

NEW YORK COUNCIL OF DEFENSE LAWYERS

**COMMENTS OF THE NEW YORK COUNCIL
OF DEFENSE LAWYERS REGARDING 2015 PROPOSED
AMENDMENTS TO THE SENTENCING GUIDELINES,
POLICY STATEMENTS, AND OFFICIAL COMMENTARY**

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The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of criminal cases, especially white collar criminal cases, in federal court. We count among our members several former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York and current and former attorneys from the Office of the Federal Defender in those districts, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York. Our members thus have gained familiarity with the Sentencing Guidelines (“Guidelines”) both as prosecutors and as defense lawyers.

We appreciate this opportunity to submit comments to the Commission regarding the proposed amendments to the Guidelines. In the pages that follow, we address certain of these amendments. The contributors to these comments include members of the NYCDL’s Sentencing Guidelines Committee, Catherine M. Foti (Chair), Richard F. Albert, Michael Bachner, Laura Grossfield Birger, Christopher P. Conniff, James M. Keneally, Sharon L. McCarthy, Brian Mass, and Marjorie J. Peerce. In addition, the following individuals helped the Committee in their review and consideration of the amendments: Toi Frederick, Lauren Gerber Lee and Tyler Maulsby.

I. PROPOSED AMENDMENTS TO ECONOMIC CRIME GUIDELINES

The Commission has proposed a multi-part amendment to the Guidelines provisions applicable to economic crimes. This proposed amendment is a result of the Commission's multi-year study of §2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines.

We respectfully submit that the existing Guidelines and policy statements applicable to economic offenses covered by § 2B1.1 result in a recommended advisory Guidelines range that is far greater than necessary to accomplish the purposes of punishment for most defendants.

The NYCDL believes that although the amendments currently being considered are a step in the right direction, further work is required to more appropriately reflect the culpability of individual defendants and to reduce the number of exorbitantly high advisory Guidelines ranges that arise in a substantial number of these cases. As the Commission may know, a Task Force assembled by the Criminal Justice Section of the American Bar Association ("ABA") recently submitted a report on reforming federal sentencing for economic crimes. In its report, the ABA Task Force suggested that the Guidelines approach to sentencing for economic crimes be revised to focus on the culpability of individual defendants. The NYCDL agrees with the premise of the ABA Task Force's report and also suggests that the Commission reconsider its entire approach to sentencing for economic crimes.

A. Proposed Amendment: “intended loss”

The Commission has proposed two alternative amendments to the definition of “intended loss” set forth at Note 3(A)(ii) to § 2B1.1 of the Guidelines. Both alternatives adopt the subjective approach to “intended loss” that has been followed by the majority of the circuits by proposing that “intended loss” shall be “the pecuniary harm that was intended to result from the offense” with the defendant’s intent to be inferred from all available facts. The two alternatives differ in that the second option would also include in the definition of “intended loss” the “pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under § 1B1.3(A) for the other participant.” The Commission has raised as issues for comment first, whether the definition of “intended loss” should be revised in the manner proposed by one of the two alternatives or in some other way and how the definition of “intended loss” should interact with other parts of the Guidelines and second, whether “intended loss” should be limited in some way in light of the direction in § 2B1.1 that in determining loss, courts should use the greater of “actual loss” or “intended loss.”

1. Issue for Comment 1: Definition of “intended loss”

The Commission requests 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.

The NYCDL, while generally skeptical of the utility of “intended loss” as a factor in sentencing, believes that the proposed change in the definition is a positive step towards insuring that sentencing is based on a defendant’s personal conduct. The Commission’s

proposed amendment adopts the language of the court in *United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011), that “intended loss” should be: “the pecuniary harm that the defendant purposely sought to inflict” In *Manatau*, where the defendant negotiated stolen checks for specific amounts, the court rejected the Government’s argument that the determination of “intended loss” should be the sum total of the credit limits linked to the stolen checks in defendant’s possession. Instead, the court agreed that since Manatau had no way of knowing the actual credit limit, the “intended loss” should be limited to a loss “defendant *purposely* sought to inflict.” *Id.* at 1050 (emphasis in original). The Court continued, “[i]ntended [l]oss’ does not mean a loss the defendant merely *knew* would result from his scheme or a loss he might have *possibly and potentially* contemplated.” *Id.* (emphasis in original).

This approach contrasts to the objective approach endorsed by the First Circuit in *United States v. Inarelli* , 524 F.3d 286, 291 (1st Cir. 2008), and the Seventh Circuit in *United States v. Lane*, 323 F.3d 568, 590 (3d Cir. 2003), which focused instead on a defendant’s reasonable expectation (*Inarelli*) or the objective risk to the victims (*Lane*).

The basic problem with the objective approach is highlighted by the Second Circuit’s decision in *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008). In that decision, the court, in a bank fraud case, rejected a notion of “intended loss” based on the full amount of the loan available and adopted the subjective approach finding that the defendant should have an opportunity to persuade the sentencing judge that the loss he intended was less than the face amount of the loans. Other Circuits have also endorsed this approach. See *United States v. Diallo*, 710 F.3d 147 (3d Cir. 2013) (citing *Manatau* and

holding that district court erred by simply equating potential loss and intended loss); *United States v. Kopp*, 951 F.2d 521, 536 (3d Cir. 1991) (intended loss not the potential loss a victim could suffer but the amount of loss the defendant actually intended to inflict); *United States v. Sanders*, 343 F.3d 511 (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.”).

The NYCDL disagrees with Option 2 to the revised definition of “intended loss” which would include the harm intended by other participants. This alternative is contrary to the purpose of the overall amendment which is intended to “better reflect a defendant’s culpability” and will make any proceeding to determine “intended loss” unnecessarily complicated and practically impossible for the defendant needing to counter government allegations as to another person’s subjective intent. If the defendant and the other person jointly formed the intent to inflict pecuniary harm, then any such intent would presumably be included in the intent attributed to the defendant. However, if the other person formed an intent independent of the defendant, then that other person’s subjective intent should not be relevant to the Guidelines calculation for the defendant.

2. Issue for Comment 2: Limitations to Definition of “intended loss”

The Commission also requests comment on whether “intended loss” should be limited in some way in light of the admonition that the court should use the greater of actual and “intended loss” in the determination of loss.

The NYCDL is not clear as to how “intended loss” would be limited except for the Commission to finally decide that the only fair determination of a defendant’s culpability

is actual loss. Even the sharpened focus of the proposed amendment on a defendant's subjective intent will still allow for speculation as to what a defendant might have done had the criminal activity not been terminated. Such speculation has no role in the sentencing determination and the NYCDL urges the Commission to drop "intended loss" as a factor in sentencing.

