;
- iii. the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- iv. the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- v. the degree to which the defendant stood to benefit from the criminal activity.

¹ Sentencing Resource Counsel Project is a national project of the Federal Public & Community Defenders.

Third, the commentary now states by way of example that “a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.” It also provides that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.” This latter change rejects the approach of many circuits, which have held that a defendant who plays an indispensable or essential role does not qualify for a mitigating role adjustment.

Fourth, the commentary discussing individuals who perform limited functions has been changed to state that they “may receive” a mitigating role adjustment rather than that they “are not precluded” from receiving an adjustment.

2. Jointly Undertaken Criminal Activity

The Commission voted to promulgate an amendment to §1B1.3, restructuring the guideline and its commentary to “set out more clearly the three-step analysis the court applies in determining whether the defendant is accountable for acts of others in the jointly undertaken criminal activity.”

The three step analysis requires that before a court may consider the acts and omissions of others under §1B1.3(a)(1)(B), it must find that those acts and omissions were (1) “within the scope of the jointly undertaken activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity.” The commentary to §1B1.3 also makes clear that if one of those criteria is not met, the conduct is “not relevant conduct” under the “jointly undertaken provision.”

The Commission had requested commented on whether it should replace the reasonable foreseeability requirement with a higher mens rea, but it declined to take up the issue this amendment cycle. For a potential variance argument on why “reasonable foreseeability” is a negligence standard that does not satisfy the statutory purposes of sentencing, see the Defender comments to the Commission, available on fd.org at <http://bit.ly/1yZ6nTw>.

3. Inflationary Adjustments

The Commission, for the first time in the history of the guidelines, voted to amend the monetary tables to account for inflation. This means it will take larger loss amounts to trigger enhanced offense levels. For example, it will take a loss amount of more than \$40,000 instead of \$30,000 to trigger a +6 enhancement under USSG §2B1.1.

This amendment also increases the fines tables. The Commission added a special note to §5E1.2 providing that for “offenses committed prior to November 1, 2015, use the applicable guideline range that was set forth in the version of §5E.12(c) that was in effect on November 1, 2014.” This note presumably is intended to avoid ex post facto problems.

It is worth noting that with this amendment, the Commission treats the various monetary tables in the guidelines differently, using different time frames for different guidelines. For example, §2B1.1 is adjusted for inflation since 2001, whereas the monetary tables in §2B2.1 and §2B2.3 are adjusted for

inflation since 1989. The Commission claims this takes “into consideration the year each monetary table was last amended” but ignores, as the Commission has admitted, that the monetary values in the Chapter Two offense guidelines have “never been revised specifically to account for inflation.” For more on this, and arguments to use in support of variances in cases involving the monetary tables that received less favorable treatment, see the Statement of Michael Caruso.²

4. Economic Crime

a. Intended Loss

The Commission amended the definition of intended loss at §2B1.1 comment. (n.3(A)(ii)) to limit intended loss to the pecuniary harm “that the defendant purposely sought to inflict.”

b. Victims Table

The Commission made several changes to the victims table. First, with these amendments, the only enhancement based solely on the number of victims is now a +2 for 10 or more victims. The enhancements for 50 or more, and 250 will be eliminated effective Nov. 1, 2015. Second, the amendments brings new victim enhancements. Starting Nov. 1, 2015, when the offense resulted in “substantial financial hardship” to victims, the following enhancements will apply:

- +2: substantial financial hardship to **one** or more victims.
- +4: substantial financial hardship to **five** or more victims
- +6: substantial financial hardship to **twenty-five** or more victims

It is important to note that these new enhancements for substantial financial hardship are **not** cumulative to the enhancement for 10 or more victims, but rather alternatives.

The Commission also amended the commentary to provide a list of factors the “court shall consider, among other factors” in determining whether the offense “resulted in substantial financial harm to a victim.” Specifically, whether the offense resulted in the victim:

- i. becoming insolvent;
- ii. filing for bankruptcy;
- iii. suffering substantial loss of a retirement, education or other savings or investment fund;
- iv. making substantial changes to his or her employment, such as postponing his or her retirement plans;
- v. making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and

² Attached to Defender comments to the Commission, available on fd.org at <http://bit.ly/1yZ6nTw>.

vi. suffering substantial harm to his or her ability to obtain credit.

The amendments made three other victim related changes:

- The Commission removed the 4-level enhancement at 2B1.1(b)(16) for offenses that “substantially endangered the solvency or financial security of 100 or more victims”
- The Commission changed one of the special rules for undelivered United States Mail. An undelivered mail case that involved a relay box, collection box, or the other listed containers shall be considered to have involved at least 10, instead of 50, victims. This lowers the increase in offense level from +4 to +2.
- Because substantial harm to a person’s credit record is now a factor to be considered for purposes of the victim enhancements, the Commission deleted the upward departure provision based on substantial harm to a victim’s credit record, or the inconvenience of repairing that record.

c. Sophisticated Means

The Commission’s amendment “narrows the scope of the specific offense characteristic to cases in which the defendant intentionally engaged in or caused (rather than the offense involved) sophisticated means.” USSG §2B2.1(b)(10)(C) as amended provides: “the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.”

d. Fraud on the Market

Although the Commission just amended the guidelines in 2012 to add a rebuttable presumption that loss should be calculated in a specific way in cases involving the fraudulent inflation or deflation of a publicly traded security or commodity, this year, the Commission changed course. With these amendments, the Commission now advises courts to “use any method that is appropriate and practicable under the circumstances.” The previously recommended method is now just “one... method the court may consider.”

5. “Single Sentence” Rule

The Commission voted to promulgate an amendment that makes several changes to USSG §4A1.2, addressing a circuit split between the Eighth and Sixth Circuits about whether sentences counted as a “single sentence” qualify as a predicate conviction under the career offender guideline, §2K1.3 (explosives), and §2K2.2 (firearms). While the Eighth Circuit had the better approach,³ the Commission voted to “generally follow[]” the Sixth Circuit. This means that a prior considered as part

³ See Statement of Jon M. Sands, attached to Defender comments to the Commission, available on fd.org, here: <http://bit.ly/1yZ6nTw>.

of a “single sentence” for purposes of criminal history points counts as a predicate for career offender and other guidelines “if it independently would have received criminal history points.” If more than one prior within a group of offenses considered as a single sentence is a “crime of violence” or a controlled substance offense under §4B1.2, only one may count as a predicate offense.

In addition to this change, the Commission made several stylistic changes to §4A1.1 and 4A1.2 so that references to sentences “counted” as a single sentence” are changed to “treated” as a single sentence.

6. Hydrocodone

In response to the DEA’s rescheduling of hydrocodone from Schedule III to Schedule II and the FDA’s approval of “single-entity” hydrocodone products that are not combined with acetaminophen or similar substances, the Commission decided to change the drug equivalency table so that hydrocodone is treated like oxycodone: 1 gram of hydrocodone (actual) is equivalent to 6700 grams of marijuana.

The Commission adopted this amendment despite substantial evidence that the oxycodone guideline is not based on empirical evidence and other evidence that hydrocodone does not have the same abuse potential as oxycodone. For information that may help challenge the new hydrocodone guideline, see the Defender comments and Statement of Lex Coleman, available on fd.org at <http://bit.ly/1yZ6nTw>.

