



President

Theodore Simon Philadelphia, PA

President-Elect

E. G. Morris Austin, TX

First Vice President

Barry J. Pollack Washington, DC

Second Vice President

Rick Jones New York, NY

Secretary

Drew Findling Atlanta, GA

Immediate Past President

Jerry J. Cox Mount Vernon, KY

Parliamentarian

Nina J. Ginsberg Alexandria, VA

Directors

Christopher W. Adams Charleston, SC

Daniel N. Arshack New York, NY

Charles Atwell Kansas City, MO

Brian H. Bieber Miami, FL

Andrew S. Birrell Minneapolis, MN

Susan K. Bozorgi Miami, FL

Ellen C. Brotman Philadelphia, PA

Alexander Bunin Houston, TX

Jean-Jacques Cabou Phoenix, AZ

Maureen A. Cain Denver, CO

Aric M. Cramer Sr. Saint George, UT

Candace Crouse Cincinnati, OH

Ramon de la Cabada Miami, FL

Nicole DeBorde Houston, TX

Marissa L. Elkins Northampton, MA

Michael P. Heiskell Fort Worth, TX

Paula Rhea Henderson Knoxville, TN

Bonnie Hoffman Leesburg, VA

Stephen Ross Johnson Knoxville, TN

Ashish S. Joshi Ann Arbor, MI

Elizabeth Kelley Spokane, WA

Nellie L. King West Palm Beach, FL

Benjamin R. LaBranche Baton Rouge, LA

Tracy Miner Boston, MA

Tyrone C. Monciffe Houston, TX

Norman R. Mueller Denver, CO

Melinda M. Sarafa New York, NY

Mark Schamel Washington, DC

Kristina W. Supler Cleveland, OH

Jeffrey E. Thoma Fairfield, CA

Robert S. Toale Gretna, LA

CeCelia E. Valentine Phoenix, AZ

Deja Vishny Milwaukee, WI

Christopher A. Wellborn Rock Hill, SC

Steven M. Wells Anchorage, AK

Christie N. Williams Austin, TX

William P. Wolf Chicago, IL

Jeff Zimmerman Alexandria, VA

Executive Director

Norman L. Reimer Washington, DC

March 18, 2015

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002
Attn: Public Affairs

Re: NACDL Comments on Proposed Amendments for 2015 Cycle

Dear Judge Saris:

The National Association of Criminal Defense Lawyers (NACDL) submits this response to the Commission's January 16, 2015, request for comment on the proposed permanent amendments to the United States Sentencing Guidelines. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. We appreciate the opportunity to provide these comments to the Commission and respectfully urge your utmost consideration.

I. Proposed Amendment: "Single Sentence" Rule

NACDL urges the Commission to reject any amendment that breaks "single sentences" into component parts to search for predicate offenses for recidivist enhancements, and instead to adopt the approach used in the Eighth Circuit in *King v. United States*, 595 F.3d 844 (8th Cir. 2010), where the longest sentence from a single, composite sentencing controls predicate offense findings for criminal history enhancement purposes.

A. *The Commission should use the King approach to respond to the King/Williams conflict over the “single sentence” rule*

When multiple convictions are treated as a single sentence for criminal history scoring purposes, circuits have split about whether component offenses from that single sentence can serve as a predicate offense for other recidivist enhancements, like those contained in the Career Offender guideline (§ 4B1.1), and individual offense guidelines (e.g., § 2K2, firearms offenses).

In the Eighth Circuit, the longest sentence from within a “single sentence” (ostensibly, the most serious offense) is the lone offense to be used as a predicate offense for recidivist enhancements.¹ Conversely, the Sixth Circuit has held that any offense within the composite “single sentence” may be used as a predicate for recidivist enhancement, even though the longest sentence alone is used to score the Criminal History Category (“CHC”).² The Sixth Circuit reasoned that not looking to any offense within the composite sentence would allow defendants to escape recidivist enhancements by simply being guilty of additional, more serious crimes than the predicate offenses.

Adopting the Sixth Circuit’s approach from *Williams* would once again ratchet upward the starting point for federal sentencing decisions. It also misses a remedial point about deference to the judgment of other sovereigns. In sentencing other offenses more seriously than those ordinarily considered predicates for federal enhancements, state courts have spoken to how they rate the seriousness of those offenses. They have deemed them less serious offenses than others in a single sentencing episode, and avenged the peace and dignity of their state’s laws accordingly. Without understating the gravity of any crime, state judges in a much better position to find facts and apply local law than either the Commission, or future federal sentencing judges, have ruled what offense should drive future sentencing decisions.