B. Proposed Amendment: Victims Table

The Sentencing Commission's proposed change to § 2B1.1 recognizes that "the current Guideline may not effectively reflect the harm to victims because it is predicated only on the number of victims."¹ With this in mind, the Commission proposes to amend the victims table in § 2B1.1.

First, the proposed amendment would reduce the offense level increases that are based solely on the number of victims. *Second*, the proposed amendment would increase the offense level where one or more victims suffered substantial [financial] hardship. Two options are provided. Under Option 1, it appears that a discretionary increase would result as soon as a court found substantial hardship to one or more victims. Option 2 provides for a tiered increase based on the number of victims that suffer substantial hardship.

The NYCDL appreciates the Commission's recognition that merely "counting victims" often overstates the seriousness of a given financial crime and its corresponding proposal to reduce the number of offense levels connected to each grouping of victims.

¹ U.S. Sent'g Comm'n, Chair Chief Judge Patti B. Saris Remarks for Public Meeting (Jan. 9, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf>

While this is a step in the right direction, the NYCDL firmly believes that the Commission should remove from § 2B1.1 any offense level increase based solely on the number of victims and allow for offense level increases only when the harm to any such victim is substantial.

As we have argued in the past, in the vast majority of fraud cases, the loss table set forth in § 2B1.1(b)(1) already results in excessive proposed punishment. Because cases involving relatively large loss amounts also generally involve a sizeable number of victims, the current Guidelines result in double-counting an aspect of the offense, especially in instances where a defendant is employed by a financial institution that services a large number of clients. Removing the victims table and focusing instead on the nature of the harm caused by the criminal conduct likely will result in more accurate calculation of the offense level for a particular financial crime. As such, we propose deleting the victims table in its entirety and relying solely on the tiered “substantial [financial] hardship” enhancement identified as Option 2 of the Commission’s proposed changes. The elimination of the victim’s table, therefore, would deal with the Commission’s request for comment regarding the use of the victim’s table where no victims were substantially harmed by the offense. The NYCDL believes that under such circumstances, the loss table suffices to establish the appropriate offense level and avoid the risk of double-counting.

1. Issue for Comment 1: Amending the Victims Table and Other Parts of § 2B1.1 to Adequately Address Harm to Victims

The Commission requests comment on whether the victims table and other parts of § 2B1.1 adequately address the harms to victims.

As set forth above, the NYCDL agrees with the Commission’s effort to shift the focus of § 2B1.1 from the number of victims to the harm caused to each victim. As United States District Court Judge Rakoff has lamented, “[T]he numbers [of victims] themselves are drawn from nowhere.”² The Commission is right to explore and adopt methods for limiting the impact of the victims table, which is the source of much criticism for its contributions to disproportionately harsh sentencing Guidelines ranges. The NYCDL has argued previously to the Commission that it should severely limit, if not eliminate, the victims table in order to avoid the cumulative impact resulting from consideration of both the loss and the victims tables. Independent of the other seventeen specific offense characteristics set forth under § 2B1.1(b), the loss table ensures sufficient – if not excessive – punishment for all fraud offenses. Furthermore, in cases involving relatively large loss amounts, the cumulative impact is often that of overlapping specific offense characteristics that double-count the harm caused by the offense.³ For example, large scale fraud, by definition, tends to involve a sizeable group of victims.

As an initial matter, the Commission requests comment regarding whether the victims table should apply if no victims were substantially harmed by the offense. The NYCDL recommends the elimination of the victims table under such circumstances since

² Jed S. Rakoff, *Why The Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent. Rep. 6, 7 (2013).

³ See *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (J. Rakoff) (suggesting that “the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear ‘objective,’ tend to place great weight on putatively measurable quantities, such as . . . the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors,” which in some cases, “may lead to guideline offense levels that are, quite literally, off the chart”).

the loss table suffices to establish the appropriate offense level and the Commission will avoid the risk of double-counting.

2. Issue for Comment 2: Scope of Enhancement for an Offense that Resulted in Substantial [Financial] Hardship for One or More Victims

The Commission requests comment on the scope of the new enhancement for substantial [financial] hardship to one or more victims and the factors provided.

The NYCDL agrees that the impact of the victims table should be shifted from a calculation of the number of victims to a more detailed focus on the harm to any such victims. This approach best reflects the severity of a financial crime and more accurately measures its impact. For example, a defendant that defrauds hundreds of people of \$10,000 each may often cause less harm to those victims than a defendant who defrauds a single retiree of his or her life savings, even if the total loss is the same. Courts have recognized this same logic in making sentencing determinations in financial crime cases.⁴

a. Accounting for Harm to Victims

As stated above, the Commission proposes two options for measuring substantial [financial] hardship to one or more victims. Option 1 is a generalized enhancement that

⁴ See *United States v. Bodden*, 552 Fed. App'x 86, 87 (2d Cir. 2014) (affirming the district court's imposition of an above guidelines sentence for wire fraud based on the "duration of [the] offense; the callous nature in which [the defendant] solicited additional money from his victims after they tried to get their money back; and how the fraud scheme ruined the lives of families who trusted [the defendant] with their life savings"); *United States v. Stiitsky*, 536 Fed. App'x 98, 115 (2d Cir. 2013) *cert. denied*, 135 S. Ct. 188 (2014) (affirming a sentence of eighty-five years, the maximum under the Guidelines range, for securities, mail, and wire fraud where the scheme "resulted in devastating injury," especially older victims whose "life savings" were wiped out "at the end of their lives when they no longer had the ability to earn substantial amounts of money"); *United States v. Van Zandt*, 164 F.3d 620, 620 (2d Cir. 1998) (affirming an eighteen-month upward departure where defendant's mail fraud cost at least two victims "all of their money" and one was "close to losing her home").

applies if there is at least one victim suffering substantial harm. The enhancement is bracketed at [2][3][4] levels. Option 2 provides a more specific, tiered enhancement based on the number of substantially harmed victims. 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. If there are at least twenty-five victims, the enhancement is [3][6] levels.

The NYCDL supports Option 2 because it accounts for harm to victims, while minimizing the risk of overstating this particular factor. The NYCDL believes that adopting Option 2 in lieu of the victims table is most consistent with the Commission’s aim to “ensure a short but definite period of confinement for a larger proportion of these ‘white collar’ cases, both to ensure proportionate punishment and to achieve adequate deterrence.”⁵

b. *Factors to Consider in Applying the Enhancement*

The Commission also proposes factors for a court to consider in determining whether substantial [financial] hardship resulted. While it is clear that the Commission is seeking through this Application Note to achieve some clarity in what it means to suffer “substantial [financial] hardship,” the NYCDL worries that some of the proposed examples will create unnecessary ambiguity and potentially redirect a sentencing court’s focus from the harm actually caused by the crime. For instance, we recommend deleting sections 5 (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)

⁵ U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing*, vii (Nov. 2004), available at <https://www.ncjrs.gov/pdffiles1/Digitization/208044NCJRS.pdf>.

