



**U.S. Department of Justice**

Criminal Division

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*Office of Policy and Legislation*

*Washington, D.C. 20530*

March 9, 2015

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Chief Judge Saris:

On behalf of the U.S. Department of Justice, we submit the following views, comments and suggestions regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 16, 2015.<sup>1</sup> We thank the members and staff of the Commission for being responsive to many of the Department's sentencing policy priorities this amendment year and for working hard to address all of the guideline issues under consideration. We look forward to continuing our work with the Commission during the remainder of the amendment year on all of the published amendment proposals.

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<sup>1</sup> U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines*, 80 Fed. Reg. 2570 (Jan. 16, 2015).

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U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS  
TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT  
PUBLISHED BY THE U.S. SENTENCING COMMISSION  
IN THE FEDERAL REGISTER ON JANUARY 16, 2015

**1. Technical Amendment**

We appreciate the Commission updating the Guidelines Manual to reflect editorial reclassifications in the United States Code and to correct technical errors. **We support the amendment.**

**2. “Single Sentence” Rule**

**The Department supports the proposed amendment** making clear that the “single sentence” rule of §4A1.2(a)(2) should not be applied in a manner that forecloses proper application of the career offender guideline. **The Department further believes that a consistent rule should be applied with respect to other recidivism provisions of the guidelines, and should also address the limitation on criminal history points set forth in §4A1.1(c).**

The career offender provision, §4B1.2(c), states:

The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) *the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c).*

(Emphasis added). Application Note 3 adds: “The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.”

The “single sentence” rule in §4A1.2(a)(2) provides:

If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second

offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. *See also* §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

Under *King v. United States*, 595 F.3d 844, 852 (8th Cir. 2010), a prior sentence that otherwise qualifies as a career offender predicate does not count as such if it was part of a “single sentence” with another offense that is not a career offender predicate and that resulted in a sentence longer than or equal to that imposed for the sentence that would otherwise qualify as a predicate. In *United States v. Williams*, 753 F.3d 626, 639 (6th Cir. 2014), the Sixth Circuit rejected that part of *King* which held that a prior sentence that otherwise qualifies as a career offender predicate would not so qualify if part of a “single sentence” with a non-predicate that received a sentence *equal to* that imposed for the predicate offense. The court added: “Our holding has the added advantage of avoiding the ‘ridiculous result’ noted by the district court. If we accepted Williams’s argument, he would evade career offender status because he committed more crimes than the qualifying offense. Such a result cannot be squared with Congress’s admonition that the Guidelines should ‘specify a term of imprisonment at or near the maximum term authorized for’ career offenders. 28 U.S.C. § 994(h).” *Id.* at 639.

The holding of *Williams* should be adopted by the Commission. It would be anomalous if a person were to commit the requisite number of offenses to be classified a career offender, but were not so treated because he committed one or more *additional* crimes which were prosecuted in conjunction with one of the career offender predicate offenses.<sup>2</sup>

As the Commission noted in its request for comments, a similar issue may arise in the application of §4A1.1(c), which adds one criminal history point for each sentence for which no term of imprisonment of 60 days or more was imposed, up to a total of four points. It is theoretically possible that a person may have more than four such prior sentences, with most being non-career offender predicates, raising the question whether any of the sentences which is a career offender predicate may be so assessed. For instance, the Commission observed, “some

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<sup>2</sup> The Commission’s proposed amendment states that “each of the multiple prior sentences within the single sentence should be treated as if it received criminal history points” for purposes of applying the career offender provision. That language may create confusion in application of the rule in the career offender provision that requires “separate” predicates. If each prior sentence within a single sentence is treated as a predicate, a person could become a career offender after only one prosecution, for instance, if he is charged in a federal indictment with two drug distribution charges and convicted of both. Below, we propose a revision of the amendment that would make clear that the amendment applies only to assure that the *King* result is foreclosed, while maintaining the requirement of multiple and separate prior predicate sentences.

helpline callers have asked whether the sentences under §4A1.1(c) should be placed in chronological sequence, with the first four sentences each receiving a point (and being eligible to serve as a career offender predicate) and any remaining sentences not receiving a point (and being ineligible to serve as a career offender predicate).” The Department favors a rule that any prior sentence that would by itself be counted under §4A1.1(c) qualifies as a career offender predicate, such that application of the four-point limitation in the particular case is irrelevant.

(The Commission also noted that a similar issue may be presented by §4A1.1(e), which adds one point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) because such sentence was counted as a single sentence, up to a total of three points. However, subsection (e) is in fact not pertinent to this discussion. The career offender provision in §4B1.2(c) includes only sentences “counted separately under the provisions of §4A1.1(a), (b), or (c),” such that points assessed under §4A1.1(e) are irrelevant. Further, application of §4A1.1(e), which adds points for sentences otherwise excluded by the “single sentence” rule, is unnecessary once the proposed amendment is adopted that makes the “single sentence” rule inapplicable in the assessment of certain career offender predicates in relation to §4A1.1(a), (b), and (c).)

As the Commission notes in its requests for comment, the issue exposed by the *King/Williams* split may be found in the application of other recidivism provisions of the guidelines. Notably, guidelines addressing explosive materials (§2K1.3) and firearms (§2K2.1) apply enhanced offense levels where the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (§2K1.3(a)(1); §2K2.1(a)(1) and (a)(2)) or subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense (§2K1.3(a)(2); §2K2.1(a)(3) and (a)(4)(A)).

We further observe that both §2K1.3 (in Application Note 9) and §2K2.1 (in Application Note 10) contain identically worded application notes, which state that in applying the provisions in those guidelines regarding predicate sentences, “use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c).” These application notes add that for purposes of applying the subsections that require two predicate sentences, “use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).” For instance, Application Note 10 to §2K2.1 states in full:

Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

The purpose of these provisions would likewise be defeated if the “single sentence” rule or §4A1.1(c) were applied to prevent application of the recidivism provision simply because a

predicate crime of violence or controlled substance offense was charged or sentenced at the same time as yet another crime, or because the prior offense did not receive a criminal history point only because the defendant had numerous other prior convictions falling within §4A1.1(c).

The other current guideline in which this issue is presented is §2L1.2 (Unlawfully Entering or Remaining in the United States). That guideline states:

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, *increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;*

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, *increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;*

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Application Note 1(C) to §2L1.2 states:

Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction *receives criminal history points* under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

The italicized provisions create the possibility that an appropriate predicate will not qualify for the maximum offense level in a pertinent subsection because it did not “receive criminal history points” due to operation of the “single sentence” rule or the points limitation in §4A1.1(c). Once again, that is inappropriate; it does not make sense that a crime that would otherwise serve as a predicate does not simply because the defendant committed an additional crime that was charged or sentenced at the same time, or because he committed numerous additional crimes subject to §4A1.1(c).

The distinction in offense level in §2L1.2 for predicates that did or did not receive “criminal history points” was added in Amendment 754 (Nov. 1, 2011). The discussion in that amendment solely focused on the inequity of imposing greater enhancements based on aged convictions which do not receive criminal history points under §4A1.2. The problem of the impact of the single sentence rule that is also contained in §4A1.2, or of the limitation in §4A1.1(c), was not considered.<sup>3</sup>

A similar problem arises with regard to application of §2L1.2(b)(1)(E), which addresses “three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses,” given that Application Note 4(B) states: “‘Three or more convictions’ means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).”

\* \* \*

**Accordingly, the Department supports adoption of Application Note 3(A) to §4A1.2, as proposed by the Commission and amended as follows:**

In General.—In some cases, multiple prior sentences are counted as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses under the provisions listed below, one (and only one) prior sentence within, each of the multiple prior sentences included in the single sentence should be treated as if it received criminal history points, if it otherwise qualifies as a predicate sentence under one of the provisions listed below and if it independently would have received criminal history points but for application of the “single sentence” rule. The provisions to which this application note applies are:

§2K1.3(a)(1), §2K1.3(a)(2) (explosive materials)  
§2K2.1(a)(1), (a)(2), (a)(3), and (a)(4)(A) (firearms)

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<sup>3</sup> In a recent case, a defendant argued that an enhancement provision of §2L1.2 was not applicable to him because it applies to a prior conviction that receives criminal history “points,” and his prior conviction at issue only received a single criminal history point. While the Court of Appeals rejected this argument, *United States v. Gillespie*, 563 F. App’x 206, 208 (3d Cir. 2014) (not precedential), it may be helpful to clarify the language in §2L1.2 and make clear that the enhancements apply to an appropriate conviction that received “one or more criminal history points.” The same modification would logically be applied in §2K1.3 Application Note 9 and §2K2.1 Application Note 10.

§2L1.2(b)(1)(A), (b)(1)(B), (b)(1)(E) (unlawful entry to or remaining in United States)  
§4B1.2(c) (career offender)

~~Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, such as §2K1.3(a) and §2K2.1(a), if it independently would have received criminal history points.~~

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day and are counted as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of three points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received two criminal history points under §4A1.1(b), it may serve as a predicate under the provisions listed above career offender guideline.

Separately, §4A1.1(c) limits to four the number of points that may be applied under that subsection. This limitation as well does not apply in the application of the provisions listed above. A prior sentence may serve as a predicate under one of the provisions listed above if it independently would have received a criminal history point under §4A1.1(c), regardless of application of that provision of §4A1.1(c) which otherwise limits to four the number of points that may be applied under that subsection.