PROPOSED AMENDMENT: ECONOMIC CRIME

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission's multi-year study of §2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines, including examination of the loss table, the definition of loss, role in the offense, and offenses involving fraud on the market. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).*

The proposed amendment contains four parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. They are as follows:

***Part A** revises the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)). Two options are presented, one of which would reflect certain principles discussed in the Tenth Circuit's decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). Issues for comment on intended loss are also provided.*

***Part B** addresses the impact of the victims table in §2B1.1(b)(2). It proposes to establish a new enhancement for cases where one or more victims suffered substantial [financial] hardship and to reduce the levels of enhancement that apply based solely on the number of victims. Two options are provided. It includes issues for comment on the victims table and other provisions relating to victims.*

***Part C** revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways. An issue for comment is also included.*

***Part D** addresses offenses involving fraud on the market and related offenses. Issues for comment are also included.*

(A) Intended Loss

Synopsis of Proposed Amendment: *This part of the proposed amendment revises the definition of “intended loss” at §2B1.1, comment. (n.3(A)(ii)). While the current definition for intended loss was added as part of the Economic Crime Package in 2001, see USSG App. C, amend. 617 (eff. Nov. 1, 2001), the concept of intended loss has been included in the fraud and theft guidelines since the inception of the guidelines, see USSG §2F1.1, comment. (n.7) (1987). Note 3(A)(ii) states that “intended loss”—*

(I) means the pecuniary harm that was intended to result from the offense; and (II) 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 Commission has received comment expressing concern regarding the operation of intended loss, including suggestions that the Commission consider certain revisions to better reflect a defendant’s culpability. In addition to these comments, the Commission has observed some disagreement in the case law regarding whether intended loss requires a subjective or objective inquiry. In United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011), the Tenth Circuit held that a subjective inquiry is required, which is similar to holdings in the Second, Third and Fifth Circuits. See United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had “proven a subjective intent to cause a loss of less than the aggregate amount” of fraudulent loans); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim); United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this determination, we look to the defendant’s subjective expectation, not to the risk of loss to which he may have exposed his victims.”); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) (“our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level”). On the other hand, the First and the Seventh Circuits have issued decisions that support a more objective inquiry. See United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (“we focus our loss inquiry for purposes of determining a defendant’s offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes”); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct”).

The Commission is publishing this proposed amendment and issues for comment to inform the Commission’s consideration of these issues. Two options are bracketed for comment. They are as follows:

Option 1 *would state that intended loss means the pecuniary harm “that the defendant purposely sought to inflict” and that the defendant’s purpose may be inferred from all available facts. This would reflect certain principles discussed in the Tenth Circuit’s decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). In Manatau, the defendant was convicted of bank fraud and aggravated identity theft. The district court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was “both possible and potentially contemplated by the defendant’s scheme.” 647 F.3d at 1049-1050. On appeal, the Tenth Circuit reversed, holding that “intended loss” contemplates “a loss the defendant purposely sought to*

inflict,” and that the appropriate standard was one of “subjective intent to cause the loss.” 647 F.3d at 1055. Such an intent, the court held, may be based on making “reasonable inferences about the defendant’s mental state from the available facts.” 647 F.3d at 1056.

Option 2 is similar to Option 1, but would also encompass the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant.

Issues for comment on intended loss are also provided.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

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Application Notes:

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3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

[Option 1: (ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that was intended to result from the offense ~~the defendant purposely sought to inflict;~~ and (II) 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 defendant’s purpose may be inferred from all available facts, including the defendant’s actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.]~~

[Option 2: (ii) Intended Loss.—“Intended loss” (I) means ^(a) the pecuniary harm that was intended to result from the offense ~~the defendant purposely sought to inflict and~~ ^(b) the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant.

and (II) 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).

An individual's purpose may be inferred from all available facts, including the individual's actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.

- (iii) Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

* * *

Issues for Comment:

1. *The Commission seeks comment on whether the definition of “intended loss” should be revised or refined, in the manner contemplated by the proposed amendment or in some other manner, to clarify or simplify guideline operation or for other reasons consistent with the purposes of sentencing. What changes, if any, should the Commission make to the definition of “intended loss”?*

How should the definition of “intended loss” interact with other parts of the guidelines? For example:

- (A) *Should intended loss be limited to the amount the defendant personally intended, or should it also include amounts intended by other participants, such as participants (i) that the defendant aided and abetted, and/or (ii) that were in a jointly undertaken criminal activity with the defendant?*
 - (B) *How should intended loss interact with the commentary relating to partially completed offenses in §2B1.1, Application Note 18 (providing that, in the case of a partially completed offense, the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy))?*
2. *Section 2B1.1 provides that for the determination of loss under subsection (b)(1), the court shall use the greater of “actual loss” or “intended loss.” Should intended loss be limited in some manner?*

(B) Victims Table

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses issues relating to the impact of the victims table in §2B1.1(b)(2) as well as other provisions relating to victims in §2B1.1.*

The victims table provides a tiered enhancement based on the number of victims. It provides an enhancement of 2 levels if the offense involved 10 or more victims or was committed through mass-marketing; 4 levels if the offense involved 50 or more victims; and 6 levels if the offense involved 250 or more victims.

*First, the proposed amendment provides a new enhancement at subsection (b)(3)(A) that applies if the offense resulted in substantial [financial] hardship to one or more victims. Two options are presented. Under **Option 1**, the enhancement applies if there are one or more such victims and the amount of the enhancement is bracketed at [2][3][4] levels. **Option 2** provides a tiered enhancement based on the number of such victims. Specifically, if there is at least [one] such victim, the enhancement is [1][2] levels; if there are at least [five] such victims, the enhancement is [2][4] levels; and if there are at least [25] such victims, the enhancement is [3][6] levels. The proposed amendment also provides factors for the court to consider in determining whether substantial [financial] hardship resulted. Several of those factors, bracketed in the proposed amendment, are non-monetary and are derived from the upward departure provision at Application Note 20(A)(vi). The proposed amendment also brackets the possibility of deleting Application Note 20(A)(vi).*

Both options also bracket the possibility of a “cap” that limits the cumulative impact of subsection (b)(2) and the new (b)(3)(A) to [6] levels.

Second, the proposed amendment revises the impact of the victims table by reducing the enhancements in the table from 2, 4, and 6 levels to 1, 2, and 3 levels, respectively.

Third, the proposed amendment deletes prong (iii) of subsection (b)(16)(B), relating to an offense that substantially endangered the solvency or financial security of 100 or more victims.

Finally, the proposed amendment includes issues for comment on other possible changes to the operation and impact of the victims table and other provisions relating to victims in §2B1.1.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

- (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

* * *

(2) (Apply the greatest) If the offense—

- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by ~~2~~ levels; ~~1~~ level;
- (B) involved 50 or more victims, increase by ~~4~~ levels; or
- (C) involved 250 or more victims, increase by ~~6~~ levels.

[Insert the following as (3) and renumber other provisions accordingly:

[Option 1:

- (3) (A) ~~[If the offense resulted in substantial financial hardship to one or more victims, increase by 2][3][4] levels.]~~
- (B) ~~[The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed 6] levels.]~~

[Option 2:

- (3) (A) ~~(Apply the greatest) If the offense resulted in substantial financial hardship to—~~
 - (i) ~~[one] or more victims, increase by [1][2] levels;~~
 - (ii) ~~[five] or more victims, increase by [2][4] levels; or~~
 - (iii) ~~[25] or more victims, increase by [3][6] levels;~~
- (B) ~~[The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed 6] levels.]~~

* * *

~~(16)~~(17) (Apply the greater) If—

- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or
- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; ~~or~~ (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had

1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.

- (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(16)(7)(B) shall not exceed 8 levels, except as provided in subdivision (D).
- (D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

* * *

Commentary

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Application Notes:

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[Insert the following and renumber other notes accordingly:

~~5. Enhancement for Substantial [Financial] Hardship (Subsection (b)(3)). In determining whether the offense resulted in substantial [financial] hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—~~

~~(A) becoming insolvent;~~

~~(B) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);~~

~~(C) suffering substantial loss of a retirement, education, or other savings or investment fund;~~

~~(D) making substantial changes to his or her employment, such as postponing his or her retirement plans;~~

~~(E) making substantial changes to his or her living arrangements, such as relocating to a less expensive home;~~

~~(F) suffering substantial harm to his or her reputation or credit record, or a substantial inconvenience related to repairing his or her reputation or a damaged credit record;~~

~~(G) being erroneously arrested or denied a job because an arrest record has been made in his or her name;~~

~~(H) having his or her identity assumed by someone else.]~~

* * *

20. Departure Considerations.—

(A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.
- (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).
- (iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.
- (v) In a case involving stolen information from a “protected computer”, as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

~~[(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:~~

~~(I) The offense caused substantial harm to the victim’s reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation or a damaged credit record.~~

~~(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.~~

(HH) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.]

