Defending Liberty
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AMERICAN BAR ASSOCIATION

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

August 25, 2011

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500
Washington, D.C. 20002-8002

Dear Chair Saris:

On behalf of the American Bar Association, I write to express our view that the Sentencing Commission should add to its list of priorities for the amendment cycle ending May 1, 2012, the initiation of a review of the sentencing guidelines for economic crimes, particularly for such crimes involving high loss amounts.

As expressed in the testimony of our Liaison, James Felman, at the Commission's hearing on February 16, 2011, the ABA believes these guidelines are in need of a comprehensive and rigorous assessment. Mr. Felman's testimony followed the adoption by our House of Delegates of a Resolution calling for such a review. I attach and incorporate by reference that Resolution and the Report accompanying it in support of our request for this review. We understand that these issues are complex and that the requested review may require more than one amendment cycle to complete. Nevertheless, we urge the Commission to begin this important work at this time, and respectfully request that the Commission add this to its list of priorities for the coming year.

Sincerely,

Thomas M. Susman

Thomas M. Susman

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 14, 2011

RESOLUTION

RESOLVED, That the American Bar Association urges the United States Sentencing Commission to complete a rigorous and comprehensive assessment of the Federal Sentencing Guidelines for high loss economic crimes to ensure that the Guidelines for such crimes are proportional to offense severity and adequately take into consideration individual culpability and circumstances by:

(1) reevaluating the emphasis on
   - (a) monetary loss; and
   - (b) multiple specific offense characteristics that, in combination, tend to overstate the seriousness of the offense; and

(2) placing greater emphasis on
   - (a) mens rea and motive in relation to an offense;
   - (b) the defendant's role in the offense;
   - (c) whether and to what extent the defendant received a monetary gain from the offense; and
   - (d) the nature of the harm suffered by victims.

FURTHER RESOLVED, That the American Bar Association urges the United States Sentencing Commission to examine the ways that states with sentencing guideline systems address economic crimes.

REPORT

The ABA has a long history of policy regarding criminal sentencing. This includes policy relating to federal sentencing, including the penalties for certain drug offenses and the need for expanded use of alternatives to incarceration. Although this policy addresses specifically the federal sentencing guidelines for high-loss economic crimes, the ABA remains concerned about a variety of federal sentencing issues, and this resolution should not be construed to imply that the concerns it addresses are paramount.

I. Introduction

The advisory federal guidelines for the sentencing of high-loss economic crimes have been criticized in recent judicial decisions as "patently absurd on their face,"[1] "a black stain on common sense,"[2] and, ultimately, "of no help."[3] The result of relentless upward ratcheting, the present guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. These guidelines are merely advisory, however, and some judges opt instead to impose significantly lower sentences. Other judges adhere to the guidelines and mete out the sentences called for by them. To some, this looks like the disparity the guidelines were created to avoid – a regime in which the punishment turns as much on the philosophy of the sentencing judge as it does on the facts of the offense. To others, it reflects the birth of a common law of sentencing as the courts evaluate the extent to which guideline sentences serve the purposes of sentencing in individual cases. Under either view, the present guidelines in high loss cases appear to be broken. They should be fixed.

II. A Brief History of the Economic Crime Guidelines

The upward ratchet of the guidelines for economic crimes began at the beginning – with the initial set of guidelines. Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-guidelines practice, the Commission specifically elected to increase the penalties for economic crimes in the initial 1987 guidelines over the pre-guidelines practices of the judiciary as a whole.[4] While citing no data demonstrating these initial increased penalty levels were inadequate, the Commission waited only two years before revising the penalties for economic crimes upward again through a new loss table.[5] The Commission added numerous aggravating specific offense characteristics from 1989 to 2001,[6] when it again adopted wholesale increases through yet another new loss table.[7] Just when the Commission thought it could rest assured that the penalties for economic crimes were now sufficiently severe, a series of high profile corporate scandals drove the Congress to enact the Sarbanes-Oxley Act, which in

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[1] *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).

[2] *United States v. Parris*, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).

[3] *United States v. Watt*, ___ F.Supp.2d ___, 2010 WL 1676439 (D. Mass. 2010).

[4] *See* U.S.S.G. Ch.1 Pt.A. The other exception to pegging guideline penalties to pre-guidelines practices was in drug cases, where the Commission was driven upward to avoid "cliffs" caused by the mandatory minimum penalties enacted in 1986.

[5] U.S.S.G. Appendix C, Amds. 99, 154 (1989).

[6] U.S.S.G. Appendix C, Amd. 317 (1990); U.S.S.G. Appendix C, Amd. 551 (1997); U.S.S.G. Appendix C, Amd. 576 (1997); U.S.S.G. Appendix C, Amd. 596 (2000);

[7] U.S.S.G. Appendix C, Amd. 617 (2001).

part directed the Commission to ratchet up the penalties for high-loss economic crimes yet again. The Commission dutifully did so.[8] A result of all this effort is that a typical officer or director of a public company who is convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Officer or director, §2B1.1(b)(17)(A)(i):	+4
Role in the offense, §3B1.1(a):	+4
$7 million loss, §2B1.1(b)(1)(K):	+20[9]
Total offense level:	43 (life)

The advisory guideline sentence will be life without parole for virtually *any* employee convicted of a serious securities fraud causing more than $100 million of loss:

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Substantially jeopardizing corporation, §2B1.1(b)(14)(B):	+2
$100 million loss, §2B1.1(b)(1)(N):	+26
Total offense level:	43 (life)

Thus, virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act will now face an advisory range of life without parole.