**The Department further proposes the following conforming amendments:**

- In §2K1.3 Application Note 9 and §2K2.1 Application Note 10, add the following sentence at the end of the first paragraph of each: "However, the rules stated in §4A1.2 Application Note 3(A), regarding application of the "single sentence" rule and the limitation stated in §4A1.1(c), are applicable for purposes of applying these subsections."
- In §2L1.2 Application Note 1(C), add the following at the end: "The rules stated in §4A1.2 Application Note 3(A), regarding application of the "single sentence" rule and the limitation stated in §4A1.1(c), are applicable for purposes of applying subsections (b)(1)(A) and (B)."
- In §2L1.2 Application Note 4(B), add the following at the end: "The rule stated in §4A1.2 Application Note 3(A) regarding application of the "single sentence" rule is applicable for purposes of this subsection."

### **3. Jointly Undertaken Criminal Activity**

The Commission has proposed an amendment to §1B1.3(a)(1)(B) as a part of its effort to “simplify the operation of the guidelines, including, among other matters, the use of relevant conduct in offenses involving multiple participants,” and to “provide further guidance on the operation of the ‘jointly undertaken criminal activity’ provision . . . .”

The Commission states that the proposal “restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies to hold the defendant accountable for acts of others in the jointly undertaken criminal activity.” U.S. Sentencing Comm’n, *Proposed Amendments to the Sentencing Guidelines*, 80 Fed. Reg. at 2574. The Department questions the need for the amendment, as it is not aware of any widespread difficulty in the courts in applying this familiar provision. Nonetheless, **the Department does not oppose this proposal so long as the Commission makes clear that no substantive change is intended.**

Section 1B1.3(a)(1)(B) currently applies to “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” The proposal would replace that phrase with reference to:

all acts and omissions of others that were –

- (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 . . . .

Clause (i) may be problematic, depending on how it is interpreted. It is a new statement, as also reflected in the proposed changes to current Application Note 2, which previously referred only to the “in furtherance” and “reasonably foreseeable” requirements. It is objectionable if read to mean that the relevant conduct itself was something the defendant agreed to.

Take, for example, a bank robbery, in which the defendant is a getaway driver while his armed confederate entered the bank. The armed robber then discharged the firearm, injuring a bank employee. The defendant, relying on the new clause (i), may argue that the discharge of the firearm was outside “the scope of the criminal activity that the defendant agreed to jointly undertake,” asserting that he agreed to aid an armed bank robbery, only so long as no one was hurt. That argument would not prevail under current law, given that the discharge was in furtherance of jointly undertaken criminal activity (the bank robbery) and was reasonably foreseeable. Stated differently, a provision that requires relevant conduct to be specifically within the defendant’s agreement would essentially erase the concept of reasonable foreseeability altogether.

It appears that, properly, that is not the Commission's intent, as it retains (while slightly modifying) Application Note 2, which would now read in pertinent part:

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the criminal activity that the defendant agreed to jointly undertake (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

It would be helpful if the Commission further specified in any amendment that no substantive change is intended.

The Department also suggests, for purposes of consistency, that the proposed amendment to what would be Application Note 3(B) be amended as follows:

Accordingly, the accountability of the defendant for the acts of others is limited by the scope of the criminal activity he agreed his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of that activity-defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

Such a change is consistent with the other parts of the amendment which refer to "the scope of the criminal activity that the defendant agreed to jointly undertake."

Separately, the Commission posed "issues for comment" inquiring whether any additional or different guidance should be provided on the "jointly undertaken criminal activity" provision. The Department suggests that no additional guidance is necessary, nor need any of the examples in the application notes be changed. While certainly these examples do not embrace all criminal acts to which the relevant conduct guideline is applied, they provide sufficient and plain guidance. More broadly, courts and litigants have more than 25 years of experience in applying these provisions, and there currently is a solid understanding of how to do so.

With respect to possible policy changes, the Commission "seeks comment on whether changes should be made for policy reasons to the operation of 'jointly undertaken criminal activity,' such as to provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants that the defendant did not aid, abet,

counsel, command, induce, procure, or willfully cause.” The Commission inquires whether the current provision appropriately furthers the purposes of sentencing.

The Department believes that it does. It has long been a tenet of criminal law that a person is responsible for the foreseeable consequences of his actions. *Allen v. United States*, 164 U.S. 492, 496 (1896) (reciting “the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act.”).

The Commission inquires whether “jointly undertaken criminal activity” “should require a higher state of mind, such as recklessness or deliberate indifference; knowledge; or intent.” The Commission states that “[t]he requirement that the other participant’s conduct be reasonably foreseeable has been described as a ‘negligence’ standard, that is, the defendant should have known or should have foreseen the conduct.”

We are not aware, however, of any case equating reasonable foreseeability with negligence. More appropriately, the test has been defined and commonly applied as an objective inquiry, as follows: “the court must determine to what extent others’ acts and omissions that were in furtherance of jointly undertaken criminal activity likely would have been foreseeable by a reasonable person in defendant’s shoes at the time of his or her agreement.” *United States v. LaCroix*, 28 F.3d 223, 227 (1st Cir. 1994).

The Department favors that objective test, which comports with the *Pinkerton* standard. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Introducing an additional test of recklessness, knowledge, or intent would complicate sentencing proceedings, while diminishing the appropriate impact of the guideline in assuring that defendants are held responsible for the consequences of their criminal actions.

The Commission also asks whether a defendant should be accountable for a “jointly undertaken criminal activity” “only when the defendant (1) was convicted of a conspiracy charge related to a co-conspirator’s conduct in furtherance of the jointly undertaken criminal activity; or (2) was convicted by a jury that was specifically instructed on *Pinkerton* liability regarding a substantive offense; or (3) admitted facts sufficient to constitute *Pinkerton* liability.”

The Department opposes that suggestion. It is antithetical to the basic theory of the guidelines, which focuses significantly on real conduct and not charging decisions. Indeed, implementation of such a suggestion would inevitably result in the filing of additional charges in order to assure that a defendant is held accountable for all of the consequences of his actions.

We also observe that, under the guidelines, relevant conduct is no greater than, and often narrower than *Pinkerton* liability. Application Note 2 already states that the scope of jointly undertaken criminal activity “is not necessarily the same as the scope of the entire conspiracy.” The proposal that a conspiracy conviction or jury finding is required to justify attribution of relevant conduct is anomalous for this reason as well.

#### 4. Inflationary Adjustments

The Commission proposes to adjust monetary amounts in the guidelines for inflation, using a multiplier derived from the Consumer Price Index. The new amounts would then be rounded using either the methodology found in section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, or by using a special method devised by the Commission. **The Department opposes any inflationary adjustment to the guidelines' monetary tables.**

First, the sentencing guidelines, including the monetary amounts in the guidelines, are meant to reflect distinctions in criminal activity “that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.” USSG, Ch. 1, Pt. A, 4 (2014). As a result, the Commission should only adjust the guidelines' monetary amounts when they are no longer in step with their motivating social value judgments and no longer serve the purposes of sentencing. The Commission should not adjust those amounts simply to keep pace with inflationary trends.

Previous adjustments to the guidelines' monetary amounts have been consistent with this understanding. For example, when the Commission revised the fraud-loss table in 2001, it did so to reflect changing societal perceptions about appropriate punishment for economic crimes – not to adjust for inflation. *See* 66 Fed. Reg. 30542. Indeed, the Commission made clear in 2001 that its revisions primarily addressed concerns that the old loss table was too stratified and too lenient on serious economic-fraud offenders, adjusting the loss enhancements upward despite contrary inflationary trends.

Congress has also declined to index loss and punishment amounts in criminal laws to inflation. Instead, it has established fixed dollar amounts which may be amended if and when those amounts no longer reflect society's values. *See e.g.*, 7 U.S.C. § 6; 18 U.S.C. § 288; 18 U.S.C. § 656; 18 U.S.C. § 1028; 18 U.S.C. § 1361; 18 U.S.C. § 2113. Congress has also twice explicitly voted not to index criminal penalties to inflation. *See* Federal Criminal Penalties Inflationary Adjustment Act, S. 1015, 100th Cong. (1987) (unenacted); Federal Criminal Penalties Inflationary Adjustment Act, S. 2558, 99th Cong. (1986) (unenacted); *see also* 100 Cong. Rec. 8973-75 (Apr. 10, 1987) (Sen. Lautenberg) (arguing unsuccessfully that Congress should adjust criminal penalties for inflation to increase revenue); 99 Cong. Rec. 13851-52 (June 16, 1986) (Sen. Lautenberg) (same). Thus, adjusting the guidelines' monetary amounts for inflation would put them in tension with the criminal laws that they help to enforce.

Second, adjusting the guidelines' monetary amounts for inflation would lead to an unwarranted reduction in sentences for perpetrators of many of these offenses. For example, if a defendant's fraud offense causes a loss of \$500,000, his sentence would currently be subject to 14 added offense levels. Under the proposed amendment (in either Option 1 or Option 2), the defendant's sentence would be subject to only 12 added offense levels for the same amount of loss. According to the Commission's analysis, affected §2B1.1 cases would see a 26% average

sentence reduction.<sup>4</sup> The affected tax and antitrust offenses would similarly see an average reduction of about 25%. These are significant changes.

