



Testimony of
JAMES E. FELMAN on behalf of
the
AMERICAN BAR ASSOCIATION
before the
UNITED STATES SENTENCING COMMISSION
for the hearing on
PROPOSED AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES
regarding
ECONOMIC CRIMES

Washington, D.C.
March 12, 2015

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

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

The American Bar Association is among the world's largest voluntary professional organizations, with a membership of over 350,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William Hubbard to present to the Sentencing Commission the ABA's position on the Commission's proposed amendments to the economic crime guidelines. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates, as well as a special task force of expert academics, judges, and practitioners assembled specifically to address this topic.

The ABA is keenly interested in the reform of the sentencing guidelines for economic crimes. As the Commission is no doubt aware, the economic crime guidelines have been criticized in recent judicial decisions as “patently absurd on their face,”¹ “a black stain on common sense,”² and, ultimately, “of no help.”³ The result of relentless upward ratcheting, the

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

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

³ *United States v. Watt*, 707 F.Supp.2d 149, 151 (D. Mass. 2010).

present guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. These guidelines are merely advisory, however, and some judges opt instead to impose significantly lower sentences. Other judges adhere to the guidelines and mete out the sentences called for by them. To some, this looks like the disparity the guidelines were created to avoid -- a regime in which the punishment turns as much on the philosophy of the sentencing judge as it does on the facts of the offense. To others, it reflects the birth of a common law of sentencing as the courts evaluate the extent to which guideline sentences serve the purposes of sentencing in individual cases. Under either view, the present guidelines appear to be broken.

The economic crime guidelines should be fixed, but the amendments published for comment by the Commission simply do not go far enough to reduce the unwarranted emphasis on both loss and multiple specific offense characteristics that, alone and especially in combination, tend to overstate the seriousness of many offenses. The Commission should go further. It should amend the guidelines to place greater emphasis on mens rea and motive in relation to an offense, whether and to what extent the defendant received a monetary gain from the offense, and other circumstances that better reflect the culpability of the offender and the severity of the offense. Finally, the Commission should amend the economic crime guidelines to insure that they “reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense....” 28 U.S.C. § 994(j).

I. A Brief History of the Economic Crime Guidelines

The upward ratchet of the guidelines for economic crimes began at the beginning -- with the initial set of guidelines. Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-guidelines practice, the Commission specifically elected to increase the penalties for economic crimes in the initial 1987 guidelines over the pre-guidelines practices of the judiciary as a whole.⁴ While citing no data demonstrating that these initial increased penalty levels were inadequate, the Commission waited only two years before revising the penalties for economic crimes upward again through a new loss table.⁵ The Commission added numerous aggravating specific offense characteristics from 1989 to 2001,⁶ when it again adopted wholesale increases through yet another new loss table.⁷ Further, a series of high profile corporate scandals drove the Congress to enact the Sarbanes-Oxley Act, which in part directed the Commission to ratchet up the penalties for high-loss economic crimes yet again. The Commission did so in 2003.⁸ The Commission implemented additional increased penalties for certain securities, bank fraud, and health care fraud offenses in 2011 pursuant to congressional directives in the Patient Protection Act and the Dodd-Frank Act. A result of these numerous increases in guideline penalties is that a typical officer or director of a public company who is

⁴ See U.S.S.G. Ch.1 Pt.A. The other exception was in drug cases, where the Commission was driven upward to avoid "cliffs" caused by the mandatory minimum penalties enacted in 1986.

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

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

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

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

convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.

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

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

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

Thus, virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act will now face an advisory range of life without parole. The same is true of many health care and other fraud offenses.

II. Judicial Criticism of the Economic Crime Guidelines

Faced with such “advice,” a number of judges have understandably declined to follow it. In *United States v. Adelson*, for example, Judge Rakoff of the Southern District of New York was confronted with a defendant convicted of joining a conspiracy “initially concocted by others” to materially overstate a public company's financial results and thereby artificially inflate

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

the price of its stock.¹⁰ Adelson's guidelines score was level of 46 -- three levels "off the chart" -- and called for a sentence of life imprisonment. Even the government "blinked at this barbarity," but was unable to make a specific sentencing recommendation.¹¹ For Judge Rakoff, this circumstance exposed "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."¹² Given that Adelson had not originated the fraud, presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate, and coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders," the court sentenced Adelson to three-and-a-half years' imprisonment and ordered restitution in the amount of \$50 million.¹³ Along the way, Judge Rakoff explained that he had jettisoned the advisory guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face."¹⁴

Another example is *United States v. Parris*. In that case Judge Block in the Eastern District of New York sentenced two defendants to five years' imprisonment "in the face of an advisory guideline range of 360 to life."¹⁵ The offense -- a "pump and dump" stock manipulation scheme -- scored an offense level 42 based on upward adjustments for more than \$2.5 million of loss, more than 250 victims, sophisticated means, officer/director status, role in the offense, and obstruction of justice.¹⁶ Quoting Judge Rakoff in *Adelson*, Judge Block described this guidelines scoring as the "kind of 'piling-on' of points for which the guidelines have frequently been

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

¹¹ *Id.* at 511-13.

¹² *Id.* at 512.

¹³ *Id.* at 514-15.

¹⁴ *Id.* at 515.

¹⁵ 573 F.Supp.2d 744, 745 (E.D.N.Y. 2008).

¹⁶ *Id.* at 747-48.

criticized.”¹⁷ The court noted that there were no valid grounds for downward departure from the guidelines and thus, but for their advisory status, it “would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence.”¹⁸ Even the government agreed that “many reasonable sentences would fall outside” the advisory guidelines range.¹⁹ In fashioning a reasonable sentence, the court stated it “would have much preferred a sensible guideline range to give me some semblance of real guidance.” The court found no such help in the present guidelines, observing that “we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.” Instead of being guided by the guidelines, the court assembled a lengthy compendium based on submissions from the parties listing sentences in other high-loss cases.²⁰ After a lengthy discussion of what is essentially an emerging common law of economic crime sentences, the court concluded that a sentence of five years' imprisonment was sufficient to achieve the purposes of sentencing.