III. Recent Judicial Criticism of the Economic Crime Guidelines

Faced with such "advice," a number of judges have understandably declined to follow it. In *United States v. Adelson*, for example, Judge Rakoff of the Southern District of New York was confronted with a defendant convicted of joining a conspiracy "initially concocted by others" to materially overstate a public company's financial results and thereby artificially inflate the price of its stock.[10] Adelson's guidelines score was level 46 – three levels "off the chart" – and called for a sentence of life imprisonment. Even the government "blinked at this barbarity," but was unable to make a specific sentencing recommendation.[11] For Judge Rakoff, this circumstance exposed "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[12] Given that Adelson had not originated the fraud,

[8] U.S.S.G. Appendix C, Amd. 647, 653 (2003).

[9] A $7 million is rather easy to come by in securities fraud cases because it is often equated with the drop in market capitalization that follows the disclosure of the fraud.

[10] 441 F.Supp.2d 506, 507 (S.D.N.Y. 2006).

[11] *Id.* at 511-13.

[12] *Id.* at 512.

presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate, and coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders," the court sentenced Adelson to three-and-a-half years imprisonment and ordered restitution in the amount of $50 million.[13] Along the way, Judge Rakoff explained that he had jettisoned the advisory guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face."[14]

Another example is *United States v. Parris*, where Judge Block in the Eastern District of New York sentenced two defendants to five years' imprisonment "in the face of an advisory guideline range of 360 to life."[15] The offense – a "pump and dump" stock manipulation scheme – scored an offense level 42 based on upward adjustments for more that $2.5 million of loss, more than 250 victims, sophisticated means, officer/director status, role in the offense, and obstruction of justice.[16] Quoting Judge Rakoff in *Adelson*, Judge Block described this guidelines scoring as the "kind of 'piling-on' of points for which the guidelines have frequently been criticized."[17] The court noted that there were no valid grounds for downward departure from the guidelines and thus, but for their advisory status, it "would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence."[18] Even the government agreed that "many reasonable sentences would fall outside" the advisory guidelines range.[19] In fashioning a reasonable sentence, the Court stated it "would have much preferred a sensible guideline range to give me some semblance of real guidance." The Court found no such help in the present guidelines, observing that "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment." Instead of being guided by the guidelines, the Court instead assembled a lengthy compendium based on submissions from the parties listing sentences in other high-loss cases.[20] After a lengthy discussion of what is essentially an emerging common law of high-loss economic crime sentences, the Court concluded that a sentence of five years' imprisonment was sufficient to achieve the purposes of sentencing.

Another recent case illustrating the overkill of the present high-loss guidelines is *United States v. Watt*, where Judge Gertner in the District of Massachusetts was presented with a 25-year-old first offender who pled guilty to what was reportedly the "largest conspiracy to commit identity theft in American history."[21] The government had resolved the matter by permitting

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[13] *Id*. at 514-15.

[14] *Id*. at 515.

[15] 573 F.Supp.2d 744, 745.

[16] *Id*. at 747-48.

[17] *Id*. at 745 (*quoting Adelson*, 441 F.Supp.2d at 510).

[18] *Id*. at 750-51.

[19] *Id*. at 751.

[20] *Id*. at 756-63. The compendium includes 34 cases with loss amounts ranging from $6 million to $14 billion and sentences ranging from probation to 25 years' imprisonment.

[21] 2010 WL 1676439 at *1 (D. Mass. 2010).

Watt to plead guilty to a single count carrying a five-year statutory maximum penalty.[22] Watt, who received no financial benefit from the crime, sought probation, while the government urged the maximum possible five-year sentence. As Judge Gertner sought to determine the sentence sufficient but not greater than necessary to achieve the purposes of sentencing, she specifically noted that "[t]he Guidelines were of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment."[23] Given Watt's zero gain from the offense, his lack of any criminal history, and the court's belief that he was unlikely to recidivate, Judge Gertner sentenced him to two years' imprisonment and $171 million of restitution.

A number of similar cases did not result in published decisions. In *United States v. Ferguson*, the district court in Connecticut imposed sentences ranging from one year and one day to four years on five defendants whose guideline ranges included the possibility of life imprisonment and who were convicted of fraud leading to over $500 million in loss.[24] In *United States v. Stinn*, a former CEO of a public company faced a guidelines range of life imprisonment but was sentenced to twelve years' imprisonment in the Eastern District of New York.[25] A defendant who caused approximately $25 million in losses was sentenced by the District Court in the Eastern District of Missouri to one year and one day in *United States v. Turkan*.[26] In each of these cases the courts found significant mitigating circumstances not otherwise taken into consideration by the guidelines.

IV. Recent Legislative Developments

Congress has recently called for yet *more* upward racheting of the penalties for economic crimes. In the recent health care reform law the Congress directed the Sentencing Commission to amend the definition of loss to provide that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall be prima facie evidence of the amount of the intended loss by the defendant."[27] There are, of course, a wide array of forms of health care fraud, ranging from the billing for services that were simply not rendered, at one extreme, to properly billing for services actually rendered but accompanied by a false anti-kickback certification, near the other.[28] Cases in the middle of this range include "upcoding" – billing for

[22]This means of case resolution is the likely norm going forward in such cases. Where the guidelines routinely call for a lifetime of imprisonment, a significant portion of the sentencing function is transferred to the prosecutors who select the statutory maximum penalties of the counts to which the defendant will be permitted to plead guilty.