Using the Eighth Circuit’s *King* approach, on the other hand, embraces a rare and appropriate deference to the Rule of Lenity. This alone serves another purpose tasked to and publicly endorsed by the Commission, the reduction of prison crowding rates through measured sentencing considerations. The *King* approach also defers to other jurisdictions’ prior sentencing decisions, thus honoring important federalism tenets. It further reduces risks of confusion in an already confusing tome, the Sentencing Guidelines, by not re-defining “prior offense” to depend on what question is being asked.

Importantly, the *King* approach also recognizes that Congress has spoken to what constitutes predicate offenses, and Congress has chosen not to make each component offense within single sentences subject to predicate offense analysis. The recidivist enhancements in the Guidelines all drive the initial benchmark of an appropriate sentence toward the statutory maximum sentence, no matter age or actual seriousness of the underlying predicates. Congress has shown itself well able to pass harsh sentencing laws when it so desires. But it has not shown that desire here. The Commission should not on its own create longer recidivist sentences when Congress itself could, but has chosen not to do so.

¹ See *King v. United States*, 595 F.3d 844, 852 (8th Cir. 2010).

² See *United States v. Williams*, 753 F.3d 626, 639 (6th Cir. 2014).

If the component violent or drug-related conduct is understated by a Guidelines calculation, sentencing courts already have the authority to depart upwardly in Criminal History Category (for career offender findings), or in offense level (for Chapter Two base offense guidelines, such as for firearms offenses). Mandating recidivist enhancements despite the single-sentence rule and trial courts' departure authority undermines these individual determinations, in favor of the harshest sentence possible. In this way, the amendment also obstructs the Parsimony Provision itself—that sentences be no greater than necessary to serve the ends of sentences, per 18 U.S.C. § 3553(a).

NACDL respectfully submits that the *King* approach is the most appropriate resolution of this circuit split.

B. To the extent that the application issues presented by the “single sentence” rule also present in other provisions, the same trial court authority to upwardly depart cures any concerns about the Guidelines not being harsh enough as toward certain defendants

Where other Guidelines applications of the “single sentence” rule might also be involved in criminal history score calculations, trial courts can again upwardly depart in appropriate individual cases to account for understated seriousness of a defendant's criminal past.

But importantly, where prior sentences score only one criminal history point, such as the provision in §4A1.1(c) (adding one point for certain prior offenses up to a total of four points), less than 60 days have been served in custody. In federal parlance, where sentences are typically measured in years and decades, a 59-day sentence reflects a petty offense. Using such a petty offense to trigger a years- or decades-long recidivist enhancement would be an unfairness of perhaps constitutional proportions, and must be avoided.

II. Proposed Amendment: Jointly Undertaken Criminal Activity

A. Proposed Amendment

The Commission has proposed revising § 1B1.3(a)(1), which is the subdivision of the Relevant Conduct Guideline that governs when conduct by others is considered for purposes of calculating the guidelines level. The revision would incorporate a portion of the existing Commentary into the guideline itself and is part of the “Commission's effort to simplify the operation of the guidelines[.]” The proposed revision aims not to work any significant change in policy. NACDL generally supports the proposed revision, but does not believe it goes far enough in narrowing the scope of vicarious liability under the Guidelines, which routinely and predictably yields excessively long sentences of incarceration.

The proposed amendment would clarify that “*all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity*” may be considered in calculating the guideline sentence only if they are within “*the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e. the scope of the specific conduct and objectives embraced by the defendant's agreement).*” Under the current rule, the first quoted

phrase is found in the guideline itself at § 1B1.3(a)(1)(B), but the second phrase is found in the Commentary to that section under Application Note 2. The proposed amendment would specify in the guideline itself that the court should apply a three-part test that combines the existing guideline with the Commentary. Accordingly, under the proposed amendment, in order to form the basis for sentencing calculations, acts and omissions of individuals other than the defendant must be “(i) within the scope of the criminal activity that the defendant agreed to jointly undertake, (ii) in furtherance of the jointly undertaken criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity.”

