

Testimony of

CATHERINE M. FOTI

on behalf of the

NEW YORK COUNCIL OF DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION

for the hearing on

2015 PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

Washington, D.C.

March 12, 2015

INTRODUCTION

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

Good morning, my name is Catherine Foti. For more than twenty-five years, I have been engaged in the private practice of federal criminal defense with Morvillo Abramowitz Grand Iason & Anello PC, in New York City. I am a former member of the Board of Directors of the New York Council of Defense Lawyers (“NYCDL”), and I currently serve as the chair of the NYCDL’s Sentencing Guidelines Committee.

On behalf of the NYCDL, I would like to begin by thanking you for the opportunity to address the Sentencing Commission (“Commission”) with respect to some of the important issues under consideration during this amendment cycle. The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of criminal cases, especially white collar criminal cases, in federal court. We count among our members several former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York and current and former attorneys from the Office of the Federal Defender in those districts, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York. Our members thus have gained familiarity with the Sentencing Guidelines (“Guidelines”) both as prosecutors and as defense lawyers. My testimony will be focused on the Commission’s proposed amendments to the economic crimes Guidelines, and address additional amendments that regularly impact cases involving economic crime.

The NYCDL intends to submit a more formal submission on or before March 18, 2015 in response to the Commission’s requests for comments. What follows below is a synopsis of the key points that the more extensive submission will cover, which we wanted to highlight for you today.

PROPOSED AMENDMENTS: ECONOMIC CRIMES

The Commission has proposed a multi-part amendment to the Guidelines provisions applicable to economic crimes. This proposed amendment is a result of the Commission's multi-year study of § 2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines.

We respectfully submit that the existing Guidelines and policy statements applicable to economic offenses covered by § 2B1.1 result in a recommended advisory Guidelines range that is far greater than necessary to accomplish the purposes of punishment for most defendants.

The NYCDL believes that although the amendments currently being considered are a step in the right direction, further work is required to more appropriately reflect the culpability of individual defendants and to reduce the number of exorbitantly high advisory Guidelines ranges that arise in a substantial number of these cases. As the Commission may know, a Task Force assembled by the Criminal Justice Section of the American Bar Association ("ABA") recently submitted a report on reforming federal sentencing for economic crimes. In its report, the ABA Task Force suggested that the Guidelines approach to sentencing for economic crimes be revised to focus on the culpability of individual defendants. The NYCDL agrees with the premise of the ABA Task Force's report and also suggests that the Commission reconsider its entire approach to sentencing for economic crimes.

Proposed Amendment: Intended Loss

The Commission has proposed two alternative amendments to the definition of "intended loss" set forth at Note 3(A)(ii) to § 2B1.1 of the Guidelines. Both alternatives adopt the subjective approach to "intended loss" that has been followed by the majority of the circuits by proposing that "intended loss" shall be "the pecuniary harm that was intended to result from the offense" with the defendant's intent to be inferred from all available facts. The two alternatives differ in that the second option would also include in the definition of "intended loss" the "pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under 1B1.3(A) for the other participant."

The NYCDL, while generally skeptical of the utility of “intended loss” as a factor in sentencing, believes that the proposed change in the definition is a positive step towards insuring that sentencing is based on a defendant’s personal conduct. The Commission’s proposed amendment adopts the language of the court in *United States v. Manatau*, (647 F.3d 1048 (10th Cir. 2011)), that “intended loss” should be: “the pecuniary harm that the defendant purposely sought to inflict” and expressly rejects the objective approach endorsed by the First Circuit in *United States v. Inarelli* (524 F.3d 286 (1st Cir. 2008)) and the Seventh Circuit in *United States v. Lane* (323 F.3e 568 (3d Cir. 2003)), which focused instead on a defendant’s reasonable expectation or objective risk for the victims.

The NYCDL disagrees with Option 2 to the revised definition of “intended loss” which would include the harm intended by other participants. This alternative is contrary to the purpose of the overall amendment which is intended to “better reflect a defendant’s culpability” and will make any proceeding to determine “intended loss” unnecessarily complicated and practically impossible for the defendant needing to counter government allegations as to another person’s subjective intent. If the defendant and the other person jointly formed the intent to inflict pecuniary harm, then any such intent would presumably be included in the intent attributed to the defendant. However, if the other person formed an intent independent of the defendant, then that other person’s subjective intent should not be relevant to the Guidelines calculation for the defendant.