[23]2010 WL 1676439 at *1. *See also id.* at *4 ("It should be noted that the Guidelines are almost irrelevant here, to the extent that they are completely trumped by the maximum sentence.").

[24]*United States v. Ferguson*, No. 3:06-cr-00137-CFD (D. Conn. 2009).

[25]*United States v. Stinn*, No. 07-CR-00113(NG) (E.D.N.Y. 2009).

[26]*United States v. Turkan*, No.4:08-CR-428 DJS (E.D. Mo. 2009).

[27]The Patient Protection and Affordable Care Act ("PPACA"), § 10606(a)(2)(B), 124 STAT. 1007 (2010).

[28]Bills submitted to federal health care programs routinely require the provider to certify that it has not paid any "kickbacks" to obtain the referral of the services. *See* 42 U.S.C. § 1320a-7b(b).

a more expensive procedure than the one actually performed. Evidently the intent of this new law is to treat some or all of these cases identically – as if no services were provided. Coupled with this potentially expansive new definition of loss, the law also provides for a new 2-level increase for losses between $1 million and $7 million, a new 3-level increase for losses between $7 million and $20 million, and a new 4-level increase for losses over $20 million. Thus the combination of the new loss definition and the new high-loss upward adjustments means that a hospital executive who approves the submission of $20M of bills for services actually rendered but obtained via the payment of unlawful kickbacks would likely face the following guidelines calculation:

Base offense level:	7
$20 million loss:	+22
Health care fraud:	+4
Sophisticated means:	+2
Role in the offense:	+4
Total offense level:	39

Assuming no prior record, this yields an advisory guidelines range of 21.8 to 27.25 years' imprisonment. It is not evident why Congress believed health care frauds are any more serious than any other frauds, or why it believed the existing penalties for health care frauds were insufficient.[29]

Congress was at it again in recent financial overhaul legislation, directing the Sentencing Commission to revisit the penalties for both securities fraud and bank fraud to ensure that they fully reflect "the serious nature of [these] offenses," the "need for an effective deterrent and appropriate punishment to prevent [these] offenses," and "the effectiveness of incarceration in furthering" these objectives.[30] While the law does not say so explicitly, it seems likely that the Sentencing Commission will read this provision as a suggestion that the penalties for securities fraud and bank fraud should be increased yet again. As with the health care law, it is not possible to discern why Congress believed that these two types of fraud are any worse than other frauds, or why it believed the existing penalties for these frauds are insufficient.

V. Recent Department of Justice Developments

The Department of Justice has recently announced that it is very concerned about the present state of affairs. In its recent annual report to the Sentencing Commission, the Criminal Division of the Justice Department openly acknowledged that there are "certain offense types for which the guidelines have lost the respect of a large number of judges . . . including certain frauds involving high loss amounts."[31] The letter calls for change, stating that the Commission

[29]The law also directs the Sentencing Commission more broadly to "provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances," but left it to the Commission to decide what such circumstances are. PPACA, § 10606(a)(3)(A)(ii), 124 Stat. 1007 (2010).

[30]Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1079A (2010).

[31]June 28, 2010, letter to William K. Sessions, Chair of the Sentencing Commission, from Jonathan Wroblewski, Director, Office of Policy and Legislation (on file with the author).

"should conduct a review of – and consider amendments to – those guidelines that have lost the backing of a large part of the judiciary."[32] The Department has not, however, said much about what should be changed. After noting the "increasing frequency [of] district courts sentencing fraud offenders – especially high-loss fraud offenders – inconsistently and without regard to the federal sentencing guidelines," the Department declares that the "sentencing outcomes in these cases are unacceptable."[33] The Department suggests the Commission "should determine whether some reforms are needed," but the extent of specificity given consists of the single sentence: "Such reforms might include amendments to the sentencing guideline for fraud offenses, recommendations for new statutory penalties, or other policy changes."[34] The reference to "new statutory penalties" is presumably intended to suggest mandatory minimum penalties for certain economic offenses.

VI. The Need for an ABA Resolution

The current state of affairs in high-loss economic crimes cases cries out for reform. One possibility, of course, is that the Department of Justice and the Congress will attempt to force increased penalties on the judiciary through new mandatory minimum statutory penalties. But the ABA should support a different option – re-calibrating the guidelines for economic crimes in such a manner that the respect of the judiciary would be restored. The dynamic between the judiciary and the Congress/Sentencing Commission needs to become a dialectic – a process of improvement through a synthesis of views. In simpler terms, if the guidelines made more sense the judges would be more willing to follow them.

There are a number of concrete steps the Sentencing Commission could take to improve the economic crime guidelines. First, the reliance on loss as the primary measure of culpability needs to be reduced, as perhaps best described by Judge Lynch:

> The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting – no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes – to assign precise weights to the theft of different dollar amounts. In many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.[35]

In the initial 1987 guidelines, the amount of the loss could result in no more than a five-fold increase in the range of imprisonment. Under the current guidelines the loss can increase the

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[32] *Id.*

[33] *Id. But see United States v. Ovid*, 2010 WL 3940724 (S.D.N.Y. Oct. 1, 2010) (criticizing DOJ letter and suggesting DOJ has adequate remedy for unacceptable outcomes through the appellate process).