* * *

Issues for Comment:

1. *The Commission seeks comment on whether the victims table and other parts of §2B1.1 adequately address the harms to victims. If not, what if any additional enhancements or other provisions should the Commission provide to address those harms?*

Alternatively, should the Commission amend §2B1.1 to limit the impact of the victims table if no victims were substantially harmed by the offense? For example, should the Commission provide that the 4-level and 6-level prongs of the victim table apply only if the offense substantially endangered the solvency or financial security of at least one victim?

2. *The proposed amendment would establish a new enhancement if the offense resulted in substantial [financial] hardship to one or more victims, and provides factors for the court to consider in determining whether the enhancement applies.*

The Commission seeks comment on the scope of the enhancement and the factors provided. Should the new enhancement encompass non-monetary harms? If so, what non-monetary harms should it encompass? Should any factors be deleted or changed? Should any additional factors be added? If so, what factors?

How should this new enhancement interact with other provisions in §2B1.1 that account for harm to victims? For example, how should this new enhancement interact with the victims table in subsection (b)(2), the enhancement for theft from the person of another in subsection (b)(3), the enhancement for means of identification in subsection (b)(11), and the enhancement for unauthorized public dissemination of personal information in subsection (b)(17)(B)? Should this new enhancement be fully cumulative with the victims table and the other enhancements, or should the Commission reduce the cumulative impact of these various provisions?

3. *Section 2B1.1(b)(16)(B)(iii) provides a 4-level enhancement if the offense "substantially endangered the solvency or financial security of 100 or more victims." The Commission seeks comment on whether subsection (b)(16)(B)(iii) should be eliminated (as reflected in the proposed amendment) or, in the alternative, whether the number of victims required by subsection (b)(16)(B)(iii) should be reduced. If the number of victims should be reduced, what number of victims should be required?*

(C) Sophisticated Means

Synopsis of the Proposed Amendment: *As part of its overall examination of §2B1.1, the Commission is considering issues relating to the application of the sophisticated means enhancement set forth in subsection (b)(10)(C). In doing so, the Commission identified two issues that are the subject of this part of the proposed amendment.*

First, the existing enhancement applies if “the offense otherwise involved sophisticated means.” Applying this language, courts have applied this enhancement without a determination of whether the defendant’s own conduct was “sophisticated.” See, e.g., United States v. Bishop-Oyedepo, 480 Fed. App’x 431, 433-34 (7th Cir. 2012) (affirming enhancement for mortgage loan officer who submitted three fraudulent applications because the other schemer’s actions were “reasonably foreseeable”; stating that “because [the defendant] knew of the scheme and the scheme as a whole was sophisticated, the adjustment was appropriate regardless of the sophistication of her individual actions”). Relatedly, courts have varied in their analysis as to whether a scheme must be “sophisticated” in comparison to any fraud that could be sentenced under §2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue. Compare United States v. Jones, 530 F.3d 1292, 1307 (10th Cir. 2008) (affirming application of enhancement because scheme at issue was “readily distinguishable from less sophisticated means by which the myriad crimes within the ambit of §2B1.1 may be committed”), with United States v. Wayland, 549 F.3d 526, 529 (7th Cir. 2008) (affirming application of enhancement because the “scheme required a greater level of planning or concealment than the typical health care fraud case”) and United States v. Hance, 501 F.3d 900, 909 (8th Cir. 2007) (stating that the sophisticated means enhancement is appropriate when the “mail fraud, viewed as a whole, was notably more intricate than that of the garden-variety mail fraud scheme”).

The Commission is publishing this part of the proposed amendment to inform its consideration of whether the enhancement should be revised such that it applies based only on the defendant’s conduct rather than offense as a whole, and whether the conduct should be compared only to similar frauds or to all frauds that could fall within the scope of §2B1.1.

The proposed amendment revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways.

Specifically, it specifies that sophisticated means is determined relative to offenses of the same kind, and it narrows the scope of the specific offense characteristic to cases in which the defendant used (rather than the offense involved) sophisticated means.

An issue for comment is also included.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

- (10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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9. Sophisticated Means Enhancement under Application of Subsection (b)(10).—

- (A) Definition of United States.—For purposes of subsection (b)(10)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.
- (B) Sophisticated Means Enhancement under Subsection (b)(10)(C).—For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct that displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense than a typical offense of the same kind, pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.

In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant engaged in or caused such conduct, i.e., the defendant committed such conduct or the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused such conduct. See §1B1.3(a)(1)(A).

- (C) Non-Applicability of Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

* * *

Issue for Comment:

1. *The proposed amendment would specify that “sophisticated means” is determined relative to other offenses of the same kind. What guidance, if any, should the Commission provide for determining what offenses are of the same kind, for purposes of determining sophisticated means? For example, are all telemarketing fraud offenses of the same kind, or should distinctions be made among different kinds of telemarketing fraud offenses, or — conversely — are all telemarketing fraud offenses in fact a subset of a broader category? Similarly, are all theft offenses of the same kind, or are there broader or narrower distinctions that should be made?*

(D) Fraud on the Market and Related Offenses

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. The proposed new guideline is a result of the Commission's continued work on fraud offenses and, in particular, in the area of securities fraud and "fraud on the market" offenses. See 79 FR 49379 (August 20, 2014) (identifying as a Commission priority for the current amendment cycle the continuation of its work on economic crimes, including among other things a study of offenses involving fraud on the market).*

The proposed amendment also involves the Commission's past work in implementing the directive in section 1079A(a)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203.

Specifically, section 1079A(a)(1)(A) directed the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses."

In addition, section 1079A(a)(1)(B) provided that, in promulgating any such amendment, the Commission shall—

- (i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—
 - (I) the serious nature of the offenses described in subparagraph (A);*
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and*
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);**
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;*
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;*
- (iv) make any necessary conforming changes to guidelines; and*
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.*

Securities fraud is prosecuted under 18 U.S.C. § 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory

maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

Securities fraud is also prosecuted under 18 U.S.C. § 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. § 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. *See* §2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to §2B1.1.

Under the proposed amendment, the court is directed to use gain, rather than loss, for purposes of subsection (b)(1) if the offense involved (i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels. While cases involving this conduct occur infrequently (the Commission identified seven such cases in fiscal years 2012 and 2013), the Commission has received comment that these cases are complex, resulting in courts applying a variety of methods to determine the appropriate enhancement under subsection (b)(1). In such cases in fiscal years 2012 and 2013, the median enhancement under subsection (b)(1) was 14 levels and the average sentence was 48 months.

As a conforming change, the special rule at Application Note 3(F)(ix), relating to the calculation of loss in cases involving the fraudulent inflation in the value of a publicly traded security or commodity, is deleted.

Issues for comment are also included.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level:
 - (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
 - (2) 6, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
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(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 2
(C)	More than \$10,000	add 4
(D)	More than \$30,000	add 6
(E)	More than \$70,000	add 8
(F)	More than \$120,000	add 10
(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30.

Provided, that if the offense involved (i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator, the enhancement determined above shall be based on the gain that resulted from the offense rather than the loss. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels.

* * *

Commentary

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Application Notes:

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3. Loss Under Subsection (b)(1).—*This application note applies to the determination of loss under subsection (b)(1).*

* * *

(F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*

* * *

~~(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—*In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—*~~

~~(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and~~

~~(II) multiplying the difference in average price by the number of shares outstanding.~~

~~In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).~~

* * *

Issues for Comment:

1. *In 2012, the Commission responded to directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, by providing, among other things, a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, see §2B1.1, comment. (n.3(F)(ix)), and departure provisions for cases in which there was risk of a significant disruption of a national financial market, see §2B1.1, comment. (n.20(A)(iv)), and cases in which there was a securities fraud involving a fraudulent statement made publicly to the market, see §2B1.1, comment. (n.20(C)).*

The Commission seeks comment on the operation of these provisions and whether they adequately address “fraud on the market” cases and similar types of cases involving the financial markets. Should the Commission revise these provisions to better address these types of cases? If so, how? Should the Commission make any other changes to the guidelines to address these types of cases? If so, what changes should the Commission make? For example, should the Commission provide a separate guideline for these cases? In the alternative, should these cases be sentenced under §2B1.4 (Insider Trading) instead of §2B1.1, and if so, what if any changes should be made to §2B1.4 to address these cases?