(being erroneously arrested or denied a job because an arrest record has been made in his or her name), and (H) (having his or her identity assumed by someone else), since they relate primarily to collateral issues arising from identity theft. These factors should remain in Application Note 20(A)(vi).

Furthermore, the NYCDL believes that the Commission should define “substantial hardship” in such a way that it reduces the cumulative effect of the proposed amendment and other provisions in § 2B1.1(b)(2). Subsection (b)(16)(B) already provides an enhancement where the offense substantially jeopardizes “the safety and soundness of a financial institution” or substantially endangers “the solvency or financial security” of certain organizations. To avoid double counting, the proposed amendment should apply only when the victims are individuals. Finally, subsection (b)(17) should be eliminated as duplicative of Application Note 20(A)(vi), which already allows for upward departure in cases involving unlawfully obtained or produced means of identification.

3. Issue for Comment 3: Extension of Enhancement for 100 or More Victims

The Commission requests comment on whether § 2B1.1(b)(16)(b)(iii) should be eliminated or reduced. This subsection provides a 4-level enhancement if the offense “substantially endangered the solvency or financial security of 100 or more victims.” The NYCDL believes that the tiered approach in option 2 will adequately address this harm and that maintaining the enhancement will lead to unfair duplication, therefore, the NYCDL supports elimination of this subsection. However, the cumulative adjustment subsection

and the victims table should still be capped at 6 levels.

C. Proposed Amendment: Sophisticated Means

The Commission has proposed amending the sophisticated means enhancement under § 2B1.1 so that it applies based only on the defendant's conduct rather than the offense as a whole. The Commission also is considering whether the fraudulent conduct at issue should be compared only to similar frauds or to all frauds that could fall within the scope of § 2B1.1. Finally, the Commission has asked for comment on whether the proposed amendment to the accompanying Comment should provide guidance for determining what offenses are of the same kind for purposes of applying the sophisticated means enhancement.

The NYCDL recommends that the Commission amend the sophisticated means Guideline to specify that it applies based on the sophisticated nature of the defendant's *own* conduct, rather than on the offense as a whole and that the conduct should be compared to similar frauds.

Current Language

Section 2B1.1(c)(10) states as follows:

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

Currently, Application note (9)(B) provides as follows:

For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate *offense conduct* 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.

(emphasis added).

As noted by the Commission, courts have applied the sophisticated means enhancement based solely upon the sophisticated nature of the offense without focusing on the *specific actions of the particular defendant* being sentenced. Likewise, courts have not been consistent in determining whether the particular scheme at issue must be sophisticated in comparison to other fraud offenses that may fall under § 2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue.

The Commission therefore proposes adding a new Section (B) under the Application Notes to § 2B1.1 which would state as follows:

(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. 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).

The NYCDL supports the proposed change to Application Note 9(B), which makes it clear that the enhancement should apply only when “the defendant engaged in or caused such [sophisticated] conduct.” This language is necessary in order to avoid the application of the 2-level enhancement in common scenarios, such as that cited by the Commission as

occurring in *United States v. Bishop-Oyedepo*, 480 Fed.Appx. 431 (7th Cir. 2012), where the court found that whether the defendant's "individual actions were sophisticated [did] not matter" and that the adjustment may be applied to a defendant who engages in "jointly undertaken criminal activity" "so long as the use of sophisticated means by other criminal associates was reasonably foreseeable' to the defendant." *Id.* at 432 (emphasis added) (quoting *United States v. Green*, 648 F.3d 569, 576 (7th Cir. 2011); citing *United States v. Cosgrove*, 637 F.3d 646, 666 (6th Cir. 2011); *United States v. Jenkins-Watts*, 574 F.3d 950, 965 (8th Cir. 2009)). The NYCDL agrees that such broad use of the sophisticated means enhancement to encompass even minor participants in a complex fraudulent scheme results in unfairly severe sentences. The proposed amendment serves to steer courts in a more sensible direction that avoids imposing the overall sophistication of a scheme on small players.

Likewise, the NYCDL supports the proposed amendment to Application Note 9(B) that clarifies that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." As noted by the Commission, courts have not been consistent in analyzing whether a scheme must be sophisticated in comparison to any fraud that falls under § 2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue at sentencing. For example, in *United States v. Jones*, 530 F.3d 1292, 1307 (10th Cir. 2008), in affirming the application of the two-level sophisticated means enhancement, the Tenth Circuit compared the run-of-the-mill bank fraud case at issue, where a bank teller stole customer information and, together with her boyfriend, created phony checks with their home computer, with "the myriad crimes within the ambit

of § 2B1.1.” On the other hand, both the Seventh and Eighth Circuits have analyzed fraudulent schemes in comparison to similar types of schemes. *See, e.g., United States v. Wayland*, 549 F.3d 526, 529 (7th Cir. 2008) (“typical health care fraud case”); *United States v. Hance*, 501 F.3d 900, 909 (8th Cir. 2007) (“garden-variety mail fraud scheme”). The approach of the Seventh and Eighth Circuits, and the proposed approach of the Commission, makes good sense and will result in fairer sentencing outcomes as it will force courts to analyze the specific nature of the fraud at issue. The Tenth Circuit’s approach has the effect of making the sophisticated means enhancement a foregone conclusion in any case involving anything but rudimentary false statements.

Notably, the *Jones* court, in rejecting the defendants’ argument that the sophisticated means enhancement should not apply to their basic mail fraud scheme, distinguished *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995), a tax evasion case in which former § 2T1.3(b)(2) applied. Application Note 2 to former § 2T1.3(b)(2), which was deleted from the Sentencing Guidelines as of November 1, 1993, specifically stated, “‘Sophisticated means,’ as used in § 2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case.” *See* Appendix C, Amendment 491 (§ 2T1.3(b)(2), Commentary Note 2). The Commission’s proposed amendment would return this aspect of the Guidelines to a more common-sense approach, whereby similar fraudulent schemes are compared, rather than all schemes that may fall under a specific fraud Guideline. In order for the Guidelines to be applied uniformly, the NYCDL recommends that the Commission amend all other application notes concerning sophisticated means to reflect the proposed change and clarify that

“[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.” *See, e.g.*, § 2T1.1, Application Note 5 (current language is: “‘sophisticated means’ means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense”).

1. Issue for Comment: Guidance for Determining What Offenses Are of the Same Kind

The Commission requests comment regarding what guidance, if any, the Commission should provide for determining what offenses are of the same kind, for purposes of determining sophisticated means.