[34] *Id.*

[35] *United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

range nearly forty-fold. The reliance on loss to drive sentencing outcomes is simply out of control.[36]

In addition to loss, the guidelines should look at the defendant's actual and/or intended gain from the offense. There can be no question that the harm caused by an offense is an important consideration in determining culpability. But loss often does not tell the whole story without consideration of gain. There is a palpable difference in culpability between a defendant who commits bank fraud to obtain a loan he fully expects and desires to repay and a defendant who commits bank fraud for the sole purpose of running off with the money and does so. There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting the proceeds of it into his pocket. The current guidelines fail to draw these distinctions because they are indifferent to the defendant's gain or lack thereof.[37] Many, if not all, of the cases where judges have found the current guidelines unhelpful present circumstances in which the defendant's gain was either zero or quite small in relation to the loss. One possible approach might be to have both a simplified table for loss and a second fairly simple table for gain, with the adjustments from both tables applied cumulatively in appropriate cases.

The economic crime guideline should also be dramatically simplified to reduce and eliminate multiple upward adjustments that, either singly or in combination, produce a "piling on" effect beyond their underlying rationale and often smack of double counting. A fraud that resulted in a $100 loss to 250 victims does not necessarily warrant a sentence six levels higher (roughly doubling the sentence) than a fraud that caused $25,000 loss to a single victim.[38] Many, if not most, of the blizzard of specific offense characteristics added to the fraud guideline over the past two decades are superfluous and frequently fail to accomplish meaningful distinctions in relative culpability across a spectrum of defendants.

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial,[39] the guideline should

[36]The present loss table is also needlessly complex given the advisory status of the ending guideline calculation. There is no need for a table that slices loss sixteen different ways to afford judges appropriate advice in determining a reasonable sentence.

[37]A defendant's gain may be considered only if there was a loss that cannot reasonably be measured, such that the defendant's gain is used to estimate the loss. U.S.S.G. § 2B1.1, Application Note 1(B).

[38]An offense with a large number of victims should be viewed more harshly than one with a small number of victims under some circumstances, but typically that would be so only where the harm caused to the large number of victims was highly significant to each or most of them. In any event, it is difficult to justify punishing otherwise identical frauds with the same loss and gain figures with more than a 25 percent variance based solely on the spread of the loss across a number of victims.

[39]U.S.S.G. § 2B1.1(b)(6).

attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in mid-stream under coercive circumstances? Did the offense risk or cause some significant non-monetary harm? Was the offense committed because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?

The ABA should encourage the Sentencing Commission to take to heart the Congressional directive to revisit the penalties in securities fraud and bank fraud cases and the Department of Justice's request to revisit the guidelines in high-loss cases as a whole. But in doing so, it should begin not simply with what it thinks Congress or the Justice Department want, but also with what the judiciary will respect and follow.

Respectfully submitted,

Bruce Green, Chair
ABA Criminal Justice Section

February 2011

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GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Bruce Green, Chair

1. Summary of Recommendation(s).
The proposed resolution urges the U.S. Sentencing Commission to assess current federal policy regarding sentences for economic crimes to ensure they are proportional to offense severity and individual culpability by reducing emphasis on monetary loss and combinations of multiple specific offense characteristics that overstate the seriousness of the offense and by placing greater emphasis on *mens rea* and motive, the defendant's role in the offense, and the defendant's monetary gain from the offense.

2. Approval by Submitting Entity.
The proposed resolution was approved by the Criminal Justice Section Council at its November 6-7, 2010 Fall meeting in Washington, D.C.

3. Has this or a similar recommendation been submitted to the House or Board previously?
The ABA has a long history of policy regarding criminal sentencing. The first edition *ABA Criminal Justice Standards on Sentencing* were approved in 1968; the current third edition Standards were approved in 1994. The Standards recognize both a legislative function (enacting statues articulating the societal purposes of sentencing, defining authorized types of sanctions, and setting maximum limits of sanctions) and an "intermediate" (e.g., guideline commission) function (transforming statutes into more particularized sentencing provisions to guide sentencing courts). Standard 18-2.4 of the Standards provides that "…Sentences authorized and imposed, taking into account the gravity of the offense, should be no more severe than necessary to achieve the societal purposes for which they are authorized." Since the Standards were approved, the ABA has adopted several policies relating to the U.S. Sentencing Commission, including one at the 1995 Annual Meeting (#129) calling on Congress to amend the federal sentencing guidelines to, *inter alia*, "assign greater weight in drug offense sentencing to other factors [i.e., other than crack vs. powder cocaine] that may be involved in the offense, such as weapons use, violence, or injury to another person." At the 2004 Annual Meeting, the House approved a resolution (#121A) including the principle that "Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses." The resolution also stated that "Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts."

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The proposed resolution would seek to conform sentencing for economic crimes with the ABA sentencing policies mentioned above.

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5. What urgency exists which requires action at this meeting of the House?
The United States Sentencing Commission acts on an annual amendment cycle which ends each year on May 1 with the submission of proposed amendments to the guidelines to the Congress. Passage of this resolution by the House in February would allow the ABA to lobby the Commission prior to the end of its annual amendment cycle.

6. Status of Legislation. (If applicable.)
There is no directly applicable legislation, although the Commission has received directives from the last Congress directing it to review the sentences for certain types of economic offenses.

