Statement of Michael Caruso

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on Economic Crime and Inflationary Adjustments

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My name is Michael Caruso and I am the Federal Public Defender in the Southern District of Florida. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Economic Crime and Inflationary Adjustments.

We have been pleased to work with the Commission over the past few years as it engaged in a multi-year study of economic offenses. But, we are disappointed that at the end of this process, the Commission has concluded that "the fraud guideline may not be fundamentally broken for most forms of fraud."[1] Our experience and interpretation of the data are to the contrary. Before addressing the specifics of the Commission's proposed amendments, we first urge the Commission to reconsider its position on the general state of the guideline.

Applying the current guideline requires a tremendous amount of work, and ultimately provides little guidance on what sentence would be sufficient, but not greater than necessary, in any given case. This super-sized guideline, running almost 5 full pages plus an additional 18 pages of commentary, includes complicated rules for calculating loss and the other 18 specific offense characteristics, many of which contain several subparts. It is difficult and time-consuming to apply this guideline, and often requires lengthy sentencing hearings. And, sentences in actual cases demonstrate that courts do not find the guideline particularly helpful in determining a just sentence because the recommended guideline range is rejected more often than accepted.[2]

While the press focuses on the high profile cases involving large losses motivated by greed, and on the small number of such prosecutions despite corporate acknowledgement of wrongdoing,[3] Defenders see a steady stream of government cases against individuals with no

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[1] Honorable Patti B. Saris, Chair, U. S. Sentencing Comm'n, Remarks for Public Meeting January 9, 2015, at 2, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf (*USSC Chair Remarks*).

[2] USSC *2013 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2013) (*2013 Sourcebook*) (49.5% of sentences under §2B1.1 fell within the recommended guideline range). Preliminary data from FY 2014 suggests the rate of within recommended guideline range sentences continues its steady decline and has dropped to 46%. USSC, *Preliminary Data Report, 4th Quarter Release Preliminary Fiscal Year 2014 Data* (2014) tbl. 5 (*2014 4th Quarter Data Report*).

[3] *See, e.g.*, Christopher M. Matthews, *Ex-SAC Trader Gets Nine-Year Term – Judge Penalizes Martoma for Insider Trading; a 'Darker Side to His Character'*, Wall St. J., Sept. 9, 2014, at C1 ("Mathew

criminal history who played a low-level role in a larger scheme, and who commit this first non-violent offense in an effort to feed and house themselves and their families at basic levels. To be sure, not all of our clients meet these descriptions, but a significant number do, and the guidelines fail to provide courts with adequate guidance on the appropriate sentence for these individuals.

For example, in one recent case, a 55-year old female defendant with high blood pressure and osteoarthritis, faced a recommended guideline range of 108-135 months, far above the 60-month statutory maximum. This recommended sentence is strikingly high for a defendant who the government described as follows: a "mid to low level employee" who "was one of dozens of telemarketers [soliciting investment in movies] . . . most of whom were not charged," who earned "less than $45,000 per year" for the four years she worked as a telemarketer, and who for at least part of the time did not understand she was participating in a fraudulent scheme "as evidenced by a $5,000 investment from defendant's daughter."[4] The government calculated the guidelines at offense level 31 (including a three-point reduction for acceptance of responsibility) in large part due to the 20-point enhancement for loss, which meant a guideline-recommended range of 108-135 months for this defendant in Criminal History Category I. The Court sentenced the defendant to a year and a day, well below the 24 months requested by the government, and significantly below 108 months, the low-end of the recommended guideline range. While there is a good question about why the defendant was not allowed to participate in a post-plea diversion program available in the district, that does not excuse the failure of the guidelines to come anywhere close to providing appropriate guidance on sentences in these cases involving

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Martoma, who worked for hedge-fund billionaire Steven A. Cohen, was sentenced to nine years in prison Monday for taking part in what prosecutors said was one of the largest insider-trading schemes ever."); Trip Gabriel, *Ex-Executive Is Indicted in Disaster at Coal Mine*, N.Y.Times, Nov. 14, 2014, at A12) ("The former chief executive of the company involved in the nation's worst coal mine disaster in 40 years, in which 29 miner died in West Virginia in 2010, was charged on Thursday with widespread violations of safety rules and deceiving federal inspectors."); James B. Stewart, *When the Buck Doesn't Stop*, N.Y.Times, Feb. 20, 2015, at B1 (quoting Professor Brandon L. Garrett, author of *Too Big to Jail*: "More often than not, when the largest corporations are prosecuted federally, individuals aren't charged."); Peter J. Henning, *Eric Holder's Mixed Legacy on White-Collar Crime*, N.Y.Times Blogs (DealBook) (Sept. 29, 2014) (Holder's "last year as attorney general was marked by multibillion-dollar settlements with banks for their role in fueling the boom in subprime mortgages. They were a long-awaited response to the financial crisis but came after precious few prosecutions of corporate executives."); Devlin Barrett, *Loretta Lynch to Face Tough Questioning by Lawmakers; Attorney General Nominee Likely to be Asked about Immigration, Surveillance*, Wall St. J. Online (Nov. 9, 2014) ("The [HSBC] settlement, which came with no criminal penalties for any of the individuals involved, was harshly criticized by those who felt Mr. Holder's Justice Department has failed to punish bank executives for their part in the 2008 financial meltdown.").