The NYCDL believes that the unique factual scenarios presented by each case counsels against providing examples of offenses that should be considered of the “same kind” and that the use of such examples may operate to limit a court’s discretion to apply or reject the enhancement. Therefore, the NYCDL does not recommend the inclusion of such examples. Rather, the NYCDL recommends that the guidance make clear that a sophisticated means enhancement is appropriate only when the acts of the defendant, “measured for their complexity and intricacy,” are distinguishable from other similar offenses (*see United States v. Hance*, 501 F.3d at 910) and believes this determination should be left to the discretion of the sentencing judge.

D. Proposed Amendment: Fraud on the Market and Related Offenses

The Commission proposes to amend the Guidelines as they relate to, among other things, “fraud on the market” cases and related offenses. In particular, the Commission is considering whether “fraud on the market” and similar types of financial market cases were adequately addressed by the amendments to § 2B1.1 adopted in 2012 and whether § 2B1.1

should direct courts to use gain, rather than loss, for purposes of determining the harm accountable to a defendant under 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. The Commission also proposes that in such cases subsection (b)(1) require a minimum enhancement of between 14-22 levels.

1. Issue for Comment 1: Adequacy of the 2012 Amendments

The Commission requests comment on whether “fraud on the market” and similar types of financial market cases were adequately addressed by the amendments to § 2B1.1 adopted in 2012 as a response to directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

The NYCDL believes that the 2012 amendments to the Guidelines do not adequately address “fraud on the market” and similar types of cases. As the NYCDL comments to the 2012 proposed amendments anticipated, the 2012 amendments have created an excessive increase in recommended advisory Guidelines ranges, which were already unduly harsh, and have resulted in Guidelines ranges that, for most defendants, are far greater than necessary to accomplish the purposes of punishment.⁶ The average Guideline minimum in fraud cases increased from approximately 25 months to 29 months

⁶ See Comments of the New York Council of Defense Lawyers Regarding 2012 Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, dated March 19, 2012 (“NYCDL 2012 Comments”), at 2-3.

between 2009 and 2012.⁷ From 2013 to third quarter 2014, the average Guideline minimum continued to rise from approximately 29 months to 35 months.⁸

In turn, this growth in recommended ranges has caused increased departures from the Guidelines in fraud cases as judges have attempted to reach more sensible and just results that properly contemplate the seriousness of the offense and the individual culpability of the defendant. From 2012 to 2013, the number of fraud defendants sentenced within the Guidelines range dropped from 50.4% to 47.4%, and the number of fraud defendants sentenced below the Guidelines range, without a request by the government in support, rose from 23.8% to 25.9%.⁹ This trend appears to be continuing, with preliminary data for 2014 showing that, in fraud cases, courts sentenced within the Guidelines range only 43.4% of the time and have varied below the Guidelines range, without a request by the government in support, 28.4% of the time.¹⁰

The NYCDL endorses the sentencing of “fraud on the market” cases under § 2B1.4 (Insider Trading), instead of § 2B.1.1, as such cases are more conceptually similar to insider trading cases than to the types of fraud offenses covered by § 2B.1.1. However, in light of the presumption under § 2B1.4 that an insider trading case employs sophisticated means, the NYCDL believes that application of § 2B1.4 to “fraud on the market” cases must be accompanied by the possibility of a two-point downward adjustment for defendants who do not employ sophisticated means under the new iteration of that

⁷ See U.S. Sentencing Comm’n, *Preliminary Quarterly Data Report*, fig. C (published Dec. 22, 2014).

⁸ *Id.*

⁹ See U.S. Sent’g Comm’n, 2013 Sourcebook of Federal Sentencing Statistics, tbl 27A; 2012 Sourcebook of Federal Sentencing Statistics, tbl. 27A.

¹⁰ See U.S. Sent’g Comm’n, *Preliminary Quarterly Data Report*, tbl. 3 (Sept. 30, 2014).

enhancement. (*See supra* pp. 7-10). Further, the NYCDL continues to encourage a de-emphasis on the gain adjustment under § 2B1.4 in calculating a defendant's total offense level.¹¹ The gain attributable to an insider trading defendant may easily account for half to two-thirds of his total offense level, without any regard to how much, if any, of the gain is paid to the defendant personally.¹² Because the gain calculation does not take into account motive, intent, or personal gain, it often creates unreasonably high sentencing recommendations that are not meaningfully tethered to the defendant's individual culpability.

The NYCDL does not, however, endorse the creation of a separate guideline for "fraud on the market" cases. Little is gained from distinguishing "fraud on the market" from other forms of securities fraud, and the creation of a new guideline specific to "fraud on the market" will only lead to additional confusion and over-complication of the Guidelines.

To the extent the Commission continues to sentence "fraud on the market" cases under § 2B1.1, the NYCDL believes, as it did in 2012, that the upward departure provision for cases involving "a risk of a significant disruption of a national financial market," *see* § 2B1.1, App. N. 20(A)(iv)), is unnecessary and duplicative, especially in "fraud on the market" cases. The NYCDL believes that even taking into account its recommended

¹¹ *See* NYCDL 2012 Comments, at 4-10.

¹² *See e.g. U.S. v. Gupta*, 904 F.Supp.2d 349 (S.D.N.Y. 2012) (gain accounted for 18 of 28 points despite the fact that the defendant did not financially benefit from the insider trading at all); *United States v. Rajaratnam*, No. 09 CR. 1184 RJH, 2012 WL 362031, at *20 (S.D.N.Y. Jan. 31, 2012) (Gain accounting for 24 of total 38 points); ; *see United States v. Nacchio*, 573 F.3d 1062, 1074 (10th Cir. 2009) (noting that district court improperly focused only on defendant's net profit, ignoring "the myriad of factors unrelated to his criminal fraud that could have contributed to the increase in the value of the securities").

changes to the enhancements contained in the loss and victim tables, those tables, combined with the enhancements for employing sophisticated means and for substantially jeopardizing a financial institution, sufficiently address situations involving a risk of significant disruption of a national financial market. Further, as they stand, these enhancements, even without the additional departure, tend to place defendants at the outer bounds of the Sentencing Table and beyond the statutory maximum sentences allowed by law.¹³

The NYCDL also continues to believe that the special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity tends to unnecessarily inflate sentences by failing adequately to account for extrinsic factors, such as market conditions that can affect stock price, and incorrectly assumes that all shares outstanding incurred harm.¹⁴ As discussed below, to better address “fraud on the market” and similar types of cases involving the financial markets, the Commission should revise the Guidelines to de-emphasize loss and instead focus more on the conduct of the defendant in determining the sentence.

