Testimony of

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on behalf of the

NEW YORK COUNCIL OF DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION

for the hearing on

2012 PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

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INTRODUCTION

Judge Saris and Distinguished Members of the United States Sentencing Commission:

Good morning, my name is Marjorie Peerce. Since 1986, I have been engaged in the private practice of federal criminal defense with a small firm in New York City, Stillman & Friedman, P.C. I am a former president of the New York Council of Defense Lawyers (NYCDL), and I currently serve as the chair of the NYCDL's Sentencing Guidelines Committee, a position I previously held for several years in the mid-1990's.

On behalf of the NYCDL, I would like to begin by thanking you for the opportunity to address the Commission with respect to some of the important issues under consideration during this amendment cycle. The NYCDL is a professional association comprised of more than 200 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. We count among our members a former United States Attorney, 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 Federal Defender offices in those districts. Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In my testimony, I will address a number of proposed amendments of interest to our organization.

The NYCDL intends to submit a more fulsome submission on or before March 19, 2011 in response to the Commission's requests for comments. What follows below is a synopsis of some of the key points that the more extensive submission will cover, which we wanted to highlight for you today.

PROPOSED AMENDMENT: DODD FRANK/FRAUD

The Commission has proposed a multi-part amendment that continues the Commission's multi-year review of fraud offenses to ensure that the Guidelines provide appropriate penalties: (1) in cases involving securities fraud and similar offenses and (2) in cases involving mortgage fraud and financial institution fraud. This review is conducted pursuant to a congressional directive to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203.

We respectfully submit that the existing Guidelines and policy statements applicable to offenses covered by the directive result in most cases in a recommended advisory guidelines range that is far greater than necessary to accomplish the purposes of punishment for most defendants, and that the existing guidelines and policy statements should be reviewed and amended to ameliorate some of their harsh effects, particularly in cases involving securities, mortgage, and financial institution fraud.

Our position is that far from needing to further increase the terms of incarceration called for by the Guidelines, the Guidelines are harsh enough as written. The Commission should consider amendments to the Guidelines and policy statements in the future that work 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 cases.

HARM TO FINANCIAL MARKETS (ISSUE FOR COMMENT 1)

The Commission has requested comment on whether the Guidelines Manual provides penalties that appropriately account for the potential and actual harm to the public and the financial markets from the offenses covered by the directives. Section 2B1.1 already contains provisions that address harm to the public and financial markets in various ways, by taking into account the amount of loss, the number of victims, and other factors contained in the specific offense characteristics and departure provisions. The NYCDL believes that the current Guidelines more than adequately account – and, in many cases, yield overly-harsh results – for potential and actual harm to the public and financial markets in securities fraud and similar offenses and mortgage fraud and financial institution fraud.

PROPOSED AMENDMENT TO § 2B1.4 (INSIDER TRADING)

The Insider Trading Guideline (§ 2B1.4) is one of the guidelines that the Commission proposes to amend in order to address Dodd-Frank's directive to ―review and, if appropriate, amend" the securities fraud-related guidelines to insure appropriate accountability for the actual and potential harm to the public and financial markets from securities and mortgage fraud crimes. In particular, the Commission is considering whether § 2B1.4 should include offense level enhancements for (1) ―sophisticated" acts of insider trading; and (2) offenses involving individuals holding certain identified positions of trust. The NYCDL urges the Commission not to implement either of these proposed enhancements because both of these concepts are addressed in the current version of the Guidelines and, therefore, would only result in unnecessarily higher offense levels and concomitant increased departures and variances from the Guidelines.

The Insider Trading Guideline Was Created to Address What the Commission Identified as a Sophisticated Fraud. The Commission proposes a two-level increase in the base offense level, reaching at least a minimum enhancement of an offense level twelve or fourteen, for all offenses involving what it characterizes as ―sophisticated insider trading." The problem with the Commission's proposal, however, is that the sophisticated nature of insider trading is covered by the current guidelines. The Commentary under the current guideline specifically states that insider trading is ―treated essentially as a sophisticated fraud."