The Commission also requests comment on whether “intended loss” should be limited in some way in light of the admonition that the court should use the greater of actual and intended loss in the determination of loss. The NYCDL is not clear as to how intended loss would be limited except for the Commission to finally decide that the only fair determination of a defendant’s culpability is actual loss. Even the sharpened focus of the proposed amendment on a defendant’s subjective intent will still allow for speculation as to what a defendant might have done had the criminal activity not been terminated. Such speculation has no role in the sentencing determination and the NYCDL urges the Commission to drop “intended loss” as a factor in sentencing.

Proposed Amendment: Victims Table

The Sentencing Commission's proposed change to § 2B1.1 recognizes that "the current guideline may not effectively reflect the harm to victims because it is predicated only on the number of victims." With this in mind, the Commission proposes to amend the victims table in § 2B1.1(b)(2) as well as other provisions relating to victims in § 2B1.1.

First, the proposed amendment would reduce the offense level increases that are based solely on the number of victims. *Second*, the proposed amendment would increase the offense level where one or more victims suffered substantial [financial] hardship. Two options are provided. Under Option 1, it appears that a discretionary increase would result as soon as a court found substantial hardship to one or more victims. Option 2 provides for a tiered increase based on the number of victims that suffer substantial hardship.

The NYCDL appreciates the Commission's recognition that merely "counting victims" often overstates the seriousness of a given financial crime and its corresponding proposal to reduce the number of offense levels connected to each grouping of victims. Indeed, as the Honorable Jed Rakoff has lamented in comments on the Guidelines' current victims table, "[The] numbers [of victims] themselves are drawn from nowhere." (Jed S. Rakoff, *Why The Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent. Rep. 6, 7 (2013)). Thus, while the NYCDL agrees the Commission's proposal is a step in the right direction, the NYCDL firmly believes that the Commission should remove from § 2B1.1 any offense level increase based solely on the number of victims and allow for offense level increases only when the harm to any such victim is substantial.

As we have argued in the past, in the vast majority of fraud cases, the loss table set forth in § 2B1.1(b)(1) already results in excessive proposed punishment. Because cases involving relatively large loss amounts also generally involve a sizeable number of victims, the current Guidelines result in double-counting an aspect of the offense, especially in instances where a defendant is employed by a financial institution that services a large number of clients. Removing the victims table and focusing instead on the nature of the harm caused by the criminal conduct

likely will result in more accurate calculation of the offense level for a particular financial crime. As such, we propose deleting the victims table in its entirety and relying solely on the tiered “substantial [financial] hardship” enhancement identified as Option 2 of the Commission’s proposed changes. The elimination of the victim’s table, therefore, would deal with the Commission’s request for comment regarding the use of the victim’s table where no victims were substantially harmed by the offense. The NYCDL believes that under such circumstances, the loss table suffices to establish the appropriate offense level and avoid the risk of double-counting.

The Commission also proposes factors for a court to consider in determining whether substantial [financial] hardship resulted. While it is clear that the Commission is seeking through this Application Note to achieve some clarity in what it means to suffer “substantial [financial] hardship,” the NYCDL worries that some of the proposed examples will create unnecessary ambiguity and potentially redirect a sentencing court’s focus from the harm actually caused by the crime. For instance, we recommend deleting sections 5 (F) (suffering substantial harm to his or her reputation or credit record, or a substantial inconvenience related to repairing his or her reputation or a damaged credit record), (G) (being erroneously arrested or denied a job because an arrest record has been made in his or her name), and (H) (having his or her identity assumed by someone else), since they relate primarily to collateral issues arising from identity theft. These factors should remain in Application Note 20(A)(vi).

Furthermore, the NYCDL believes that the Commission should define “substantial hardship” in such a way that it reduces the cumulative effect of the proposed amendment and other provisions in § 2B1.1(b)(2). Subsection (b)(16)(B) already provides an enhancement where the offense substantially jeopardizes “the safety and soundness of a financial institution” or substantially endangers “the solvency or financial security” of certain organizations. To avoid double counting, the proposed amendment should apply only when the victims are individuals. Finally, subsection (b)(17) should be eliminated as duplicative of Application Note 20(A)(vi), which already allows for upward departure in cases involving unlawfully obtained or produced means of identification.