Lessening penalties for economic crime would be contrary to the overwhelming societal consensus that exists around these offenses. All three branches of government have expressed a belief that the sentences for fraud offenses are either appropriate or too low. In 2010, for example, Senator Patrick Leahy (D-VT), currently the ranking member of the Senate Judiciary Committee, introduced an amendment to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, that would have directed the Commission to “amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud ... to reflect the intent of Congress that penalties for the offenses be increased.” 156 Cong. Rec. S3105 (daily ed. May 4, 2010) (statement by Sen. Leahy). The amendment was joined by, among others, Senator Chuck Grassley (R-IA), now the Chairman of the Judiciary Committee. *Id.* While this language was ultimately changed to provide the Commission with greater flexibility in considering amendments to the fraud guideline, it nonetheless shows that not only did Congress decline to reduce sentences just a few years ago when considering the matter, but key Members of Congress supported higher sentences.

Also in 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. 111-148, increasing the penalties for health care fraud offenses. Section 10606(a)(3)(A)(ii) of the Act required the Commission to amend the guidelines to “provide increased penalties for persons convicted of health care fraud offenses” and § 10606(a)(2)(C) contained specific directives for increases in offense levels for health care fraud defendants. These examples, and countless others (including both statements by Members of Congress and enactments of Congress since 2001) demonstrate the intent of Congress that sentences for fraud not be reduced.

The federal Judiciary has expressed a similar belief about fraud penalties. The Commission’s 2010 survey of district court judges included a question on whether the guideline range was “generally appropriate” for certain offenses. U.S. Sentencing Comm’n, *Results of Survey of United States District Judges* (2010), 13. For fraud offenses, 89% of the 594 judges who answered the question indicated that the guideline range was either appropriate or too low, with only 10% responding that the guideline range was “too high.” *Id.* To put that number in context, out of the seventeen types of offenses that generated at least 300 responses from judges, fraud offenses had the second-lowest percentage of respondents who answered that the guideline range was too high. Larceny/theft/embezzlement – also referenced to §2B1.1 – was slightly lower with 9%. *Id.* Compare this to the 70% of respondents who answered that the guidelines were too high for trafficking of crack cocaine and possession of child pornography. *Id.*

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<sup>4</sup> U.S. Sentencing Comm’n, *Prison and Sentencing Impact Assessment for Proposed 2015 Amendments for Inflationary Adjustments to Monetary Tables in the Federal Sentencing Guidelines* (February 11, 2015), available at: [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/2014\\_2015\\_Proposed\\_Impact.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/2014_2015_Proposed_Impact.pdf).

The Department also feels that penalties for economic crimes should remain unchanged and not be decreased. The proportionality established between loss and offense level is based upon numerous policy considerations, including how economic crimes should be punished and deterred. In the Department's experience and judgment, the harm from economic crimes is generally not being overstated.

If the Commission, nonetheless, adjusts the monetary tables for inflation, it should do so only infrequently and consider using a different inflation index, the Gross Domestic Product (GDP) implicit price deflator from the Commerce Department's Bureau of Economic Analysis. Because we are in an extraordinarily low-inflationary period of our economic history, there is no urgency nor is it worth the effort and added complications to make frequent or automatic adjustments.<sup>5</sup> A ten-year interval seems reasonable now, and the Commission can switch to a shorter interval if inflation should become far more significant than it is now.<sup>6</sup> While no price index is perfect, the use of the CPI does not appear ideal. There is literature indicating that the CPI is problematic for inflation adjustment.<sup>7</sup> It reflects prices for a market basket for urban consumers and hence is more heavily influenced by health care, housing, and food costs than is the economy as a whole. The GDP deflator is a standard inflation adjustment factor used in economics and is a broader, economy-wide price index.

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<sup>5</sup> If there were an expectation in the bar of regular inflation adjustments, we will likely see many requests to continue sentencings in the years leading up to such adjustments, in the hopes that defendants would receive a reduced sentence just by delaying until the next adjustment.

<sup>6</sup> We also believe that should the Commission make an inflationary adjustment, it should adopt a method that results in round incremental numbers rather than a strict multiplier method. The latter method suggests a precision in assessing crime which is not possible to capture in sentencing guidelines and thus among other things undermines respect for the guidelines. Moreover, we note that the use of a present-day inflation multiplier likely would overcompensate for inflation, as defendants are sentenced under the guidelines in effect on the date of sentencing, while the loss figures are historical. Accordingly, if a practice of frequent adjustments were adopted, the inflation multiplier used should lag the amendment's effective date to account for the use of historical loss figures.

<sup>7</sup> See, e.g., Jim Chen, *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation*, 54 HASTINGS L.J. 1375, 1402-29 (2003); David E. Lebow & Jeremy B. Rudd, *Measurement Error in the Consumer Price Index: Where Do We Stand?*, 41 J. ECON. LIT. 159 (2003).

## 5. Mitigating Role

**The Department supports most but not all of the proposed amendment to §3B1.2 (mitigating role).**

A. The Department supports the Commission's first suggestion, that the application notes be amended to make clear that a defendant's culpability should be measured against the "average participant" in the particular criminal activity, not the typical offender who commits similar crimes. The Commission cites cases from the Seventh and Ninth Circuits in support of the proposal, and we believe the proposal in fact describes the approach long used in most sentencing courts. See *United States v. Benitez*, 34 F.3d 1489 (9<sup>th</sup> Cir. 1994); *United States v. DePriest*, 6 F.3d 1201, 1214 (7<sup>th</sup> Cir. 1993). The competing suggestion, to compare defendants to others involved in "similar" crimes, is very imprecise, raising difficult questions about how to define the average crime and participant. It would foster litigation and inconsistency, for no material benefit.<sup>8</sup>

To be sure, there may be particular cases in which one defendant was substantially less culpable than his co-conspirators, but only because his co-conspirators' roles and conduct were particularly egregious, while the defendant played a typical role with respect to offenders who commit similar crimes. In such an unusual case, the court may address the situation through a departure or variance.

B. The Department also does not oppose the Commission's proposal to add a non-exclusive list of factors in Application Note 3(C) for consideration in determining the extent of a mitigating role adjustment.

We suggest a further amendment in Application Note 4. Under the Commission's proposal, it would read:

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the *enterprise* and of the activities of others is indicative of a role as minimal participant.

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<sup>8</sup> In fact, elsewhere in this letter, the Department *opposes* a proposed amendment to the sophisticated means enhancement in §2B1.1(b)(10)(C) for the same reason. That proposal would exclude from "sophisticated means" any "conduct that is common to offenses of the same kind." This proposal suffers from multiple infirmities, including that it would create the same difficulties in litigating and identifying "offenses of the same kind" that is avoided by the Commission's sensible suggestion that a mitigating role should be measured against the conduct of co-participants and not anyone else involved in a "similar" offense.

For consistency, the italicized word “enterprise” should be changed to “criminal activity.” The new proposed list of factors in Application Note 3(A) refers to the “scope and structure of the criminal activity,” and Application Note 4 should be worded the same way.

C. The Department opposes that part of the proposed amendment that would alter the language applicable to defendants who “perform a limited function” in criminal activity and already have reduced offense levels as a result.

The current Application Note 3(A) states in pertinent part:

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that 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 is not precluded from consideration for an adjustment under this guideline.

The proposed amendment would nudge this provision even more in the defendant’s favor. It states that a defendant “may receive” an adjustment rather than “is not precluded from consideration for an adjustment.” The Commission does not explain the need for this change.

The current language was added to the application note in 2001 in Amendment 635. Before that, this was a frequently debated issue in individual cases, with the government arguing and some courts holding that a defendant should not get a mitigating role adjustment where his offense level was already limited to the narrower conduct in which he personally participated. A circuit split resulted.

The Department opposed Amendment 635 as adopted. In a March 19, 2001, letter to the Commission, the Department suggested a compromise provision that would read:

A defendant convicted of a drug or chemical trafficking offense whose Chapter 2 offense level is based only on the quantity of drugs or chemicals with which he personally was involved is precluded from consideration for an adjustment under this guideline, with a single exception. Such a defendant may be considered for an adjustment where his role is significantly less than that of another participant, and the other participant’s involvement was limited to the same drugs or chemicals for which the defendant is accountable. The adjustment to be applied in the rare case described herein is limited to a two-level minor role reduction.

The Commission elected to adopt the current language, stating at the time: “The amendment does not require that such a defendant receive a reduction under §3B1.2, or suggest

that such a defendant can receive a reduction based only on those facts; rather, the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of §3B1.2.” U.S. Sentencing Comm’n, *Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary* (May 1, 2001), 118 available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20010501Amendments.pdf>.

At this time, we know of no need for a further amendment. The 2001 amendment was properly understood to make clear that a mitigating role adjustment is not precluded in this situation, *see, e.g., United States v. Hill*, 563 F.3d 572, 578 (7th Cir. 2009) (vacating sentence because the district court did not recognize its authority under the 2001 amendment to grant a mitigating role adjustment), and we are not aware of any decision in which the adjustment was wrongly seen as barred. Courts understood the amendment correctly; for instance, the Eleventh Circuit viewed the amendment as ratifying its earlier statement that “[w]e do not create a presumption that drug couriers are never minor or minimal participants, any more than that they are always minor or minimal. Rather, we hold only that the district court must assess all of the facts probative of the defendant’s role in her relevant conduct in evaluating the defendant’s role in the offense.” *United States v. Boyd*, 291 F.3d 1274, 1277 (11th Cir. 2002) (quoting *United States v. Rodriguez De Varon*, 175 F.3d 930, 943 (11th Cir. 1999) (*en banc*)).