While NACDL agrees that the proposed change would improve the clarity of these provisions by consolidating a key point from the Commentary into the body of the Guideline, we remain concerned that the language regarding the criminal agreement has been diluted and that the illustrations could permit an inference that the agreement element is something less than an actual agreement to engage in specific criminal activity. We therefore recommend the first element of the test be re-worded to read “(i) embraced by the defendant’s agreement to engage in specific conduct and objectives with those individuals[.]” This formulation hews more closely to the meaning of the Commentary and emphasizes that a general agreement to engage in criminality is not sufficient.³ Rather, in order to hold a particular defendant accountable for the acts of others, the government must show he or she agreed with the others to engage in specific conduct or to achieve particular goals.

Similarly, the proposed section 3(B) would be stronger if there were less emphasis on “scope” and more emphasis on the actual conduct embraced by the agreement. We would thus omit the words “the scope of” from the new language in this subsection in both places they appear.

With respect to the examples, we agree with the Federal Defenders that the robbery example is a mistaken application of the current rule and makes sense only if the term “scope” is read too broadly.⁴ If, as in the example, the defendant did not agree to a particular criminal act or omission, he should not be held liable for it for sentencing purposes even though the act is foreseeable and in furtherance of the defendant’s own criminal activity because it happened in the course of the robbery. Thus, NACDL agrees that the robbery example should be deleted.

Similarly in the getaway-driver bank robbery example, Application Note 4(B)(i), NACDL does not believe it would be appropriate to hold the defendant getaway driver liable for the injury to the teller absent evidence that the driver agreed that such injury should be inflicted if necessary to complete the robbery. The objective of the agreement in the example is to obtain money and the defendant’s own conduct did not cause any injury. The defendant did not agree to any conduct that did cause injury, even if a court could arguably find that the injury was “within the scope” of what the driver did indeed agree to do. He should be liable for the conduct of his accomplice only if he in fact agreed to it or if it was one of the objectives of the agreement. The fact that it was foreseeable or even likely is not enough absent an agreement. Accordingly, in this

³ See *United States v. Studley*, 47 F.3d 569, 575 (2d Cir. 1995).

⁴ See Statement of Jon Sands Before the United States Sentencing Commission, Washington, D.C., at 24 (March 12, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Sands.pdf>.

example the new words “within the scope” should be replaced by “agreed to by the defendant.” A similar change should be made to the example at (C) on page 29 of the proposed amendment.

B. Possible Policy Changes

NACDL agrees with the Federal Defenders that sentencing policy would be better served if the “reasonably foreseeable” part of the analysis of joint criminal activity were replaced by an intent requirement. Of the two options posed, Option A would more effectively limit a defendant’s accountability for co-participants’ conduct which the defendant did not aid, abet, counsel, command, induce, procure, or willfully cause. The current “reasonably foreseeable” standard frequently results in a defendant’s criminal liability for conduct that he may not have intended, or even consciously disregarded. In the context of a drug conspiracy, for example, this standard often results in considerably lengthier sentences than necessary or warranted when considering the purposes of sentencing, and blurs or extinguishes any difference in sentencing between leaders, managers, and low-level offenders intended by the Commission. NACDL agrees with the Federal Defenders that a higher state of mind should be required to ensure a defendant’s accountability for jointly undertaken criminal activity is appropriately limited and to further the objectives of the amendments to U.S.S.G. § 1B1.3 proposed by the Commission.

As *Pinkerton* liability is not a marked difference from the current standard, we too fail to see how Option B would address the concerns the Commission seeks to remedy with the suggested policy change.

III. Proposed Amendment: Mitigating Role

NACDL supports the Commission’s decision to clarify and improve the Mitigating Role reduction in U.S.S.G. § 3B1.2. In particular, by adopting the position of the Seventh and Ninth Circuit Courts of Appeals, the Commission allows the sentencing judge appropriate flexibility to impose appropriate and proportional sentences on defendants within a conspiracy that reflect their relative roles in that particular conspiracy. To further clarify the language of this section and its applicability, NACDL also offers the suggestions contained in the paragraphs below.