7. Cost to the Association. (Both direct and indirect costs.)
Only usual lobbying costs would be incurred.

8. Disclosure of Interest. (If applicable.)
None.

9. Referrals.
At the same time this resolution is being submitted to the ABA Policy Administration Office, it is being e-mailed to the chairs and staff directors of the following ABA entities:

Standing Committee on the Federal Judiciary
Standing Committee on Legal Aid & Indigent Defendants
Business Law Section
General Practice, Solo and Small Firm Division
Individual Rights and Responsibilities Section
Judicial Division/National Conference of Federal Trial Judges
Litigation Section
Taxation Section

At the request of Rules and Calendar, it has subsequently been sent to the chairs and staff directors of the following ABA entities and leaders of affiliated organizations:

Conference of Chief Justices
Standing Committee on Judicial Improvements
Young Lawyers Division
Judicial Division

10. Contact Person. (Prior to the meeting.)
James Felman, CJS Council Member and Co-Chair, CJS Sentencing Committee
Kynes Markman & Felman
100 S. Ashley Drive, Suite 1300
Tampa FL 33602
PH: (813) 229-1118
E-mail: jfelman@kmf-law.com

11. Contact Person. (Who will present the report to the House.)

Stephen A. Saltzburg
George Washington University Law School
2000 H Street NW
Washington DC 20053
PH: 202/994-7089; 202/489-7464 (cell)
E-mail: ssaltz@law.gwu.edu

William Shepherd
Office of Statewide Prosecution
1515 N Flagler Drive, Suite 900
West Palm Beach FL 33401
PH: 561/837-5000; 561/723-9669
E-mail: William.shepherd@myfloridalegal.com

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

The proposed resolution urges the U.S. Sentencing Commission to assess current federal policy regarding sentences for economic crimes and, based on that assessment, to reconsider its approach to ensure that the guidelines are proportional to offense severity by reducing emphasis on monetary loss and combinations of multiple specific offense characteristics that overstate the seriousness of the offense and by placing greater emphasis on *mens rea* and motive, the defendant's role in the offense, and the defendant's monetary gain from the offense.

B. Issue Recommendation Addresses.

The proposed resolution addresses the ratcheting up of federal advisory guideline sentences for economic crimes by the Sentencing Commission so that a typical officer or director of a public company who is convicted of a securities fraud and any employee convicted of a serious securities fraud causing over $100 million faces an advisory guideline sentence of life without parole (43 years) in virtually every case. Because the guidelines are now advisory, some judges follow them and mete out maximum guideline sentences while other judges find them onerous and therefore sentence well below them, so that instead of encouraging uniformity of sentences for economic offenses, the guidelines are resulting in considerable sentencing disparities.

C. How Proposed Policy Will Address the Issue.

The proposed resolution would enable the ABA to encourage the Sentencing Commission to heed the Congressional directive to revisit the penalties in securities and bank fraud cases by recalibrating the guidelines for economic crimes in such a manner that the respect of the judiciary would be restored – to reduce the reliance on loss as the primary measure of culpability; to take into account the defendant's actual and/or intended gain; to reduce multiple upward adjustments that produce a "piling on" effect; and to pay increased attention to the harm intended by the defendant, the defendant's motivation, purpose, role, etc.

D. Minority Views or Opposition.

None are known.

AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

Testimony of

JAMES E. FELMAN

on behalf of the

AMERICAN BAR ASSOCIATION

before the

UNITED STATES SENTENCING COMMISSION

for the hearing on

PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

regarding

THE DODD-FRANK ACT
and
THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Washington, D.C.

February 16, 2011

Chair Saris, and distinguished members of the United States Sentencing Commission:

Good morning. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am a former Co-Chair of your Practitioners' Advisory Group, and am appearing today on behalf of the American Bar Association for which I serve as Liaison to the Sentencing Commission and as a Co-Chair of the Criminal Justice Section Committee on Sentencing.

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Stephen Zack to present to the Sentencing Commission the ABA's position on the implementation of the Dodd-Frank Act and the Patient Protection and Affordable Care Act. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates.

I. An Overview of the ABA's Policy Resolution Supporting Reform of the Federal Sentencing Guidelines for Economic Crimes

The ABA is keenly interested in the topic of today's hearing – the implementation of the Congressional directives in the Dodd-Frank Act and the Patient Protection Act relating to the sentencing of federal securities fraud, bank fraud, and health care fraud offenses. Our interest in these topics is only a part of our broader concerns regarding the economic crimes guidelines as a whole, especially in cases involving high loss.

As the Commission is no doubt aware, the advisory federal guidelines for the sentencing of high-loss economic crimes have been criticized in recent judicial decisions as "patently absurd on their face,"[1] "a black stain on common sense,"[2] and, ultimately, "of no help."[3] The result of relentless upward ratcheting, the present guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. These guidelines are merely advisory, however, and some judges opt instead to impose significantly lower sentences. Other judges adhere to the guidelines and mete out the sentences called for by them. To some, this looks like the disparity the guidelines were created to avoid – a regime in which the punishment turns as much on the philosophy of the sentencing judge as it does on the facts of the offense. To others, it reflects the birth of a common law of sentencing as the courts evaluate the extent to which guideline sentences serve the purposes of sentencing in individual cases. Under either view, the present guidelines in high loss cases appear to be broken. The ABA believes they should be fixed.

Just two days ago our House of Delegates passed a new Resolution urging the Commission to complete a rigorous and comprehensive assessment of the Guidelines for all economic crimes – particularly those involving high loss amounts – to ensure that the Guidelines for such crimes are proportional to offense severity and that they adequately take into consideration individual

[1] *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).

[2] *United States v. Parris*, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).

[3] *United States v. Watt*, 707 F.Supp.2d 149 (D. Mass. 2010).

culpability and circumstances. The Resolution contains the specific suggestion that the Commission should amend these guidelines to re-evaluate the emphasis on both monetary loss and multiple specific offense characteristics that, in combination, tend to overstate the seriousness of some offenses. The Resolution calls on the Commission to place greater emphasis on mens rea and motive in relation to an offense, the defendant's role in the offense, whether and to what extent the defendant received a monetary gain from the offense, and the nature of the harm suffered by victims of the offense. Finally, the Resolution urges the Commission to examine the ways that states with sentencing guideline systems address economic crimes.