Enhancements for Individuals Holding a Position of Trust. Similarly, the proposed amendment for an enhancement for specific types of defendants is unnecessary because the current Guidelines already contain an enhancement for abusing a position of trust or special skill. Application Note 1 of the current version of § 2B1.4 references application of § 3B1.3, which permits a 2-level increase for abusing a position of trust or incorporation of a special skill. Based on recent criminal prosecutions of insider trading and the resulting sentences, it is clear that judges are aware of and utilize the Chapter 3 enhancements for the defendant's role in the offense, including making enhancements for defendants who abuse a position of trust. The Commission should leave the Guideline as is, and allow sentencing judges to rely on § 3B1.3, to increase offense levels, where appropriate, to address individuals who have abused a position of trust.

The Proposed Enhancements Will Lead to Increased Variances from the Guidelines. If adopted, the proposed amendments to the Guidelines on insider trading will result in automatic increases in the advisory guidelines range for these offenses and likely further the increasing number of downward departures and variances from the Guidelines. According to the Commission, in fiscal 2009, forty-two percent of all sentences nationwide were below the Guidelines. It also appears that

almost seventy-five percent of recent insider trading cases resulted in prison sentences below or at the very bottom of the range called for under the Guidelines. These sentences continue to send a clear, consistent message that the judiciary believes that the Guidelines for insider trading offenses are already too harsh due to the emphasis on ―gain,” and do not necessarily provide an appropriate basis for rendering fair sentences in insider trading cases.

Rather than creating overlapping Guidelines that require judges to consider growing numbers of duplicative enhancements, the Commission should aim to eliminate enhancements where the Guidelines ranges in these cases are already high enough and account for the seriousness of the offense. This would help decrease the necessity of departures and variances from the Guidelines by judges attempting to mitigate the harsh recommendations of the Guidelines and create more consistency in sentencing.

ISSUE FOR COMMENT 1. INSIDER TRADING

The Commission seeks comment on whether it should provide one or more specific offense characteristics to increase enhancements under § 2B1.4 for insider trading cases. The Commission also asks whether it should consider a tiered enhancement based on the ―volume of trading” for insider trading cases analogous to the ―volume of commerce” enhancement under subsection (b)(2) of § 2R1.1.

Further Specific Offense Enhancements. The NYCDL strongly opposes amending § 2B1.4 to include any further specific offense enhancements. We also oppose adoption of a tiered enhancement based on the volume of trading. Although not specifically requested by the Commission with respect to the insider trading guidelines at this time, the NYCDL encourages the Commission to consider, at the appropriate time, the proposal set forth below, which aims to take greater account of each defendant's individual culpability level. While this recommendation will require further study and discussion, we believe it is worthy of exploration and is relevant to the request for comment regarding § 2B1.1 with respect to other approaches that would address the impact of the loss and victims tables.

The NYCDL recommends that the Commission include certain downward adjustments to § 2B1.4(b) to permit judges to provide lower sentences without departing from the Guidelines. The purpose of these downward adjustments is to distinguish between short-lived ―ordinary” insider trading schemes involving few transactions and little to no gain and those that are wide-ranging and result in significant personal gain. Relatively minor offenses, involving few acts of insider trading or few co-conspirators, should not be treated the same as offenses involving long-term, multi-faceted conspiracies. For example, the ordinary ―tipper” who provides inside information on one occasion should be sentenced differently from a ―tipper” who engaged in a pattern of divulging inside information. To facilitate this recommendation, the Commission could include the following factors as grounds for downward adjustments to § 2B1.4(b):

- The defendant was not an organizer, leader, manager, or supervisor of others in the offense or scheme.
- The offense involved no more than one act of trading of securities in furtherance of the offense or scheme.
- The offense involved no more than two acts of trading of securities in

furtherance of the offense or scheme.

- The offense or scheme involved no more than two co-conspirators, including the defendant.
- The offense or scheme involved no more than three co-conspirators, including the defendant.
- The defendant voluntarily withdrew from the scheme or offense.
- The defendant did not engage in acts to conceal the scheme or offense, or the profits of the scheme or offense, from the Government or the victim.
- The defendant, not later than the time of the sentencing hearing, truthfully provides to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, regardless if the information was relevant or useful to the Government or if the Government was already aware of the information.
- The defendant was not an officer or director at the time of the offense.
- The defendant did not breach a duty of loyalty or trust to the insider.