2. *The Commission seeks comment on whether gain, rather than loss, is a more appropriate method for determining the harm accountable to the defendant in “fraud on the market” cases. What are the advantages and disadvantages of using gain to measure harm in such cases? Are there application issues that would arise in determining gain in such cases? If so, what are the issues and how, if at all, should the Commission address them?*
3. *The Commission has heard concerns that gain and loss are difficult to measure in “fraud on the market” cases and may not effectively address the role of market forces and other factors. Accordingly, it has been argued, the use of gain or loss may over-punish some defendants and under-punish others. How, if at all, should the Commission address this issue?*

In particular, the Commission seeks comment on whether “fraud on the market” offenses should be structured to include a minimum level of enhancement of [14]-[22] levels (as bracketed in the proposed amendment) under subsection (b)(1). Would such an approach be consistent with the purposes of sentencing and the directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act? Should the Commission consider such an approach? If so, what minimum level of enhancement should be provided?

If the Commission were to provide such a minimum enhancement for such cases, should the Commission also specify that certain other specific offense characteristics in the guideline should not apply in such cases?

PROPOSED AMENDMENT: MITIGATING ROLE

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014).*

First, there are differences among the circuits about what determining the “average participant” requires. The Seventh and Ninth Circuits have concluded that the “average participant” means only those persons who actually participated in the criminal activity at issue in the defendant’s case, so that the defendant’s relative culpability is determined only by reference to his or her co-participants. See, e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that “the relevant comparison . . . is to the conduct of co-participants in the case at hand.”); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) (“While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the §3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.”) (internal quotations omitted); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993) (“The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy’s other participants.”). The First and Second Circuits have concluded that the “average participant” also includes typical offenders who commit similar crimes. See, e.g., United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004) (“[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes.”); United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) (“A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant’s conduct must be ‘minor’ or ‘minimal’ as compared to the average participant in such a crime.”). Under this latter approach, courts will ordinarily consider the defendant’s culpability relative both to his co-participants and to the typical offender. The proposed amendment would generally adopt the approach of the Seventh and Ninth Circuits.

Second, the Commentary to §3B1.2 provides that certain individuals who perform limited functions in criminal activity are not precluded from consideration for a mitigating role adjustment. The proposed amendment would revise this language to state that such an individual may receive a mitigating role adjustment.

Third, the proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment.

An issue for comment is also included.

Proposed Amendment:

§3B1.2. Mitigating Role

Based on the defendant’s role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4

levels.

- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, “participant” has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—

- (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant ~~in the criminal activity.~~

~~A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the concerted criminal activity is not precluded from consideration for may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for may receive an adjustment under this guideline.~~

~~Likewise, 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/or who had limited knowledge of the scope of the scheme is not precluded from consideration for may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role participation 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 consideration for may receive an adjustment under this guideline.~~

- (B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this

section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

- (C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity; and
- (iii) the degree to which the defendant stood to benefit from the criminal activity.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
5. Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.
6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

* * *

Issue for Comment:

1. *The Commission seeks comment on the application of the mitigating role adjustment. Are there application issues relating to this adjustment that the Commission should address and, if so, how should the Commission address them?*

The proposed amendment would provide additional guidance on applying the mitigating role adjustment. Is the additional guidance in the proposed amendment appropriate? What additional or different guidance should the Commission provide on applying mitigating role adjustments?

PROPOSED AMENDMENT: JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission's effort to simplify the operation of the guidelines, including, among other matters, the use of relevant conduct in offenses involving multiple participants. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).*

This proposed amendment is being published to inform the Commission's consideration of these issues. The Commission seeks comment on revisions that would provide further guidance on the operation of the "jointly undertaken criminal activity" provision as well as on possible revisions that would change the operation of the provision.

Proposed Additional Guidance

The proposed amendment would revise §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to provide more guidance on the use of "jointly undertaken criminal activity" in determining relevant conduct under the guidelines. See §1B1.3(a)(1)(B). Specifically, it restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies to hold the defendant accountable for acts of others in the jointly undertaken criminal activity. The three-step test requires that the court (1) identify the scope of the criminal activity the defendant agreed to jointly undertake; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Possible Policy Changes

An issue for comment is provided on whether the Commission should make changes for policy reasons to the operation of "jointly undertaken criminal activity." Several options are presented for comment.

Proposed Amendment:

§1B1.3.

Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), ~~all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, all acts and omissions of others that were~~
 - (i) ~~within the scope of the criminal activity that the defendant agreed to jointly undertake;~~
 - (ii) ~~in furtherance of the jointly undertaken criminal activity, and~~
 - (iii) ~~reasonably foreseeable in connection with that criminal activity;~~

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. ~~Accountability Under More Than One Provision.~~ *[In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.]**

2.3. ~~Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).~~

(A) ~~In General.~~ *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) ~~within the scope of the criminal activity that the defendant agreed to jointly undertake;~~

(ii) *in furtherance of the jointly undertaken criminal activity; and*

(iii) *reasonably foreseeable in connection with that criminal activity.*

*[The conduct of others that was both ~~within the scope of,~~ in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not ~~within the scope of the criminal activity that the defendant agreed to jointly undertake~~ was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.]***

(B) ~~Scope.~~ *Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same*

* The bracketed text currently appears in the commentary in the illustration referring to Defendants A and B. The proposed amendment would place the text here, while also leaving it intact in the illustration.

** The bracketed text was originally placed as part of the third paragraph of the current Application Note 2.

as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement).—

~~In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), in doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.~~

~~Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).~~

~~[i]n cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.]**~~

~~[A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.]****~~

~~(C) In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the criminal activity that the defendant agreed to jointly undertake.~~

~~(D) Reasonably Foreseeable.—The court must then determine if the conduct (acts and omissions) of others in furtherance of the jointly undertaken criminal activity was reasonably foreseeable in connection with the criminal activity that the defendant agreed to jointly undertake.~~

*** The bracketed text was originally placed as the last paragraph in example (c)(8) of the "Illustrations of Conduct for Which the Defendant is Accountable."

**** The bracketed text was originally placed as the last paragraph of Application Note 2, before the "Illustrations of Conduct for Which the Defendant is Accountable."

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the criminal activity that the defendant agreed to jointly undertake (the robbery), was in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all reasonably foreseeable quantities of contraband that were within the scope of, and in furtherance of, the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).

(a) Acts and omissions aided or abetted by the defendant.

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under

more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity that meets all three criteria of subsection (a)(1)(B). First, the criminal activity was within the scope of what the defendant agreed to jointly undertake (the scope of which was the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.

(b)(B) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable acts and omissions in a jointly undertaken criminal activity.

(#) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c)(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity.

(#) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then

uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance within the scope of the criminal activity he agreed to jointly undertake with Defendant D (i.e., the forgery of the \$800 check).

- (2ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the criminal activity they agreed to jointly undertake (the scheme to sell fraudulent stocks), was in furtherance of the jointly undertaken criminal activity, and was reasonably foreseeable in connection with that criminal activity.
- (3ii) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to in furtherance of the importation of that shipment on the basis of subsection (a)(1)(B) that were reasonably foreseeable (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not in furtherance within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).
- (4iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably

foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount ~~he is not engaged in a jointly undertaken criminal activity with the other defendants.~~ For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5vi) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance ~~within the scope~~ of her jointly undertaken criminal activity (i.e., the one delivery).