First, NACDL suggests two linguistic modifications. In Application Note 3(A) of U.S.S.G. § 3B1.2, the Commission adds the language “in the criminal activity” after “average participant.” For clarity, NACDL suggests that the added language should be “in the overall criminal activity of which defendant was a part.” This wording is less ambiguous than merely “in the criminal activity.” This modification is appropriate in Note 3(A) and in Notes 4 and 5 to this section. The other linguistic modification suggested is the same as that suggested by Jon Sands on behalf of the Federal Public Defenders, namely that “is not precluded from consideration” be replaced with “should generally receive an adjustment,” rather than “may receive an adjustment.”

Substantively, NACDL recommends more explanation in the commentary regarding specific circumstances in which the reduction is appropriate. For example, the proposed amendment to the commentary recognizes that a defendant whose “participation in the offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the

quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.” NACDL believes it appropriate to add that “the quantity of drugs or amount of loss involved in the offense is not dispositive when deciding whether a defendant played a mitigating role in an offense.” This is particularly important because commentators have long recognized that quantity of drugs involved and amount of loss are not good indicators of culpability. The criticisms leveled at guidelines driven by quantity and amount of loss in setting the initial offense level are just as appropriately directed at determination of relative culpability based simply on quantity.

Likewise, the commentary should make clear that defendants who have played a lesser role in the offense are entitled to a mitigating role reduction even if the relatively minor role was “indispensable to carrying out the plan.” Arguably, every behavior that is part of criminal conduct could be indispensable to the completion of the conduct, but that does not make every actor equally valuable or equally culpable in the overall scheme. Sands’ analogy of drug couriers to delivery truck drivers is completely apropos. A business establishment may not be able to sell its merchandise if the delivery driver does not transport the goods to the retail store, but truck drivers are easily replaceable and minimally paid in the overall scheme of the business. Couriers who do nothing more than transport from manufacturers to dealers, for little compensation, are less culpable than those who manufacture contraband and those who sell it for large profits.

Finally, NACDL joins in the Federal Defender recommendation for a list of criteria to consider in determining the extent of reduction (minor, minimal, or in between) to be received by a defendant who is less culpable than the average participant in the overall criminal activity of which the defendant was a part. Suggested factors include the following:

- (i) the nature and extent of the defendant’s role relevant to other known and unknown participants in the overall criminal activity of which the defendant was a part;
- (ii) lack of knowledge or understanding of the scope and structure of the offense, and of the identity or role of other participants in the offense;
- (iii) the sophistication or lack thereof in the tasks performed by the defendant and the extent to which the defendant would be easily replaceable as a member of the overall criminal scheme in which the defendant was a part;
- (iv) the extent to which the defendant made decisions and/or acted on his own or his actions were directed by the decisions of others;
- (v) the anticipated or actual benefit received by the defendant in comparison to that received by other participants in the overall criminal activity of which the defendant was a part, including whether the defendant received a percentage of profits or merely a flat fee;
- (vi) the seriousness of harm caused by the defendant’s actions in comparison to that caused by other participants in the criminal activity of which the defendant was a part;

- (vii) the duration of the defendant's involvement in the overall criminal activity.

With these additional recommendations incorporated into the proposed amendments to § 3B1.2, NACDL believes that guideline application improves the Guidelines by taking into account more of the myriad factors that distinguish between defendants of greater or lesser culpability.

IV. Proposed Amendment: Flavored Drugs and Hydrocodone

As the recent report by the Charles Colson Task Force on Federal Corrections makes clear, the drug guidelines have played an outsize role in ballooning the federal prison population.⁵ NACDL continues to believe that § 2D1.1 requires a major overhaul that de-emphasizes drug quantity as a driver of sentence severity, focuses instead on the defendant's role in the offense, and encourages treatment-based alternatives to incarceration. In addition, NACDL joins with the Federal Defenders in rejecting a piecemeal, category-specific approach to amending the drug guidelines, rather than a comprehensive one informed by the most up-to-date pharmacological knowledge, the purposes of sentencing, and the need to avoid unwarranted disparities. The increased penalties the Commission proposes as a result of the reclassification of hydrocodone products merely exacerbate the problems and disparities endemic in § 2D1.1, and will further fuel our unnecessary over-incarceration of drug-addicted offenders. Nor is there a need to increase penalties for anticipated crimes involving flavored drugs, when there is already a wealth of statutory and guideline enhancements available to punish individuals acting with exploitative intent.