Thus, we are interested in not only the matters addressed to the Commission by the recent legislation, but also the broader issue of the guidelines for economic crimes as a whole. We do not believe this broader review of these guidelines can be completed in the small window of time remaining in this amendment cycle. We believe the Commission would be best served by deferring action on at least the directives in the Dodd-Frank Act until the next amendment cycle, and to use the opportunity presented by those directives to engage in a searching and comprehensive review of the economic crime guidelines using both this amendment cycle and the next.

II. A Brief History of the Economic Crime Guidelines

The upward ratchet of the guidelines for economic crimes began at the beginning – with the initial set of guidelines. Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-guidelines practice, the Commission specifically elected to increase the penalties for economic crimes in the initial 1987 guidelines over the pre-guidelines practices of the judiciary as a whole.[4] While citing no data demonstrating these initial increased

[4] *See* U.S.S.G. Ch.1 Pt.A. The other exception was in drug cases, where the Commission was driven

penalty levels were inadequate, the Commission waited only two years before revising the penalties for economic crimes upward again through a new loss table.[5] The Commission added numerous aggravating specific offense characteristics from 1989 to 2001,[6] when it again adopted wholesale increases through yet another new loss table.[7] Further, a series of high profile corporate scandals drove the Congress to enact the Sarbanes-Oxley Act, which in part directed the Commission to ratchet up the penalties for high-loss economic crimes yet again. The Commission dutifully did so in 2003.[8] A result of these numerous increases in guideline penalties is that a typical officer or director of a public company who is convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Officer or director, §2B1.1(b)(17)(A)(i):	+4
Role in the offense, §3B1.1(a):	+4
$7 million loss, §2B1.1(b)(1)(K):	+20[9]
Total offense level:	43 (life)

The advisory guideline sentence will be life without parole for virtually *any* employee convicted of a serious securities fraud causing more than $100 million of loss:

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upward to avoid "cliffs" caused by the mandatory minimum penalties enacted in 1986.

[5]U.S.S.G. Appendix C, Amds. 99, 154 (1989).

[6]U.S.S.G. Appendix C, Amd. 317 (1990); U.S.S.G. Appendix C, Amd. 551 (1997); U.S.S.G. Appendix C, Amd. 576 (1997); U.S.S.G. Appendix C, Amd. 596 (2000);

[7]U.S.S.G. Appendix C, Amd. 617 (2001).

[8]U.S.S.G. Appendix C, Amd. 647, 653 (2003).

[9]A $7 million loss is rather easy to achieve in securities fraud cases because it is often equated with the drop in market capitalization that follows the disclosure of the fraud.

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Substantially jeopardizing corporation, §2B1.1(b)(14)(B):	+2
$100 million loss, §2B1.1(b)(1)(N):	+26
Total offense level:	43 (life)

Thus, virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act will now face an advisory range of life without parole.

III. Recent Judicial Criticism of the Economic Crime Guidelines

Faced with such "advice," a number of judges have understandably declined to follow it. In *United States v. Adelson*, for example, Judge Rakoff of the Southern District of New York was confronted with a defendant convicted of joining a conspiracy "initially concocted by others" to materially overstate a public company's financial results and thereby artificially inflate the price of its stock.[10] Adelson's guidelines score was level of 46 – three levels "off the chart" – and called for a sentence of life imprisonment. Even the government "blinked at this barbarity," but was unable to make a specific sentencing recommendation.[11] For Judge Rakoff, this circumstance exposed "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[12] Given that Adelson had not originated the fraud, presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate, and coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar'

[10] 441 F.Supp.2d 506, 507 (S.D.N.Y. 2006).

[11] *Id*. at 511-13.

[12] *Id*. at 512.

offenders," the court sentenced Adelson to three-and-a-half years imprisonment and ordered restitution in the amount of $50 million.[13] Along the way, Judge Rakoff explained that he had jettisoned the advisory guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face."[14]

Another example is *United States v. Parris.* In that case Judge Block in the Eastern District of New York sentenced two defendants to five years' imprisonment "in the face of an advisory guideline range of 360 to life."[15] The offense – a "pump and dump" stock manipulation scheme – scored an offense level 42 based on upward adjustments for more that $2.5 million of loss, more than 250 victims, sophisticated means, officer/director status, role in the offense, and obstruction of justice.[16] Quoting Judge Rakoff in *Adelson*, Judge Block described this guidelines scoring as the "kind of 'piling-on' of points for which the guidelines have frequently been criticized."[17] The court noted that there were no valid grounds for downward departure from the guidelines and thus, but for their advisory status, it "would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence."[18] Even the government agreed that "many reasonable sentences would fall outside" the advisory guidelines range.[19] In

[13] *Id*. at 514-15.

[14] *Id*. at 515.

[15] 573 F.Supp.2d 744, 745.

[16] *Id*. at 747-48.

[17] *Id*. at 745 (*quoting Adelson*, 441 F.Supp.2d at 510).

[18] *Id*. at 750-51.

[19] *Id*. at 751.

fashioning a reasonable sentence, the Court stated it "would have much preferred a sensible guideline range to give me some semblance of real guidance." The Court found no such help in the present guidelines, observing that "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment." Instead of being guided by the guidelines, the Court assembled a lengthy compendium based on submissions from the parties listing sentences in other high-loss cases.[20] After a lengthy discussion of what is essentially an emerging common law of high-loss economic crime sentences, the Court concluded that a sentence of five years' imprisonment was sufficient to achieve the purposes of sentencing.