The Commission seeks comment on whether § 2B1.1(b)(16)(b)(iii) should be eliminated or reduced. This subsection provides a 4-level enhancement if the offense “substantially endangered the solvency or financial security of 100 or more victims.” The NYCDL believes that the tiered approach in option 2 will adequately address this harm and that maintaining the enhancement will lead to unfair duplication, therefore, The NYCDL supports elimination of this subsection. However, the cumulative adjustment subsection and the victims table should still be capped at 6 levels.

Proposed Amendment: Sophisticated Means Enhancement

The Commission has proposed amending the sophisticated means enhancement under § 2B1.1 so that it applies based only on the defendant’s conduct rather than the offense as a whole. The Commission also is considering whether the fraudulent conduct at issue should be compared only to similar frauds or to all frauds that could fall within the scope of § 2B1.1. Finally, the Commission has asked for comment on whether the proposed amendment to the accompanying Comment should provide guidance for determining what offenses are of the same kind for purposes of applying the sophisticated means enhancement.

The NYCDL recommends that the Commission amend the sophisticated means guideline to specify that it applies based on the sophisticated nature of the defendant’s *own* conduct, rather than on the offense as a whole and that the conduct should be compared to similar frauds.

As noted by the Commission, courts have applied the sophisticated means enhancement based solely upon the sophisticated nature of the offense without focusing on the *specific actions of the particular defendant* being sentenced. Likewise, courts have not been consistent in determining whether the particular scheme at issue must be sophisticated in comparison to other fraud offenses that may fall under § 2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue.

The NYCDL supports the proposed change to Application Note 9(B), which makes it clear that the enhancement should apply only when “the defendant engaged in or caused such [sophisticated] conduct.” This language is necessary in order to avoid the application of the 2-

level enhancement in common scenarios, such as that cited by the Commission as occurring in *United States v. Bishop-Oyedepo* (480 Fed.Appx. 431 (7th Cir. 2012)) where the court found that whether the defendant's "individual actions were sophisticated [did] not matter" and that the adjustment may be applied to a defendant who engages in jointly undertaken criminal activity "so long as the use of sophisticated means by other criminal associates was reasonably foreseeable 'to the defendant.'" The NYCDL agrees that such broad use of the sophisticated means enhancement to encompass even minor participants in a complex fraudulent scheme results in unfairly severe sentences. The proposed amendment serves to steer courts in a more sensible direction that avoids imposing the overall sophistication of a scheme on small players.

Likewise, the NYCDL supports the proposed amendment to Application Note 9(B) that clarifies that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." As noted by the Commission, courts have not been consistent in analyzing whether a scheme must be sophisticated in comparison to any fraud that falls under § 2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue at sentencing. The proposed approach of the Commission makes good sense and will result in fairer sentencing outcomes as it will force courts to analyze the specific nature of the fraud at issue.

In order for the Guidelines to be applied uniformly, the NYCDL recommends that the Commission amend all other application notes concerning sophisticated means to reflect the proposed change and clarify that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." (*See, e.g.*, § 2T1.1, Application Note 5) (the current language is: "'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense").

Finally, the NYCDL believes that the unique factual scenarios presented by each case counsels against providing examples of offenses that should be considered of the "same kind" and that the use of such examples may operate to limit a court's discretion to apply or reject the enhancement. Therefore, the NYCDL does not recommend the inclusion of such examples. Rather, the NYCDL recommends that the guidance make clear that a sophisticated means

enhancement is appropriate only when the acts of the defendant, “measured for their complexity and intricacy,” are distinguishable from other similar offenses (see *United States v. Hance*, 501 F.3d 900, 910 (2d Cir. 2007)) and believes this determination should be left to the discretion of the sentencing judge.