[4] *United States v. Floyd*, No. 2:11-cr-543, Government's Objections to the Presentence Report and Recommendation for Participation in CASA (Dkt. No. 530), Government's Sentencing Position (Dkt. No. 559).

lower-level players whose loss amounts are driven to absurdly high levels based on the conduct of others over whom these lower-level participants have no control.

Another case where the guideline failed involved a 43-year-old woman with no prior criminal conduct who had worked in the family businesses since she was a kid.[5] Most recently, she had been working as the chief financial officer of a family farm equipment business. While suffering from clinical depression, she became aware that the family business was failing. At the same time, the rest of the family assumed the business was thriving. To ensure that other family members could continue to receive salaries and health insurance until business improved, the defendant worked for a very low salary – $24,000 to $26,000 per year – for several years, and even worked a few months without taking any salary at all. But this was not enough, and in desperation, and in her depressive state, she took out loans in the names of clients and family members to cover business expenses. She believed she could pay the money back once the business was back on its feet. Unfortunately, that did not happen. In this case, the defendant agreed to not seek a below-guideline sentence, and stipulated to a loss amount in excess of $1 million in exchange for the government's agreement to dismiss a charge under 18 U.S.C. § 1028A which would have required a 24-month sentence consecutive to any other sentence imposed. The government and probation calculated an offense level of 32, with a recommended guideline range in Criminal History Category I of 121-151 months. The court issued a 10-page memorandum opinion addressing defendant's objections to the offense level calculations, and sustained only the defendant's objection to the 2-level enhancement at §2B1.1(b)(16)(A). The recommended guideline range for offense level 30 is 97-121 months. The court, on its own, varied downward and imposed a sentence of 73 months, a sentence approximately 25% below the bottom of the recommended range.

The data confirms our experiences that the fraud guideline is broken and fails to provide courts with meaningful guidance. District courts impose sentences outside recommended guideline ranges more often than they do within. This rate of dissatisfaction with the guideline recommended sentences is decidedly not driven by the cases that fall within the upper half of the 16-category loss table. Commission data shows that, for all categories in the bottom-half of the loss table that recommend enhancements based on loss amount, the rate of within-guideline sentences is less than half.[6] This is important because more than two-thirds of all cases

[5] Because of the personal nature of some of the facts in this case, we do not identify the name of the defendant.

[6] USSC, *Economic Crime Public Data Briefing* figs. 4 & 5 (Jan. 9, 2015) (For loss amounts of more than $5,000 up to and including $1 million dollars, the loss amounts for which the guidelines recommend an enhancement between 2 to 14 levels, the rate of within guideline sentences was 47.9% in FY 2012), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf (*Economic Crime Briefing*).

sentenced under §2B1.1 fall in those loss categories.[7] Significantly, the category with the highest rate of within guideline sentences – 84.1% – is where the guidelines recommend no enhancement based on the loss amount.[8] This highlights one of the biggest problems with the guideline: the overemphasis on loss. When the loss determination starts to play a significant role in the recommended guideline range, courts start rejecting that range as an appropriate sentence. And, when the enhancement for loss becomes large enough that it doubles the lowest base offense level – which happens at the low loss amount of more than $30,000 – courts begin rejecting the recommended guideline in half the cases.[9]

The Commission has indicated it believes that "sentences on average hew fairly closely to the guidelines for all but the highest dollar values, over $1 million in loss."[10] Based on publicly available data, we disagree.[11] In FY 2009 - FY 2013, defendants sentenced under §2B1.1 received an average reduction of 60.4% in their sentence in cases where the government filed substantial assistance motions, an average reduction of 59.1% in cases where the government sponsored below-guideline sentences for reasons other than those contained in Chapter Five, and an average reduction of 54.6% in cases with below guideline sentences that were not sponsored by the government.[12] These numbers cannot be fully attributed to the relatively small number of high- loss cases involving loss amounts of $1 million or more (only 17% of all cases in FY 2012).[13] In many of the loss categories involving losses of $1 million or less, courts impose sentences significantly below the recommended guideline range. For example, in FY 2012, in cases where the loss amount fell in the more than $70,000 category, the average sentence was 19% below the average guideline minimum; where the loss amount fell in the more than $120,000 category, the average sentence was 21.4% below the average guideline minimum; where the loss amount fell in the more than $200,000 category, the average sentence

[7] *Id.* at fig. 4 (There were 5,814 people sentenced based on loss amounts of more than $5,000 up to and including $1 million dollars in FY 2012, and 8,503 individuals total under §2B1.1).

[8] *Id.* at fig. 5.

[9] *Id.*

[10] *USSC Chair Remarks*, at 2.

[11] If the Commission has other data that it has not released to the public that shows sentences hewing closely to the guidelines, Defenders request the Commission make that data available.

[12] USSC, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (Dec. 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Theft_Property_Destruction_Fraud_FY13.pdf (*Fraud Quick Facts*).