¹³ See, e.g., *United States v. Georgiou*, No. 10-4774, 2015 WL 241438 (3d Cir. Jan. 20, 2015) (total offense level of 43 – consisting of a base offense level of 7 (2B1.1(a)), 24 points for the calculated \$55,832,398 loss (2B1.1(b)(1)(M)), 2 points for the sophistication of the offense (2B1.1(b)(10)(C)), 6 points for the number of victims (2B1.1(b)(2)(C)), and 4 points for the dissolution of one of the financial institution defendants (2B1.1(b)(16) – equated to life in prison, well beyond the 20-year statutory maximum); Transcript of Sentencing, *United States v. Madoff*, 09 CR 213 (DC) (S.D.N.Y. June 29, 2009) (defendant’s conduct resulted in billions of dollars in losses and yielded a total offense level of 52, resulting in a Guidelines-recommended sentence of life imprisonment).

¹⁴ NYCDL 2012 Comments, 20-21; see also *United States v. Ollis*, 429 F.3d 540, 545-49 (5th Cir. 2005) (recognizing that stock price movements based on factors extrinsic to the fraud should not be included in the loss determination); see generally *Dura Pharmaceuticals*, 544 U.S. 336, 342 (2009) (a private plaintiff cannot prove a defendant’s fraud caused an economic loss simply by demonstrating that the price of the security was inflated on the date that he or she purchased the security).

To address concerns regarding the overstatement of culpability in “fraud on the market” cases, under either § 2B.1.4 or § 2B1.1, the Commission should consider adjusting the loss table in § 2B1.1 to include fewer levels with a broader numerical spread between each tier. Providing for a wider range of loss/gain amounts between tiers would better serve the Guidelines’ goal of distinguishing between smaller and larger frauds without placing undue emphasis on this sentencing factor.¹⁵

2. Issue For Comment 2: Appropriateness of Using Gain as the Method for Determining Harm

The Commission requests 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.

Generally, the NYCDL believes that reliance on either loss or gain does not properly account for the culpability of defendants, and distorts the evaluation of an appropriate sentence.¹⁶ As the Honorable Jed Rakoff of the Southern District of New York has previously observed, “[t]he guidelines give the mirage of something that can be

¹⁵ See Danielle DeMasi Chatten, *The More You Gain, the More You Lose: Sentencing Insider Trading Under the U.S. Sentencing Guidelines*, 79 Fordham L. Rev. 165, 208-09 (2010) (citations omitted) (“A better proxy for determining the defendant’s intent and the seriousness of the offense would be a chart that contains fewer increments and separate amounts that truly represent large-scale fraud from small-scale fraud); U.S. Sentencing Commission Public Hearing Testimony and Transcripts (2009) (statement of Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090709-10/Newman_testimony.pdf, at 4-5 (“I fully recognize, as do all sentencing regimes, that seriousness of the offense should be considered a basis for increasing a sentence . . . stealing one million dollars is properly punished more severely than stealing one hundred dollars. The issue is not whether seriousness of the offense should increase severity of the sentence. The issue is whether every minute increment of offense conduct must result in a minute increment of punishment.”)

¹⁶ See *United States v. Ovid*, No. 09-CR-216 JG, 2010 WL 3940724, at *7 (E.D.N.Y. Oct. 1, 2010) (Gleeson, J.) (“[T]he fact that two fraud defendants have similar or even identical *Guidelines ranges* does not necessarily mean they committed similar offenses. In ways captured by the § 3553(a) factors but not sufficiently by the Guidelines themselves,” one fraud defendant may be more culpable than another.)

obtained with arithmetic certainty.”¹⁷ However, between the two options, the NYCDL believes gain is the more appropriate measure, particularly if the Guidelines focus not on the entire gain of the purported fraud, but on the gain to the individual defendant.

Excessive emphasis on rote Guidelines loss calculations has frequently resulted in severe advisory sentence ranges for defendants who commit an economic crime and in some instances has resulted in sentences greater than those imposed for violent crimes and serial child molestation.¹⁸ The current rule tends toward unjustified sentence variances by failing to adequately account for extrinsic factors, such as market conditions, that can affect stock price and incorrectly assuming that all shares outstanding incurred harm. A defendant whose offense conduct spans a period that includes extraneous market forces that artificially increase stock price will receive a harsher sentence due to an artificial increase in the loss calculation. This failure to account for extrinsic factors creates a disconnect between the amount of loss and the culpability of the defendant and seriousness of the offense.

Likewise, by “multiplying the difference in average price by the number of shares outstanding,” (§ 2B1.1, App. N. 3(F)(ix)(II)), the current loss calculation presupposes that

¹⁷ Peter Lattman, *2 Defendants Sentenced in Insider Trading Case*, N.Y. TIMES DEALBOOK, Sept. 21, 2011, available at <http://dealbook.nytimes.com/2011/09/21/2-defendants-sentenced-in-insider-trading-case/>; see also *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (slavish adherence to the loss table in § 2B1.1(b) can result in an “utter travesty of justice” that can only be cured when “cabined by common sense”).

¹⁸ See David Debold & Matthew Benjamin, Essay, “*Losing Ground*”—*In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 142 (2011) (noting that increased Guidelines ranges driven by loss and combined with duplicative enhancements “have escalated advisory guidelines sentences for high-loss frauds beyond those once reserved for violent criminals”); *United States v. Ebberts*, 458 F.3d 110, 129 (2d Cir. 2006), cert. denied, 127 S. Ct. 1483 (2007).

every outstanding share incurred harm, which in many cases is not an accurate assumption. For instance, if a stock consistently trades at \$5 per share prior to a fraud, rises to \$10 per share during the fraud, and then returns to its pre-fraud price of \$5 after the fraud is disclosed, only those shareholders who purchased the stock during the fraud and sold them after disclosure of the fraud are harmed. By assuming that all outstanding shares are harmed this method is biased toward higher calculations of loss.

In the insider trading sphere, focusing on gain has not produced a substantially more equitable result.¹⁹ However, to the extent that the Commission keeps the current framework in place, reliance on gain, rather than loss, may be a more appropriate indicator of a defendant's culpability and thus a more reliable method for determining harm, particularly for those defendants involved in frauds that exacted a large loss on the market, but who personally gained little. Rather than focusing on the entire gain resulting from the fraud, a better approach may be to focus on personal gain in relation to the overall gain of the fraudulent scheme, as the defendant's personal gain will more closely approximate the defendant's level of culpability.²⁰ For example, a defendant who realized a personal gain amounting to a small fraction of the scheme's overall gain would have his base offense level enhanced to a lesser degree than a defendant garnering a more significant percentage of the scheme's overall gain.

¹⁹ See *Nacchio*, 573 F.3d at 1074 (any gain calculation must take into account all market forces that might contribute to share price fluctuation).

²⁰ See *e.g.*, *Gupta*, 904 F. Supp. 2d at 351 (court could not abide by sentence recommended by government under the Guidelines where two-thirds of the points calculated for the defendant's sentence resulted from the monetary gain, not to the defendant, but to the company for which he worked); *see*

3. Issue for Comment 3: Over- and Under-Punishment Caused by the Emphasis on Loss and Gain

The Commission requests comment on whether the use of gain or loss may over-punish some defendants and under-punish others, and how the Commission should address this issue. Specifically, whether “fraud on the market” offenses should be structured to include a minimum level of enhancement.