Volume of Trading. The NYCDL opposes a tiered enhancement based on a ―volume of trading” scale as unworkable and counterproductive. The Commission's proposed approach is similar to the § 2R1.1(b)(2) ―volume of commerce” model applicable in the bid-rigging context. It focuses on the impact of certain activity on commerce and places an inappropriate emphasis on the insider trading defendant's position, measured by volume of overall trading in a security, rather than the actual results of the purported criminal activity. While in some rare instances insider trading may have an impact on the volume of shares in the traded security, it is unlike bid-rigging in that it does not have a clear, measureable impact on the larger market. Notably, the Commission does not offer any clear guidance as to how courts would measure this ―impact on commerce,” particularly given the complexities of trading. For instance, will a covered short position be treated the same as a long buy? How would the impact of options trading in the underlying security be measured? District Judges will be hard pressed to figure this out.

Additionally, the NYCDL believes that a volume of trading enhancement would only serve to enhance insider trading sentences which, as noted above, runs contrary to what the evidence suggests is necessary to bring the Guidelines into alignment with a significant judicial sentiment and a belief among members of the bar that these sentences already are too harsh.

ISSUE FOR COMMENT 2. CALCULATION OF LOSS UNDER § 2B1.1

Method of Loss Calculation. The Commission has asked for comment on various methods of loss calculation under Guidelines § 2B1.1, which relates to, among other crimes, fraud and deceit. The Commission has identified four specific methods of loss calculation that have been used by the courts and seeks comment on each method: (i) simple rescissory method; (ii) modified rescissory method; (iii) market capitalization method; and (iv) market-adjusted method. The NYCDL recommends adopting the market-adjusted method, as set forth in the *Olis* (5th Circuit) and *Rutkoske* (2d Circuit) decisions.

The Commission has asked whether there are any other changes that the Commission should make regarding the determination of loss in cases involving securities fraud or similar offenses to ensure that the guidelines appropriately account for the potential and actual harm to the public and financial markets from those offenses. In a word, ―no.” The NYCDL believes that simplicity and consistency are important here.

Amendments to § 2B1.1 to Clarify Method Used in Determining Loss. The Commission has asked whether § 2B1.1 should be amended to clarify the method or methods used in determining loss in cases involving securities fraud and similar offenses. The NYCDL applauds the Commission's efforts to achieve uniformity in sentencing in securities fraud and related cases, but it is our position that such efforts will likely have unfair results in most cases. Section 2B1.1, note 3(C) now states that ―The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference.” As it is now written, § 2B1.1 allows the sentencing court to take into account a number of factors, some of which may or may not be present in every case.

In particular, the Commission seeks comments on what method or methods of loss calculations should be used for two particular types of securities fraud: (1) investment fraud; and (2) market manipulation fraud.

Investment Fraud. With respect to investment fraud, the Commission asks if it should revise or repeal Application Note 3(F)(iv) to § 2B1.1 and provide a different rule for investment fraud. The Application Note reads:

> Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

The NYCDL does not think that Application Note 3(F)(iv) should be repealed, but it should be revised. The rule properly captures the typical nature of a Ponzi scheme: one victim's gain comes at the loss of another victim. The rule does not, however, provide clear guidance as to how to calculate loss in cases of investment fraud, including Ponzi schemes. Accordingly, we encourage the Commission to adopt a revised rule, which states that in all cases of investment fraud, including Ponzi schemes, loss must be measured by the net out-of-pocket loss of the victims. This approach is consistent with the fundamental loss calculation tenet that loss is the greater of actual or intended loss, as set forth in Application Note 3(A).

Market Manipulation Fraud. With respect to market manipulation fraud, the Commission has asked what method or methods of loss calculations should be used in market manipulation fraud cases. The NYCDL urges the Commission to adopt the *Dura/Olis/Rutkoske* market-adjusted method, much as the NYCDL advocates for this standard for cases of securities fraud in general. However, we do not endorse the creation of a specific set of rules to be applied to market manipulation cases as opposed to other forms of securities fraud; for purposes of sentencing, there is nothing to be gained from distinguishing market manipulation from other forms of securities fraud, and it will only lead to

confusion in having multiple ways of calculating loss in only a certain class of cases.