Proposed Amendment: Fraud on the Market and Related Offenses

The Commission proposes to amend the Guidelines as they relate to, among other things, “fraud on the market” cases and related offenses. In particular, the Commission is considering whether “fraud on the market” and similar types of financial market cases were adequately addressed by the amendments to § 2B1.1 adopted in 2012 and whether § 2B1.1 should direct courts to use gain, rather than loss, for purposes of determining the harm accountable to a defendant under subsection (b)(1) if the offense involved (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. The Commission also proposes that in such cases subsection (b)(1) require a minimum enhancement of between 14-22 levels.

The NYCDL believes that the 2012 amendments to the Guidelines do not adequately address “fraud on the market” and similar types of cases. As the NYCDL comments to the 2012 proposed amendments anticipated, the 2012 amendments have created an excessive increase in recommended advisory Guidelines ranges, which were already unduly harsh, and have resulted in Guidelines ranges that, for most defendants, are far greater than necessary to accomplish the purposes of punishment. The average Guideline minimum in fraud cases increased from approximately 25 months to 29 months between 2009 and 2012. (U.S. Sent’g Comm’n, *Preliminary Quarterly Data Report*, fig. C (published Dec. 22, 2014)). From 2013 to third quarter 2014, the average Guideline minimum continued to rise from approximately 29 months to 35 months. (*Id.*)

In turn, this growth in recommended ranges has caused increased departures from the Guidelines in fraud cases as judges have attempted to reach more sensible and just results that

properly contemplate the seriousness of the offense and the individual culpability of the defendant. From 2012 to 2013, the number of fraud defendants sentenced within the Guidelines range dropped from 50.4% to 47.4%, and the number of fraud defendants sentenced below the Guidelines range, without a request by the government in support, rose from 23.8% to 25.9%. (U.S. Sent'g Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, tbl 27A; 2012 Sourcebook of Federal Sentencing Statistics, tbl. 27A.). This trend appears to be continuing, with preliminary data for 2014 showing that, in fraud cases, courts sentenced within the Guidelines range only 43.4% of the time and have varied below the Guidelines range, without a request by the government in support, 28.4% of the time. (U.S. Sent'g Comm'n, *Preliminary Quarterly Data Report*, tbl. 3 (published Dec. 22, 2014)).

The NYCDL endorses the sentencing of “fraud on the market” cases under § 2B1.4 (Insider Trading), instead of § 2B.1.1, as such cases are more conceptually similar to insider trading cases than to the types of fraud offenses covered by § 2B.1.1. However, in light of the presumption under § 2B1.4 that an insider trading case employs sophisticated means, the NYCDL believes that application of § 2B1.4 to “fraud on the market” cases must be accompanied by the possibility of a two-point downward adjustment for defendants who do not employ sophisticated means under the new iteration of that enhancement. (*See supra* 7-9). Further, the NYCDL continues to encourage a de-emphasis on the gain adjustment under § 2B1.4 in calculating a defendant’s total offense level. The gain attributable to an insider trading defendant may easily account for half to two-thirds of his total offense level, without any regard to how much, if any, of the gain is paid to the defendant personally. Because the gain calculation does not take into account motive, intent, or personal gain, it often creates unreasonably high sentencing recommendations that are not meaningfully tethered to the defendant’s individual culpability.

The NYCDL does not, however, endorse the creation of a separate guideline for “fraud on the market” cases. Little is gained from distinguishing “fraud on the market” from other forms of securities fraud, and the creation of a new guideline specific to “fraud on the market” will only lead to additional confusion and over-complication of the Guidelines.

To the extent the Commission continues to sentence “fraud on the market” cases under § 2B1.1, the NYCDL believes, as it did in 2012, that the upward departure provision for cases involving “a risk of a significant disruption of a national financial market,” (see § 2B1.1, App. N. 20(A)(iv)), is unnecessary and duplicative, especially in “fraud on the market” cases. The NYCDL believes that, even taking into account its recommended changes to the enhancements contained in the loss and victim tables, those tables, combined with the enhancements for employing sophisticated means and for substantially jeopardizing a financial institution, sufficiently address situations involving a risk of significant disruption of a national financial market. Further, as they stand, these enhancements, even without the additional departure, tend to place defendants at the outer bounds of the Sentencing Table and beyond the statutory maximum sentences allowed by law.

The Commission asks two specific questions regarding gain and loss. First the Commission requests comment on whether gain, rather than loss, is a more appropriate method for determining the harm accountable to the defendant in “fraud on the market” cases. Second the Commission requests comment on whether the use of gain or loss may over-punish some defendants and under-punish others, and how the Commission should address this issue.