The NYCDL submits that the current methods for determining loss and gain fail to take account of market conditions in significant ways, thus tending to over-punish defendants and cause unwarranted sentencing variations. More importantly, the focus on loss or gain distorts sentencing by minimizing, and at times eliminating, consideration of the defendant’s individual culpability. This distortion leads to a lack of uniformity in sentencing. As one appellate court judge recently observed, there is a “widespread perception that the loss guideline is broken” and this “leaves district judges without meaningful guidance in high-loss cases.”²¹ Similarly, use of the gain Guidelines when taking into account the entire gain from the scheme rather than any individual defendant’s gain can lead to sentences that are vastly disproportionate to a defendant’s individual culpability.

It bears noting that the focus on loss and gain amount as the largest determining factor does not only distort sentences in high loss cases. The distortion affects the bottom half of the table as well. For example, in the bottom half of the loss table, a loss amount of more than \$10,000 but less than \$20,000 carried an increase of 3 levels in 1989, but now

²¹ See *United States v. Corsey*, 723 F.3d 366, 378 (2d Cir. 2013) (per curiam) (Underhill, J. concurring).

carries a 4 level increase. A loss amount of more than \$30,000 but less than \$50,000 carried an increase of 4 levels in 1989 and now carries an increase of 6 levels. This means that even a first time offender with no other enhancements is pushed into Zone 6 with a loss amount of \$30,000 or above. These increases have caused significant departures from the Guidelines by sentencing courts, for example, according to statistics released by the Commission, in 2012, 47.7% of sentences in cases involving loss amounts of more than \$30,000 but less than \$70,000 were below the Guidelines range.²² Of that 47.7%, 28.4% were varied below the Guidelines range without a request by the government in support.²³ Further, in each of the next 4 loss categories, up to \$1 million, sentences fell outside the Guideline recommended range well over half of the time (ranging from 56.8% to 64%).²⁴ Significantly, across all of these loss amounts, approximately one-third of the cases involved non-government sponsored sentences below the Guideline range (ranging from 28.3% to 35.2%).²⁵ This is well above the national rate of non-government sponsored below Guideline sentences for all offenses, which in FY 2012 was only 17.8%.²⁶

The NYCDL believes the Commission should address these issues by de-emphasizing loss and gain in “fraud on the market” cases, and all other fraud cases governed by § 2B1.1, and shift the focus of sentencing in these cases to considerations that

²² USSC, Sentencing and Guideline Application Information for §2B1.1 Offenders, Symposium on Economic Crime, Sept. 18-19, 2013, at 8, http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Sentencing_Guideline_Application_Info.pdf (“Symposium Guideline Application Information”).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. Sent’g Comm’n, 2012 Sourcebook of Federal Sentencing Statistics tbl. N (2012).

reflect the defendant's individual culpability, such as the defendant's role in the offense, whether the defendant voluntarily withdrew from the scheme, any attempts by the defendant to conceal the offense, and the defendant's cooperation with the government.

Finally, the Commission requests comment on whether "fraud on the market" offenses should be structured to include a minimum level of enhancement. The Commission's proposed amendment contains a minimum enhancement of 14 to 22 offense levels for all "fraud on the market" cases, which is equivalent to a loss of \$400,000 to \$20 million under § 2B1.1 (or a gain of \$400,000 to \$20 million under § 2B1.4). The NYCDL opposes any such minimum enhancement for "fraud on the market."

Under such a regime, the Guidelines would call for a sentence of 33-41 months under § 2B1.1 (or 41-51 months under § 2B1.4) for a first time offender even where the defendant received no personal gain and was subject to no additional enhancements. Such a minimum enhancement would not allow for properly individualized assessments of the defendant's culpability or the seriousness of the crime, and will result in excessively harsh sentences. Further, the NYCDL believes that increasing the severity of sentences in this way would lead to further departures from advisory Guidelines ranges by courts.

II. PROPOSED AMENDMENT: "JOINTLY UNDERTAKEN CRIMINAL ACTIVITY"

The Commission requests comment on a proposed amendment to § 1B1.3 (relevant conduct) regarding the application of the "jointly undertaken criminal activity" provision. The proposed amendment alters the description of the type of "jointly undertaken criminal activity" that should be included in relevant conduct by delineating three separate components that must be met in order for the conduct to be included. The amended

Guideline states that in the case of “jointly undertaken criminal activity,” relevant conduct will only include acts and omissions of others if they were “(i) within the scope of the criminal activity that the defendant jointly agreed to undertake, (ii) in furtherance of the “jointly undertaken criminal activity”, and (iii) reasonably foreseeable in connection with that criminal activity”

The NYCDL supports this amendment. By itemizing the three steps of the analysis, the revised Guideline will better ensure that defendants are held responsible for conduct of others only when such conduct was within the scope and in furtherance of their intended criminal activity and reasonably foreseeable as a consequence of that activity. We believe some courts have been too quick to sentence defendants based on the conduct of others premised solely on a finding that the conduct at issue was reasonably foreseeable to a particular defendant, without regard to whether those actions also were within the scope of the criminal activity to which the defendant specifically agreed. The amended Guideline will guard against courts giving short shrift to the need to ascertain the “scope” of the “jointly undertaken criminal activity” to which the defendant agreed prior to engaging in any reasonable foreseeability analysis.

In addition, the Commission invited comment on additional guidance on the treatment of “jointly undertaken criminal activity” for the purpose of determining relevant conduct. The NYCDL believes that the Commission should offer additional guidance, as set forth below.

First, we believe that the Commission should emphasize that not all activity undertaken by more than one person is jointly undertaken. As the Second Circuit

articulated in the frequently cited case *United States v. Studley*, “a defendant’s knowledge of another participant’s criminal acts is not enough to hold the defendant responsible for those acts” under the “jointly undertaken criminal activity” provision. *U.S. v. Studley*, 47 F.3d 569, 575 (2d Cir. 1995); *See also United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002); *United States v. Offiong*, 83 F.3d 430 (9th Cir. 1996); *United States v. Flores*, 230 F. Supp. 2d 138, 143-44 (D. Mass. 2002) *aff’d sub nom. United States v. Laboy*, 351 F.3d 578 (1st Cir. 2003).