(6vii) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were ~~within the scope of the jointly undertaken criminal activity,~~ in furtherance of the jointly undertaken ~~that~~ criminal activity, and reasonably foreseeable in connection with that criminal activity.

(7viii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. ~~Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).~~

(8viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marijuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marijuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of

which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity ~~(which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity)~~. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, ~~in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity)~~ may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(A).

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~~46~~ * * *
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* * *

Issues for Comment:

1. Additional Guidance. *The Commission seeks comment on whether additional or different guidance should be provided on the “jointly undertaken criminal activity” provision in subsection (a)(1)(B). In particular, should the Commission provide further guidance on how to determine (A) the scope of the jointly undertaken criminal activity, (B) whether the conduct of others was in furtherance of the criminal activity, and (C) whether the conduct of others was reasonably foreseeable in connection with the criminal activity? Does the proposed amendment provide adequate guidance on the operation of “jointly undertaken criminal activity”?*

Should the Commission provide additional or different examples to better explain the operation of “jointly undertaken criminal activity”? If so, what examples should be provided? Are there examples that are no longer good illustrations of present-day criminal cases? If so, should those

examples be deleted or revised, or should they be replaced with more appropriate illustrations of present-day criminal cases?

2. Possible Policy Changes. The Commission seeks comment on whether changes should be made for policy reasons to the operation of “jointly undertaken criminal activity,” such as to provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants that the defendant did not aid, abet, counsel, command, induce, procure, or willfully cause. (Such conduct is covered by §1B1.3(a)(1)(A).) In particular, but without limitation, the Commission seeks comment on two options for possible changes that could be made to the operation of “jointly undertaken criminal activity”, as follows.

(A) Option A: Requiring a Higher State of Mind Than “Reasonable Foreseeability”

This option would revise “jointly undertaken criminal activity” by changing the “reasonable foreseeability” part of the analysis. The requirement that the other participant’s conduct be reasonably foreseeable has been described as a “negligence” standard, that is, the defendant should have known or should have foreseen the conduct.

The Commission seeks specific comment on whether “jointly undertaken criminal activity” should require a higher state of mind, such as recklessness or deliberate indifference; knowledge; or intent. For example, if a co-participant possessed a weapon, should the defendant be held accountable for the weapon only if he was deliberately indifferent to whether a weapon would be possessed; or only if he knew the weapon would be possessed; or only if he intended that the weapon be possessed?

(B) Option B: Requiring a Conviction for Conspiracy or At Least a “Pinkerton Conviction”

This option would hold a defendant accountable for a “jointly undertaken criminal activity” only when the defendant (1) was convicted of a conspiracy charge related to a co-conspirator’s conduct in furtherance of the jointly undertaken criminal activity; or (2) was convicted by a jury that was specifically instructed on Pinkerton liability regarding a substantive offense; or (3) admitted facts sufficient to constitute Pinkerton liability.

The Commission seeks specific comment on what the practical impact of such a change would be on charging and sentencing practices.

Does the current provision on “jointly undertaken criminal activity” appropriately further the purposes of sentencing? If not, what changes, if any, should the Commission make to “jointly undertaken criminal activity” to more appropriately further the purposes of sentencing? Do any of the options described above more appropriately further the purposes of sentencing? Are there other possible changes, whether or not identified in the options described above, that should be made to “jointly undertaken criminal activity” to more appropriately further the purposes of sentencing?

FILED
United States Court of Appeals
Tenth Circuit

April 28, 2015

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROGER KEITH HOWARD,

Defendant - Appellant.

No. 14-1075

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 1:12-CR-00039-RBJ-1)

Elizabeth L. Harris, Law Office of Elizabeth L. Harris, LLC, Denver, Colorado, for
Defendant -Appellant.

Paul Farley, Assistant United States Attorney (John F. Walsh, United States Attorney,
with him on the brief), Denver, Colorado, for Plaintiff - Appellee.

Before **KELLY, LUCERO**, and **HARTZ**, Circuit Judges.

HARTZ, Circuit Judge.

Attachment G

Defendant Roger Howard pleaded guilty to three counts of wire fraud, *see* 18 U.S.C. § 1343, and one count of money laundering, *see id.* § 1957, arising from his participation in three mortgage-fraud schemes. His participation included identifying property buyers, arranging for their applications for mortgage loans to overstate assets and incomes, and obtaining inflated property appraisals and kickbacks to himself and some buyers. All buyers defaulted on their mortgage notes. Some notes had been sold by the original lenders to downstream lenders, who may themselves have resold the notes.

The United States District Court for the District of Colorado sentenced Defendant to 108 months' imprisonment and ordered him to pay \$8,862,191.18 in restitution. He argues that the district court made two errors in imposing the sentence: (1) it improperly increased his offense level by miscalculating the loss to the mortgage lenders, *see* USSG § 2B1.1; and (2) it awarded restitution to alleged victims without evidence of their actual losses. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm the determination of loss under USSG § 2B1.1, which was calculated in accordance with our precedents, but we largely agree with Defendant's restitution argument and therefore reverse the restitution order and remand for further proceedings.

I. LOSS UNDER USSG § 2B1.1(B)(1)

Under the sentencing guideline for fraud, the offense level is based on the amount of loss. *See* USSG § 2B1.1(b)(1). The district court calculated the loss caused by

Defendant to be \$8,961,191.18. For losses exceeding \$7 million but less than \$20 million, the offense level is 20. *See id.* § 2B1.1(b)(1)(K).

In mortgage-fraud cases like this, “[a]ctual loss” under USSG § 2B1.1 cmt. n.3(A)(i) “is the unpaid portion of the loan as offset by the value of the collateral.” *United States v. Crowe*, 735 F.3d 1229, 1241 (10th Cir. 2013) (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 1565 (2014). “[S]o long as it is foreseeable that loans will be sold or repackaged, both the original lenders and downstream lenders are foreseeable victims of the fraud, and the general formula applies.” *United States v. Smith*, 705 F.3d 1268, 1276 (10th Cir. 2013). “That is so because any gains or losses sustained by the original lender will be offset by a corresponding loss or gain by the downstream lender, leaving the total loss to equal mortgage balance minus foreclosure price.” *Id.* As a result, “the number of lenders involved and the amount of profit made [or loss suffered] by the original lender or any intermediate lenders is mathematically irrelevant to the calculation of the total loss caused by the fraud.” *Id.* (emphasis and internal quotation marks omitted).

Defendant does not dispute that the district court’s method of calculating loss was the method dictated by our precedents. Instead, he challenges the loss amount based on three arguments not raised below: (1) the government’s evidence was insufficient to prove \$709,588 in losses on eight loans included in the loss amount; (2) the court should have reduced the loss amount by \$973,935 to account for interest payments made on the loans; and (3) the court should not have included \$313,261 in losses to a downstream

noteholder that purchased three loans after the buyers had defaulted. Based on these arguments, he concludes that the correct total loss amount is \$6,964,407 (instead of \$8,961,191). *See* Aplt. Br. at 27. Because his offense level and guidelines range remain the same unless the net actual loss is \$7 million or less, *see* USSG § 2B1.1(b)(1)(K), Defendant cannot prevail if we reject any argument challenging more than \$35,593.

When the defendant objects to the loss calculation below, we review the district court's factual findings for clear error and calculation methodology *de novo*. *See Crowe*, 735 F.3d at 1235–36. But because Defendant failed to object below on the grounds argued here, we review only for plain error. *See id.* at 1242. Relief is available under the plain-error standard only if Defendant establishes four elements: “(1) the district court committed error; (2) the error was plain—that is, it was obvious under current well-settled law; (3) the error affected the Defendant’s substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012) (brackets and internal quotation marks omitted). Defendant must establish all four elements. *See id.* “[T]he failure of any one will foreclose relief and the others need not be addressed.” *Id.*

Defendant argues that the district court committed plain error by counting losses on certain loans totaling \$709,588. Among those losses are the amounts of five second-mortgage loans totaling \$422,588. The court calculated the losses from printouts from UTLS Default Services. The printouts showed the amounts of the loans and named the noteholders. Defendant asserts that the amounts cannot be believed because each

printout is indisputably wrong in naming the holder of the first-mortgage note on the property. This challenge to the loss calculation raises solely a question of fact—was there a second mortgage in the amount stated on the printout? But “factual disputes regarding sentencing not brought to the attention of the district court do not rise to the level of plain error.” *United States v. Lewis*, 594 F.3d 1270, 1288 (10th Cir. 2010) (brackets and internal quotation marks omitted).