[13] *Economic Crime Briefing* at fig. 4.

was 24.2% below the average guideline minimum; and where the loss amount fell in the more than $400,000 level, the average sentence was 22% below the average guideline minimum.[14]

And, while sentences of 2, 4 and 6 months below the average guideline minimum may sound like small differences in the world of lengthy federal sentences, for these low-level cases, such reductions are significant because they place the sentence within a lower Zone, which allows for alternatives to incarceration. For example, for the loss category of more than $30,000, the average guideline minimum is 15 months, and the average sentence is just 2 months lower – 13 months.[15] In Criminal History Category I, the category that applies to most people sentenced under §2B1.1,[16] 15 months is the bottom of the range at offense level 14. A two month reduction would move the defendant to a lower offense level and from Zone D to Zone C, where the guidelines encourage greater use of community supervision, in contrast to Zone D which recommends the entire sentence be spent in prison.[17]

Against this backdrop, we believe the Commission's proposed amendments fail to adequately address the core problems that cause the recommended guideline sentences to be higher than necessary for the seriousness of many offenses. [18] The guidelines need to reduce the current overemphasis on loss as a measure of culpability, eliminate intended loss, allow loss amounts to be mitigated by a variety of other factors relevant to culpability, encourage alternatives to incarceration, eliminate the victim table, eliminate the enhancement for sophisticated means, amend §2B1.1(b)(10) to exclude what are largely foreign offenses, cap the cumulative effect of the specific offense characteristics, eliminate floors for non-violent offenses, and also possibly include a safety-valve for fraud cases.[19] If, however, the Commission is unwilling to make these bigger changes, Defenders believe some of the Commission's proposed amendments take steps in the right direction.

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[14] *Id.* at fig. 6.

[15] *Id.* at fig. 6.

[16] *Fraud Quick Facts*.

[17] *See* USSG §5C1.1.

[18] *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (Nov. 20, 2013) (addressing problems with §2B1.1 and proposing solutions).

[19] *Id.* (providing a more detailed explanation of these changes Defenders believe are necessary to improve the guidelines).

I. Inflationary Adjustments

Defenders enthusiastically support an immediate, and ideally, retroactive, adjustment to the monetary values in the Chapter Two offense guidelines for inflation. It is critical, however, that the Commission properly acknowledge that the guidelines "have never been revised specifically to account for inflation."[20] Accordingly, Defenders oppose the Commission's proposal to arbitrarily select different starting points for different guidelines (*e.g.* 2001 for §2B1.1 and 1989 for §2B2.1). The starting point should be the same for all – 1987 – because the monetary values in the Chapter Two offense guidelines "have never been revised specifically to account for inflation."[21]

Adjusting the monetary values in Chapter Two for inflation makes good sense and is consistent with the Commission's mandate to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[22] The premise of the Chapter Two monetary values is that they serve as a proxy for offense seriousness. Over time, without adjustment, those monetary values reflect less and less serious offenses due to the effects of inflation. Because $10,000 is worth less today than it was in 1987, a fraud or burglary involving a loss amount of $10,000 is less severe today than it was in 1987. By not adjusting for inflation, the Commission has effectively increased the recommended penalties for Chapter Two offenses that are based on monetary values. It is time to fix that. An increase or decrease to the recommended sentence for an offense where monetary values serve as a proxy for offense seriousness should be based on empirical evidence about why such a change is consistent with the purposes of sentencing, not the vagaries of inflation.

While this would be the first time the Commission specifically adjusted the Chapter Two monetary values for inflation, it certainly should not be the last. We recommend the Commission add to the Guidelines a provision that would automatically make inflationary adjustments to the Chapter Two monetary values. If these automatic adjustments do not occur annually, we urge the commission to provide for a downward departure in cases where, had there been an annual inflationary adjustment, it would have resulted in a lower loss enhancement.

In addition, while we support inflationary adjustments to the Chapter Two offense monetary values now and on an automatic and regular basis in the future, we oppose the

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[20] USSC, *Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing*, 80 Fed. Reg. 2570, 2579 (Jan. 16, 2015) (*2015 Proposed Amendments*).

[21] *Id.*

[22] 28 U.S.C § 994(g).

Commission's proposal to use starting points other than 1987 for the Chapter Two adjustments. First, the guidelines "have never been revised specifically to account for inflation."[23] That alone is reason enough to calculate all of the adjustments from the beginning. Second, the Commission has long worked to achieve proportionality in the guidelines.[24] Picking different dates for the starting point of the inflationary adjustment for different Chapter Two offense guidelines is inconsistent with that goal. For example, right now a $10,000 loss amount triggers a 4-level enhancement under §2B1.1, and a 2-level enhancement under §2B2.1, which starts at a higher base offense level. Under the proposed amendments, those same enhancements will be triggered by two different loss amounts: it will take $15,000 to trigger §2B1.1's 4-level enhancement, and §20,000 to trigger §2B2.1's 2-level loss amount. Put a different way: Why would a loss of $18,000 under the current guidelines be worth +4 under §2B1.1, +2 under §2B2.1, but then, after November 1, 2015, still be worth +4 under §2B1.1 and only +1 under §2B2.1? No reason justifies this difference other than the arbitrary one that the Commission last amended the monetary values in §2B1.1 in 2001, and §2B2.1 in 1989. But when the Commission last amended the monetary values in §2B2.1, it did so in part to "conform the offense levels . . . to the amended loss table at §2B1.1."[25] To be sure, after the amendment to §2B2.1 in 1989, the Commission later amended §2B1.1 in 2001 as part of the Economic Crime Package. But that does not mean that in so doing the Commission abandoned its goal of proportionality. It is difficult to imagine why the Commission would abandon that goal now, and even more difficult to see how that goal could be served by picking different starting dates for different Chapter Two offenses when none of them has ever "been revised specifically to account for inflation."[26] The best way to ensure that inflation does not arbitrarily increase the severity of sentences for offenses that rely on monetary values, and simultaneously maintain the Commission's goal of proportionality, is to adjust all of the Chapter Two monetary values for inflation since 1987.