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

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

¹⁸ *Id.* at 750-51.

¹⁹ *Id.* at 751.

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

²¹ 707 F.Supp.2d 149, 150 (D. Mass. 2010).

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

A number of similar cases further illustrate judicial dissatisfaction with the economic crime guidelines, although not all resulted in published decisions. In *United States v. Ovid*,²⁴ the defendant faced an advisory guidelines range of 210-262 months, but the district court imposed a sentence of 60 months (with the agreement of the government) based on factors not considered by the guidelines. Ovid did not set out in his business to commit fraud; he contributed more of his own funds to the company than he took out of it, and did not commit the fraud for his own personal gain. In *United States v. Ferguson*, the district court in Connecticut imposed sentences ranging from one year and one day to four years on five defendants whose guideline ranges included the possibility of life imprisonment and who were convicted of fraud leading to over

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

²³ 707 F.Supp.2d at 151. *See also id.* at 154 (“It should be noted that the Guidelines are almost irrelevant here, to the extent that they are completely trumped by the maximum sentence.”).

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

\$500 million in loss.²⁵ In *United States v. Stinn*, a former CEO of a public company faced a guidelines range of life imprisonment but was sentenced to twelve years' imprisonment in the Eastern District of New York.²⁶ A defendant who caused approximately \$25 million in losses was sentenced by the District Court in the Eastern District of Missouri to one year and one day in *United States v. Turkan*.²⁷ Three executives convicted of health care fraud in the Middle District of Florida faced guideline ranges of 121 to 151 months, 108 to 135 months, and 78 to 97 months, but were sentenced to three years, two years, and one year and a day, respectively.²⁸ In *United States v. Cole*, the Eighth Circuit Court of Appeals affirmed as substantively reasonable a probationary sentence where the guidelines range was 135 to 168 months.²⁹ In each of these cases the courts found significant mitigating circumstances not otherwise taken into consideration by the guidelines.

III. The ABA's Proposed Solution

Given our concern about the inequities sometimes caused by the economic crime guidelines and the need to promote greater respect for them, the ABA in 2011 adopted a resolution calling on the Commission to complete a rigorous and comprehensive assessment of these guidelines to better ensure that they are proportional to offense severity and adequately take into consideration individual culpability and circumstances. The resolution urged the

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

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

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

²⁸ *United States v. Farha*, No. 8:11-cr-115-5-30MAP (M.D. FL 2014).

²⁹ *United States v. Cole*, 765 F.3d 884 (8th Cir. 2014).

commission to reduce the reliance on loss as the primary measure of culpability, as perhaps best described by Judge Lynch:

The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting - no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes - to assign precise weights to the theft of different dollar amounts. In many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.³⁰

In the initial 1987 guidelines, the amount of the loss could result in no more than a five-fold increase in the range of imprisonment. Under the current guidelines the loss can increase the range nearly forty-fold. The reliance on loss to drive sentencing outcomes is simply out of control.³¹

It should also be noted that judicial dissatisfaction with the economic crime guidelines is not limited to high-loss cases as some have suggested. The Commission's data for fiscal year 2012 reflect that the rate of non-government sponsored below range sentences spikes from 19.7% to 29.8% once the loss reaches \$30,000.³² The rate of non-government sponsored below-range sentences remains roughly the same as the amount of the loss increases, varying from a low of 26.1% where the loss is between \$2.5 million and \$7 million, to a high of 38.1% where the loss is between \$50 million and \$100 million.³³ The Commission should address the overstated impact of loss on the guidelines at all points in the loss table.

³⁰ *United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

³¹ The present loss table is also needlessly complex given the advisory status of the ending guideline calculation. There is no need for a table that slices loss sixteen different ways to afford judges appropriate advice in determining a reasonable sentence.

³² United States Sentencing Commission Economic Crime Data Briefing, Figure 5, available at <http://www.ussc.gov/videos/economic-crime-presentation>.

³³ *Id.* Data from the last three categories in the loss table are excluded due to the small number of cases in those categories.

Our 2011 Resolution also called on the Commission to look beyond loss, and to consider as well the defendant's actual and/or intended gain from the offense. There can be no question that the harm caused by an offense is an important consideration in determining culpability. But loss often does not tell the whole story without consideration of gain. There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting the proceeds of it into his pocket. The current guidelines fail to draw these distinctions because they are indifferent to the defendant's gain or lack thereof.³⁴ Many, if not all, of the cases where judges have found the current guidelines unhelpful present circumstances in which the defendant's gain was either zero or quite small in relation to the loss.

The ABA resolution further suggested simplification of the economic crime guidelines to reduce and eliminate multiple upward adjustments that, either singly or in combination, produce a “piling on” effect beyond their underlying rationale and often smack of double counting. A fraud that resulted in a \$100 loss to each of 250 victims does not necessarily warrant a sentence six levels higher (roughly doubling the sentence) than a fraud that caused \$25,000 loss to a single victim.³⁵ Many, if not most, of the blizzard of specific offense characteristics added to the fraud guideline over the past two decades are superfluous and frequently fail to accomplish meaningful distinctions in relative culpability across a spectrum of defendants.

³⁴ A defendant's gain may be considered only if there was a loss that cannot reasonably be measured, such that the defendant's gain is used to estimate the loss. U.S.S.G. § 2B1.1, Application Note 1(B).

³⁵ An offense with a large number of victims should be viewed more harshly than one with a small number of victims under some circumstances, but typically that would be so only where the harm caused to the large number of victims was highly significant to each or most of them. In any event it is difficult to justify punishing otherwise identical frauds with the same loss and gain figures with more than a 25 percent variance based solely on the spread of the loss across a number of victims.

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial,³⁶ the guideline should attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in mid-stream under coercive circumstances? Did the offense risk or cause some significant non-monetary harm? Was the offense committed because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?