Defendant relies on *United States v. Goode*, 484 F.3d 676, 681 (10th Cir. 2007), for the proposition that sufficiency of the evidence can be reviewed for plain error. *Goode*, however, involved a challenge to the sufficiency of the evidence of guilt at a criminal trial, where different considerations are in play than with sentencing.¹ More importantly, the issue raised by Defendant is one of *admissibility* of evidence—was the printout sufficiently reliable to be used to establish the amount of the second mortgage notes?—not *sufficiency*. Because Defendant failed to object to the evidence below, there was no need for the government to explain why the printout was likely to be accurate. Defendant has given us no reason to believe that the government could not present reliable evidence on remand of the amount of the second-mortgage loans. *See Lewis*, 594

¹ For example, if the appellate court determines that there was insufficient evidence of guilt, the Double Jeopardy Clause forbids the government from gathering more evidence and subjecting the defendant to a second trial, *see Burks v. United States*, 437 U.S. 1, 14–17 (1978); but the Double Jeopardy Clause does not apply to noncapital sentencing, *see Monge v. California*, 524 U.S. 721, 728–29 (1998). As a result, only in the sentencing context does an appellate court reviewing for plain error consider whether anything ultimately would be accomplished by a remand for further proceedings. *See Lewis*, 594 F.3d at 1288.

F.3d at 1288. We are not disposed to ignore our binding precedents regarding the scope of plain-error review of sentencing determinations.

II. RESTITUTION

The award of restitution in this case is governed by the Mandatory Victims Restitution Act of 1996 (MVRA), which “requires certain offenders to restore property lost by their victims as a result of the crime.” *Roberts v. United States*, 134 S. Ct. 1854, 1856 (2014). Defendant’s principal challenge is to the method of calculating the loss to downstream lenders—that is, lenders who did not originate the mortgage loan but purchased it from the original lender or an earlier downstream lender. Because we agree with this challenge and remand for further proceedings, we need not address his other challenges, which had not been raised below and can be considered on remand.

The MVRA requires that a defendant convicted of an offense against property, including any offense committed by fraud or deceit, be ordered to pay restitution to victims of the offense. *See* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). Payment is to be made to “an identifiable victim or victims [who] suffered . . . pecuniary loss.” *Id.* § 3663A(c)(1)(A)(ii), (B). A *victim* is “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” *Id.* § 3663A(a)(2). “Restitution must not unjustly enrich crime victims or provide them a windfall.” *United States v. Ferdman*, 779 F.3d 1129, 1132 (10th Cir. 2015). District courts thus “may not order restitution in an amount that exceeds the actual loss caused by the defendant’s conduct, which would amount to an illegal sentence.” *Id.* (internal

quotation marks omitted); *see also United States v. Griffith*, 584 F.3d 1004, 1019 (10th Cir. 2009) (“a district court that orders restitution in an amount greater than the total loss caused by the offense thereby exceeds its statutory jurisdiction and imposes an illegal sentence”) (internal quotation marks omitted)).

In disputes over the amount of a victim’s loss, the government bears the burden of persuasion by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e). The district court “may consider hearsay evidence that bears minimal indicia of reliability so long as the defendant is given the opportunity to refute the evidence.” *United States v. Rodriguez*, 751 F.3d 1244, 1261 (11th Cir. 2014) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 310 (2014); *cf. United States v. Sunrhodes*, 831 F.2d 1537, 1544 (10th Cir. 1987) (admission of hearsay testimony with substantial indicia of reliability in restitution proceeding did not violate hearsay rule or Confrontation Clause). We review the restitution order for an abuse of discretion, which requires us to review factual findings for clear error and application of the MVRA de novo. *See Ferdman*, 779 F.3d at 1131; *United States v. Battles*, 745 F.3d 436, 460 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 355 (2014); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (reviewing sanction under Fed. R. Civ. P. 11: “A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”).

The “victim” identified for each loan was the holder of the note when the property went into foreclosure. The district court calculated the restitution amount for each

identified victim using the same method it employed in calculating loss under USSG § 2B1.1—by adding the unpaid principal balances on each loan held by the victim and subtracting the amounts recovered from sales of the properties securing the loans. (The total restitution amount was \$99,000 less than the loss under § 2B1.1 because the noteholder on one loan had not been identified.)

Defendant contends that the court “applied an incorrect methodology for computing restitution.” Aplt. Br. at 10. He argues that the MVRA limits restitution to “actual, out-of-pocket losses,” *id.*, and that the measure of actual loss to a downstream lender is “the difference between what the successor lender paid for the loan . . . and proceeds obtained from payments and sale of collateral,” *id.* at 10–11. The method used to calculate restitution in this case—subtracting the amounts recovered through foreclosure sales from the unpaid principal balances on the loans—does not reflect actual loss to downstream noteholders, he says, because they could have paid less than the unpaid balance to acquire the notes. *See id.* at 11, 30–31.

Defendant’s argument is correct. Although the total-loss calculation under USSG § 2B1.1 does not depend on which lender in the chain of title of a mortgage note suffered what loss, that information is necessary to avoid windfalls in awarding restitution. A hypothetical example illustrates why. Say, the original mortgage note was for \$500,000; the original noteholder sold the note to a downstream lender for \$200,000; the borrower made no payments on the note; and foreclosure on the property netted \$100,000. Under the district court’s methodology, Defendant would have to pay the

downstream lender restitution of \$400,000 (\$500,000 less \$100,000 from the foreclosure sale), although its loss was only \$100,000. That would create an unlawful windfall for the downstream lender.

Other circuits agree with this analysis. The Ninth Circuit has noted that “[b]ecause the value of [the] loan is not necessarily its unpaid principal balance, but may vary with the value of the collateral, the credit rating of the borrower, market conditions, or other factors, the loan purchaser may have purchased the loan for less than its unpaid principal balance.” *United States v. Yeung*, 672 F.3d 594, 602 (9th Cir. 2012), *overruled in part on other grounds by Roberts*, 134 S. Ct. 1854. As a result, it said, “To calculate a victim’s restitution award using the outstanding principal balance of the loan, if the victim only paid a fraction of that amount to obtain the loan on the secondary market, would cause the victim to receive an amount exceeding its actual losses.” *Id.*; *see United States v. Chaika*, 695 F.3d 741, 748 (8th Cir. 2012) (“The ultimate foreclosure sale price is irrelevant to an initial lender who sold the loan, while the purchasing secondary lender may not be a victim, and if it is, actual loss will turn on its purchase price in the secondary market, whether it remained on the loan all the way to foreclosure, and perhaps other factors.”); *United States v. Beacham*, 774 F.3d 267, 278–79 (5th Cir. 2014) (following *Chaika* and *Yeung*).

The government contends that this point was not raised below, but we disagree. Defendant’s sentencing memorandum argued that the restitution calculations in the probation office’s presentence report were flawed because they did not examine the

purchase prices paid by downstream holders of the mortgage notes, and he reminded the district court of the issue at the sentencing hearing. Once that objection to the government's methodology was clear, Defendant was not also required to object to the evidence offered in reliance on the challenged methodology. He gave ample notice that he objected to a restitution calculation that did not identify the specific losses of individual noteholders in the chain of title of a mortgage note. When the government did not put on such evidence, it took the risk that we would agree with Defendant's legal argument.