Using 1987 as a starting point for the inflationary adjustments also would mildly ameliorate some of the unduly harsh effects of a loss table that from its inception recommended sentences greater than necessary, and that over time has only ratcheted up recommended penalties based on loss amount for reasons unsupported by empirical evidence. When the guidelines were first promulgated, the Commission decided to "abandon the touchstone of prior

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[23] *2015 Proposed Amendments*.

[24] USSG, ch.1, original intro., pt. 3 ("Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.")

[25] USSG App. C, Amend 105, Reason for Amendment (Nov. 1, 1989)

[26] *2015 Proposed Amendments*.

past practice" for economic offenses.[27] The Commission therefore required some form of confinement for all but the least serious cases, and adopted a fraud guideline requiring no less than 0-6 months and no more than 30-37 months for defendants in Criminal History Category I.[28] The Commission explained that "the definite prospect of prison, though the time is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm."[29] The evidence, however, shows no difference in deterrent effect between probation and imprisonment.[30] It is well-supported and widely-accepted that deterrence is not linked to the severity of the penalty. The greatest deterrent effect is achieved through the certainty of getting caught and punished, not the severity of the punishment.[31]

Since then, the Commission has repeatedly increased the offense levels for loss based on reasons unsupported by empirical evidence. This is true across the entire loss table. For example, in 1987, a loss amount of more than $10,000 and up to $20,000 carried an increase of 3 levels, but now carries an increase of 4 levels. A loss amount of more than $30,000 and up to $50,000 carried an increase of 4 levels in 1987, but now carries an increase of 6 levels, pushing

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[27] Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 22-23 (1988).

[28] *See* USSG §2F1.1 (1987).

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

[30] *See* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007).

[31] *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 Criminology & Pub. Pol'y 13, 37 (2011) ("The key empirical conclusions of our literature review are that at prevailing levels of certainty and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police."), http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2010.00680.x/pdf. A 2010 review of deterrence research concluded that there is "no real evidence of a deterrent effect for severity." Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 818 (2010). "[I]n virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity." *Id.* at 817. A good overview of the criminological research on certainty versus severity is available in an article by Valerie Wright, Ph.D., entitled *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010), http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf.

even individuals for whom this is their first offense into Zone C. A loss amount of more than $70,000 and up to $100,000 has increased from 5 to 8 levels. A loss amount of more than $120,000 and up to $200,000 has increased from 6 to 10 levels.[32] Every single level increase affects a person's liberty by increasing the guideline recommended sentence, and at these levels, can mean the difference between probation and imprisonment.

Based on this history, even with adjustments for inflation, we believe the monetary values in the Chapter Two offense guidelines – and particularly in §2B1.1 – place far too much emphasis on loss. In response to the Commission's Issue for Comment on whether it should consider other changes to the monetary tables, Defenders repeat their plea that the enhancements for loss amounts be reduced so that they better reflect the seriousness of the offenses.

Turning back to the proposed inflationary adjustments, the Commission has proposed two different methods for adjusting for inflation, both of which use the Consumer Price Index. Option 1 rounds the amounts using a methodology applied when adjusting civil monetary penalties for inflation under section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. §2461 note). Option 2 uses different rounding rules "extrapolated from the methodology used in Option 1." Defenders see no reason to deviate from the well-established practice for civil penalties. This method provides more precision in the lower-middle part of the loss table (more than $100,000 and under $1 million), whereas Option 2 provides rounder numbers at the top end of the guideline where there are fewer affected cases.[33] While that may eventually change due to inflation, if the amounts eventually become so large that the rounding method in Option 1 becomes imprecise, it can and should be changed at that time in the future.

Finally, Defenders oppose inflationary adjustments for the fines table in Chapter Five. Here, inflation is doing a good job of shrinking the negative impact that fines can have on reentry, which is positive for the individuals who are reentering society, as well as for public safety. Criminal debt limits a person's ability to "attain housing, employment, and access to credit."[34] In addition, "[a]n important consequence of financial burdens is that they increase the

[32] The increases are even more extreme in the top half of the loss table.

[33] *See* USSC, *Prison and Sentencing Impact Assessments for Proposed 2015 Amendments for Inflationary Adjustments to Monetary Tables in the Federal Sentencing Guidelines*, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/2014_2015_Proposed_Impact.pdf.

[34] Douglas N. Evans, Research & Evaluation Center, John Jay College of Criminal Justice, *The Debt Penalty, Exposing the Financial Barriers to Offender Reintegration*, at 9 (Aug. 2014).

likelihood of recidivism, particularly when offenders are unable to pay."[35] Any amendment to fines for individuals should work to reduce them.