Generally, the NYCDL believes that reliance on either loss or gain does not properly account for the culpability of defendants, and distorts the evaluation of an appropriate sentence. However, in answer to the first question, and to the extent that the Commission keeps the current framework in place, reliance on gain, rather than loss, may be a more appropriate indicator of a defendant’s culpability and thus a more reliable method for determining harm, particularly for those defendants where the fraud exacted a large loss on the market, but who gained little. Rather than focusing on the entire gain resulting from the fraud, a better approach may be to focus on personal gain in relation to the overall gain of the fraudulent scheme, as the defendant’s personal gain will more closely approximate the defendant’s level of culpability.

As to the second question, the NYCDL submits that the current methods for determining loss and gain fail to take account of market conditions in significant ways, thus tending to over-punish defendants. More importantly, the focus on loss or gain distorts sentencing by minimizing,

and at times eliminating, consideration of the defendant's individual culpability. This distortion leads to a lack of uniformity in sentencing. The NYCDL believes the Commission should address these issues by de-emphasizing loss and gain in "fraud on the market" cases, and all other fraud cases governed by § 2B1.1, and shift the focus of sentencing in these cases to considerations that reflect the defendant's individual culpability, such as the defendant's role in the offense, whether the defendant voluntarily withdrew from the scheme, any attempts by the defendant to conceal the offense, and the defendant's cooperation with the government.

Finally, the Commission requests comment on whether "fraud on the market" offenses should be structured to include a minimum level of enhancement. The Commission's proposed amendment contains a minimum enhancement of 14 to 22 offense levels for all "fraud on the market" cases, which is equivalent to a loss of \$400,000 to \$20 million under § 2B1.1 (or a gain of \$400,000 to \$20 million under § 2B1.4). The NYCDL opposes any such minimum enhancement for "fraud on the market." Under such a regime, the Guidelines would call for a sentence of 33-41 months under § 2B1.1 (or 41-51 months under § 2B1.4) for a first time offender even where the defendant received no personal gain and was subject to no additional enhancements. Such a minimum enhancement would not allow for properly individualized assessments of the defendant or the seriousness of the crime, and will result in excessively harsh sentences. Further, the NYCDL believes that increasing the severity of sentences in this way would lead to further departures from advisory Guidelines ranges by courts.

PROPOSED AMENDMENT: JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

The Commission has asked for comments on a proposed amendment to § 1B1.3 (relevant conduct) regarding the application of the "jointly undertaken criminal activity" provision. The proposed amendment alters the description of the type of "jointly undertaken criminal activity" that should be included in relevant conduct by delineating three separate components that must be met in order for the conduct to be included. The amended Guideline states that in the case of jointly undertaken criminal activity, relevant conduct will only include acts and omissions of others if they were "(i) within the scope of the criminal activity that the defendant jointly agreed to undertake, (ii) in furtherance of the jointly undertaken criminal activity, and (iii) reasonably

foreseeable in connection with that criminal activity”

The NYCDL supports this amendment. By itemizing the three steps of the analysis, the revised Guideline will better ensure that defendants are held responsible for conduct of others only when such conduct was within the scope and in furtherance of their intended criminal activity and reasonably foreseeable as a consequence of that activity. We believe some courts have been too quick to sentence defendants based on conduct of others premised solely on a finding that the conduct at issue was reasonably foreseeable to a particular defendant, without regard to whether those actions also were within the scope of the criminal activity to which the defendant specifically agreed. The amended Guideline will guard against courts giving short shrift to the need to ascertain the “scope” of the jointly undertaken criminal activity to which the defendant agreed prior to engaging in any reasonable foreseeability analysis.

In addition, the Commission invited comment on additional guidance on the treatment of “jointly undertaken criminal activity” for the purpose of determining relevant conduct. The NYCDL believes that the Commission should offer additional guidance, as set forth below.