We recognize that the government may be able to explain (on remand) why the restitution calculation is "a reasonable estimate of the loss," *United States v. James*, 564 F.3d 1237, 1248 (10th Cir. 2009) (internal quotation marks omitted); but it did not provide such an explanation in the district court and, equally important, the court itself made no finding on the point. *See Ferdman*, 779 F.3d at 1133 (district courts may not "dispense with the necessity of proof as mandated by the MVRA and simply 'rubber stamp' a victim's claim of loss based upon a measure of value unsupported by the evidence," and restitution awards may not be based on "[s]peculation and rough justice" (internal quotation marks omitted)). The presentence report stated that the victims it identified had not responded to correspondence from the probation office. The FBI agent who testified at the sentencing hearing about the losses caused by Defendant said that he did not know whether original lenders had suffered losses on any loans sold, and that he had no information about the amounts paid by downstream noteholders to purchase the

loans. He never testified that the information was not available and, for all the record reveals, he never asked for it. Neither the failure of a victim to respond to a request for evidence of actual loss nor the government's unexplained failure to obtain the necessary proof suffices to justify a restitution award. There is no public interest served by requiring that restitution be paid to an alleged victim who declines to cooperate in providing the evidence necessary to establish its loss.

In short, although the impact of sales of mortgage notes to downstream lenders is generally irrelevant to the total-loss calculation under USSG § 2B1.1, it is highly relevant in calculating restitution under the MVRA. *See United States v. James*, 592 F.3d 1109, 1116 n.6 (10th Cir. 2010) (“the calculation of loss for sentencing purposes does not necessarily establish loss for the purpose of awarding restitution under the MVRA”). We remand with instructions that the district court vacate its restitution order and redetermine the amount of actual loss to identified downstream-noteholder victims. Should the court find the existing record to be insufficient to permit a proper calculation of a victim's actual loss, the court may “(1) ask the Government to submit additional evidence, (2) hold an evidentiary hearing, or (3) decline to order restitution.” *Ferdman*, 779 F.3d at 1133.

III. CONCLUSION

We **AFFIRM** the district court's calculation of loss under USSG § 2B1.1 and **REMAND** with instructions that the court **VACATE** its restitution order for redetermination of the amount of actual loss to apparent victims.

Representative Paul Ray proposes the following substitute bill:

WHITE COLLAR CRIME REGISTRY

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Mike K. McKell

Senate Sponsor: Curtis S. Bramble

LONG TITLE

General Description:

This bill modifies the Utah Code of Criminal Procedure to include a registry for persons who commit specified white collar crimes.

Highlighted Provisions:

This bill:

▶ authorizes the Office of the Attorney General to develop, operate, and maintain the Utah White Collar Crime Offender Registry website;

▶ provides the manner and process by which the Office of the Attorney General disseminates information from the Utah White Collar Crime Offender Registry website to the public, including the type of information that will be provided;

▶ provides the offenses for which a person must be registered with the Utah White Collar Crime Offender Registry website;

▶ provides that offenders who were convicted of the specified offenses between December 31, 2005 and the time this bill is enacted will not be placed on the Utah White Collar Crime Offender Registry if they:

- have complied with all court orders;
- have paid all restitution claims; and



Attachment H

25 • have not been convicted of any other offenses for which registration would be
26 required;

27 ▶ provides the duration for which offenders will be placed on the Utah White Collar
28 Crime Offender Registry;

29 ▶ provides rulemaking authority for the Office of the Attorney General to implement
30 the Utah White Collar Crime Offender Registry; and

31 ▶ provides the process and conditions under which a person may petition to have his
32 or her name and information removed from the Utah White Collar Crime Offender
33 Registry.

34 **Money Appropriated in this Bill:**

35 None

36 **Other Special Clauses:**

37 None

38 **Utah Code Sections Affected:**

39 AMENDS:

40 **76-8-504.6**, as last amended by Laws of Utah 2010, Chapter 283

41 ENACTS:

42 **77-42-101**, Utah Code Annotated 1953

43 **77-42-102**, Utah Code Annotated 1953

44 **77-42-103**, Utah Code Annotated 1953

45 **77-42-104**, Utah Code Annotated 1953

46 **77-42-105**, Utah Code Annotated 1953

47 **77-42-106**, Utah Code Annotated 1953

48 **77-42-107**, Utah Code Annotated 1953

49 **77-42-108**, Utah Code Annotated 1953

50

51 *Be it enacted by the Legislature of the state of Utah:*

52 Section 1. Section **76-8-504.6** is amended to read:

53 **76-8-504.6. False or misleading information.**

54 (1) A person is guilty of a class B misdemeanor if the person, not under oath or
55 affirmation, intentionally or knowingly provides false or misleading material information to:

- 56 (a) an officer of the court for the purpose of influencing a criminal proceeding; or
- 57 (b) the Bureau of Criminal Identification for the purpose of obtaining a certificate of
- 58 eligibility for;

59 (ii) expungement[-]; or

60 (ii) removal of the person's name from the White Collar Crime Registry created in Title
61 77, Chapter 42, Utah White Collar Crime Offender Registry.

62 (2) For the purposes of this section "officer of the court" means:

- 63 (a) prosecutor;
- 64 (b) judge;
- 65 (c) court clerk;
- 66 (d) interpreter;
- 67 (e) presentence investigator;
- 68 (f) probation officer;
- 69 (g) parole officer; and
- 70 (h) any other person reasonably believed to be gathering information for a criminal
- 71 proceeding.

72 (3) This section does not apply under circumstances amounting to Section 76-8-306 or
73 any other provision of this code carrying a greater penalty.

74 Section 2. Section 77-42-101 is enacted to read:

75 **CHAPTER 42. UTAH WHITE COLLAR CRIME OFFENDER REGISTRY**

76 **77-42-101. Title.**

77 This chapter is known as the "Utah White Collar Crime Offender Registry."

78 Section 3. Section 77-42-102 is enacted to read:

79 **77-42-102. Definitions.**

80 As used in this chapter:

81 (1) "Attorney general" means the Utah attorney general or a deputy attorney general.

82 (2) "Bureau" means the Bureau of Criminal Identification of the Department of Public
83 Safety established in Section 53-10-201.

84 (3) "Business day" means a day on which state offices are open for regular business.

85 (4) "Certificate of eligibility" means a document issued by the Bureau of Criminal
86 Identification stating that the offender has met the requirements of Section 77-42-108.

87 (5) "Offender" means an individual required to register as provided in Section
88 77-42-105.

89 (6) "Register" means to comply with the requirements of this chapter and rules of the
90 Office of the Attorney General made under this chapter.

91 Section 4. Section 77-42-103 is enacted to read:

92 **77-42-103. Duties.**

93 (1) The attorney general shall:

94 (a) develop and operate a system to collect, analyze, maintain, and disseminate
95 information on offenders; and

96 (b) make information listed in Section 77-42-104 available to the public.

97 (2) Any attorney general, county attorney, or district attorney shall, in the manner
98 prescribed by the attorney general inform the attorney general of a person who is convicted of
99 any of the offenses listed in Section 77-42-105 within 45 business days.

100 (3) The attorney general shall:

101 (a) provide the following additional information when available:

102 (i) the crimes for which the offender has been convicted, noting cases in which the
103 offender is still awaiting sentencing or has appealed the conviction;

104 (ii) a description of the offender's targets; and

105 (iii) any other relevant identifying information as determined by the attorney general;

106 (b) maintain the Utah White Collar Crime Offender Registry website; and

107 (c) ensure that information is entered into the offender registry in a timely manner.

108 Section 5. Section 77-42-104 is enacted to read:

109 **77-42-104. Utah White Collar Crime Offender Registry -- Attorney general to**
110 **maintain.**

111 (1) The attorney general shall maintain the Utah White Collar Crime Offender Registry
112 website on the Internet, which shall contain a disclaimer informing the public that:

113 (a) the information contained on the website is obtained from public records and the
114 attorney general does not guarantee the website's accuracy or completeness;

115 (b) members of the public are not allowed to use the information to harass or threaten
116 offenders or members of their families; and

117 (c) harassment, stalking, or making threats against offenders or their families is

118 prohibited and may violate Utah criminal laws.