As an initial matter, we welcome the Commission's approach to use the actual weight of the hydrocodone, rather than the number of pills or the entire weight of the mixture or substance. We urge the Commission to utilize that methodology to calculate marijuana equivalency for *all* prescription opioids. As the Federal Defenders point out in their detailed submission, the use of the entire weight of the substance can lead to unwarranted disparities, where certain combination products can contain less of a controlled substance than in a single entity formulation, while weighing more. But counting the weight of the pure controlled substance alone is not enough. In formulating the equivalency table, the Commission should also take into account the analgesic effect, toxicity and potential for abuse of the particular drug and drug formulation in question, resulting in lower guidelines for those drugs that are less potent and/or contain abuse deterrent properties. To that end, we endorse the Federal Defenders' position that the marijuana equivalency for oxycodone be revised before the Commission uses it to compare to other opioids. Such revision is necessary because the current 1 gram of oxycodone to 6,700 grams of marijuana ratio was adopted without analyzing oxycodone potency and abuse liability as compared to other opiates. Heroin, for example, is more potent than oxycodone, but is punished less severely.

To the extent the marijuana equivalency table is not revised, the Commission's guidelines on hydrocodone should not treat it like oxycodone because the two drugs differ in key respects. Oxycodone has higher abuse potential than hydrocodone because it is metabolized faster. In

⁵ Charles Colson Task Force on Federal Corrections, *Drives of Growth in the Federal Prison Population* (March 2015), available at <http://www.urban.org/UploadedPDF/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf>.

addition, the profile of hydrocodone offenders indicates an even lower-level offender than in those convicted of oxycodone offenses—with a higher proportion in its population being female, non-violent, and rural, with minimal prior criminal history. Thus, we oppose both marijuana equivalencies proposed—1:4,467 or 1:6,670. These proposed equivalencies (respectively, a 3:2 ratio of hydrocodone to oxycodone, or a 1:1 ratio) represent an unjustified equivalency with oxycodone. In addition, whichever one the Commission adopts will lead to unnecessarily severe sentences for what is fundamentally a public health problem.

Finally, we oppose any additional guidelines penalizing the flavoring of drugs to make them more attractive to children. Even if sound empirical evidence supports the Commission’s speculation that drugs “appear to be designed to attract use by children,” the statutory and guideline penalties currently available to punish victimization of children—including, as the Commission itself notes, 21 U.S.C. § 859(b) and U.S.S.C. § 3A1.1—are fully sufficient to address any need for more severe penalties. We add that empirical research indicates that deterrence is primarily a function of the certainty, not severity, of punishment.

V. Proposed Amendment: Economic Crime

As a threshold matter, NACDL notes that the Commission has not addressed a widespread concern relating to § 2B1.1, which is the proliferation of overlapping enhancements. While many of the current enhancements are not identical to one another, they are highly correlated with each other such that where one applies, most often several apply. This results in frequent double- or triple-counting of extremely similar factors.⁶ NACDL continues to support a wholesale reevaluation of § 2B1.1 of the sort recently undertaken by the American Bar Association and submitted to the Commission for consideration.⁷

NACDL further notes that the Commission has not proposed modifications to § 2B1.1 that would reduce the extent to which offense levels are based on loss amount. Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from bench and bar alike.⁸ NACDL continues to believe that § 2B1.1 should be re-conceptualized to

⁶ See, e.g., Alan Ellis, John R. Steer, Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011) (noting that “[m]ultiple, overlapping enhancements also have the effect of ‘double counting’ in some cases”); James E. Felman & Mary Price, *Out of Control Fraud Guidelines*, NAT’L L.J. July 25, 2011, at 43 (describing redundant sentencing enhancements as one of the major weaknesses of the fraud guidelines); Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1648-49 (2007) (factors such as sophisticated means and large number of victims “double-count because they are captured by other enhancements or by the loss calculation”).

⁷ See ABA Criminal Justice Section, *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014), available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.pdf.

⁸ See, e.g., *United States v. Gupta*, 904 F.Supp.2d 349, 350 (S.D.N.Y. 2012) (noting that “the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice”); *United States v. Parris*, 573 F.Supp.2d 744, 751 (E.D.N.Y. 2008) (“[W]e now have an advisory guidelines regime where . . . 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.”); see also James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED SENT. R. 138, 139 (2010) (describing the current high-loss guidelines as “overkill”); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED SENT. R. 167, 169 (2008) (“In sum, since *Booker*, virtually every

address these criticisms by reducing the outsize role that loss amount currently plays in sentencing determinations. Additionally, NACDL continues to support modifications that would lessen the impact of the loss table for all defendants sentenced under § 2B1.1 who gain little or nothing from their conduct, and better adhere to the statutory directive in 28 U.S.C. § 994(j) to ensure the Guidelines reflect the appropriateness of a non-custodial sentence for first-time, non-violent, non-serious offenders.