ISSUE FOR COMMENT 3. SPECIFIC PROVISIONS IN § 2B1.1

The Commission seeks comment on whether any changes should be made to either or both of the enhancements at § 2B1.1(15) and (b)(18) in response to the directive, including whether the Commission should expand the scope or the amounts of the increases provided by subsection (b)(15) or (b)(18), or both, to ensure that the Guidelines appropriately account for the potential and actual harm to the public and the financial markets. The NYCDL does not believe the Commission should expand the scope or amounts of the increases provided by subsections (b)(15) or (b)(18), as the Guidelines already provide substantial punishment in the § 2B1.1 loss table. If anything, we believe reductions are appropriate. If a serious fraud were to substantially endanger a financial institution, the resulting increase in the offense level as a result of the loss table, plus the additional enhancements in § 2B1.1 that already exist, would ensure a sentence at the outermost limits of the guidelines. Similarly, the categories of individuals to receive the four-level increase under (b)(18) are already sufficiently broad to capture most defendants and sufficiently punitive at an increase of four levels.

MORTGAGE FRAUD AND FINANCIAL INSTITUTION FRAUD

The Commission proposes four amendments relating to mortgage fraud and seeks comment as to whether the Guidelines appropriately account for the “potential and actual harm to the public and the financial markets from these offenses.”

Proposed Addition to Application Note 3(A)(v)(IV). The first proposed amendment is an addition to Application Note 3(A)(v)(IV) to create a new Specific Offense Characteristic for mortgage fraud, and to include in the loss calculation any “reasonably foreseeable administrative costs to the lending institution associated with foreclosing on the mortgaged property” provided that the lending institution exercised “due diligence in the initiation, processing, and monitoring of the loan and the disposal of the collateral.” The NYCDL respectfully submits that the Guidelines do not require any changes to properly deter and punish mortgage fraud. The proposed changes to Note 3 would only further complicate the ability to calculate the applicable guidelines range for fraud, requiring factual inquiries by sentencing judges that would be burdensome and, in many cases, impossible to accomplish. As I have previously stated, our view is that the Guidelines should reduce the emphasis on loss in determining a sentence, whether it be the actual or intended loss. We further urge that the appropriate loss calculation for mortgage fraud is to look at how much money remains outstanding on the loan and subtract from that the amount of money received by the original lender when it first sold the loan. Additionally, the value of the collateral must be credited against the loss. This calculation is employed by sentencing judges, and is the fairest way to capture the loss attributed to a mortgage fraud.

Proposed Addition to Application Note 3(E)(ii). We do not support the Commission's suggestions to “provide an additional special rule for determining fair market value if the mortgaged property has not been disposed of by the time of sentencing” or, for example, to “provide that, if the mortgaged property has not been disposed of by that time, the most recent tax assessment value of the mortgaged property shall constitute prima facie evidence of the fair market value.” The NYCDL respectfully submits that it would be impossible for the Commission to devise a fair Guideline that encompasses the wide array of approaches used to determine the assessed value of real property, because in many cases the assessed value bears no rational relationship to the fair market value of the

property. The rules vary from state to state, and even in some states between cities and counties.

Proposed Additions to Application Note 12. The NYCDL does not support the remaining two proposed amendments, additions to Application Note 12, because they are ambiguous, will result in speculative and variable sentencing findings, and will require the expenditure of additional investigatory and judicial resources to apply.

IMPACT OF LOSS AND VICTIMS TABLES IN CERTAIN CASES

The Commission has observed that cases sentenced under § 2B1.1 involving relatively large loss amounts have relatively high rates of below-range sentences (both government sponsored and non-government sponsored), particularly in the case of securities fraud and similar offenses. Following receipt of public comments and review of judicial opinions suggesting that the impact of the loss table or the victims table (or the combined impact of the loss and victims tables) may overstate the culpability of certain offenders, the Commission is studying whether it should limit the impact of the loss table or victims table (or both) in such cases sentenced under § 2B1.1 involving relatively large loss amounts.

The NYCDL applauds the Commission's efforts in this regard and believes that the Commission is right to explore and adopt methods for limiting the impact of these tables, which are the source of much criticism for their contributions to disproportionately harsh sentencing guidelines ranges

Examples abound in which an excessive emphasis on mechanical Guidelines calculations leads to an unnecessarily severe advisory guidelines range for a defendant who committed an economic offense. The Second Circuit has observed that the Guidelines calculations for white-collar offenses may result in sentences ―longer than [those] routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007). Indeed, ―virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (2008). The Guidelines ranges that give way to these extreme sentences base the offense level for economic crimes on the pecuniary loss resulting from the crime – an amount that is often speculative, imprecise, and highly-contested. For economic offenses, this flawed process is rooted in the loss table and compounded by the victims table, which often produces Guidelines ranges that *exceed* even the statutory maximum for the offense at issue.