II. Intended Loss

Defenders continue to believe the intended loss rules can be particularly unfair, increasing loss amounts well beyond the actual loss or culpability of the defendant. The best solution to the problems created by the intended loss rules is to strike intended loss from the guidelines. If the Commission insists it remain, we support the Commission's proposal in Option 1 to limit intended loss to the pecuniary harm "the defendant purposely sought to inflict." We do, however, recommend that the Commission change the proposed directions for determining a defendant's purpose, which currently indicate a defendant's intent can be inferred from, among other things, "the actions and intentions of other participants, and the natural and probable consequences of those actions." This language is confusing and could render meaningless the proposed language limiting intended loss to the pecuniary harm the defendant purposely sought to inflict. In addition, if intended loss is to remain in the guideline, we urge the Commission to make additional changes as outlined below.

When calculating a defendant's intended loss, some courts have held that a defendant is accountable for loss intended by co-participants if the conduct of the co-participants was foreseeable to the defendant.[36] For example, in one case, a nurse who was paid $500 a week for her relatively minor participation in a larger scheme, was held responsible for the entire intended loss of more than $9 million on the basis that she was responsible for losses from all reasonably foreseeable acts of co-conspirators, even if the losses did not actually occur.[37] This approach is both unfair and unduly complex. Holding a defendant accountable for the entire loss "*intended* by co-conspirators so long as the conduct of the entire group was foreseeable to the defendant . . . [is] troublesome insofar as it muddles the distinction between actually occurring harm that was foreseeable to a defendant and harm that did not occur but which was subjectively intended."[38] For intended loss, "proof of subjective intent stands in for actual occurrence of the merely foreseeable."[39]

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[35] *Id.*

[36] *See, e.g., United States v. Otuya*, 720 F.3d 183, 191 (4th Cir. 2013); *United States v. Sliman*, 449 F.3d 797,801 (7th Cir. 2006).

[37] *United States v. Mateos*, 623 F.3d 1350, 1370-71 (11th Cir. 2010).

[38] Roger W. Haines, Jr., Frank O. Bowman, III & Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* 380 (2013-2014 ed.).

[39] *Id.* at 368.

Both of the Commission's proposals have the potential to help put a stop to this sweeping interpretation of intended loss by some courts. Option 1, limiting intended loss to the pecuniary harm "the defendant purposely sought to inflict," is superior to Option 2, which would allow courts to also consider the pecuniary harm "that any other participant sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant." Option 1 makes clear that when intended loss is substituted for actual loss, it must be based on the defendant's "subjective intent to cause the loss." This option also advances the Commission's goals of increas[ing] clarity" and "reduc[ing] ambiguity"[40] by limiting the intended loss inquiry to only the subjective intent of the defendant.

Option 2, on the other hand, while not as bad as the decisions that look to all jointly undertaken activity, still shifts the focus away from where it should be: the subjective intent of the defendant. It calls for increased punishment based on what others intended – that is based on what others were merely thinking. This is fundamentally unfair and will result in recommended guideline sentences that overstate the culpability of the defendant. Option 2 also adds unnecessary complexity to a guideline that is in dire need of simplification. It will be time-consuming and complicated to apply – requiring courts to determine not only the mental state of the defendant, but also the mental state of any other participants for whom the defendant is accountable under §1B1.3(a)(1)(A).

Defenders, however, are concerned that under either Option 1 or Option 2, the proposed amendments would allow an individual's purpose to be determined not only by that individual's actions, but also "by the actions and intentions of other participants and the natural and probable consequences of those actions."[41] This language, at best, will confuse the analysis and result in litigation, and, at worst, undo the work of the earlier language – particularly in Option 1 – limiting intended loss to the pecuniary harm the defendant purposely sought to inflict. It is difficult to understand how the "intentions of other participants" and even the "actions . . . of other participants" that the defendant may not have even known about, are relevant to determining the defendant's subjective intent.

A better approach would be to follow the lead of the Tenth Circuit in *United States v. Manatau*, 647 F.3d 1048, 1056 (10th Cir. 2011), and direct simply:

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[40] *USSC Chair Remarks*, at 2.

[41] This is a concern with both options. Option 2 initially refers to participants for whom the defendant is accountable under §1B1.3(a)(1)(A), but later refers to the "actions and intentions of other participants" without the limitation that the participants be those for whom the defendant is accountable under §1B1.3(a)(1)(A).

The defendant's purpose may be inferred from all of the available facts.[42]

The Tenth Circuit in *Manatau* did not provide any more specificity than that, and the Commission should not either, leaving the inquiry to the discretion of the sentencing court in light of the circumstances of the particular case.

At minimum, the Commission should reject the proposed language directing courts to consider the "intentions of other participants," and require that the "actions . . . of other participants" be at least known to the defendant. Similarly, the language "natural and probable consequences of those actions," could lead to confusion over whether this is an inquiry into reasonable foreseeability, or not, and should be omitted. As discussed above, the Commission should draw clear distinctions between reasonable foreseeability and intended loss. There is no need to introduce such complexity and ambiguity here, when the Commission could simply provide the general direction that courts are to consider "the available facts."