Insofar as the Commission has elected at this time to retain the loss table, NACDL supports the proposed inflationary adjustments to the loss table and other monetary tables throughout the Guidelines. While these adjustments do not ameliorate the fundamental shortcomings described above, they at least ensure that a loss-driven guideline does not become harsher over time, subjecting later defendants to more severe sentences for causing the same effective loss. NACDL supports automatic adjustments for inflation as long as the loss table remains a fixture of § 2B1.1.

A. Intended Loss

The Commission seeks comments on whether the definition of “intended loss” should be revised or refined to clarify or simplify guideline operation or for other reasons consistent with the purposes of sentencing. Specifically, the Commission seeks comment on whether the definition of “intended loss” should be modified in the manner contemplated by the proposed amendments to Application Note 3(A)(ii).

NACDL supports the Commission’s reconsideration of the concept of “intended loss.” The current construction can, and often does, produce perplexing and unprincipled sentencing outcomes, as defendants whose offenses caused little or no losses to victims can face years or decades in federal prison because of what they purportedly intended but failed to achieve. In addition to the facial injustice of a punishment that is vastly disproportionate to the injury caused by the crime, this approach raises serious questions about a court’s ability to divine what a defendant intended in the absence of actual harm.

NACDL believes, however, that the Commission’s proposed amendments fail to address the fundamental problems with sentences based on intended but un-actualized loss. Redefining “intended loss” as the pecuniary harm “that the defendant purposely sought to inflict” (rather than the harm “that was intended to result from the offense”) will not ameliorate the difficulty of affixing a reliable dollar value to a defendant’s unrealized purpose. While the Commission has proposed to add language stating that a defendant’s purpose “may be inferred from all available facts,” telling courts that they may consider factors as general as “the defendant’s actions, the actions and intentions of other participants, and the natural and probable consequences of those actions” only underscores the inscrutability of the inquiry.

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”); Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1648-49 (2007) (discussing how the loss table often overstates the actual harm suffered by the victim).

NACDL submits that a more extensive revision is required to promote fairness in sentencing for offenses that do not produce pecuniary harm (or that produce lesser harm than a defendant may arguably have intended). More specifically, NACDL supports a modification to § 2B1.1 that would decouple intended loss from the loss table, and instead treat any disparity between actual and intended loss as grounds for a potential sentencing enhancement. Thus, in lieu of the current rule stating that “loss is the greater of actual or intended loss,” (§ 2B1.1 App. Note 3(A)), the Guideline could be reformulated to provide that the definition of loss is limited to actual loss, but that an enhancement may be applied in cases where intended loss substantially exceeds actual loss. Although the magnitude of any such enhancement merits further study, the enhancement would presumably be commensurate with other offense-related enhancements in § 2B1.1.

While this proposed modification would not eliminate the challenges inherent in ascertaining a defendant’s unrealized intent, it would limit the impact that such a difficult, and necessarily imprecise, determination could have on a defendant’s sentence. As such, it would ensure that § 2B1.1 does not recommend a sentence that is vastly disproportionate to the actual pecuniary harm inflicted by a defendant’s conduct.

The Commission has also asked for comments on whether intended loss should be limited to the amount the defendant personally intended, or if it should also include amounts intended by co-conspirators and participants in jointly undertaken criminal activity. NACDL submits that intended loss should be limited to the amount the defendant personally intended. Expanding the concept of intended loss to include losses purportedly intended by others exacerbates the imprecision described above. It also renders a defendant potentially liable for others’ intentions without any showing that those intentions were shared by, or even known to, the defendant. At bottom, it risks exposing a defendant to an exponentially higher sentencing range based on harms that did not occur and that the defendant himself did not intend.

Moreover, the definition of “relevant conduct” under § 1B1.3 contemplates that a defendant may only be sentenced on the basis of his own contributions to a jointly undertaken criminal scheme, or on the portions of that scheme that were reasonably foreseeable to him.⁹ Permitting a defendant to be sentenced under § 2B1.1 for amounts that co-conspirators intended (absent evidence that the defendant shared that intent) is irreconcilable with this construction of relevant conduct, and with basic tenets of fairness and due process.