First, we believe that the Commission should emphasize that not all activity undertaken by more than one person is jointly undertaken. As the Second Circuit articulated in the frequently cited case *United States v. Studley*, (47 F.3d 569,575 (2d Cir. 1995)), “a defendant’s knowledge of another participant’s criminal acts is not enough to hold the defendant responsible for those acts” under the “jointly undertaken criminal activity” provision. To help courts identify what conduct of the defendant’s co-participants was jointly undertaken for purpose of determining a particular defendant’s individualized sentence, the NYCDL proposes that the commentary provide a list of non-exclusive factors for the court to consider, drawn from the discussion in *Studley*:

- The specific activities the defendant agreed should be undertaken or accomplished by his co-participants
- The specific role the defendant agreed to play in the criminal operation
- Whether defendant was involved in designing and executing the illegal scheme
- Whether the participants worked independently or separately

- Whether the defendant's success or profit depended on the success or profit of other co-participants in the scheme
- Whether the participants pooled their profits, knowledge, weapons, or other resources

The commentary should note that these factors should be evaluated collectively: how many factors are sufficient for identifying certain conduct as "jointly undertaken activity" may depend on the individual facts of a case.

Second, we believe that further guidance is warranted on how to determine "the scope of the criminal activity that the defendant jointly agreed to undertake." The proposed Guideline already provides that "[a]cts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct." We believe it would be helpful for the Commission to emphasize that the scope of the conduct a particular defendant jointly agreed to undertake is limited to the conduct *specifically intended* by that defendant.

This guidance will ensure that courts do not conflate conduct of which the defendant was aware (or even conduct the court believes the defendant should have known about) with conduct the defendant specifically agreed to undertake. This guidance will be particularly valuable for defendants convicted of broad conspiracy charges; it will underscore the fact that the scope of each defendant's agreed-upon criminal activity is distinct and help courts avoid the often incorrect assumption that the scope of the conspiracy is coterminous with the scope of the criminal activity intended by a defendant.

We believe that these clarifications will enhance the Guidelines' goal of achieving "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." (U.S.S.G. Ch. ONE, Pt. A, Subpt. 1).

The Commission also requested comment on two proposed policy changes: (1) whether the reasonable foreseeability standard should be replaced with a different state of mind requirement, and (2) whether the provision should require a conviction of conspiracy or a Pinkerton conviction before it can be applied.

The NYCDL believes that if the definition of the scope of “jointly undertaken criminal activity” is modified to make clear that it is limited to conduct specifically intended and agreed to by the defendant, then it is not necessary to change the reasonable foreseeability requirement to a higher state of mind. We believe that circumscribing the scope of conduct for which a defendant is responsible is a more precise and easier to administer standard for ensuring that a defendant’s sentence is appropriately tailored to his criminal conduct. Limiting the scope to what a defendant specifically intended achieves the apparent goal of the proposed policy change, without the unjust outcomes that might follow from eliminating the reasonable foreseeability requirement.

The NYCDL supports the concept of limiting “jointly undertaken criminal activity” to convictions of conspiracy. In light of the prevalence of conspiracy charges when offenses involve more than one person, this limitation is unlikely to work a major change in the application of the Guidelines. It would, however, provide a framework to ground a court’s task of identifying the scope of activity to which a particular defendant agreed (with the outer limit being the full scope of the conspiracy). In addition, this policy change will ensure that the “jointly undertaken criminal activity” provision is applied solely to defendants who definitively engaged in criminal activity in concert with others, eliminating some of the guesswork that might otherwise be involved in applying this provision.

However, should a conspiracy requirement be adopted, the NYCDL urges the Commission to include cautionary guidance to courts explaining that the scope of a conspiracy does not – and most often will not – equate to the scope of the defendant’s “jointly undertaken criminal activity.” The conspiracy includes the universe of possible conduct, from which the defendant’s particular scope must be determined. While such guidance already exists in the commentary, we urge that it be highlighted and emphasized.

PROPOSED AMENDMENT TO MONETARY TABLES: ADJUSTMENT FOR INFLATION

The Commission has proposed adjusting monetary values referenced in the Guidelines to account for inflation. The Commission notes that the monetary values in the Guidelines have

never been adjusted specifically to account for inflation. The NYCDL believes that the monetary tables in the Guidelines should be adjusted for inflation. As some commentators note, “while the commission has made multiple aggravating amendments over the years, it has failed to make any adjustments for the effects of inflation, which itself has effectively increased penalties.” (Alan Ellis, John R. Steer, Mark H. Allenbaugh, At A "Loss" for Justice Federal Sentencing for Economic Offenses, Crim. Just., Winter 2011, at 34, 37.)