If the Commission persists in keeping intended loss as part of the guidelines, there are additional changes that need to be made. First, an example should be added to Application Note 20(C) that would make clear that a downward departure is warranted if intended loss greatly exceeds actual loss. Second, the arbitrary rule in the commentary setting a floor of $500 per access device should be eliminated.[43] It is inconsistent with looking at the subjective intent of the defendant and works to drive up loss amounts even where no evidence shows the defendant sought to take the full $500. For offenses involving multiple access devices, the intended loss amounts climb rapidly and often overstate a defendant's culpability.[44] Third, impossible-to-obtain loss amounts should be excluded from intended loss. Before the 2001 amendments, some courts limited intended loss to that which was possible,[45] and the guidelines specified that a downward departure may be warranted when, for example, a defendant attempted "to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it." USSG §2F1.1, comment. (n.11) (1987).[46] The guideline's current use of impossible-to-

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[42] In *Manatau*, the Tenth Circuit stated the district court is "free . . . to make reasonable inferences about the defendant's mental state from the available facts." 647 F.3d at 1056.

[43] USSG §2B1.1, comment. (n.3(F)(i)).

[44] *See, e.g.*, *United States v. Levine*, 87 F. App'x 44 (9th Cir. 2004) (calculating total loss of more than $1 million by multiplying the number of unauthorized credit card numbers in the defendant's possession (2,071) by the $500 minimum); *United States v. Gilmore*, 431 F. App'x 428 (6th Cir. 2011) (affirming 16-level loss enhancement based on applying the "$500-per-device rule" to all 2,747 devices).

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

[46] This example was included in the original guideline, §2F1.1, comment. (n.11) (1987), and remained until the amendments of 2001, at which point this example was omitted, USSG App. C., Amend. 617

obtain loss amounts to increase the guideline range, rather than mitigate it, does not accurately reflect offender culpability.[47] If the Commission declines to exclude impossible-to-obtain loss from the definition, Application Note 20(C) should be amended to specify that a downward departure may be warranted in such circumstances. For example, §2F1.1 used to provide that a downward departure may be appropriate where the "defendant attempts to pass a negotiable instrument so obviously fraudulent that no one would seriously consider honoring it." USSG §2F1.1, comment. (n.11) (2000).

III. Sophisticated Means

Defenders are pleased the Commission is considering amendments to the enhancement for sophisticated means. As the Commission is aware, Defenders have long been troubled by the enhancement for sophisticated means because it is too ambiguous for meaningful application.[48] Accordingly, Defenders propose eliminating the concept from the guidelines. If, however, the sophisticated means concept is to remain a part of the guidelines, Defenders recommend that the specific offense characteristic be replaced with two departure provisions: an invited upward departure, and a companion downward departure where the lack of sophistication is notable.

(Nov. 1, 2001). No explanation was given for removing this example. At the same time, the Commission amended the guidelines to provide that "intended loss" includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." The reason given for this new definition was that the "amendment resolves the [circuit] conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender…. Accordingly, concepts such as 'economic reality' or 'amounts put at risk' will no longer be considerations in the determination of intended loss." USSG, App. C, Amend 617 (Nov. 1, 2001).

[47] *See, e.g.*, *United States v. Corsey*, 723 F.3d 366, 378-79 (2d Cir. 2013) (Underhill, D.J., concurring) ("This was a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars…. Appellants' conduct was not dangerous because they had absolutely no hope of success…. This conspiracy to defraud involved no actual loss, no probable loss, and no victim. The scheme was treated as sophisticated, but could be more accurately described as a comedic plot outline for a 'Three Stooges' episode. Because the plan was farcical, the use of intended loss as a proxy for seriousness of the crime was wholly arbitrary: the seriousness of this conduct did not turn on the amount of intended loss any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars. By relying unquestioningly on the amount of the intended loss, the District Court treated this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts."); *United States v. Zedner*, 401 F.3d 36, 39 & n.1 (2d Cir. 2005) (defendant approached financial institutions to open accounts using a counterfeit $10 million bond, but institutions "uniformly refused to open an account"; "[s]ome of bonds referred to the United States as the 'Onited States' and 'Thunted States,' misspelled Philadelphia as 'Dhtladelphia,' misspelled Chicago as 'Cgicago,' referred to the month August as 'Augit,' and 'Auouit,' misspelled the word dollar, and claimed to have a duration of 'forevev.'").

[48] *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 7, 13 (Nov. 20, 2013).

Finally, it should not be applied cumulatively when the device-making enhancement at §2B1.1(b)(11) is applied.[49]

While the Commission's proposed changes to the sophisticated means enhancement do not go as far as Defenders would like, we believe they may – with modifications– move in the right direction. If the enhancement is to remain in the guidelines, Defenders would support narrowing the application of the enhancement to situations where the defendant willfully caused the sophisticated conduct. Currently, some courts apply the enhancement based not on the conduct of the defendant but instead on the sophistication of the general scheme.[50] Low-level participants in fraudulent schemes who do not willfully cause sophisticated conduct should not have their sentences enhanced simply because someone else in the scheme – often someone over whom the defendant has no control – engaged in conduct that constitutes sophisticated means.

We are concerned that the proposed amendment may not operate to limit application of the enhancement to defendants who willfully caused conduct constituting sophisticated means. The proposed amendment to the guideline provides the enhancement should apply when the defendant "engaged in or caused the conduct constituting sophisticated means." The proposed amendment to the related commentary also uses the phrase "engaged in or caused" and directs that the enhancement should apply when a defendant "aided [or] abetted . . . such conduct." We have three concerns with this language. First, the use of the term "caused," instead of "willfully caused" as used in §1B1.3(a)(1)(A), is troubling because it is a slippery term that has resulted in extensive litigation in a variety of contexts. Including it in this guideline would undermine the Commission's simplification goals. Second, the phrase "engaged in" is superfluous and confusing. And, third, the "aided" and "abetted" language may lead some courts to apply the enhancement to a defendant who is engaged in low-level conduct such as running errands, but in doing so is aiding or abetting sophisticated conduct by another.