Finally, the Commission has asked how intended loss should interact with the commentary relating to partially completed offenses in Application Note 18 to § 2B1.1. As presently drafted, the commentary provides that the sentence for an offense that does not achieve the full loss the defendant intended should be based on the greater of the actual loss, or the intended loss minus three levels. By way of example, the commentary cites to a hypothetical

⁹ U.S.S.G. § 1B1.3 App. Note 2; *see, e.g., United States v. Treadwell*, 593 F.3d 990, 1002 (9th Cir. 2010) (“a district court may not automatically hold an individual defendant responsible for losses attributable to the entire conspiracy, but rather must identify the loss that fell within the scope of the defendant’s agreement with his co-conspirators and was reasonably foreseeable to the defendant”); *accord United States v. Correy*, 773 F.3d 276, 280 (1st Cir. 2014) (“Absent an individualized finding, the drug quantity attributable to the conspiracy as a whole cannot automatically be shifted to the defendant for the purpose of calculating a Guidelines offense level.”) (internal quotes and citation omitted).

robbery case in which \$800,000 was targeted but only \$30,000 was robbed. In such a case, says the commentary, the offense level should be the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.¹⁰

As the Commission's question suggests, this guidance is inconsistent with the definition of "intended loss" set forth in either the current version of § 2B1.1 or the amended version proposed by the Commission. There is no practical or enforceable distinction between an attempt to rob \$800,000 that netted only \$30,000, and a completed robbery of \$30,000 where the intended loss was \$800,000. Yet the definition of "intended loss" embodied in § 2B1.1 treats the latter more harshly than the former. To square that definition with Application Note 18, the definition must be revised to reduce the sentencing exposure in cases where intended loss exceeds the loss actually caused.

NACDL's proposed revision would accomplish this objective. By treating intended loss as an enhancement rather than an alternate measure of loss under the loss table, NACDL's proposal would address the inconsistency between attempted and intended loss. Whether the crime is regarded as an unsuccessful attempt to steal \$800,000 or a completed theft of \$30,000 with unrealized intent to steal more, the result would be the same: a sentence based on actual loss, plus an enhancement to reflect any additional culpability associated with the additional intent.

B. Victims Table

The Commission has requested comments on its proposed amendments to the victims table in § 2B1.1(b)(2).

The Commission has first asked whether § 2B1.1 adequately addresses harms to victims. While NACDL is sensitive to injuries suffered by victims of offenses sentenced under this Guideline, NACDL submits that § 2B1.1 fully accounts for victim harm without the need for a victims table that adds levels based on the number of victims affected.

First, the financial losses suffered by victims are already captured—and significantly punished—by the loss table in its current form.

Second, there is already an extensive patchwork of victim-related adjustments. For example, the Guideline prescribes enhancements for victims from whom items are stolen in person; victims of various kinds of misrepresentations; victims of identity theft; and victims whose personal information is publicly disseminated. Considering the many ways in which victims are already contemplated by the Guideline, the inclusion of a separate enhancement based specifically on the number of victims virtually assures some measure of double-counting.

Third, the victims table is arbitrary and lacks any sort of empirical basis. For example, it is not clear how or why the Commission has prescribed a harsher punishment for a defendant whose conduct affected ten victims than one whose conduct affected only nine, particularly in the absence of any showing that the ten victims incurred greater hardship than the nine.

¹⁰ See § 2X1.1 App. Note 4, *cited in* § 2B1.1 App. Note 18.

For all of these reasons, NACDL believes the victims table should be eliminated from § 2B1.1.

Should the Commission nonetheless retain the victims table, the Commission should at a minimum tie any enhancement based on the number of victims to the extent of the injury suffered by those victims. Accordingly, NACDL strongly opposes the Commission's proposal to retain the victims table and add a *further* enhancement based on the financial hardship the victims suffered. Instead, NACDL suggests that these enhancements should be collapsed into one, such that a defendant's offense level would be increased only upon a finding that the offense caused a certain amount of hardship to a certain number of victims. Absent a showing of financial hardship, therefore, no enhancement should apply.