Where there is no correlation between loss to the ―victims" and gain to the defendant, the loss table drives an illogical and unjust result, and courts historically have departed downward on this basis in cases where the defendant's gain was a tiny fraction in relation to the total alleged loss. The issue is a matter of degree: the extent of disproportion between the loss to the victim and the gain to the defendant. Moreover, the need for reform is underscored by the fact that the Guidelines' loss and victims tables, in their current forms, advance neither the Commission's nor Congress's sentencing goals in white-collar cases. These inflated guidelines ranges caused by substantially overlapping enhancements must be addressed to answer Congress's call for securities fraud penalties that ―appropriately account for the potential and actual harm to the public and the financial markets."

ISSUE FOR COMMENT 1. LIMITING THE IMPACT OF LOSS/VICTIMS TABLES

***Relatively Little Gain Relative to the Loss*.** The NYCDL believes the Commission should limit the impact of the loss table in cases involving large loss amounts if the defendant had relatively little gain relative to that loss, and that this may be best accomplished in the form of a downward adjustment that would allow the sentencing judge to consider factors, such as individual culpability and the type of gain, rather than through a specific offense characteristic that focuses only on specific dollar amounts.

The Commission proposes that a new specific offense characteristic should be inserted to limit the impact of the loss table in cases involving large loss amounts if the defendant had relatively little gain relative to the loss. For example, if the defendant's gain resulting from the offense did not exceed $10,000, the adjustment from the application of sub-section (b)(1) shall not exceed 14/16 levels. Thus, the proposed specific offense level proposes a cap on the increase in levels based on the defendant's gain. The Commission proposes that the maximum gain amount in specific offense characteristic correspond to one percent of the maximum loss amount. The NYCDL does not believe that this approach is the right approach to address the impact of the loss table.

First, the NYCDL believes that the suggested caps on the increase in offense levels are too high. Under the Commission's proposal, a defendant with a gain of $10,000, $25,000, or $70,000 will not receive an enhancement in excess of 14/16, 16/18, and 18/20 levels respectively. However, even under this proposal, defendants will receive severe enhancements for relatively minor gains. If one considers Example 3, where a defendant's gain resulting from the offense did not exceed $70,000 and thus the adjustment from application of § 2B1.1(b)(1) would not exceed 18 levels. This would result in a defendant, who may have gained only $25,001 as a result of his participation in a $7,000,000 fraud, finding his base offense level of 6 or 7 increased by 18 levels. On its face, this result seems wildly disproportionate to that defendant's culpability, especially in contrast to a defendant who not only caused a loss amount of more than $2,500,000 but also gained that full amount, who would have his base offense level increased by the same 18 levels. In addition, the decision to set gain as one percent of loss creates a threshold that is simply too low to yield meaningful results in all cases.

The new specific offense characteristic proposal is also lacking for some of the same reasons the loss table is inadequate: it takes an overly-formulaic approach that cannot possibly account for the varied and complex factual scenarios that each individual case presents, scenarios best left to the discretion of the sentencing judge. For example, in a large bank fraud, if a principal's gain is equivalent to the loss amount, then it makes sense for him to be charged with the full amount of the loss. However, if a lower level employee at the principal's firm was also involved in the fraud but only gained indirectly through his receipt of salary and bonuses from his employment at the firm, it overstates such defendant's culpability to charge him with the full amount of the loss or even a capped amount in the range contemplated by the Commission's proposed amendment.

Moreover, in insider trading cases, while the gain in an insider trading scheme may be large, a defendant may only receive a fraction of the overall gain. It is not unusual to find an employer or ringleader who devises, puts into action, and controls a fraudulent scheme for his own profit, ensnaring less culpable ministerial employees in the web of illegal conduct along the way. The new specific offense characteristic, as proposed, would not account for differences in the roles played by these distinct actors at sentencing and, thus, should not be adopted in its current form.