In this situation, where courts have a correct understanding of the basic rule, there is no need for clarification, and the amendment will only be seen as a signal that mitigating role adjustments should be granted more freely. That result is ill-advised. In fact, it should be the rare case where a defendant who is held accountable only for his own conduct is granted a downward adjustment based upon the fact his role is less than the other participants in the offense, as such an adjustment effectively grants a benefit for acting with others instead of on one’s own.

Say that the only available proof in a case is that on five occasions a defendant bought 10 grams of crack, then walked down the street and sold it to someone else. If he acted on his own, he would receive the offense level applicable to the distribution of 50 grams of crack. Then hypothesize that the same defendant acted as part of a group. A large organization took over a city block and made thousands of transactions over a one-year period. The defendant enlisted for two days, and made five 10-gram sales of crack supplied to him by the organization. Using the proposed focus on co-participants alone, his effort pales in comparison to dedicated sellers employed by the organization, who peddled crack for years on end.

If in the latter case the defendant’s offense level based on relevant conduct is limited only to his five sales consisting of 50 grams, what purpose of sentencing is served if he gets a further two- or four-level mitigating role adjustment just because he happened to associate with other more devoted offenders? We think it runs contrary to the purposes of sentencing, and the proposed amendment would further encourage this inappropriate result. It is basically a reward

for associating with a criminal gang rather than acting as a sole proprietor, which of course turns ordinary sentencing policy on its head.

We recognize that there are cases in which a defendant is responsible under the guidelines only for the conduct in which he personally participated, but still had a mitigating role with respect to that conduct. The current guideline does not preclude an adjustment in that situation, and courts have had no difficulty in recognizing that. But this is a rare circumstance, and the application note should say so. Instead, the proposed amendment seems to push in the opposite direction, and is unwarranted.

## **6. Flavored Drugs**

We believe federal sentencing policy should punish severely those who manufacture and distribute illegal drugs with the intent of appealing to children. Under the Controlled Substances Act, a person who distributes a controlled substance to a person under 21 years of age is generally subject to twice the statutory maximum term of imprisonment that would otherwise apply, and a statutory minimum term of imprisonment of one year, unless a higher statutory minimum applies. *See* 21 U.S.C. § 859(a). If such a person already has a prior conviction under section 859, he or she is generally subject to three times the statutory maximum term of imprisonment that would otherwise apply. *See* 21 U.S.C. § 859(b).

While these provisions apply only to the distribution of controlled substances and not to the manufacture of such substances, few federal drug prosecutions to date have involved the manufacture of controlled substances designed with the intent of appealing to children. We thus approach any possible changes to the guidelines in this area cautiously. We are uncertain, for example, that the suggestion of a mandatory vulnerable victim enhancement under §3A1.1(b) is the best route to achieving appropriate punishment. Moreover, we believe requiring proof of "specific intent to appeal to children" will not result in effective policy, as such proof will most likely only be accomplished through circumstantial evidence relating to the nature of the packaging. We think any provision addressing this issue should focus instead on deceptive packaging and labeling of controlled substances. This would include both drugs marketed to children and, for example, synthetic drugs that are marketed "not for human consumption" or as "potpourri" or "bath salts" when they are intended and marketed for human consumption. Both these circumstances are pernicious and deserving of incremental punishment.

## 7. Hydrocodone

In 2014, the Drug Enforcement Administration (DEA) reclassified all hydrocodone products as Schedule II controlled substances. Previously, single-entity hydrocodone products, such as Zohydro (approved by FDA in October 2013) and Hysingla™ER (approved in November 2014), were classified as Schedule II, while hydrocodone combination products meeting certain criteria were classified as Schedule III. The Commission has proposed amending the sentencing guidelines to conform to this reclassification.

In relevant part, the proposed amendment provides a single marijuana equivalency for all hydrocodone offenses, whether single-entity or in combination, based on the *actual* weight of the hydrocodone involved, rather than the number of pills involved or the weight of the pills. Specifically, the Commission proposes a marijuana equivalency under which one gram of “hydrocodone (actual)” equates to either 4,467 or 6,700 grams of marijuana. **The Department supports the proposed changes and recommends the Commission adopt a drug equivalency of 6,700 grams.**

An equivalency of 6,700 grams would be parallel to that of oxycodone under the current guidelines. The bulk of the scientific data, law enforcement data, and anecdotal evidence show that hydrocodone and oxycodone have very similar potencies, abuse potential, and adverse health consequences. Of the two options proposed by the Commission, an equivalency of 6,700 grams is a more accurate reflection of the close relationship between hydrocodone and oxycodone than the 4,467 gram option.

Both hydrocodone and oxycodone belong to the same pharmacological class of “narcotic analgesics,” or opioids, a group that also includes morphine and heroin. Hydrocodone, like oxycodone, produces analgesia and is used in the clinical management of pain. Goodman and Gilman’s *Pharmacological Basis of Therapeutics*, a textbook that is sometimes described as the “Bible of Pharmacology,” recommends equivalent dosages of hydrocodone and oxycodone for purposes of pain relief, describing the drugs as “equipotent.”<sup>9</sup>

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<sup>9</sup> T.L. Yaksh & M.S. Wallace, *Opioids, Analgesia, and Pain Management* (2011), in Goodman & Gilman’s *The Pharmacological Basis of Therapeutics* 481-525 (12th Ed. 2011); J.H. Jaffe & W. R. Martin, *Opioid analgesics and antagonists* (1990), in Goodman & Gilman’s *The Pharmacological Basis of Therapeutics* 485-521 (8<sup>th</sup> ed. 1991).

	<b>Hydrocodone</b> (in Lorcet, Vicodin, Lortab, others typically with acetaminophen)	<b>Oxycodone</b> (Rexicodone, Oxycontin, also in Percocet, Percodan, tylox, other)
<b>Approximate equi-analgesic oral dose</b>	30 mg q3-4h	30 mg q3-4h
<b>Recommended starting oral dose (adults &gt; 50 kg)</b>	5 mg q3-4h	5 mg q3-4h
<b>Recommended starting oral dose (Children and adults &lt; 50 kg)</b>	0.2 mg/kg q3-4h	0.2 mg/kg q3-4h

Multiple studies conducted in the last ten years have found that oxycodone is “approximately equipotent to or slightly more potent” than hydrocodone.<sup>10</sup> Testifying before the FDA’s Drug Safety and Risk Management Advisory Committee, Dr. Sharon Walsh of the University of Kentucky noted that “from a pharmacological perspective, the drugs [hydrocodone and oxycodone] are the same ... Based on all of the studies that we have available to us, I think that there are really very few, if any, pharmacological differences.”<sup>11</sup> Dr. Walsh conceded that the relative potencies were “not 1 to 1 ... but they’re very, very close.”<sup>12</sup>

Oxycodone and hydrocodone also have similar abuse liability. Both drugs can produce a euphoric high which creates the potential for abuse. A 2008 study concluded that the abuse liability of the two drugs “do not differ substantially from one another.”<sup>13</sup> The potential for the abuse of these drugs has become a reality, and both drugs have caused similarly significant harm to public health. Hydrocodone and oxycodone are both among the top ten drugs most frequently encountered by law enforcement.<sup>14</sup> In 2012, over 25.6 million Americans aged 12 years or older

<sup>10</sup> Sharon L. Walsh et al., *The relative abuse liability of oral oxycodone, hydrocodone and hydromorphone assessed in prescription opioid abusers*, in Drug and Alcohol Dependence 98, 191-202 (2008) (concluding that potency of oxycodone and hydrocodone “do not differ substantially”); William W. Stoops et al., *Intravenous oxycodone, hydrocodone, and morphine in recreational opioid users: abuse potential and relative potencies*, in Psychopharmacology 212, 193-203 (2010) (finding the average potency of oxycodone to be 1.03 compared to .92 for hydrocodone, using morphine as a baseline); J.P. Zacny & S. Gutierrez, *Within-subject comparison of the psychopharmacological profiles of oral hydrocodone and oxycodone combination products in non-drug-abusing volunteers*, in Drug and Alcohol Dependence 101, 107-114 (2009) (finding that hydrocodone and oxycodone “produced a similar profile of psychopharmacological effects”); Catherine A. Marco, et al., *Comparison of oxycodone and hydrocodone for the treatment of acute pain associated with fractures: a double-blind, randomized, controlled trial*, in Acad. Emerg. Med. 12(4): 282-288 (2005) (hydrocodone produced analgesic effects that are similar to those produced by oxycodone).

<sup>11</sup> FDA Advisory Committee Hearing on Potential Rescheduling of Hydrocodone 147-148 (Jan. 24, 2013), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/DrugSafetyandRiskManagementAdvisoryCommittee/UCM346941.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> S.L. Walsh, et al., *The relative abuse liability of oral oxycodone, hydrocodone and hydromorphone assessed in prescription opioid abusers*, in Drug and Alcohol Dependence 98, 191-202 (2008).