We were very gratified that the Commission agreed with our assessment that the economic crime guideline required a comprehensive review. Recognizing that the exhortations in our policy resolution could benefit from more concrete suggestions, the ABA Criminal Justice Section formed a special Task Force to move beyond the resolution to the drafting of a specific model guideline that would effectuate the reforms we believe are needed. We are very proud of our Task Force, which consisted of five professors, three judges, six practitioners, two organizational representatives, and observers from the Department of Justice and the Federal Defenders. We presented an initial draft of our Task Force work at the Commission's symposium on economic crimes in the fall of 2013. After numerous additional meetings and drafts, the Task Force arrived at a consensus final proposal for the Commission's consideration in November, 2014. A copy of this Final Report is attached to this testimony as Exhibit A³⁷.

³⁶ U.S.S.G. § 2B1.1(b)(6).

³⁷ The ABA Board of Governors authorized the submission of the Report of the Criminal Justice Section

Our Task Force Final Report reflects a proposed guideline that would accomplish the goals stated in our resolution. In particular, the Task Force proposal reduces the weight placed on loss, eliminates the use of loss that is purely “intended” rather than actual, and introduces the concept of “culpability” as a measure of offense severity working in conjunction with loss. Through the culpability factor, the Task Force proposal would permit consideration of numerous matters ignored by the current guideline, including the defendant’s motive (including the general nature of the offense), the correlation between the amount of the loss and the amount of the defendant’s gain, the degree to which the offense and the defendant’s contribution to it was sophisticated or organized, the duration of the offense and the defendant’s participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The Task Force proposal also sets forth a more nuanced approach to victim impact, recognizing that in many instances the harm to victims is fully captured by consideration of the amount of the loss caused by the offense, and that in some circumstances the nature of the harm suffered by the victims will be more significant than their number. Finally, the Task Force proposal would implement the statutory directive of 28 U.S.C. § 994(j) by providing an offense level cap where the offense is not “otherwise serious.”

IV. The Commission’s Proposed Amendments

While we applaud the Commission for its careful attention to the economic crime guidelines and support one or more versions of the various amendments published for comment, we are disappointed that the proposed amendments do not go nearly far enough to address the

shortcomings of the current guidelines. The proposed amendments would leave intact the guidelines' undue emphasis on loss, the reliance in some instances on loss that is merely intended rather than actual, the potential "piling on" of numerous specific offense characteristics that frequently overstate culpability,³⁸ and the failure to include or address many other considerations that bear on the culpability of the offense or render it not otherwise serious and thus deserving of a sentence other than imprisonment.³⁹

If the Commission is unwilling to consider a more comprehensive re-write of the guideline along the lines of that proposed by our Task Force, we urge the Commission to give consideration to the expansion of Application Note 20(C) regarding the circumstances in which "the offense level determined under this guideline substantially overstates the seriousness of the offense." The Background commentary to the guideline explains:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

We believe the work of the Commission as well as our Task Force reveals that there are many circumstances where loss, alone and in combination with other specific offense characteristics, may substantially overstate the seriousness of the offense. We believe the guideline would be

³⁸ See *United States v. Schmitz*, 717 F.3d 536, 539-40 (7th Cir. 2013) (describing "factor creep" phenomenon resulting from the "three-fold increase in the number of specific offense characteristics . . . incorporated into the fraud guideline").

³⁹ The Commission's data also demonstrate that mitigating circumstances are not adequately addressed by the mitigating role in the offense provision, U.S.S.G. §3B1.2, as that provision is applied in a meager 6% of economic crime cases. United States Sentencing Commission Economic Crime Data Briefing, Figure 9, available at: <http://www.ussc.gov/videos/economic-crime-presentation>.

significantly improved by the addition of the following language to Application Note 20(C):

Where the motive for the offense was not entirely predatory, where the loss was largely intended rather than actual, where the defendant's gain from the offense was significantly less than the loss, where the offense was of limited sophistication or duration, where significant and unusual extenuating circumstances contributed to the commission of the offense, or where the defendant took significant steps to mitigate the harm caused by the offense, the guideline may produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted. Where the totality of the circumstances demonstrate that the offense is not otherwise serious and the defendant is a first offender, a departure to a sentence other than imprisonment is generally appropriate.

An application note of this nature would greatly improve the operation of the guidelines. To the extent the Commission is concerned that courts will utilize this departure authority without appropriate basis or with a lack of uniformity, these concerns could be addressed by a requirement that a departure pursuant to this provision must be supported by specific findings regarding the nature of the mitigating circumstances at issue and the justification for the departure and extent of such departure with reference to those specific mitigating circumstances.

Although the amendments published for comment by the Commission do not go far enough in the absence of an addition to Application Note 20(C), the ABA supports each of the Commission's proposals. The adjustment to the tables for inflation is both appropriate and long overdue. Although the Task Force Report recommends the elimination of intended loss,⁴⁰ the Commission should at a minimum clarify that intended loss is limited to that which the defendant purposely sought to inflict. To better individualize the culpability of each criminal participant in an offense, the losses intended to be inflicted by each participant should be used as

⁴⁰ See also *United States v. Corsey*, 723 F.3d 366, 378 (2d Cir. 2013) (criticizing guidelines' use of intended loss).

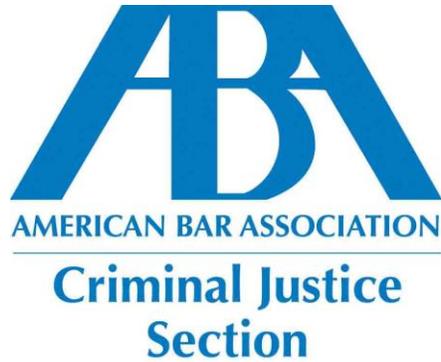
the measure of culpability, rather than considering such intended losses in the aggregate. The use of aggregate loss to drive culpability is sustainable where those losses are actual, but this justification loses much of its force where the losses exist only in the minds of others. A similar limitation on the sophisticated means adjustment would also be appropriate – defendants’ culpability is much more justifiably increased where they are themselves responsible for the sophistication of the offense. And in considering sophisticated means, the Commission should clarify that the adjustment focuses on the degree of sophistication in comparison to schemes of the same general type at issue rather than in comparison with any and all economic crimes channeled to Section 2B1.1.