The Commission has also asked whether § 2B1.1(b)(16)(B)(iii), which provides a 4-level enhancement if the offense "substantially endangered the solvency or financial security of 100 or more victims," should be eliminated, or whether the number of victims required to trigger the enhancement should be reduced. NACDL submits that this enhancement should be eliminated. The determination whether the financial security of any victim was "substantially endangered" is complex and subjective, and, if properly applied, requires consideration of each victim's unique financial circumstances to evaluate the substantiality of the endangerment. This analysis takes sentencing courts far afield and promotes disparity in sentencing. Moreover, there is a very high correlation between loss amount and the likelihood that a significant number of victims were impacted. As long as the Commission retains the loss table in its current form, therefore, the enhancement at § 2B1.1(b)(16)(B)(iii) poses a serious risk of double-counting.

C. Sophisticated Means

The Commission has proposed to modify the enhancement for "sophisticated means" to clarify that the determination of whether this enhancement applies should be based on a comparison to offenses of the same kind, and that it applies only where the defendant himself used such means.

NACDL respectfully submits that this enhancement is a paradigmatic example of the redundancy and ambiguity that plagues § 2B1.1, and that it should be eliminated in its entirety. First, the premise that a defendant who employed purportedly "sophisticated" means is more culpable than one who did not is eminently debatable as a matter of law, logic, and philosophy, and lacks any sort of empirical basis. Second, the definition of "sophistication" is incurably subjective. While the Commission has proposed that district courts define sophistication by comparison to "a typical offense of the same kind," it remains unclear how district courts should—or reasonably could—determine what constitutes a typical offense. Third, the variability in courts' determinations of what constitutes sophisticated means (and their determinations of what constitutes a typical offense) promotes the very disparity in sentencing that the Guidelines were intended to reduce. Fourth, the "sophisticated means" enhancement overlaps in many cases with other enhancements (*e.g.*, threat to a financial institution, substantial financial hardship to victims, officer or director of a publicly traded institution), and thus leads to unprincipled double-counting.

NACDL recognizes that the Commission’s proposed amendments marginally clarify the circumstances under which the sophisticated-means enhancement is supposed to apply, and should therefore marginally reduce the dangers described above. However, NACDL respectfully submits that the enhancement should be stricken from § 2B1.1 altogether.

D. Fraud on the Market

The Commission has solicited comments on proposed amendments that would replace loss with gain as the measure of harm in fraud-on-the-market cases, while placing a floor on the offense level that would apply irrespective of the amount of such gain.

NACDL supports reconsideration of the ways in which § 2B1.1 applies to so-called fraud-on-the market cases. As the Commission correctly notes, determining loss in such cases is complex and time-consuming and produces disparate and often unjust outcomes.

However, NACDL has serious reservations about the Commission’s proposal that sentences in such cases should be based on the gain that resulted from the offense, with a minimum enhancement of 14 to 22 levels. NACDL is aware of many securities fraud cases in which the defendant gained little or nothing by his conduct. This is especially true in cases involving violations of the securities regulations, such as books-and-records or lying-to-auditors violations, committed by salaried employees who derived no direct pecuniary benefit from their conduct. In such cases—and many others—imposing a minimum 14- to 22-level enhancement (corresponding to a gain of more than \$400,000 to more than \$20 million) would be highly arbitrary and, in all but exceptional cases, profoundly unjust.

NACDL respectfully submits that the solution to the difficulties associated with loss determinations in fraud-on-the-market cases is to abandon the effort to affix a dollar value to the crime. Rather than attempt to measure loss, or to substitute an arbitrary measure of gain, the Commission should craft a new guideline for fraud-on-the-market cases. This Guideline could set a new base offense level in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity and the submission of false information in a public filing with the SEC or a similar regulator. This base offense level would be based on the conduct itself rather than the loss or gain associated with the conduct. As warranted, modest enhancements (or reductions) could be imposed in cases involving substantial (or negligible) identifiable losses or gains, but in the ordinary case, the base offense level would suffice to capture the harm.

This approach to fraud-on-the-market cases would respond to the directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act without the complexity of attempted computations of loss or gain and without the risk of resulting nationwide disparities. It would also avoid imposition of arbitrary floors that are inconsistent with the core notion of individualized sentencing.

* * *

NACDL appreciates the opportunity to comment on the proposed amendments and urges the Commission's consideration.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Theodore Simon', written in a cursive style.

Theodore Simon
President