Another recent case illustrating the overkill of the present high-loss guidelines is *United States v. Watt*. Judge Gertner in the District of Massachusetts was presented with a 25-year-old first offender who pled guilty to what was reportedly the "largest conspiracy to commit identity theft in American history."[21] The government had resolved the matter by permitting Watt to plead guilty to a single count carrying a five-year statutory maximum penalty.[22] Watt, who received no financial benefit from the crime, sought probation, while the government urged the maximum possible five-year sentence. As Judge Gertner sought to determine the sentence sufficient but not greater than

[20]*Id*. at 756-63. The compendium includes 34 cases with loss amounts ranging from $6 million to $14 billion and sentences ranging from probation to 25 years' imprisonment.

[21]2010 WL 1676439 at *1 (D. Mass. 2010).

[22]This means of case resolution is the likely norm going forward in such cases. Where the guidelines routinely call for a lifetime of imprisonment, a significant portion of the sentencing function is transferred to the prosecutors who select the statutory maximum penalties of the counts to which the defendant will be permitted to plead guilty.

necessary to achieve the purposes of sentencing, she specifically noted that "[t]he Guidelines were of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment."[23] Given Watt's zero gain from the offense, his lack of any criminal history, and the court's belief that he was unlikely to recidivate, Judge Gertner sentenced him to two years' imprisonment and $171 million of restitution.

A number of similar cases did not result in published decisions. In *United States v. Ovid*,[24] the defendant faced an advisory guidelines range of 210-262 months, but the district court imposed a sentence of 60 months (with the agreement of the government) based on factors not considered by the guidelines. Ovid did not set out in his business to commit fraud; he contributed more of his own funds to the company than he took out of it, and did not commit the fraud for his own personal gain. In *United States v. Ferguson*, the district court in Connecticut imposed sentences ranging from one year and one day to four years on five defendants whose guideline ranges included the possibility of life imprisonment and who were convicted of fraud leading to over $500 million in loss.[25] In *United States v. Stinn*, a former CEO of a public company faced a guidelines range of life imprisonment but was sentenced to twelve years' imprisonment in the Eastern District of New York.[26] A defendant who caused approximately $25 million in losses was sentenced by the District Court in the Eastern District of Missouri to one year and one day in *United States v. Turkan*.[27] In each of these cases the

[23]2010 WL 1676439 at *1. *See also id.* at *4 ("It should be noted that the Guidelines are almost irrelevant here, to the extent that they are completely trumped by the maximum sentence.").

[24]Case No. 09-CR-216 (JG), 2010 WL 390724 (E.D. N.Y. 2010).

[25]*United States v. Ferguson*, No. 3:06-cr-00137-CFD (D. Conn. 2009).

[26]*United States v. Stinn*, No. 07-CR-00113(NG) (E.D.N.Y. 2009).

[27]*United States v. Turkan*, No.4:08-CR-428 DJS (E.D. Mo. 2009).

courts found significant mitigating circumstances not otherwise taken into consideration by the guidelines.

IV. The Dodd-Frank Act and the Patient Protection Act

Congress has recently called for yet *more* upward ratcheting of the penalties for economic crimes. In the recent health care reform law the Congress directed the Sentencing Commission to amend the definition of loss to provide that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall be prima facie evidence of the amount of the intended loss by the defendant."[28] There is, of course, a wide array of forms of health care fraud ranging from the billing for services that were simply not rendered, at one extreme, to properly billing for services actually rendered but accompanied by a false anti-kickback certification, near the other.[29] Cases in the middle of this range include "upcoding" – billing for a more expensive procedure than the one actually performed. Evidently the intent of this new law is to treat some or all of these cases identically – as if no services were provided. Coupled with this potentially expansive new definition of loss, the law also provides for a new 2-level increase for losses between $1 million and $7 million, a new 3-level increase for losses between $7 million and $20 million, and a new 4-level increase for losses over $20 million. Thus the combination of the new loss definition and the new high-loss upward adjustments means that a hospital executive who approves the submission of $20M of bills for services actually rendered but obtained via the payment of unlawful kickbacks would likely face the following guidelines calculation:

[28]The Patient Protection and Affordable Care Act ("PPACA"), § 10606(a)(2)(B), 124 STAT. 1007 (2010).

[29]Bills submitted to federal health care programs routinely require the provider to certify that it has not paid any "kickbacks" to obtain the referral of the services. *See* 42 U.S.C. § 1320a-7b(b).

Base offense level:	7
$20 million loss:	+22
Health care fraud:	+4
Sophisticated means:	+2
Role in the offense:	+4
Total offense level:	39

Assuming no prior record, this yields an advisory guidelines range of 21.8 to 27.25 years' imprisonment. It is not evident why Congress believed health care frauds are any more serious than any other frauds, or why it believed the existing penalties for health care frauds were insufficient.[30] The ABA understands that the Commission faces few options in implementing this Act, but given our concerns we believe the Commission should adopt the narrower of the two options in defining "Government health care program." We also believe the Commission should add an application note addressing the potential disparities that may be caused by the new definition of intended loss where the resulting offense level overstates the seriousness of the offense in light of the factors enumerated in Section 3553(a).

This past Congress addressed financial fraud penalties in the new Dodd-Frank Act, directing the Commission to revisit the penalties for both securities fraud and bank fraud to ensure that they fully reflect "the serious nature of [these] offenses," the "need for an effective deterrent and appropriate punishment to prevent [these] offenses," and "the effectiveness of incarceration in furthering" these objectives.[31] The Commission should not read this provision as a mandate for the

[30]The law also directs the Sentencing Commission more broadly to "provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances," but left it to the Commission to decide what such circumstances are. PPACA, § 10606(a)(3)(A)(ii), 124 Stat. 1007 (2010).

[31]Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1079A (2010).

penalties for securities fraud and bank fraud to be increased yet again. As with the health care law, it is not possible to discern why Congress believed that these two types of fraud are any worse than other frauds, or why it believed the existing penalties for these frauds are insufficient.

V. Recent Department of Justice Developments

The Department of Justice has recently announced that it is very concerned about the present state of affairs. In its recent annual report to the Sentencing Commission, the Criminal Division of the Justice Department openly acknowledged that there are "certain offense types for which the guidelines have lost the respect of a large number of judges . . . including certain frauds involving high loss amounts."[32] The letter calls for change, stating that the Commission "should conduct a review of – and consider amendments to – those guidelines that have lost the backing of a large part of the judiciary."[33] The Department has not, however, said much about what should be changed. After noting the "increasing frequency [of] district courts sentencing fraud offenders – especially high-loss fraud offenders – inconsistently and without regard to the federal sentencing guidelines," the Department declares that the "sentencing outcomes in these cases are unacceptable."[34] The Department suggests the Commission "should determine whether some reforms are needed," but the extent of specificity given consists of the single sentence: "Such reforms might include amendments to the sentencing guideline for fraud offenses, recommendations for new statutory

[32] June 28, 2010, letter to William K. Sessions, Chair of the Sentencing Commission, from Jonathan Wroblewski, Director, Office of Policy and Legislation (on file with the author).

[33] *Id.*

[34] *Id.*

penalties, or other policy changes."[35] The reference to "new statutory penalties" is presumably intended to suggest mandatory minimum penalties for certain economic offenses.

VI. The ABA's Proposed Solution

The current state of affairs in high-loss economic crimes cases cries out for reform. One possibility, of course, is that the Department of Justice and the Congress will simply force higher penalties on the judiciary through mandatory minimum statutory penalties. But the ABA supports a different option – re-calibrating the guidelines for economic crimes in such a manner that the respect of the judiciary would be restored. The dynamic between the judiciary and the Congress/Sentencing Commission should be dialectic – a process of improvement through a synthesis of views. In simpler terms, if the guidelines made more sense the judges would be more willing to follow them.

There are a number of concrete steps the Commission could take to improve the economic crime guidelines. First, the reliance on loss as the primary measure of culpability needs to be reduced, as perhaps best described by Judge Lynch:

[35] *Id.*

> The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting – no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes – to assign precise weights to the theft of different dollar amounts. In many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.[36]

In the initial 1987 guidelines, the amount of the loss could result in no more than a five-fold increase in the range of imprisonment. Under the current guidelines the loss can increase the range nearly forty-fold. The reliance on loss to drive sentencing outcomes is simply out of control.[37]

In addition to loss, the guidelines should look at the defendant's actual and/or intended gain from the offense. There can be no question that the harm caused by an offense is an important consideration in determining culpability. But loss often does not tell the whole story without consideration of gain. There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting the proceeds of it into his pocket. The current guidelines fail to draw these distinctions because they are indifferent to the defendant's gain or lack

[36]*United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

[37]The present loss table is also needlessly complex given the advisory status of the ending guideline calculation. There is no need for a table that slices loss sixteen different ways to afford judges appropriate advice in determining a reasonable sentence.

thereof.[38] Many, if not all, of the cases where judges have found the current guidelines unhelpful present circumstances in which the defendant's gain was either zero or quite small in relation to the loss. One possible approach might be to have both a simplified table for loss and a second fairly simple table for gain, with the adjustments from both tables applied cumulatively in appropriate cases.

The economic crime guideline should also be dramatically simplified to reduce and eliminate multiple upward adjustments that either singly or in combination, produce a "piling on" effect beyond their underlying rationale and often smack of double counting. A fraud that resulted in a $100 loss to 250 victims does not necessarily warrant a sentence six levels higher (roughly doubling the sentence) than a fraud that caused $25,000 loss to a single victim.[39] Many, if not most, of the blizzard of specific offense characteristics added to the fraud guideline over the past two decades are superfluous and frequently fail to accomplish meaningful distinctions in relative culpability across a spectrum of defendants.

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial,[40] the guideline should attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was

[38]A defendant's gain may be considered only if there was a loss that cannot reasonably be measured, such that the defendant's gain is used to estimate the loss. U.S.S.G. § 2B1.1, Application Note 1(B).

[39]An offense with a large number of victims should be viewed more harshly than one with a small number of victims under some circumstances, but typically that would be so only where the harm caused to the large number of victims was highly significant to each or most of them. In any event, it is difficult to justify punishing otherwise identical frauds with the same loss and gain figures with more than a 25 percent variance based solely on the spread of the loss across a number of victims.

[40]U.S.S.G. § 2B1.1(b)(6).

his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in mid-stream under coercive circumstances? Did the offense risk or cause some significant non-monetary harm? Was the offense committed because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?

The ABA encourages the Commission to take to heart the Congressional directive to revisit the penalties in securities fraud and bank fraud cases and the Department of Justice's request to revisit the guidelines in high-loss cases as a whole. But in doing so, it should begin not simply with what it thinks Congress or the Justice Department want, but also with what the judiciary will respect and follow.

In closing, we appreciate the Sentencing Commission's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you all this morning.