The Commission’s proposed amendment seeks to adjust values in the Guidelines based on the Bureau of Labor Statistics’ Consumer Price Index and then round the amounts based on two options – one which essentially tracks the Federal Civil Penalties Inflation Adjustment Act of 1990 (“the Act”) and a second which uses the Act as a template but extrapolates to include higher amounts. The NYCDL urges the Commission to use the second approach, which extrapolates from the Act’s framework but includes amounts greater than \$100,000,000 while the former approach only reaches amounts greater than \$200,000. This approach provides much more nuance in both sentencing and monetary fines. Further, adopting the more nuanced option proposed by the Commission is particularly important in the sentencing of economic crimes where the broader numerical spread between each tier at the higher end of the table will aid in adequately distinguishing between smaller and larger frauds. A difference of \$25,000 due to rounding may not be particularly significant at the high end, whereas rounding to the nearest multiple of \$50,000,000 or \$5,000,000 may result in a significantly different Guidelines’ calculation.

The NYCDL believes that the revised table should apply to all other guidelines that reference the loss table at § 2B1.1(b)(1).

The NYCDL urges the Commission to make it a practice to make an inflationary adjustment to the monetary tables contained in the Guidelines every four years. The NYCDL believes that, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), the proposed amendment for inflationary adjustments to the monetary tables in the Guidelines should be included in subsection (c) of § 1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants.

PROPOSED AMENDMENT: MITIGATING ROLE ADJUSTMENT

The Commission has proposed amending the Application Notes relating to the mitigating role adjustment under § 3B1.2 to: (1) clarify that the defendant's relative culpability is determined only by reference to co-participants in the offense; (2) revise the language to state that certain individuals who perform limited functions may receive the adjustment; and (3) provide a non-exhaustive list of factors for the court to consider in determining whether and how to apply a mitigating role adjustment.

The Commission proposes amending Application Note 3(A), which is entitled "Substantially Less Culpable than Average Participant," to add language clarifying that the adjustment applies to "a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant *in the criminal activity.*" The purpose of this additional language is to resolve a split among the Circuit Courts in the proper analysis of "average participant." The First and Second Circuits have concluded that the "average participant" includes not just the defendant's co-participants in the crime, but typical offenders who commit similar crimes. The NYCDL submits that the approach taken by the First and Second Circuits is unduly complicated and divorced from the actual facts of the crime at issue for sentencing. The burden placed upon a defendant under this standard is unduly high.

The Commission's proposed amendment would follow the analysis of the Seventh and Ninth Circuits in clarifying that the defendant's relative culpability is to be judged by reference only to his or her co-participants in the criminal activity. As with the proposed change to the sophisticated means enhancement under § 2B1.1, the NYCDL applauds this proposed change, which makes good sense and will result in fairer sentencing outcomes as it will force courts to analyze the specific crime at issue in the defendant's sentencing without the overlay of other unrelated, albeit similar, crimes, thus avoiding reference "to some abstract metaphysical standard."

The Commission further proposes to amend the language in Application Note 3(A) to clarify that individuals who perform limited functions in criminal activity may receive a mitigating

role adjustment. This change would remove the language that suggested that the adjustment was unlikely to be applied in such circumstances (i.e. the defendant “is not precluded from consideration for an adjustment”). The NYCDL agrees with this proposed change to the Application Note, which should cause courts to apply the mitigating role adjustment more frequently.

The Commission also proposes amending Application Note 3(C), entitled “Fact-Based Determination,” to provide a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The NYCDL believes this additional guidance clearly is necessary as courts have struggled to grasp the distinction between “minor role” and “minimal role.” Courts often engage in a sort of mental gymnastics in an effort to fit a defendant’s conduct within the terms.

The NYCDL agrees with the additional guidance provided in the proposed amendment. Each of the three factors proposed by the Commission, which are focused on the defendant’s knowledge, participation, and potential benefit, will serve to aid sentencing courts in analyzing the key issues pertaining to a defendant’s role in an offense.

CONCLUSION

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