The victim table has been a tremendous source of unwarranted severity. Under ordinary circumstances the harm suffered by the victims of an economic crime is fully accounted for by consideration of the amount of the loss caused by the offense. It would be a great improvement to the guideline to limit the application of the victim table to increases in one-level increments based on either a large number of victims or where one or more victims suffered extraordinary financial harm. The cumulative cap on these considerations should be four levels rather than six, and hardships other than financial ones are best left to departures under existing Application Note 20(A). These types of extreme non-economic harms are unusual, and frequently turn on information that is not known by or available to the parties at the time of plea negotiations or even trial.

The ABA also supports the use of gain rather than loss in the “fraud on the market” cases identified by the Commission. The loss in such cases is often highly speculative and a subject of considerable good faith debate in many circumstances due to complex questions of timing and causation. More importantly, the amount of the loss may be especially likely to overstate the

seriousness of the offense in cases of this nature where the defendant's gain may be minimal in relation to the loss. For the reasons set forth above, however, the ABA believes the use of gain as an important sentencing consideration in combination with loss should not be limited to "fraud on the market" offenses, and there would seem to be no evident rationale for doing so. In any event, the Commission should refrain from setting a mandatory minimum floor on the loss enhancement where gain is used as an alternative to loss. The penalties for these offenses are quite severe in the absence of such a floor, and the use of a floor will prevent important distinctions in relative culpability among offenders from being able to be drawn.

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



**A Report on Behalf of
The American Bar Association
Criminal Justice Section
Task Force on The Reform of
Federal Sentencing
for Economic Crimes**

Final Draft

November 10, 2014

- *The views stated in this submission are presented on behalf of the Criminal Justice Section. The report has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

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Economic Offenses

(a) **Base Offense Level:** [6-8]

(b) **Specific Offense Characteristics**

(1) **Loss.** If the loss exceeded \$20,000, increase the offense level as follows:

(A) More than \$20,000	add [4]
(B) More than \$100,000	add [6]
(C) More than \$1,000,000	add [8]
(D) More than \$5,000,000	add [10]
(E) More than \$10,000,000	add [12]
(F) More than \$50,000,000	add [14]

(2) **Culpability**

(A) Lowest culpability	subtract [6-10]
(B) Low culpability	subtract [3-5]
(C) Moderate culpability	no change
(D) High culpability	add [3-5]
(E) Highest culpability	add [6-10]

(3) **Victim Impact**

(A) Minimal or none	no increase
(B) Low	add [2]
(C) Moderate	add [4]
(D) High	add [6]

(c) **Special Offense Considerations**

For offenses of a kind specified in Section 2B1.1(b)(3) through (9), (11) through (14), or (16) through (18), the court should consider those offense characteristics to the extent they are appropriate in determining culpability or victim impact. Where the offense presents a special concern of the kind intended to be addressed by these subsections, and where the concern has not been addressed in determining the offense level, increase by 2 offense levels. [incorporate specific Congressional directives].

(d) **Offense level cap of 10 for non-serious offenses by first offenders**

If the defendant has zero criminal history points under Chapter 4 and the offense was not “otherwise serious” within the meaning of 28 U.S.C. § 994(j), the offense level shall be no greater than 10 and a sentence other than imprisonment is generally appropriate.

Application Notes:

1. Loss:

[To be incorporated from current 2B1.1 with the modification that loss means actual loss].

2. Culpability:

Consideration of the various culpability factors

The guideline has 5 levels of culpability that range from lowest to highest. The appropriate culpability level for any given case will depend on an array of factors. These include, but are not limited to: the defendant's motive (including the general nature of the offense); the correlation between the amount of loss and the amount of the defendant's gain; the degree to which the offense and the defendant's contribution to it was sophisticated or organized; the duration of the offense and the defendant's participation in it; extenuating circumstances in connection with the offense; whether the defendant initiated the offense or merely joined in criminal conduct initiated by others; and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The list is not exclusive. Other factors may also bear on the culpability level.

Because of the nature and number of these culpability factors, as well as the almost limitless variety of possible combinations, there is no workable formula for assigning values to each individual factor. Rather than assign a numeric score to each individual culpability factor, the court instead arrives at one of five culpability levels after considering the combined effect of all culpability factors. The weight that each particular culpability factor plays in a given case will vary. In some cases, the defendant's motive will be the factor most indicative of the defendant's culpability. In other cases, extenuating circumstances will play the most prominent role. Also, these various factors will often overlap. A less culpable motive, or a less culpable nature of the offense, will sometimes be evident in the extenuating circumstances that prompted the defendant to commit the offense.

The end result of the court's analysis should be a culpability level that "ranks" the defendant in the hierarchy of five levels of culpability for all defendants sentenced under this guideline. By definition, all defendants sentenced under the guideline are to some degree "culpable." The court should not be reluctant to find a mitigating culpability value out of concern that it will signal a lack of opprobrium for the offense – the point of the analysis is to accomplish proportionality by meting out sentences that are sufficient but not greater than necessary to accomplish the purposes of sentencing in the light of each defendant's culpability when compared with all

other defendants sentenced under this guideline.

As a way of assisting the court in making the culpability assessment, it is anticipated that the middle culpability category – “moderate culpability” – would account for the largest number of defendants sentenced under the guideline. A defendant seeking an assessment of “low” or “lowest” culpability bears the burden of proof to establish this, while the government bears the burden to prove either “high” or “highest” culpability.

In assigning a culpability level, the court should be careful not to “double count” the amount of loss or the victim impact, each of which is a separate specific offense characteristic. Although in some circumstances there may be overlapping considerations bearing on each factor, loss, culpability, and victim impact are each intellectually distinct concepts warranting individualized assessment. Thus, a high loss or significant victim impact may result from conduct reflecting mitigated culpability by some or even all of the criminally responsible participants. Conversely some cases may present aggravated culpability resulting in more limited loss or victim impact.