To help courts identify what conduct of the defendant’s co-participants was jointly undertaken for purpose of determining a particular defendant’s individualized sentence, the NYCDL proposes that the commentary provide a list of non-exclusive factors for the court to consider, drawn from the discussion in *Studley*:

- The specific activities the defendant agreed should be undertaken or accomplished by his co-participants
- The specific role the defendant agreed to play in the criminal operation
- Whether defendant was involved in designing and executing the illegal scheme
- Whether the participants worked independently or separately
- Whether the defendant’s success or profit depended on the success or profit of other co-participants in the scheme
- Whether the participants pooled their profits, knowledge, weapons, or other resources

The commentary should note that these factors should be evaluated collectively; how many factors are sufficient for identifying certain conduct as “jointly undertaken criminal activity” may depend on the individual facts of a case.

Second, we believe that further guidance is warranted on how to determine “the scope of the criminal activity that the defendant jointly agreed to undertake.” The proposed Guideline already provides that “[a]cts 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.” We believe it would be helpful for the Commission to emphasize that the scope of the conduct a particular defendant jointly agreed to undertake is limited to the conduct *specifically intended* by that defendant.

This guidance will ensure that courts do not conflate conduct of which the defendant was aware (or even conduct the court believes the defendant should have known about) with conduct the defendant specifically agreed to undertake. This guidance will be particularly valuable for defendants convicted of broad conspiracy charges; it will underscore the fact that the scope of each defendant’s agreed-upon criminal activity is distinct and help courts avoid the often incorrect assumption that the scope of the conspiracy is coterminous with the scope of the criminal activity intended by a defendant.

We believe that these clarifications will enhance the Guidelines’ goal of achieving “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.” U.S.S.G. Ch. ONE, Pt. A, Subpt. 1.

A. Issue for Comment 1: Additional and Revised Examples to Illuminate the Scope Prong

The Commission requests comment on whether additional or different guidance should be provided on the “jointly undertaken criminal activity” provision in subsection (a)(1)(B).

To further illustrate these principles, we propose modifying Example C (ii) as follows:

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. After the conclusion of the

initial scheme, Defendant G, operating independently and without assistance from Defendant F, sells an additional \$10,000 in fraudulent stocks. Defendant F is aware of Defendant G's activity but does not participate in the activity and does not share in the proceeds. Each is convicted of mail fraud. Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is also accountable for the amount obtained by his accomplice during the initial execution of the scheme (\$55,000 total) under subsection (a)(1)(B) because the conduct of each was within the scope of the criminal activity they jointly agreed to undertake (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity. However, Defendant F is not accountable for the additional \$10,000 obtained by Defendant G after the initial scheme had concluded. This is because, unlike the joint activity that resulted in gains of \$55,000, Defendant F did not specifically intend that the additional \$10,000 fraud be perpetrated, he did not benefit or profit from this additional fraud, he did not assist with the fraud, and he did not depend on its success.

In addition, NYCDL also proposes a new example based on the *Studley* case discussed above:

Ten defendants participate in a telemarketing scheme, through which callers are defrauded into paying for sham loans. The ten defendants share an office and are given a script for the calls by the scheme's director, but otherwise operate independently and are in competition with one another for callers. The telemarketers are compensated solely on a commission basis. Each defendant telemarketer is responsible only for the losses he generated, since the defendants operated largely independently, did not pool profits or resources, and specifically intended only to accomplish their own particular frauds. The scheme's director, on the other hand, is responsible for the losses of the entire scheme, since he agreed with each individual telemarketer to perpetrate the frauds, provided them with direction and resources, and profited directly from their efforts.

B. Issue for Comment 2: Proposed Policy Changes

The Commission also requests comment on two proposed policy changes: (1) whether the reasonable foreseeability standard should be replaced with a different state of

mind requirement, and (2) whether the provision should require a conviction of conspiracy or a Pinkerton conviction before it can be applied.

The NYCDL believes that if the definition of the scope of “jointly undertaken criminal activity” is modified to make clear that it is limited to conduct specifically intended and agreed to by the defendant, then it is not necessary to change the reasonable foreseeability requirement to a higher state of mind. We believe that circumscribing the scope of conduct for which a defendant is responsible is a more precise and easier to administer standard for ensuring that a defendant’s sentence is appropriately tailored to his criminal conduct. Limiting the scope to what a defendant specifically intended achieves the apparent goal of the proposed policy change, without the unjust outcomes that might follow from eliminating the reasonable foreseeability requirement.

The NYCDL supports the concept of limiting “jointly undertaken criminal activity” to convictions of conspiracy. In light of the prevalence of conspiracy charges when offenses involve more than one person, this limitation is unlikely to work a major change in the application of the Guidelines. It would, however, provide a framework to ground a court’s task of identifying the scope of activity to which a particular defendant agreed (with the outer limit being the full scope of the conspiracy). In addition, this policy change will ensure that the “jointly undertaken criminal activity” provision is applied solely to defendants who definitively engaged in criminal activity in concert with others, eliminating some of the guesswork that might otherwise be involved in applying this provision.

However, should a conspiracy requirement be adopted, the NYCDL urges the Commission to include cautionary guidance to courts explaining that the scope of a

conspiracy does not – and most often will not – equate to the scope of the defendant’s “jointly undertaken criminal activity.” The conspiracy includes the universe of possible conduct, from which the defendant’s particular scope must be determined. While such guidance already exists in the commentary, we urge that it be highlighted and emphasized.

III. PROPOSED AMENDMENT TO MONETARY TABLES: ADJUSTMENT FOR INFLATION

The Commission has proposed adjusting monetary values referenced in the Guidelines to account for inflation. The Commission notes that the monetary values in the Guidelines have never been adjusted specifically to account for inflation. The Commission’s proposed amendment seeks to adjust values in the Guidelines based on the Bureau of Labor Statistics’ Consumer Price Index and then round the amounts based on two options – one which essentially tracks the Federal Civil Penalties Inflation Adjustment Act of 1990 (“the Act”) and a second which uses the Act as a template but extrapolates to include higher amounts. For Example, the highest amount addressed in the Act is “amounts greater than \$200,000” which it rounds to the “nearest multiple of \$25,000.” This means that a fraud involving \$200,000 and a fraud involving \$200,000,000 would both be rounded to the nearest multiple of \$25,000.

The second option the Commission proposes is to extrapolate from the Act’s framework but include amounts as high as \$100,000,000. Thus, instead of the table leveling out after \$200,000, the second option provides:

- Amounts greater than \$100,000,000 will be rounded to the nearest multiple of \$50,000,000
- Amounts greater than \$10,000,000 will be rounded to the nearest multiple of \$5,000,000

- Amounts greater than \$1,000,000 will be rounded to the nearest multiple of \$500,000
- Amounts greater than \$100,000 will be rounded to the nearest multiple of \$50,000,000²⁷

The NYCDL believes that the monetary tables in the Guidelines should be adjusted for inflation in this amendment cycle. As one commentator notes, “while the commission has made multiple aggravating amendments over the years, it has failed to make any adjustments for the effects of inflation, which itself has effectively increased penalties.” Alan Ellis, John R. Steer, Mark H. Allenbaugh, *At A "Loss" for Justice Federal Sentencing for Economic Offenses*, Crim. Just., Winter 2011, at 34, 37.