119 (2) The Utah White Collar Crime Offender Registry website shall be indexed by the
120 surname of the offender.

121 (3) The attorney general shall construct the Utah White Collar Crime Offender Registry
122 website so that before accessing registry information, users must indicate that they have read
123 and understand the disclaimer and agree to comply with the disclaimer's terms.

124 (4) Except as provided in Subsection (6), the Utah White Collar Crime Offender
125 Registry website shall include the following registry information:

126 (a) all names and aliases by which the offender is or has been known, but not including
127 any online or Internet identifiers;

128 (b) a physical description, including the offender's date of birth, height, weight, and eye
129 and hair color;

130 (c) a recent photograph of the offender; and

131 (d) the crimes listed in Section 77-42-105 of which the offender has been convicted.

132 (5) The Office of the Attorney General and any individual or entity acting at the request
133 or upon the direction of the attorney general are immune from civil liability for damages and
134 will be presumed to have acted in good faith by reporting information.

135 (6) The attorney general shall redact the names, addresses, phone numbers, Social
136 Security numbers, and other information that, if disclosed, specifically identifies individual
137 victims.

138 Section 6. Section 77-42-105 is enacted to read:

139 **77-42-105. Registerable offenses.**

140 A person shall be required to register with the Office of the Attorney General for a
141 conviction of any of the following offenses as a second degree felony:

142 (1) Section 61-1-1 or Section 61-1-2, securities fraud;

143 (2) Section 76-6-405, theft by deception;

144 (3) Section 76-6-513, unlawful dealing of property by fiduciary;

145 (4) Section 76-6-521, fraudulent insurance;

146 (5) Section 76-6-1203, mortgage fraud;

147 (6) Section 76-10-1801, communications fraud; and

148 (7) Section 76-10-1903, money laundering.

149 Section 7. Section 77-42-106 is enacted to read:

150 **77-42-106. Registration of offenders -- Utah White Collar Crime Offender**
151 **Registry.**

152 (1) An offender who has been convicted of any offense listed in Section 77-42-105
153 shall be on the Utah White Collar Crime Offender Registry for:

- 154 (a) a period of 10 years for a first offense;
- 155 (b) a second period of 10 years for a second conviction under this section; and
- 156 (c) a lifetime period if convicted a third time under this section.

157 (2) Except as provided in Subsection (3), an offender who has been convicted of any
158 offense listed in Section 77-42-105 after December 31, 2005, shall register with the attorney
159 general to be included in the Utah White Collar Crime Offender Registry.

160 (3) An offender is not be required to register as provided in Subsection (2) if the
161 offender:

- 162 (a) has complied with all court orders at the time of sentencing;
- 163 (b) has paid in full all court ordered amounts of restitution to victims; and
- 164 (c) has not been convicted of any other offense for which registration would be
165 required.

166 Section 8. Section 77-42-107 is enacted to read:

167 **77-42-107. Department and agency requirements.**

168 (1) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
169 attorney general shall make rules necessary to implement this chapter, including:

- 170 (a) the method for dissemination of registry information; and
- 171 (b) instructions to the public regarding acceptable use of the information.

172 (2) Any information regarding the identity or location of a victim may be redacted by
173 the attorney general from information provided under Subsection 77-42-104(6).

174 Section 9. Section 77-42-108 is enacted to read:

175 **77-42-108. Removal from the Utah White Collar Crime Offender Registry.**

176 (1) An offender may petition the court where the offender was convicted of the offense
177 for which registration with the Utah White Collar Crime Offender Registry is required, for an
178 order to remove the offender from the Utah White Collar Crime Offender Registry, if:

- 179 (a) five years have passed since the completion of the offender's sentence;

180 (b) the offender has successfully completed all treatment ordered by the court or the
181 Board of Pardons and Parole relating to the conviction;

182 (c) (i) the offender has not been convicted of any other crime, excluding traffic
183 offenses, as evidenced by a certificate of eligibility issued by the bureau; and

184 (ii) as used in this section, "traffic offense" does not include a violation of Title 41,
185 Chapter 6a, Part 5, Driving Under the Influence and Reckless Driving;

186 (d) the offender has paid all restitution ordered by the court;

187 (e) notice has been delivered to the victims and the office that prosecuted the offender;

188 and

189 (f) the offender has not been found to be civilly liable in any case in which fraud,
190 misrepresentation, deceit, breach of fiduciary duty, or the misuse or misappropriation of funds
191 is an element.

192 (2) (a) (i) An offender seeking removal from the White Collar Crime Offender Registry
193 shall apply for a certificate of eligibility from the bureau.

194 (ii) An offender who intentionally or knowingly provides any false or misleading
195 information to the bureau when applying for a certificate of eligibility is guilty of a class B
196 misdemeanor and subject to prosecution under Section 76-8-504.6.

197 (iii) Regardless of whether the offender is prosecuted, the bureau may deny a certificate
198 of eligibility to anyone providing false information on an application under this Subsection (2).

199 (b) (i) The bureau shall check the records of governmental agencies, including national
200 criminal databases, to determine whether an offender is eligible to receive a certificate of
201 eligibility under this section.

202 (ii) If the offender meets all of the criteria under Subsections (1)(a) through (d), the
203 bureau shall issue a certificate of eligibility to the offender which shall be valid for a period of
204 90 days from the date the certificate is issued.

205 (c) (i) The bureau shall charge an application fee for the certificate of eligibility in
206 accordance with the process in Section 63J-1-504.

207 (ii) The fee shall be paid at the time the offender submits an application for a certificate
208 of eligibility to the bureau.

209 (iii) If the bureau determines that the issuance of a certificate of eligibility is
210 appropriate, the bureau shall issue to the offender a certificate of eligibility at no additional

211 charge.

212 (d) Funds generated under this Subsection (2) shall be deposited in the General Fund as
213 a dedicated credit by the department to cover the costs incurred in determining eligibility.

214 (3) The offender shall:

215 (a) file with the court the following information:

216 (i) the petition;

217 (ii) the original information;

218 (iii) the court docket; and

219 (iv) an affidavit certifying that the offender is in compliance with the provisions of
220 Subsection (1); and

221 (b) deliver a copy of the petition to the office of the prosecutor.

222 (4) (a) Upon receipt of a petition for removal from the Utah White Collar Crime
223 Offender Registry, the office of the prosecutor shall provide notice of the petition by first-class
224 mail to the victims at the most recent addresses of record on file.

225 (b) The notice shall:

226 (i) include a copy of the petition for removal from the registry;

227 (ii) state that the victim has a right to object to the removal of the offender from the
228 registry; and

229 (iii) provide instructions for filing an objection with the court.

230 (5) The office of the prosecutor shall provide the following, if available, to the court
231 within 30 days after receiving the petition:

232 (a) a presentence report;

233 (b) any evaluation done as part of sentencing; and

234 (c) any other information the office of the prosecutor feels the court should consider.

235 (6) The victim may respond to the petition by filing a recommendation or objection
236 with the court within 45 days after the mailing of the petition to the victim.

237 (7) The court shall:

238 (a) review the petition and all documents submitted with the petition; and

239 (b) hold a hearing if requested by the office of the prosecutor or the victim.

240 (8) When considering a petition for removal from the registry, the court shall consider
241 whether the offender has paid all restitution ordered by the court or the Board of Pardons and

242 Parole.

243 (9) If the court determines that it is not contrary to the interests of the public to do so,
244 the court may grant the petition and order removal of the offender from the registry.

245 (10) If the court grants the petition, the court shall forward a copy of the order directing
246 removal of the offender from the registry to the attorney general and the office of the
247 prosecutor.

248 (11) The office of the prosecutor shall notify the victims of the court's decision in the
249 same manner as the notification required in Subsection (3)(a).

250 (12) The attorney general shall remove an offender from the registry upon the offender
251 providing satisfactory evidence to the attorney general that:

252 (a) each conviction listed in Section 77-42-105 has either been expunged or reduced in
253 degree below a second degree felony; and

254 (b) the offender has paid all court-ordered restitution to victims.