<sup>14</sup> National Forensic Information Laboratory System (NFILS) (a comprehensive data system which collects and

reported lifetime (*i.e.*, ever used) nonmedical use of hydrocodone combination products (HCPs) as compared to over 16 million reported for oxycodone products.<sup>15</sup> In the “rogue” pain clinics investigated by DEA and state and local law enforcement, the primary drugs prescribed are hydrocodone and oxycodone, and the only explanation for why one is prescribed rather than the other seems to be geography.<sup>16</sup> Rates of diversion per kilogram of HCPs distributed have been largely similar to those of oxycodone products, sometimes being slightly higher or slightly lower.<sup>17</sup> Since 2004, both drugs have been responsible for tens of thousands of emergency room visits per year.<sup>18</sup>

Currently there is no comprehensive database that monitors drug related deaths in the United States. However Florida’s Department of Law Enforcement (FDLE)<sup>19</sup> maintains a comprehensive statewide database of drug related deaths in Florida. According to the FDLE, hydrocodone and oxycodone products have been associated with large numbers of deaths in Florida in recent years. Annual rates of hydrocodone related deaths, calculated as deaths per kilogram of hydrocodone distributed, were similar to or slightly higher than those associated with oxycodone products. Thus, on a per kilogram basis, the potential of hydrocodone products to be associated with death is similar to that of oxycodone products.

In the experience of the DEA, hydrocodone users, oxycodone users, and heroin users share similar characteristics. This link has become clear through law enforcement investigations and interviews of addicts and addiction specialists. These interviews reveal that hydrocodone abuse often leads to heroin addiction. An addict may start with hydrocodone combination tablets, which cost \$5-10 a tablet, then progress to the oxycodone single entity tablet at \$30-80 a tablet. When she can no longer afford that, she may buy \$10 bags of heroin. Addiction specialists report that they are treating young adults for heroin addiction. When asked by these specialists how they started using heroin, addicts often answer that they began with hydrocodone. It is significant to note that because hydrocodone was not initially widely available as a single-entity tablet, once the abuser developed a tolerance to the combination tablet, he often would transition to oxycodone; however, now that hydrocodone is offered as a single entity tablet, it is interchangeable with oxycodone for most abusers. Studies indicate that

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monitors information from state and local authorities related to drug abuse and trafficking). *See* 76 FR 77330, 77332 (Dec. 12, 2011); System to Retrieve Information from Drug Evidence (STRIDE) (a database of drug exhibits sent to DEA labs for analysis). *Also see* Appendix, Table 1, “Total forensic drug cases reported in NFLIS and STRIDE databases.”

<sup>15</sup> *Id.*

<sup>16</sup> Investigations revealed clinics in Texas or California usually prescribe hydrocodone. Clinics in Florida usually prescribe oxycodone. In Tennessee, Kentucky and Missouri, clinics were prescribing both hydrocodone and oxycodone, but hydrocodone slightly more often.

<sup>17</sup> *See* Appendix, Table 1, “Total forensic drug cases reported in NFLIS and STRIDE databases.”

<sup>18</sup> *Emergency Department Visits Involving Nonmedical Use of Selected Prescription Drugs*, Center for Disease Control and Prevention (June 18, 2010), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5923a1.htm>. (based on data collected by the Drug Abuse Warning Network, or DAWN).

<sup>19</sup> *See* Appendix, Table 2. “Deaths related to HCPs and oxycodone products in Florida.”

as many as four out of five heroin initiates have previously used non-medical pain relievers.<sup>20</sup> Usage data suggest that hydrocodone addicts freely substitute hydrocodone with oxycodone and heroin as these ebb and flow in availability and price. We believe the guidelines should contain a marijuana equivalency for hydrocodone that is commensurate to the seriousness of the opioid abuse and trafficking problem now facing our country.

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In the issues for comment, the Commission asks whether using the “actual” amount of hydrocodone to set offense levels best achieves the goal of proportionality. We believe it does. As the Commission notes, hydrocodone products may come in different pill sizes, formulations, or dosages. Accordingly, if the number of pills or weight of an entire pill were to be used to set offense levels, an offense involving a smaller actual amount of hydrocodone could be punished more severely than an offense involving a relatively larger amount. Using the actual amount of hydrocodone will better reflect the defendant’s culpability. The Commission has already adopted this approach for offenses involving oxycodone, which is also generally sold in pill form. *See* U.S. Sentencing Comm’n, Guidelines Manual, App. C, amend. 657 (effective Nov. 1, 2003). We do not see a justification for treating hydrocodone differently.

The Commission has also invited general comment on how hydrocodone is diverted and the harms posed by this diversion. DEA investigations conducted from 2005 through 2007 determined that hydrocodone was diverted from rogue Internet pharmacies at that time. The National Forensic Laboratory Information System (NFLIS), a comprehensive data system which collects and monitors information from state and local authorities related to drug abuse and trafficking, shows that up until approximately 2009, comparing the amounts of methadone, oxycodone, and hydrocodone that were submitted for analysis, the number of cases of hydrocodone exceeded that for oxycodone. This was largely because the cases involved diversion over the Internet, and the primary drug being diverted at the time over the Internet was hydrocodone.<sup>21</sup>

The diversion of HCPs from legitimate channels includes significant diversion through prescription fraud and pharmacy burglaries. For example, in 2011, there were 8,171,057 dosage units of HCPs stolen; and 9,331,141 dosage units of oxycodone stolen. From January to September 30, 2012, there were 5,954,260 dosage units of HCPs stolen, compared to 2,170,413

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<sup>20</sup>Pradip K. Muhuri, et al., *CHBSQ Data Review: Associations of Nonmedical Pain Reliever Use and Initiation of Heroin Use in the United States* (August 2013), available at <http://www.samhsa.gov/data/sites/default/files/DR006/DR006/nonmedical-pain-reliever-use-2013.pdf>.

<sup>21</sup> However, in 2008, Congress passed the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, which effectively shut down the Internet pharmacies by requiring an in-person visit. In our experience, we have observed that diverters changed their business model and became in-person pain clinics following passage of the Act. In 2006, there were four pain clinics in Broward County, Florida. In 2007, there were approximately 20; in 2008, there were 66; in 2009, there were 142.

dosage units of oxycodone stolen. Likewise, in 2010, HCP dosage units stolen were more than double that of oxycodone (7,609,366 compared with 3,109,549, respectively). There is also violence associated with hydrocodone diversion. For example, in 2011, in Medford, Long Island, a man walked into a pharmacy and spoke with the pharmacist before he shot and killed the pharmacist, a clerk, and two customers in the pharmacy. After killing the four victims, the man stole 10,000 hydrocodone tablets. Tim Steloch, *Man Pleads Guilty in 4 Killings at Long Island Pharmacy*, N.Y. Times, Sep. 8, 2011, available at [http://www.nytimes.com/2011/09/09/nyregion/david-laffer-pleads-guilty-in-li-drugstore-killings.html?\\_r=0](http://www.nytimes.com/2011/09/09/nyregion/david-laffer-pleads-guilty-in-li-drugstore-killings.html?_r=0).

Finally, the Commission has asked whether hydrocodone is substantially similar to the chemical structure of any other controlled substance. Hydrocodone and oxycodone are similar not only in their potency and public health effects, but also in their chemical structures and in the mechanism (type of receptors involved) of pharmacological actions. Overdose of HCPs, similar to oxycodone, can lead to respiratory depression and death. Hydrocodone bitartrate hemipentahydrate (1 gram/16 milliliters), oxycodone hydrochloride (1 gram/10 milliliters), and morphine sulfate (1 gram/15.5 milliliters) are water soluble and their water solubilities (extractability potential for abuse by parenteral route of administration) are similar.<sup>22</sup> Hydrocodone is metabolized by an enzyme called CYP2D6, while oxycodone is metabolized primarily by another enzyme, CYP3A4/5, with minor contribution from CYP2D6.<sup>23</sup> Morphine-like drugs (e.g., hydrocodone, oxycodone, morphine) appear to act preferentially at  $\mu$ -opioid receptors, but they also have appreciable affinity for other types of opioid receptors.<sup>24</sup> The analgesic dose of hydrocodone (5-10 mg oral) is similar to that of oxycodone (5-10 mg oral) with similar duration of action (4 – 5 hours).<sup>25</sup> The analgesic effect produced by the above mentioned doses of hydrocodone and oxycodone is equivalent to that produced by 60 mg of oral and 10 mg of parenteral (administered subcutaneously or intramuscularly) morphine and to that produced by 60 mg of oral and 5 mg of parenteral (administered subcutaneously or intramuscularly) heroin. The duration of analgesic action of the above mentioned doses of heroin (4-5 hours) and morphine (4-5 hours following parenteral and 4-7 hours following oral administration) are similar to those mentioned above for hydrocodone and oxycodone.<sup>26</sup>

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<sup>22</sup> The Merck Index: An Encyclopedia of chemicals, drugs and biologicals (Susan Budavari et al. eds., 12<sup>th</sup> ed. 1996).

<sup>23</sup> H.B. Gutstein & H. Akil, *Opioid analgesics* (2001), in Goodman & Gilman's *The Pharmacological Basis of Therapeutics*, 547-590 (11<sup>th</sup> ed. 2006).

<sup>24</sup> J.H. Jaffe & W. R. Martin, *Opioid analgesics and antagonists* (1990), in Goodman & Gilman's *The Pharmacological Basis of Therapeutics*, 485-521 (8<sup>th</sup> ed. 1991).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

## APPENDIX

**Table 1: Total forensic drug cases reported in NFLIS and STRIDE databases. Rates of diversion are calculated using forensic drug cases as the numerator and kilograms of drugs distributed as the denominator.<sup>27</sup>**

	HCPs <sup>28</sup>		Oxycodone products	
	Cases (NFLIS+STRIDE)	Cases/kg	Cases (NFLIS+STRIDE)	Cases/kg
<b>2002</b>	9,106	0.30	7,993	0.32
<b>2003</b>	11,617	0.32	9,431	0.32
<b>2004</b>	16,299	0.41	13,342	0.41
<b>2005</b>	21,019	0.50	14,417	0.42
<b>2006</b>	24,798	0.51	17,733	0.43
<b>2007</b>	30,411	0.56	22,160	0.46
<b>2008</b>	33,611	0.57	28,343	0.52
<b>2009</b>	37,894	0.61	37,680	0.61
<b>2010</b>	39,261	0.61	47,238	0.66

<sup>27</sup> Data for the total kilograms of drug distributed annually were obtained from The Automated Reports and Consolidated Orders System (ARCOS). ARCOS is a DEA database used to monitor the distribution of some controlled substances throughout the country. It identifies retail-level registrants who receive unusual quantities of controlled substances. The CSA mandates that manufacturers submit periodic reports of the Schedule I and II controlled substances they produce, both in bulk and dosage forms. Manufacturers also report the quantity and form of each narcotic substance manufactured and listed in Schedule III. Distributors of controlled substances must report the quantity and form of all their transactions of controlled drugs listed in Schedules I and II, narcotics listed in Schedule III, and gamma-hydroxybutyric acid. Both manufacturers and distributors are required to provide reports of their annual inventories of these controlled substances. These data are all entered into ARCOS. The total sales of each of these drugs, in grams, is recorded in ARCOS and represents the quantities legitimately distributed at the retail level (such as pharmacies, hospitals and practitioners).

<sup>28</sup> Hydrocodone combination products. In the U.S., until recently, nearly 100% of total kilogram amounts of HCPs was marketed as combination products that contain hydrocodone in combination with a nonnarcotic active ingredients such as acetaminophen, aspirin, ibuprofen, chlorpheniramine or homatropine, while oxycodone was marketed both as single-entity (over 70% of total kilogram amounts distributed) and combination products (over 20% of total kilogram amounts distributed). Recently FDA approved two single-entity, extended release schedule II hydrocodone products, namely Zohydro™ ER (approved in October 2013) and Hysingla™ER (approved in November 2014).

<b>2011</b>	37,314	0.53	45,908	0.65
<b>2012</b>	34,832	0.51	41,915	0.62

**Table 2: Deaths related to HCPs and oxycodone products in Florida. Rates of deaths are calculated using deaths as numerator and kilograms (kg) # of drug distributed as denominator.**

	<b>HCPs</b>		<b>Oxycodone products</b>	
	<b>Deaths</b>	<b>Deaths/kg</b>	<b>Deaths</b>	<b>Deaths/kg</b>
<b>2006</b>	731	0.19	923	0.21
<b>2007</b>	807	0.23	1,253	0.19
<b>2008</b>	870	0.27	1,574	0.20
<b>2009</b>	865	0.26	1,948	0.19
<b>2010</b>	958	0.29	2,384	0.17
<b>2011</b>	877	0.26	2,128	0.21
<b>2012</b>	777	0.25	1,426	0.24

Source: Florida Department of Law Enforcement (FDLE).<sup>29</sup>

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<sup>29</sup> Florida Department of Law Enforcement Medical Examiners Commission publishes an Annual Medical Examiners Report, the Annual and Interim Drugs in Deceased Persons Report. In order for a death to be considered “drug-related” at least one drug identified must be in the decedent; each identified drug is a drug occurrence. The state’s medical examiners were asked to distinguish between whether the drugs were the “cause” of death or merely “present” in the body at the time of death. A drug is only indicated as the cause of death when, after examining all evidence and the autopsy and toxicology results, the medical examiner determines the drug played a causal role in the death. It is not uncommon for a decedent to have multiple drugs listed as a cause of death.

## 8. Economic Crime

We appreciate all of the Commission's work over the last several years reviewing the sentencing guidelines for economic crimes, including convening a symposium in 2013 at John Jay College of Criminal Justice in New York, conducting extensive data analysis, and meeting with stakeholders. In particular, the data analyses generated by the Commission have been invaluable in identifying those areas of the guidelines that work well and those that may be in need of amendment. We agree with the Commission's conclusion that while the fraud guideline is not fundamentally broken for most forms of fraud, it can be improved in some limited ways.

### A. Intended Loss

The Commission proposes to revise the definition of "intended loss" contained in §2B1.1, comment. n.3(A)(ii). Currently, intended loss is defined generally as "the pecuniary harm that was intended to result from the offense." The Commission seeks both to clarify and to narrow that definition, limiting intended loss to the pecuniary harm "that the defendant *purposely sought to inflict*." (Emphasis added). This language is taken from the Tenth Circuit's decision in *United States v. Manatau*, 647 F.3d, 1048, 1055 (10<sup>th</sup> Cir. 2011). **The Department opposes redefining "intended loss" using the *Manatau* framework but supports a clarifying definition using a framework enunciated by the First and Second Circuits.** We believe the First and Second Circuit's method for determining intended loss best reflects a defendant's culpability and should form the basis for any amendment to the guidelines' definition of intended loss.

In *United States v. Innaelli*, 524 F.3d 286, 291 (1<sup>st</sup> Cir. 2008), the First Circuit held that "intended loss" is not to be based on a defendant's "subjective intentions or hopes," but rather on "**the objectively reasonable expectation** of a person in [the defendant's] position at the time he perpetrated the fraud." (Emphasis added). This decision built off an earlier case, *United States v. McCoy*, 508 F.3d 74, 79 (1<sup>st</sup> Cir., 2007), in which then-Chief Judge Boudin wrote that *expected* loss would be a better term than intended loss, "expectation being the measure for the defendant's culpability."

The First Circuit is not alone in holding that intended loss requires an objective, rather than subjective, inquiry. Contrary to the synopsis of the amendment proposal, the Second Circuit has also adopted an objective approach to intended loss in most circumstances. In *United States v. Lacey*, 699 F.3d 710 (2<sup>nd</sup> Cir. 2012), Judge Lynch cited First Circuit precedent in holding that "the term 'intended loss' may fairly be read to encompass a defendant's reasonable expectation of loss." Indeed, Judge Lynch's opinion in *Lacey* suggests that the objective "reasonable expectation" interpretation of "intended loss" should apply whenever there is objective evidence of a reasonably expected loss.<sup>30</sup> *See id.*, at 719; *see also United States v.*

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<sup>30</sup> *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008), which the Commission cites in its synopsis of the proposed amendment, controls in those few situations – such as those involving a credit instrument with a set limit

*Lane*, 323 F.3d 568 (7<sup>th</sup> Cir. 2003) (holding that intended loss must be determined based on “the objective financial risk to victims” of the defendant’s conduct).

The “reasonable expectation” test is different from the “purpose” test proposed in the amendment, because it focuses on a reasonable person’s expectations about the effects of conduct, rather than the defendant’s goals or objectives. This is also different from the “reasonable foreseeability” standard that applies in determining actual loss, as an expected loss is one that is far more likely to occur than is a loss that is merely foreseeable. Holding defendants accountable for reasonably expected losses properly reflects their culpability and avoids the common occurrence of defendants acting in reckless disregard for victims’ property but claiming no intent to cause any loss. At the same time, a “reasonably expected” approach would not hold defendants responsible for all foreseeable losses where the crime is either incomplete or unsuccessful.

*Lacey* is a good illustration of why the “reasonable expectation” standard is the right one. In that case, the defendants conspired to purchase foreclosed or condemned properties at “short-sale” prices, arranged for a grossly inflated appraisal of the properties, obtained mortgage loans – based on fraudulent documentation and the fraudulent appraisals – for unsophisticated buyers with low incomes and bad credit, and then sold the properties to those buyers for a large profit. As a result of this conspiracy, the buyers almost always defaulted on their mortgage loans, forcing the banks to foreclose and recoup only the actual (and much lower than appraised) value of the properties.

If the court had measured loss as that which the defendant *purposefully sought* to inflict, the loss amount would have been zero, as the defendants did not want the buyers to default. *Lacey*, 699 F.3d at 713. Alternatively, if the court included all losses that were *foreseeable* to occur, the loss amount for each defendant would have been millions of dollars, since it was a foreseeable (although improbable) outcome that the properties “would be destroyed or otherwise rendered valueless.” *Id.* at 720. Instead of these options, Judge Lynch used the “Goldilocks” approach – assessing the loss that was “reasonably expected to occur.” The court calculated this based on the difference between the short-sale price and the mortgage amount, “objective evidence of the amount that a reasonable defendant might expect a bank would lose in the transaction.” *Id.* at 719. The interpretation in *Lacey* generated loss amounts for each defendant of several hundred thousand dollars. *Id.* at 713.

The Commission’s proposal to limit the definition of “intended loss” to that which the defendant purposefully sought to inflict would effectively eviscerate use of the intended loss criterion in determining loss. In many fraud cases, defendants routinely assert, with some

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or unsecured debt – where there is no objective evidence of a reasonably expected loss other than the entire credit limit or debt amount. For these situations, the Second Circuit adopted the majority rule set forth by the Third Circuit in *United States v. Geever*, 226 F.3d 186 (3rd Cir. 2000): that there should be a rebuttable presumption that the defendant intended victims to lose the entire credit limit or debt amount. *Id.*

persuasiveness, that they never intended to inflict any pecuniary harm on their victims, and that they genuinely believed that their victims would receive the benefits that they were originally promised (like in the *Lacey* example above). Application of the subjective standard adopted in the proposed amendment will make it difficult, if not impossible, to prove any amount of intended loss, even in cases where the evidence shows grossly reckless conduct that evidences genuine culpability, and will lead to the adoption of an actual loss standard in the great majority of criminal fraud cases. While perhaps not intended by the Commission, we do not believe this would be a development that would promote the purposes of sentencing.

The Commission's proposed amendment contains two options. Option 1 would revise the definition as stated above. Option 2 adds language that the defendant is also responsible for the pecuniary harm that "any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant." Of these two approaches, the Department prefers Option 2, as we believe that any amendment of the definition of intended loss should make clear that defendants are responsible for conduct of other participants in jointly undertaken criminal activity (*i.e.*, conduct the defendant agreed to participate in, *see* Proposed Amendment 3). This is consistent with the approach in other parts of the guidelines.

#### B. Victims Table

The Commission proposes to add a new §2B1.1(b)(3) to the guidelines, which would provide an enhancement if an offense results in substantial hardship to one or more victims. The Commission also proposes to amend the existing §2B1.1(b)(2), which provides enhancements based on the total number of victims, reducing the current enhancements by half. The cumulative adjustments from both (b)(2) and (b)(3) would be capped at six levels. The effect of these changes would be to shift the emphasis from the number of victims to the harm inflicted on individual victims. **The Department supports the amendment adding subsection (b)(3) to the guidelines – so long as non-financial harms are properly accounted for – and we favor a modified version of Option 2.**

We applaud the Commission's efforts to add a new focus in the guidelines on the harm inflicted on individual victims. However, the Commission must ensure that the guidelines recognize the non-financial hardships that many victims experience and craft the amendment so as not to put victims and their personal lives on trial. The extent or depth of the harm suffered by fraud victims is an important component of culpability that is not adequately captured either by loss amount or the number of victims alone. Many have argued that a defendant who causes a small amount of harm to a large number of victims (*i.e.* one who steals \$1 each from 1,000,000 different victims) should be subject to less punishment than a defendant who causes devastating loss to a smaller number of victims (*i.e.* one who steals \$100,000 each from ten victims). Crimes like identity theft and offenses that prey on elderly or vulnerable victims, can have heartbreaking consequences, are particularly egregious, and should be recognized as such by the guidelines.

Our Tax Division, for example, has seen a host of Stolen Identity Refund Fraud cases in recent years. For these cases, where defendants file tax returns using stolen identities, reporting fictitious income and tax withholdings to generate fraudulent refunds, the impact on victims can be devastating, although not always financially devastating. For these cases, the current guidelines provide reasonable penalty enhancements as they are now. The Commission should assure that the new bifurcated enhancement – which would include an enhancement for substantial hardship – recognizes non-financial hardship, including when a victim’s identity is stolen. If it does not, the proposed amendment will be unduly narrow and would result in unwarranted sentence reductions in many cases, including those involving stolen identities.

Stolen Identity Refund Fraud cases typically involve a large number of identity theft victims. According to the IRS, from 2008 through May 2012, the IRS identified more than 550,000 taxpayers who have had their identities stolen for the purpose of claiming false refunds in their names. In fiscal year 2013, the Department filed more than 580 indictments or informations, charging more than 880 defendants with Stolen Identity Refund Fraud-related crimes. As stated above, the current guidelines’ framework adequately addresses these cases. We recognize that in other fraud cases, though, the existing victim’s enhancement *understates* the harm, and we think the proposed amendment will be a step in rectifying this. For example, a Ponzi scheme that wipes out the retirement savings of 25 people would only receive a two-level enhancement for number of victims under the current victims’ table, while in a credit card fraud case involving 50 victims who experienced much less severe harms would receive a four-level enhancement.

The Commission proposes two options for the new §2B1.1(b)(3) enhancement. Of these, the Department prefers Option 2, which provides a tiered enhancement based on the number of victims suffering substantial hardship. A tiered system would recognize the differences in culpability among defendants who cause varying amounts of harm. However, we think it is important to modify Option 2 so that the six-level enhancement applies when 10 or more victims suffer substantial hardship, rather than 25, for two reasons. First, a fraudster who causes substantial hardship to more than ten victims has caused sufficient damage to warrant the six-level enhancement. Second, there are considerable practical concerns in litigating the individual circumstances of 25 or more victims who may have suffered substantial hardship because of a particular offense. While no substantial sentencing policy will be advanced by requiring proof and litigation over the additional victims, significant judicial time and resources will be expended. Providing evidence from, and litigating the hardship of ten victims should be sufficient to identify those offenders who warrant the maximum enhancement under §2B1.1(b)(3).

The Commission has asked for comment on the scope of the enhancement and the factors provided in the application notes. We believe it is critical that the enhancement apply to substantial hardships generally, including when a victim’s identity is stolen, and not solely substantial *financial* hardships. Many non-monetary harms can be equally devastating for victims. One case we prosecuted recently, for example, involved a woman who defrauded

multiple childless couples of relatively small sums by promising they could adopt her soon-to-arrive baby. The harm to those victims substantially exceeded their pecuniary loss. It would be bad sentencing policy for crimes causing significant, widespread harms to many victims not to receive the highest level of victims' enhancement simply because the victims did not become insolvent or otherwise suffer catastrophic financial loss. If the new enhancement is limited to such catastrophic financial losses, in effect, the Commission would create an unjustified sentence reduction in cases where significant harms occur to many victims.<sup>31</sup>

We also note that the Commission's illustrative list of substantial hardships currently addresses harms suffered primarily by individuals in their individual capacity. The Department suggests adding one example to the list for business owners, namely: "(A) becoming insolvent *or for businesses, unable to continue in business.*"

Finally, in proposing to add the enhancement for substantial hardship, the Commission has at the same time proposed deleting the four-level enhancement for offenses that "substantially endangered the solvency or financial security of 100 or more victims," which now appears at §2B1.1(b)(16)(B)(iii). This enhancement is different from the Commission's proposal addressing substantial hardship and should not be eliminated. Indeed, the existing provision addresses conduct that presents a substantial risk of – but does not actually cause – grave harm. An enhancement is warranted to address conduct that jeopardizes the financial security of individuals, but that would not be covered by the proposed enhancement. In this regard, the Commission has asked whether, if the existing enhancement that appears in subsection (b)(16)(B)(iii) is retained, the number of victims required should be reduced. The Department believes that it should be. Conduct that seriously jeopardizes the solvency or financial security of 25 or more victims is particularly harmful and should be recognized as such in the guidelines.

### C. Sophisticated Means

The Commission has proposed that for the purposes of the enhancement in §2B1.1(b)(10), "sophisticated means" ought to be determined relative to other offenses "of the same kind." The Commission proposes amending the definition to require 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." The proposal would also limit the enhancement to cases where the defendant personally "engaged in or caused

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<sup>31</sup> See e.g., *United States v. Angeline Austin*, No. 2:12-CR-108 (M.D.AL. Feb. 6, 2013) (Thompson, J.) (SIRF scheme stole identities of 800 hospital patients between 16 and 23 years of age; many of the victims were college students, some of whom expressed concern that their eligibility for grants and student loans would be negatively affected by the false reporting of income on the tax returns; one victim testified about losing his security clearance and thus his job due to damage to his credit report, and about his wife's quitting college in order to work); *United States v. Bonanee*, No. 12-60143 (S.D.FL. April 25, 2013) (Cohn, J.) (in an \$11 million SIRF scheme that involved 2,000 fraudulent returns, the court stated: "Ensnared in that mess is the innocent taxpayer faced with the task of restoring her or his good name and credit rating. It is a hurtful crime which follows its victims in many instances for years.").

the conduct constituting sophisticated means.” **The Department opposes this proposal.** We believe the current enhancement for sophisticated means is reasonable and that the proposed amendment has the potential to encourage unnecessary litigation and to produce inconsistent, anomalous and unfair results.

The purpose of the sophisticated means enhancement is to ensure that a criminal who exhibits greater sophistication gets an enhanced sentence to reflect a higher level of culpability and nefariousness above that for other frauds involving similar loss amounts. The proposed amendment would undermine that purpose. Under the proposal, the enhancement would not apply to the commission of a highly sophisticated type of fraud in a typical manner; but would, by contrast, apply to a relatively sophisticated version of a very simple type of fraud. Thus, it may well occur that the enhancement would apply to a fraud of the latter type but not the former type, even if the former offense was committed in a much more sophisticated way.

For example, take an offender who commits a \$100,000 fraud based on an elaborate and fake story about U.S. currency altered overseas and abetted by confederates in fictitious offices and carefully constructed props. Under the proposal, this fraudster would receive the sophisticated means enhancement only if he engaged in even more sophisticated conduct than the ordinary con man involved in a similar con. Otherwise, he would receive the same sentence as a person who commits a simple fraud that takes only a few minutes and no sophistication to perpetrate (*e.g.* telling a single lie that convinces a gullible person to invest in a property that does not exist). We see no justification for adopting a rule that would lead to such a result.

The proposed amendment also raises the considerable problem of deciding what offenses are “of the same kind,” an issue which is likely to encourage unnecessary litigation regarding the taxonomy of frauds. The proposal does not contain any guidance for making this determination, although the Commission acknowledges this difficulty in its issues for comment.<sup>32</sup> The Commission asks, for example, whether all telemarketing fraud offenses are of the same kind, or whether distinctions should be made among different types of telemarketing offenses. The proposal will put sentencing judges in the position of having to ask “are all theft offenses of the same kind, what kind am I dealing with in this case, and are there broader or narrower distinctions that should be made?” These are questions without clear answers. Compounding the problematic nature of the substantive changes proposed is the proposed deletion of the illustrative examples, which may permit the unfortunate inference that the Commission no longer views “the use of fictitious entities, corporate shells, or offshore financial accounts” as illustrative of sophisticated means. The Department believes the examples should remain no matter what option is ultimately chosen.