Concerns regarding the overstatement of culpability in these scenarios would be better

addressed by a meaningful downward adjustment where the loss amount overstated a particular defendant's culpability, which would consider a variety of factors, including but not limited to, the role played by the defendant, and whether the defendant's alleged gain is direct or indirect in nature. In this way, the sentencing judge could account for differences in culpability that cannot be expressed purely in dollar amounts.

No Victims Were Substantially Harmed by the Offense. The Commission proposes amending the victims table in § 2B1.1(b)(2) to limit its impact if no victims were substantially harmed by the offense. The NYCDL fully supports the Commission's initiative to limit the impact of the victims table if no victims were substantially harmed by the offense, and endorses the Commission's approach of only applying the 4-level and the 6-level prongs of the victims table if the offense substantially endangered the solvency or financial security of at least one victim.

Cumulative Impact of Loss Table and Victims Table. The NYCDL believes the Commission should limit, if not eliminate, the cumulative impact of the loss table and the victims table. The NYCDL believes that the Commission should provide that if the enhancement under the loss table is above 14 levels, the 4-level or 6-level adjustments under the victims table should not be applied.

Other Suggested Approaches to Address Impact of Loss and Victims Tables. Rather than focusing on gain as a percentage of loss, a better approach may be to focus on personal gain in relation to the overall gain of the fraudulent scheme. For example, a defendant accruing 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.

In addition, the Commission may want to consider introducing downward adjustments similar to those that the NYCDL recommended in connection with the insider trading guidelines. By adding specific offense characteristics that relate specifically to a defendant's culpability (*e.g.*, whether the defendant was not an officer or director, or an organizer, leader, manager, or supervisor of the fraudulent scheme), the Guidelines would yield more appropriate sentences based on the culpability of each individual defendant.

ISSUE FOR COMMENT 2. SCOPE OF LIMITATIONS ON LOSS/VICTIMS TABLES

The NYCDL believes that, should the impact of the loss and victims tables be limited, the limitation should apply in all cases sentenced under § 2B1.1 and not just a subset of such cases like securities fraud. The overstatement of culpability based on loss amount is by no means unique to securities fraud. Nor is it difficult to imagine additional scenarios in which loss amounts would overstate culpability, such as a large-scale health care fraud in which administrative staff is asked by hospital administrators and/or doctors to falsify medical records. In all such scenarios, a rigid loss calculation will overstate culpability and, as such, the impact of the loss and victims tables should be limited accordingly.

ISSUE FOR COMMENT 3. PROPORTIONALITY

The NYCDL believes that, should the impact of the loss and victims tables be limited, it would be worthwhile to explore how to adjust the Guidelines that reference those tables to ensure that proportional changes are made.

PROPOSED AMENDMENT: CATEGORICAL APPROACH

The Commission has proposed four different options as guidance for the courts in determining whether a prior conviction falls within a category of offense for purposes of a Guidelines conviction. The NYCDL's comments on the categorical approach are contained in our forthcoming full-length submission to the Commission, to be submitted by March 19, 2012.

PROPOSED AMENDMENT: REHABILITATION

The Commission seeks comments on proposed amendments to § 5K2.19 on ―Rehabilitation." In its current form, § 5K2.19 provides that ―[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." The Commission proposes two possible options with respect to § 5K2.19. Option 1 repeals § 5K2.19 in its entirety. Option 2 amends § 5K2.19 to provide that ―rehabilitative efforts, whether pre- or post-sentencing, may be relevant in determining whether a departure is warranted." Option 2 also adds commentary to § 5K2.19 that sets forth a two-part test and the factors for courts to consider in determining whether a departure may be warranted.

The NYCDL supports eliminating § 5K2.19 (Option 1). Alternatively, the NYCDL would support the proposed amendment (Option 2), which provides that rehabilitative efforts may be relevant if present to an unusual degree, although it believes repealing the provision in its entirety would more effectively achieve the Commission's purpose. Notwithstanding past offenses, defendants deserve an opportunity, and should be encouraged, to undertake rehabilitative efforts and courts should be encouraged, not discouraged, from rewarding defendants who seek to become productive members of society. Moreover, proper consideration of this factor may prevent sentences from unduly disrupting a life that is on the road to full rehabilitation.

CONCLUSION

Again, on behalf of the NYCDL, I wish to thank Chairman Saris and the Members of the Commission, and I look forward to any questions the Commission may have.