The NYCDL urges the Commission to use the second approach, which extrapolates from the Act’s framework but includes amounts greater than \$100,000,000. This approach provides much more nuance in both sentencing and monetary fines. Further, adopting the more nuanced option proposed by the Commission is particularly important in the sentencing of economic crimes where the broader numerical spread between each tier at the higher end of the table will aid in adequately distinguishing between smaller and larger frauds. A difference of \$25,000 due to rounding may not be particularly significant at the high end, whereas rounding to the nearest multiple of \$50,000,000 or \$5,000,000 may result in a significantly different Guidelines’ calculation.

The NYCDL believes that the revised table should apply to all other Guidelines that reference the loss table at § 2B1.1(b)(1).

²⁷Under \$100,000 the second option then essentially reverts back to the Act’s framework, with one exception – while the Act rounds amounts greater than \$1,000 to the nearest multiple of \$1,000, the second option rounds amounts greater than \$1,000 to the nearest multiple of \$500.

The NYCDL urges the Commission to make it a practice to make an inflationary adjustment to the monetary tables contained in the Guidelines every four years. The NYCDL believes that, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), the proposed amendment for inflationary adjustments to the monetary tables in the Guidelines should be included in subsection (c) of § 1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants.

IV. PROPOSED AMENDMENT: MITIGATING ROLE ADJUSTMENT

The Commission has proposed amending the Application Notes relating to the mitigating role adjustment under § 3B1.2 to: (1) clarify that the defendant's relative culpability is determined only by reference to co-participants in the offense; (2) revise the language to state that certain individuals who perform limited functions may receive the adjustment; and (3) provide a non-exhaustive list of factors for the court to consider in determining whether and how to apply a mitigating role adjustment.

Current Language

§ 3B1.2 provides that the offense level may be decreased based on the defendant's role 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.

The Commission proposes amending Application Note 3(A), which is entitled "Substantially Less Culpable than Average Participant," to add language clarifying that the adjustment applies to "a defendant who plays a part in committing the offense that makes

him substantially less culpable than the average participant *in the criminal activity*.” The purpose of this additional language is to resolve a split among the Circuit Courts in the proper analysis of “average participant.” The First and Second Circuits have concluded that the “average participant” includes not just the defendant’s co-participants in the crime, but typical offenders who commit similar crimes. *See United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004); *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999). The NYCDL submits that the approach taken by the First and Second Circuits is unduly complicated and divorced from the actual facts of the crime at issue for sentencing. For example, in the First Circuit, the analysis is described as follows:

To qualify as a minor participant, 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. . . . To qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity. In our view, this entails proof that he is substantially less culpable than his cohorts in the actual offense and that he is substantially less culpable than the vast majority of those taking part in similar crimes.

Santos, 357 F.3d at 142 (citations omitted). The burden placed upon a defendant under this standard is unduly high and, as the First Circuit has noted, “it will be the rare case in which a defendant will warrant designation as a minimal participant.” *Id.*

The Commission’s proposed amendment would follow the analysis of the Seventh and Ninth Circuits in clarifying that the defendant’s relative culpability is to be judged by reference only to his or her co-participants in the criminal activity. *See United States v. Benitez*, 34 F. 3d 1489, 1498 (9th Cir. 1994); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006); *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993). As with the

proposed change to the sophisticated means enhancement under § 2B1.1, the NYCDL applauds this proposed change, which makes good sense and will result in fairer sentencing outcomes as it will force courts to analyze the specific crime at issue in the defendant's sentencing without the overlay of other unrelated, albeit similar, crimes, thus avoiding reference "to some abstract metaphysical standard." *DePriest*, 6 F.3d at 1214.

The Commission further proposes to amend the language in Application Note 3(A) to clarify that individuals who perform limited functions in criminal activity may receive a mitigating role adjustment. This change would remove the language that suggested that the adjustment was unlikely to be applied in such circumstances (i.e. the defendant "is not precluded from consideration for an adjustment"). The NYCDL agrees with this proposed change to the Application Note, which should cause courts to apply the mitigating role adjustment more frequently.

A. Issue for Comment: Additional Guidance

The Commission also proposes amending Application Note 3(C), entitled "Fact-Based Determination," to provide 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. Application Note 3(C) thus would read as follows:

The determination 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.

The Commission requests comment on whether the additional guidance is appropriate and whether additional or different guidance should be provided on applying the mitigating role adjustment. The NYCDL believes this additional guidance clearly is necessary as courts have struggled to grasp the distinction between “minor role” and “minimal role.” *See, e.g., United States v. Maldonado–Campos*, 920 F.2d 714, 718 (10th Cir.1990) (“[T]he terms ‘minimal participant’ and ‘minor participant’ are not too distant points along a continuum of moderate criminal participation.”); *United States v. Vega-Encarnacio*, 914 F.2d 20, 25 (1st Cir. 1990) (“There is a thin line between a minor and minimal participant, and at times, it is difficult to determine just where to draw it.”). Courts often engage in a sort of mental gymnastics in an effort to fit a defendant’s conduct within the terms. *See, e.g., U.S. v. Valdez-Perea*, 2015 WL 399970, at *5 (10th Cir. Jan. 30, 2015) (“The logical implication of the application notes is . . . that a minor participant is distinguished, in part, from a minimal participant based on his relative knowledge and understanding of the criminal operation. ‘Knowledge’ and ‘understanding’ are not binary terms, but instead fall on a spectrum; a greater degree of ignorance might move one closer to the minimal-participation category, and a lesser degree of ignorance might move one closer to the minor-participation category.”); *U.S. v. Verburg*, 588 Fed. Appx. 434, 439 (6th Cir. 2014) (“To be clear, [a] defendant does not qualify for a mitigating role reduction merely because someone else planned the scheme and made all the arrangements. . . . ‘Rather, [a] defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was *indispensable or critical to the success of*

the scheme, or if his importance in the overall scheme was such as to justify his sentence.”
(citations omitted) (emphasis in original)).

The NYCDL agrees with the additional guidance provided in the proposed amendment. Each of the three factors proposed by the Commission, which are focused on the defendant’s knowledge, participation, and potential benefit, will serve to aid sentencing courts in analyzing the key issues pertaining to a defendant’s role in an offense.

CONCLUSION

The NYCDL once again wants to thank the Commission for offering us the opportunity to comment on the proposed amendments. We look forward to continuing dialogue with the Commission as it continues in its efforts to modify the Guidelines as more experience dictates change.

New York, New York
March 18, 2015

Respectfully submitted,

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