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<sup>32</sup> This proposal runs counter to the rationale of the earlier mitigating role proposed amendment. In that proposal, the Commission suggests that the defendant's culpability under §3B1.2 should be measured against other participants “in the criminal action” at issue, rather than against typical offenders who commit similar crimes. We generally support that proposal. This proposal does the opposite, evaluating sophistication with respect to “other offenses of the same kind” rather than whether it is sophisticated within the context of the charged crime.

Finally, the sophisticated means enhancement should not be limited to cases in which the defendant personally used sophisticated means. The enhancement should apply to certain defendants who would not be covered by the proposed language. The proposed amendment, as drafted, limits application of the enhancement to those defendants who engaged in or caused sophisticated conduct, or who are responsible for such conduct under §1B1.3(a)(1)(A) of the guidelines for having “aided, abetted, counseled, commanded, induced, procured, or willfully caused” such conduct. *See* §1B1.3(a)(1)(A). This would create an inconsistency with the approach used in the other parts of the guidelines. Conspicuously absent from the proposal is any reference to §1B1.3(a)(1)(B), pursuant to which defendants are ordinarily held responsible for “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” As discussed in Proposed Amendment 3, accomplice liability is limited to conduct the defendant specifically agreed to join. Holding the defendant liable for foreseeable conduct of accomplices done in furtherance of such jointly undertaken activity is hardly novel. Indeed, most courts to have considered the issue have held that the sophisticated means enhancement applies to a particular defendant so long as the use of sophisticated means by other criminal associates was reasonably foreseeable to the defendant. *United States v. Bishop-Oyedepo*, 480 F. App’x 431, 433-34 (7th Cir. 2012); *United States v. Green*, 648 F.3d 569, 576 (7th Cir. 2011); *see United States v. Crosgrove*, 637 F.3d 646, 666 (6th Cir. 2011); *United States v. Jenkins–Watts*, 574 F.3d 950, 965 (8th Cir. 2009); *United States v. Lewis*, 93 F.3d 1075, 1083-1085 (2d Cir.1996). It would be unusual for this particular guideline to take a contrary approach, especially given that the Sentencing Commission had taken up this very issue in 1998 and decided that the sophisticated means enhancement applied to the overall offense conduct for which the defendant is accountable pursuant to the relevant conduct rules, not on the personal conduct of the defendant. United States Sentencing Commission, *Guidelines Manual*, App. C, Vol. 2, Amend. 577 at 6 (Nov. 2014); 63 Fed. Reg. 602-01 at 622-632.

#### D. Fraud on the Market

The Commission has proposed that in cases involving “fraud on the market,” sentencing enhancements under §2B1.1(b)(1) should be calculated using only the gain resulting from the offense and not the losses incurred by the victims. The stated purpose of the amendment is that “these cases are complex, resulting in courts applying a variety of methods to determine the appropriate enhancement.” U.S. Sentencing Comm’n, *Proposed Amendments to the Sentencing Guidelines*, 80 Fed. Reg. at 2590. It has been suggested that the amendment will reduce litigation costs and save the courts from the burden of applying a difficult and complicated test for determining loss. While simplifying the calculation of loss is a goal we generally support, the Department believes that the proposed amendment, by disregarding loss entirely, is contrary to both congressional intent and sound sentencing policy, and therefore **we oppose it**.

First, the amendment is contrary to the clearly stated intent of Congress, as expressed in the text of section 1079A(a)(1)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. That provision directed the Commission to ensure that penalties for

securities fraud “appropriately account for the *potential and actual harm*<sup>33</sup> to the public and financial market from the offenses.” (Emphasis added). Pub. L. 111-203. Passed in the wake of the most serious financial crisis since the Great Depression, Dodd-Frank reflects a public decision that white-collar criminals should be held accountable for practices which damage the economy and hurt average Americans.

The Commission’s amendment is at odds with the intent expressed in section 1079A, as it would direct courts to use gain instead of loss to calculate sentencing enhancements, failing to account for the harm to the public and the financial market caused by “fraud on the market” offenses. In addition, while gain may be an appropriate measure of harm in some circumstances, it is ill suited for most fraud on the market cases, as the harm resulting from the reckless conduct of the defendants in such cases is often widespread, impacting great numbers of individual investors, and even the integrity of financial markets themselves.

For example, in *United States v. Brincat*, No. 1:2005-cr-00093 (N.D.IL. 2006), the defendant was an executive at Mercury Finance and perpetrator of what the Chicago Tribune called the “biggest accounting fraud in the history of northern Illinois.” Rudolph Bush, *Brincat Gets 10 Years in Mercury Finance Fraud*, Chi. Trib., May 24, 2007, available at [http://articles.chicagotribune.com/2007-05-24/business/0705231010\\_1\\_mercury-finance-mercury-executives-brincat](http://articles.chicagotribune.com/2007-05-24/business/0705231010_1_mercury-finance-mercury-executives-brincat). The company manipulated earnings and reported false profits in order to inflate its stock price. According to prosecutors, shareholders lost an estimated \$2 billion. Brincat, however, never sold his stock in an attempt to profit off his scheme, even as the company imploded. While the harm to the public was very great, Brincat did not experience large gains, and was unable to pay more than \$500,000 in restitution. This is hardly an atypical example. In *United States v. Harris*, No. 1:09-cr-00406-TCB-JFK (N.D.GA. 2012), the executives of Conversion Solutions gained only a few hundred thousand dollars from their fraud (which was used to keep the company running), but caused losses to shareholders of \$44 million. In *United States v. Elles*, No. 1:11-CR-485-AT-AJB (N.D.GA. 2012), the loss to shareholders has been estimated at \$150 million, but there is no allegation that the executives in that case received any gains from their fraud apart from ordinary compensation and bonuses. See also, *United States v. Rutkoske*, No. 03-CR-1452 (S.D.NY. 2006); *United States v. Rand*, No. 3:10-CR-182-RJC-DSC (W.D.NC. 2011). In cases that cause catastrophic harm to the markets but result in comparatively little gain for the defendant, the Commission’s amendment will likely result in sentences that do not adequately reflect the gravity of the offense committed.

Secondly, the Commission’s proposed definition of “fraud on the market” is over-inclusive and will reach cases to which the Commission does not intend its amendment to apply. As written, the amendment applies to cases which involve “(i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator.” This definition includes not only major public company fraud on the market cases

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<sup>33</sup> Under the Commission’s own guidelines, “harm” is defined to include monetary loss. USSG §1B1.3 commentary n.4.

that involve difficult loss calculations, but also more run-of-the-mill “pump and dump” cases involving lightly traded “penny stocks.” In these cases, shareholder losses are often easily ascertained because the entire investment is lost, and therefore they do not pose the problem that the Commission seeks to address with its amendment. Examples of recent pump and dump cases that would be covered under the amendment include *United States v. Lefkowitz*, No. 12-CR-4714-BTM (S.D.CA. 2012); *United States v. Davis*, No. CR-11-525-JFW (C.D.CA. 2013), *United States v. Possino*, No. CR 13-48-SVW (C.D.CA. 2013); and *United States v. Bercoon*, No. 1:14-CR-00211-ODE-1 (N.D.GA. 2014).

Finally, the Commission should not replace “loss” with “gain” to determine guideline penalties in fraud on the market cases, because the gain from an offense is itself often hard to ascertain. The Commission’s goal is for courts to avoid having to make difficult calculations, but the proposed amendment simply replaces one difficult calculation with another. It must be noted that the guidelines already allow for using gain rather than loss as a metric of culpability where “there is a loss but it reasonably cannot be determined.” USSG §2B1.1 note 3(B). Thus, in cases where the traditional “fraud on the market” model yields results that do not reflect a reasonable estimate of harm, courts are already authorized to apply gain “as an alternative measure of loss,” suggesting that the guidelines address the concerns underlying the proposed amendment.

As to determining gain, fraudsters often do not profit directly from their schemes, with gains achieved indirectly. As such, these gains may be quite difficult to quantify. They can include, for example, increased stature within the company, which may lead to bonuses and promotions. Courts would have to determine what portion of a defendant’s earnings from his company is traceable to his fraud, and what portion of his earnings he would have received anyway, an inherently difficult endeavor. In contrast, the current formula for assessing loss under §2B1.1(b)(1) is based on objective inputs, like the average price of the security during the period that the fraud occurred and the average price of the security during the 90-day period after the fraud was disclosed to the market. USSG §2B1.1, Application Note 3 (F)(ix). While courts no doubt require the assistance of experts at times to apply this formula, at least they have clearly outlined factors to consider in assessing loss. Unlike the current rule for assessing loss, the proposed amendment does not give courts any guidance as to how they ought to go about calculating gain.

The Commission’s desire to make the sentencing enhancements for fraud on the market cases easier to apply is a worthy objective. However, the proposed amendment is ill-suited to meet the purposes of sentencing. We are prepared to continue working with the Commission to explore other possible methods of determining loss in these cases.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other commissioners to refine the sentencing guidelines and to develop more effective, efficient, and fair sentencing policy.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan J. Wroblewski', written over a horizontal line.

Jonathan J. Wroblewski  
Director, Office of Policy and Legislation

cc: Commissioners  
Ken Cohen, Staff Director  
Kathleen Grilli, General Counsel