If the Commission is really trying to limit application of this enhancement to defendants who willfully caused the conduct that constitutes sophisticated means, the proposed amendment to the guideline should be changed as follows:

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[49] *See, e.g., United States v. Podio*, 432 F. App'x 308 (5th Cir. 2011) (piling sophisticated means enhancement on top of enhancement for possession or use of device-making equipment); *United States v. Abulyan*, 380 F. App'x 409, 412 (5th Cir. 2010) (same).

[50] *See, e.g., United States v. Green*, 648 F.3d 569, 572, 576-77 (7th Cir. 2011) (applying sophisticated means enhancement because the whole scheme was sophisticated, even though defendant was only a buyer applying for mortgage loans at the direction of others); *United States v. Cosgrove*, 637 F.3d 646 (6th Cir. 2011) (holding that "a sophisticated means enhancement could be applied to Cosgrove even if his role in the conspiracy did not involve the use of sophisticated means so long as the use of such means was reasonably foreseeable to him").

(b)(10)(C) the offense otherwise involved sophisticated means and the defendant ~~engaged in or~~ willfully caused the conduct constituting sophisticated means

And the proposed amendment to the commentary should be changed as follows:

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

These changes are consistent with the Commission's goal to "increase clarity, reduce ambiguity and better reflect reality."[51]

The Commission has also proposed adding language to the commentary specifying that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." Defenders support the effort to narrow the application of this enhancement. We are hopeful the change will signal that the enhancement should only be applied to a subset of defendants who willfully cause highly sophisticated conduct that is not common in other offenses.

Defenders, however, oppose the proposed addition of language specifying that the enhancement applies to conduct that "displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense than a typical offense of the same kind." We are concerned that specifically identifying "planning" or "concealing" could expand application of the enhancement. For example, a court might consider how long it took a defendant to plan an offense, rather than focusing on the intricacy of the plan, potentially exposing less intelligent defendants to the enhancement simply because it took them longer than it would take someone of average intelligence to plan an offense. Because of these concerns, we recommend Application Note 9(B) be amended as follows:

Sophisticated Means Enhancement under Subsection (b)(1)(C). – For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct ~~pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.~~ Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.

[51] *USSC Chair* Remarks, at 2.

Finally, Defenders request that in addition to making the changes the Commission proposes – in the revised form discussed above– the Commission also make clear that this enhancement should *not* be applied cumulatively with the device-making enhancement at §2B1.1(b)(11).

IV. Victim Table

The current victim table often overstates the seriousness of the offense by double counting the pecuniary harm already captured in the loss table, and by broadly defining victim to include those who suffered no loss but had their means of identification used without authority.[52] While we think changes should be made, we do not believe the Commission's proposed amendments adequately address the problems. The Commission's proposed amendments will unnecessarily increase complexity, and still not provide courts with meaningful guidance regarding the appropriate sentence in any given case. We are not aware of any impact analysis of the proposed amendment, or any efforts to test the proposed changes, but we fear they are likely to result in longer recommended sentences, without any evidence that longer sentences are necessary or appropriate.

Defenders have recommended that the Commission eliminate the victim table. Short of that, the Commission should limit enhancements in §2B1.1(b)(2) to situations where victims suffered substantial financial hardship. We do not support the hybrid method the Commission has proposed, which would enhance sentences based both on the number of victims, as well as victim impact. The better approach is to eliminate the counting of victims and focus exclusively on victim impact, enhancing sentences only where victims suffered substantial financial hardship as a result of the offense. If the hybrid approach is an attempt to address what some see as two different harms, it is important to remember that the harm being measured by merely counting the number of victims is already accounted for in the loss amount.

If, however, the Commission insists on proceeding with the hybrid approach, we support reducing the size of the enhancement under the current victim table, §2B1.1(b)(2), for each tier to 1, 2 and 3. We also believe the tiered approach of Option 2 is better than Option 1, but believe it is critical that the substantial hardship tiers begin small – 1 level to be exact – and increase in 1 level increments to a cumulative cap of 4 for both victim enhancements, §2B1.1(b)(2) and proposed §2B1.1(b)(3). Small enhancements are necessary to ensure that victim impact does not play an outsized role in the culpability determination, and to avoid further lengthening recommended sentences that are already too long. In addition, the new victim enhancement in Option 2 should provide larger steps between the tiers, so that the first 1-level enhancement would not apply until there were, for example, 5 or more victims who suffered substantial

[52] *See* USSG §2B1.1, comment. (n.4(E)).

financial harm, and the second enhancement – a 2-level enhancement – would not apply until there were, for example, 25 such victims, and the third enhancement – a 3-level enhancement– would not apply until there were, for example, 100 such victims. This would allow for a meaningful and manageable tiered approach.