There is also overlap between the considerations that inform the defendant’s level of culpability and those that bear on the defendant’s role in the offense as determined under Chapter Three. Nevertheless, as with the relationship of culpability to loss and victim impact, role in the offense is also intellectually distinct from culpability and requires separate inquiry. Where it is necessary for the court to weigh the same considerations governing role in the offense in its assessment of culpability, this may in some circumstances require a sentence outside the range resulting from a cumulative application of the culpability and role adjustments.

The court should also recognize that this guideline is intended to address *offense* characteristics. The court should continue to consider *offender* characteristics at sentencing in accordance with 18 U.S.C. § 3553(a). Although aspects of offender characteristics may overlap with culpability considerations, these are intellectually distinct concepts requiring separate consideration.

(A) *Motive/Nature of Offense*

One factor in the culpability level is the defendant’s motive or the nature of the offense. The following examples occur frequently in cases sentenced under this guideline.

- (1) *Predatory* – These offenses are intended to inflict loss for the sole or dominant purpose of generating personal gain to the defendant or to others involved in the criminal undertaking. These offenses – accompanied by no legitimate purpose – are among the most culpable types of offenses sentenced under this guideline.

(2) *Legitimate ab initio* – These offenses often arise from otherwise legitimate efforts that have crossed over into criminality as a result of unexpected difficulties. Even though such offenses may be intended to cause loss for the purpose of generating personal gain to the defendant or to others involved in the criminal undertaking, they rank lower on the culpability scale than predatory offenses.

(3) *Risk shifting* – These offenses are not specifically intended to cause loss. Instead, they shift the risk of any potential loss from the defendant (or from others involved in the criminal undertaking) to a third party, such as the victim of the offense. Examples include false statements for the purpose of obtaining a bank loan that is intended to be repaid. Such offenses are generally less culpable than those where loss is specifically intended.

(4) *Gatekeeping* – These offenses are not specifically intended to cause loss or even to shift the risk of loss. Instead, they violate so-called “gatekeeping” requirements intended generally to prevent practices that create potential loss or a risk of loss. Examples include billing Medicare for medically necessary goods and services that are actually provided without the appropriate third-party verification of medical necessity. Such offenses are generally at the lower level of culpability under this factor.

There may be cases where the nature of the offense fits more than one of these descriptions. And there may be cases for which none of these categories is appropriate. Whether or not these descriptions fit a particular case, the court should take them into account when considering how the defendant’s motive (including the nature of the offense) compares, for culpability purposes, to that of other defendants sentenced under this guideline whose offenses match these descriptions.

(B) *Gain*

Another culpability factor is the gain to the defendant or to others involved in the criminal undertaking.

(1) *Commensurate with loss* – Where the defendant and others involved in the criminal undertaking derive a gain from the offense in an amount that is roughly commensurate with the loss, this ordinarily indicates a higher degree of culpability.

(2) *Less than loss* – Where the defendant and others involved in the criminal undertaking derive a gain from the offense in an amount that is less than the loss, this ordinarily indicates a lesser degree of culpability than (1).

(3) *Minimal or Zero* – Where the defendant and others involved in the criminal undertaking derive little or no gain from the offense, this ordinarily indicates a lesser degree of culpability than (2).

The extent to which the defendant *personally* gained may also be relevant to the culpability level. For example, an accountant convicted for participation in a securities fraud scheme would be less culpable (on the factor of gain) than an officer of the company who personally gained more than the accountant. Also, a small amount of gain in relation to the loss may not always mean a lower level of culpability. For example, a defendant who intentionally inflicts a large loss on others for the purpose of achieving a small gain would be more culpable with respect to the gain factor than someone who did not intend the loss. The degree of culpability in this example varies depending on the extent to which the loss was foreseeable to the defendant.

(C) *Degree of sophistication/organization*

Criminal undertakings involving a high degree of sophistication and/or organization generally reflect a greater threat of harm and a higher level of culpability. The reverse is also true – where the offense is executed in a simple manner without the involvement of large numbers of participants, this generally reflects a lesser threat of harm and a lower level of culpability. The court should also consider the extent of the defendant's contribution to the offense's sophistication or organization. A defendant with less responsibility for the offense's sophistication or organization would be less culpable, all other things being equal, than one with greater responsibility for these characteristics.

(D) *Duration*

As with sophistication and organization, the duration of the offense and the defendant's participation in it also frequently reflects differences in culpability. Criminal undertakings that extend over several months or longer suggest a greater degree of culpability, while those that occur in a single event or over a shorter period of time in many circumstances reflect a lower level of culpability.

(E) *Extenuating circumstances*

Some defendants will commit an offense in response to various circumstances, such as coercion or duress. There are many extenuating circumstances that could contribute to the commission of an offense, and the extent of their contribution will also vary from case to case. A defendant's culpability will be affected by the nature of these extenuating circumstances and the extent to which they played a part in the commission of the offense.

(F) *Efforts to mitigate harm, including voluntary cessation, self-reporting, or restitution*

A defendant will sometimes take steps that help mitigate the harm or otherwise reflect a lower level of culpability. Where the defendant voluntarily ceases the offense conduct prior to its detection, this generally indicates a decreased level of culpability. Self-reporting of the offense is also a sign of lower culpability, as is voluntary restitution. In considering the significance of restitution, care must be taken not to punish a defendant more severely as a result of a lack of financial resources.

The court may consider a defendant's cessation of criminal conduct even if it does not qualify as a legal defense to conviction for conduct that occurred after the defendant's involvement ceased. For example, the court may consider the fact that a defendant ceased taking part in a conspiracy even though the legal standard for withdrawing from the conspiracy was not met.

3. *Victim Impact:*

The guideline has four levels of victim impact: (1) minimal or none; (2) low; (3) moderate; and (4) high. As with the culpability levels, there are many factors to consider in arriving at the appropriate level of victim impact. The court should consider how the combination of these factors places the defendant's offense in comparison to victim impact in other cases under this guideline. The court should also be cognizant that the amount of the victim(s)' loss is already accounted for and should not be counted again in the context of victim impact. An additional score for victim impact is appropriate only where there is a harm beyond that inherent in the amount of the loss.

(A) *Vulnerability of victims*

Where victims are identified and targeted because of some particular vulnerability they suffer, this may indicate a higher degree of victim impact (and/or culpability). The court should be careful not to "double count" the vulnerability of the victims in assessing culpability, victim impact, and the special adjustment in Chapter Three for vulnerable victims, 3A1.1(b). Nevertheless, there may be some circumstances in

which the vulnerability of victims results in a peculiar degree of impact, particularly where that impact was foreseeable to the defendant, that would warrant an increase in the victim impact adjustment as well as an enhancement for vulnerable victim in Chapter Three.

(B) *Significance of loss*

Where the victim suffers losses that threaten the victim's financial soundness, this generally indicates a higher degree of victim impact. This may be more common where the victims are individual as opposed to institutional. It is assumed that in most offenses involving an institutional victim, the impact is measured principally by the amount of the loss such that no additional victim impact adjustment would ordinarily be appropriate in the absence of the failure or bankruptcy of the institution.

(C) *Other non-economic harm*

Where the victim has suffered a significant non-economic harm, this may not be captured in the loss adjustment, and thus the guideline may understate the seriousness of the offense under some circumstances in the absence of an upward adjustment reflecting victim impact.

(D) *Victim inducement of offense*

In some circumstances the victim has contributed to the offense in some manner. This may include inducing the commission of the offense or some lesser degree of conduct. Under such circumstances it may be appropriate to partially discount the impact on the victim as a measure of offense severity.

4. *Offense level cap for offenses that are not "otherwise serious":*

The Sentencing Reform Act provides as follows: "The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense...." 28 U.S.C. § 994(j). Many of the offenses falling within this guideline are not "otherwise serious."

In determining whether an offense is not "otherwise serious," the court should consider (1) the offense as a whole, and (2) the defendant's individual contribution to the offense. For example, a low level employee who is peripherally involved in what would be an "otherwise serious" offense as to other defendants may nevertheless qualify for this offense level cap.

Factors to be considered in determining whether the offense is one for which a sentence of probation is appropriate include the following: the amount of the loss; whether loss was intended at the outset of the offense conduct; whether the defendant's gain from the offense is less than the loss; whether the defendant's

offense conduct lacked sophistication (including whether it was committed in a routine manner or without the involvement of a large number of participants); whether the defendant acted under duress or coercion; the duration of the offense conduct and the defendant's participation in it; whether the defendant voluntarily ceased the offense conduct before it was detected; and the nature of the victim impact caused by the offense. Where the defendant has no criminal history points, and where the circumstances of the offense support a finding that the offense was not "otherwise serious," the offense level under this guideline shall be no greater than 10, and a sentence other than imprisonment is generally appropriate.

Reporter's Notes

A. Members of the Task Force and Principles of Consensus.

In April 2013 the Criminal Justice Section of the American Bar Association assembled this Task Force to evaluate the reforms needed in the sentencing of federal economic crimes and to draft a proposed federal sentencing guideline to effectuate those reforms. The Task Force consists of five professors, three judges, six practitioners, two organizational representatives, and observers from the Department of Justice and the Federal Defenders:

- Stephen Saltzburg (Chair)
Professor of Law, George Washington
University School of Law
- James E. Felman, Esquire (Reporter)
Kynes, Markman & Felman, P.A.
- Sara Sun Beale
Professor of Law
Duke University School of Law
- Barry Boss, Esquire
Cozen O'Connor
- David Debold, Esquire
Gibson Dunn & Crutcher
- The Honorable Nancy Gertner
Professor of Law
Harvard Law School
- The Honorable John Gleeson
United States District Court
Eastern District of New York
- A. J. Kramer (Observer)
Federal Defender
District of Columbia
- Gary Lincenberg, Esquire
Bird, Marella, Boxor, Wolpert,
Nessim, Brooks & Lincenberg
- The Honorable Gerard Lynch
United States Court of Appeals
- for the Second Circuit
- Jane Anne Murray
Practitioner in Residence
University of Minnesota Law School
- Kyle O'Dowd, Esquire
Associate Executive Director for Policy
National Association of Criminal
Defense Lawyers
- Marjorie J. Peerce, Esquire
Ballard, Spahr, Stillman
& Friedman, P.C.
- Mary Price, Esquire
Vice President and General Counsel
Families Against Mandatory Minimums
- The Honorable Jed Rakoff
United States District Court
Southern District of New York
- Neal Sonnett, Esquire
Neal R. Sonnett, P.A.
- Kate Stith
Professor of Law
Yale Law School
- The Honorable Jonathan Wroblewski
(Observer)
Director, Office of Policy and
Legislation
United States Department of Justice

After a number of meetings and telephone conferences, the group arrived at a consensus proposal subject to a number of important caveats. These caveats are an essential aspect of the proposal to avoid misunderstanding its nature and scope.

First, we feel more strongly about the structure of the proposal than we do about the specific offense levels we have assigned. We assigned offense levels in the draft because we think it is helpful in understanding the structure, but the levels have been placed in brackets to indicate their tentative nature. Indeed, in some instances we have bracketed a range of levels, although as noted below in the discussion of the “Twenty-Five Percent Rule” we recognize that a final guideline likely could not include such a range. We have performed no research and have no empirical basis for the levels we assigned in the draft.

We have applied the proposal to an array of specific case scenarios, and this exercise was very helpful to us on a number of levels. We were reassured about the structure of the proposal – we felt the proposal captured the offense characteristics most relevant to sentencing, and it placed appropriate weight on the considerations of loss, culpability, and victim impact in relation to one another. We also felt that the proposal is sufficiently clear and specific that it leads to reasonably uniform application. Although the culpability and victim impact considerations do not lend themselves to exact quantification in the same way as measuring the amount of loss, we were able to reach consensus on the application of the proposal to the scenarios without undue difficulty or disparity. Most of us were comfortable with the range of outcomes that result from the levels assigned in the draft, but it should be understood that we devoted the bulk of our efforts to structural improvements and less time to issues of optimal punishment severity, in part out of a recognition that there are inherently political components to such judgments.

Second, we discussed but did not fully resolve the question of whether certain categories or types of offenses should be sentenced under a separate guideline in light of the very wide array of offenses sentenced under this guideline. We believe, in particular, that certain types of securities offenses where changes in the value of market capitalization drive the loss calculation may be especially suited for consideration under a separate guideline.

Third, the proposal is submitted as a consensus product in accordance with the following limiting principles:

1. It is assumed that, for the foreseeable future, the current structural framework dictated by statute will remain in place, including the 25% rule (28 U.S.C. § 994(b)(2)), and that the Commission therefore will still find it necessary to assign fairly specific numeric values to sentencing considerations. The draft proposal is written to comply with that assumed structural framework, although it should be noted that the American Bar Association supports the repeal of the 25% rule. ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.
2. This structural framework (both the 25% rule and the guidelines’ overly arithmetic approach) is not ideal because it can be unduly rigid and lead to the arbitrary

assignment of values and the overemphasis of considerations that are more easily quantified to the detriment of equally relevant considerations that are less easily quantified. There is also a risk under the current structural framework that a guideline will appear to carry more empirical or scientific basis than is present.

3. A better structural framework would (a) place less emphasis on arithmetic calculations and those few sentencing considerations that lend themselves to exact quantification; and (b) allocate greater sentencing authority to the judiciary.
4. The Task Force is not necessarily of one mind regarding the ideal allocation of sentencing authority between the Congress, the Sentencing Commission, the Judiciary, and the Executive Branch, but it was not deemed necessary to achieve consensus on this point as this proposal is premised on the assumption that the current structural framework will remain in place.

B. Intent of the Proposal Within the Existing Guidelines Structure

The proposal is intended as a free-standing substitution in the Guidelines Manual for the existing Guideline Section 2B1.1. There are two aspects of this substitution that bear particular emphasis.

First, we understand that Subsection (c) of the proposed guideline regarding Specific Offense Characteristics (“SOCs”) would need to be tailored to comply with specific Congressional directives to the Sentencing Commission. Many of these directives are open-ended, and require only that the Commission “consider” amending the guidelines as necessary in light of specific legislation. We believe our proposal accommodates those directives by instructing the court to apply the SOC’s in the existing guideline that resulted from such directives where the offense presents a special concern of the kind intended to be addressed by these SOC’s, and where that concern has not otherwise been addressed in determining the offense level under the guideline. But we also recognize that there have been a handful of Congressional directives that required specific amendments to the guideline. An example of such a specific directive is that contained in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606, 124 Stat. 119, 1006 (2010), which directed new offense level increases for higher loss frauds involving government health care programs. Our proposal would need to be conformed to these specific directives if adopted by the Sentencing Commission.

Second, the proposal, like all provisions of Chapter Two of the Guidelines, is intended to deal solely with *offense* characteristics. The court should continue to consider *offender* characteristics at sentencing in accordance with 18 U.S.C. § 3553(a). Although aspects of offender characteristics may overlap with culpability considerations, these are intellectually distinct concepts requiring separate consideration.

C. Compliance with the “Twenty-Five Percent” Rule

Title 28 U.S.C. § 994(b)(2) provides: “If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.” Early in the life of the Sentencing Commission, it decided to construe this statutory limitation to apply not only to the final sentencing range resulting from the guidelines computation, but also to each adjustment along the route of that computation. While this construction of the statute does not appear to be compelled by its terms, our proposal is drafted on the assumption that the Commission will not revisit this question. Accordingly, we recognize that adoption of our proposal would require the Commission to select a specific numeric value for the base offense level and each of the culpability categories. As noted above, we elected to include a range of possible values in our proposal to illustrate the range of possible outcomes under it, depending on the levels ultimately selected by the Commission. We are confident, however, that if a specific value is inserted for the base offense level and each of the culpability levels, our proposal would then comply with the statute. We have heard some outside comment that because the culpability consideration groups together a wide array of factors and thus results in such a wide array of ultimate offense level outcomes, this renders the proposal violative of the statute. We do not agree with this view, and find support for our position in the observation that role in the offense also groups together a wide array of potential considerations and can result in an eight-level swing in the range resulting from those considerations. *See* U.S.S.G. §§ 3B1.1, 1.2.

D. Case Scenarios

These scenarios are intended to illustrate application of the proposal and the manner in which it might diverge from the current guideline. They are intended as a rough illustration of how the proposal would operate based on a very general level of detail. A much wider array of facts would frequently be relevant to a court’s consideration of an appropriate sentence. Also, the scenarios do not include information regarding the history or characteristics of the offender under the assumption that these very important sentencing factors will be considered by the court in fashioning a reasonable sentence pursuant to 18 U.S.C. § 3553(a). Finally, the scoring of the scenarios continues to utilize a range of offense levels for the base and culpability factors, but we recognize that adoption of the proposal would require the selection of a specific numeric value for these factors in accordance with the “twenty-five percent” rule in 28 U.S.C. § 994(b)(2).

Case Scenario 1

The defendant was an organizer and leader of a fraudulent “lottery” scheme in which elderly persons were identified and contacted by telephone, advised that they had won a lottery award, and told that to obtain the award they must first pay advance fees to cover matters such as taxes, insurance, bonding, or other matters. After the victims submitted the requested fees, they were advised to expect the delivery of their winnings via armored car to their homes at specific dates and times. When the armored car did not arrive, the victims’ efforts to contact those to whom they had remitted the fees were not successful. The scheme victimized 14 individuals, most of whom were 70 years old or older. For six of the victims, the losses represented their life savings. The fees paid ranged from \$20,000 to \$175,000, with a total loss to all victims of roughly \$1.7 million. The majority of these funds were obtained by the defendant and converted to his personal use.

Score under current guideline:

Base Offense level:	7
Loss:	+16
more than 10 victims/mass marketing:	+2
Vulnerable victim	+2
Role in the offense	<u>+4</u>
	31

Score under ABA proposal:

Base Offense level:	6-8
Loss:	+8
Highest culpability:	+6-10
High victim impact:	+6
Vulnerable victim	+2
Role in the offense	<u>+4</u>
	32-38

This scenario presents a predatory offense where the defendant’s gain was roughly commensurate with the loss. Although the scenario does not specify the degree of sophistication or duration of the offense, some sophistication and duration is implicit in the nature and extent of the scheme. No extenuating circumstances or efforts to mitigate harm are specified. This presents a “highest culpability” offense. The victim impact is also “high” in light of the significance of the loss to six of the victims. The scheme targeted the victims based on their elderly status, and if some of them were unusually vulnerable for that reason this would be additional support for findings of high victim impact and highest culpability. It is assumed that for purposes of Chapter Three this scenario would also score adjustments for both vulnerable victim and leadership role in the offense. These adjustments are the same under both this proposal and the existing guideline as this proposal does not address Chapter Three.

Case Scenario 2

The defendant was the owner of a legitimate business for many years and financed the operations of the business through a line of credit secured by the inventory and accounts receivable of the business. When the business came on difficult times, the defendant caused the submission of false information to the lender regarding both inventory and accounts receivable, thus enabling the business to borrow more than it would otherwise have been permitted to borrow. The defendant also attempted to support the operations of the business by liquidating his personal assets and investing the proceeds into the business. The lender discovered the fraud and caused the termination of the business. After mitigating its losses by selling the inventory and collecting legitimate accounts receivable, the lender was left with a loss of approximately \$6.9 million. A forensic accounting revealed that during the period of the fraud the defendant contributed more funds to the business than he withdrew from it in salary and other compensation.

Score under current guideline:

Base Offense level:	7
Loss:	+18
More than \$1 Million in gross receipts:	+2
Role in the offense	<u>+4</u>
	31

Score under ABA proposal:

Base Offense level:	6-8
Loss:	+10
Low culpability:	-3-5
Low victim impact	+2
Role in the offense	<u>+4</u>
	17-21

This scenario presents a mixture of legitimate ab initio and risk shifting fraud. Although the offense had some degree of sophistication, the less culpable motive, zero gain to the defendant, extenuating circumstances, and efforts to mitigate harm result in a “low culpability” score. The victim impact is also rated as “low” given that it involved a single institutional victim, but not minimal given the magnitude of the loss and the difficulty of the detection of the offense and the efforts needed to mitigate its harm. It is assumed the defendant would receive a leadership role in the offense adjustment under Chapter Three.

Case Scenario 3

The defendant was the owner of a durable medical equipment business that provided oxygen to Medicare patients. To qualify for reimbursement, equipment providers must ensure the oxygen is medically necessary by sending patients to an independent laboratory for testing. Instead of referring patients to independent labs for testing, the defendant caused his employees to conduct the testing themselves and then falsely represent to Medicare that the testing had been performed by an independent lab. Virtually all of the oxygen was medically necessary, although Medicare would not have paid the bills for it had the failure to qualify the patients by independent testing been disclosed. The fraud continued for more than a year, and involved in false representations regarding the testing of 159 patients. The amount billed to Medicare for their oxygen was \$7.1 million. The patients were billed a small co-pay fee, and a small portion of the reimbursement for the oxygen received by these patients was also paid by 109 supplemental insurance companies.

Score under current guideline:

Base Offense level:	7
Intended loss:	+20
Sophisticated means:	+2
Production of unauthorized access device:	+2
More than 250 victims:	+6
Health care fraud offense	+3
Role in the offense	<u>+4</u>
	44

Score under ABA proposal:

Base offense level:	6-8
Actual loss:	+10
Moderate culpability:	0
Low victim impact:	+2
Health care fraud offense	+3
Role in the offense	<u>+4</u>
	25-27

This scenario presents a gatekeeping offense (although if the oxygen was either not provided or medically unnecessary this would be a predatory offense). Under current law in at least some circuits, the amount billed is treated as loss notwithstanding the medical necessity of the oxygen. *See, e.g., United States v. Bane*, 720 F.3d 818 (11th Cir. 2013). Notwithstanding the less culpable motive, the defendant's culpability is considered "moderate" given his personal benefit as the owner of the company, the degree of sophistication involved, the duration of the offense, and the absence of any extenuating circumstances or efforts to mitigate harm. The victim impact is considered low in light of the medical necessity of the treatments provided but not minimal in light of the sensitive nature of the government benefits program at issue. It is assumed that an additional three-level upward adjustment would be required under the Congressional directive presently located at 2B1.1(b)(7), as well as a leadership enhancement under Chapter Three.

Case Scenario 4

The defendant accepted \$1,000 to act as a “straw purchaser” in a fraudulent real estate transaction that resulted in a \$250,000 loss to a financial institution.

Score under current guideline:

Base offense level:	7
Loss:	+12
Role in the offense	<u>-2</u>
	17

Score under ABA proposal:

Base offense level:	6-8
Loss:	+6
Low culpability:	-3-5
Minimal victim impact:	0
Role in the offense	<u>-2</u>
	5-9 ¹

This scenario presents a risk shifting offense in which the defendant’s gain is minimal in relation to the loss and the offense involved limited sophistication and duration. On the other hand, the defendant knowingly played an essential role in a serious offense causing a significant risk of loss and did derive a direct personal benefit from the offense. For these reasons, the defendant’s culpability would be “low” but not “lowest.” The victim impact is considered minimal in that the victim is institutional, the amount of the loss did not threaten the security of the institution, and the severity of the offense conduct is adequately captured by the loss amount alone. A mitigating role in the offense adjustment under Chapter Three is assumed, but would not in all cases be applied.

¹If the Base Offense Level is set at 8, Low Culpability is set at -3, and the defendant did not receive a mitigating role adjustment, this would result in an offense level 11, but in this scenario the offense level cap for non-serious offenses would cap the offense level at 10 if the defendant is a first offender.