Whether the Commission decides to provide enhancements only for victim impact, or instead, to pursue the hybrid approach, Defenders support the Commission's proposal to strike from the current version of §2B1.1(b)(16) the 4-level enhancement and floor offense level of 24 where an offense "substantially endangered the solvency or financial security of 100 or more victims." Particularly if the Commission adopts the new proposed victim impact enhancement, the harm addressed in §2B1.1(b)(16) will be accounted for elsewhere in the guideline. And, with 100 or more victims, the loss amount will likely be so high, the loss table alone will lead to a recommended guideline range that is greater than necessary. But this is not the only specific offense characteristic that needs attention. Because the guideline is large and already includes 19 specific offense characteristics with multiple subparts, we urge the Commission to cap the cumulative effect of the numerous enhancements to avoid disproportionate cumulative adjustments.

In addition, under any approach that measures victim impact, specific offense levels should be based solely on "financial" hardship. As mentioned above, Defenders opposed the Commission's decision in 2009 to expand the definition of victim to include "any individual whose means of identification was used unlawfully or without authority," even if those individuals suffered no loss and even if they were unaware that their identifying information had been obtained or misused.[53] The Commission should not multiply the effect of this expansion by providing for additional enhancements for non-economic harm. These non-economic harms are well addressed in Application Note 20(A)(vi). In addition, these non-economic harms do not appear to be a factor sentencing courts deem particularly important. While we do not know exactly how many times Application Note 20(A)(vi) is relied upon, it is safe to say it is not often. In FY 2013, the rate for *all* upward departures under §2B1.1 (including guideline only as well as guideline with *Booker*) was well under 1%.[54]

Finally, Defenders oppose the Commission's proposal to include a non-exhaustive list of factors for a court to consider in determining whether the offense resulted in substantial financial hardship to a victim. First, because we oppose including non-financial hardship as a consideration for victim impact, we also oppose the inclusion of factors (F)-(H) and would keep them where they currently are, as a basis for an upward departure in Application Note 20(A)(vi). Second, many of the remaining factors are ambiguous, subjective, and would likely be a topic of

[53] USSG §2B1.1, comment. (n.4(E)).

[54] *2013 Sourcebook* tbl. 28 (0.6%); *see also 2014 4th Quarter Data Report* tbl. 5 (0.4%).

frequent litigation. The determination of whether a victim suffered a substantial financial hardship is necessarily fact intensive, and the relevant factors will vary from case to case depending on the victim's circumstances. Rather than providing meaningful guidance, the list of factors would simply multiply the number of decisions a judge is required to make about whether the offense had a *substantial* effect on various aspects of the victim's economic life. For example the court would be required to determine whether a victim suffered a *substantial* loss from a retirement, education, or other savings or investment fund; made *substantial* changes to his employment, and made *substantial* changes to her living arrangement. This adds unnecessary complexity for courts that are well-equipped to determine the ultimate issue based on all of the evidence presented in any individual case: whether the offense resulted in *substantial* financial hardship. This proposed list of factors would work squarely against the Commission's stated intent to "increase clarity, reduce ambiguity, and better reflect reality."[55]

V. Fraud on the Market

In 2012, the Commission sought comment on what method to use to calculate loss in cases involving fraudulent inflation or deflation in the value of securities or commodities. Defenders urged the Commission to use the market-adjusted model adopted by the Second and Fifth Circuits. *See*, *e.g.*, *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). Defenders supported this method of calculating loss in these cases because it is the only method that measures the loss actually *caused* by the fraud. Since the loss amount is used in §2B1.1 as a proxy for culpability, price changes that are not attributable to the defendant's conduct should not be included in the loss amount. For this reason, *Rutkoske* and *Olis* applied the loss causation standard of *Dura Pharmaceuticals, Inc., v. Broudo*, 544 U.S. 336 (2005), which limits loss to those proximately caused by the defendant's conduct.[56] The Commission rejected that approach, and instead, specified a method that is now set forth in the commentary to §2B1.1.[57] Defenders still believe the market-adjusted method adopted by the Second and Fifth Circuits is the best way to calculate loss in these cases. But, if the Commission persists in rejecting that method, Defenders believe it would be better – as a matter of simplicity and accuracy – to look to gain instead of loss calculated under the complex rules set forth in §2B1.1, comment. (n.3(F)(ix)).

Defenders, however, strongly oppose the Commission's proposal to set floors for the gain enhancement in these cases. There is simply no need to set arbitrary floors. If the sentencing court perceives that the gain and the resulting guideline range understates the seriousness of the

[55] *USSC Chair Remarks*, at 2.

[56] *See Rutkoske*, 506 F.3d at 179; *Olis*, 429 F.3d at 546.

[57] *See* USSG §2B1.1, comment. (n.3(F)(ix)).

offense, the court is free to depart upward under §2B1.1, comment. (n.20(A)).[58] The Commission's proposal to set the floor no lower than offense level 14, the median offense level for the 7 cases involving conduct of this type in 2012 and 2013, is particularly troublesome and is an example of why sentences have continued to rise for no good reason under the guidelines for years. If 14 is the *median* offense level for all cases over the past two years, it makes no sense to set that as the *floor* for all offenses going forward unless there is evidence that longer sentences are necessary. We have seen no such evidence. Particularly in light of the extremely small number of cases, if the already inflated table at §2B1.1(b)(1) results in a sentence that is too low, departures will be more than adequate to allow courts to impose an appropriate sentence.

[58] USSG §2B1.1, comment. (n.20(A)) provides: "There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted."