

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

March 12, 2015

ERIC A. TIRSCHWELL

PRACTITIONERS ADVISORY GROUP, VICE-CHAIR

Eric A. Tirschwell

Kramer, Levin, Naftalis & Frankel LLP

1177 Avenue of the Americas

New York, NY 10036

(212) 715-8404

Good morning, my name is Eric Tirschwell. I am co-chair of the White Collar Defense and Investigations Group at Kramer Levin Naftalis & Frankel LLP in New York. I'm also a former federal prosecutor from the Eastern District of New York.

On behalf of the Practitioners Advisory Group, for which I serve as Vice Chair, I want to thank you for the opportunity to address the Commission with respect to some of the important issues under consideration during this amendment cycle. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. Economic crimes are for many of us a large if not the largest portion of our criminal dockets. So we are especially appreciative of the Commission's willingness to listen to us and consider our thoughts on these important issues for comment.

Introductory Remarks

Before addressing the specific proposed amendments, I would like to first reiterate the PAG's abiding belief, expressed on numerous occasions to the Commission, that instead of proposing what we respectfully submit are only modest adjustments, the Commission should undertake a more wholesale revision of the fraud and related economic crimes guidelines. As we wrote in our letter to the Commission in July 2013, "Section 2B1.1's skewed emphasis on loss amount and that Section's multiple and overlapping upward offense level enhancements for specific offense characteristics – many of which can be imposed on a strict liability basis without regard to a defendant's knowledge or intent – too often result in unduly severe guidelines ranges." Letter from PAG to Patti B. Saris, at 3 (July 15, 2013) (hereinafter "PAG July 2013 Letter"). When the Commission's own most recent data shows that courts sentenced within the § 2B1.1 range less than half the time for all loss amounts exceeding just over \$30,000, we respectfully submit that the fraud guideline is fundamentally broken, not just in need of a tune-up.¹

Because we believe "loss is a highly imperfect measure of the seriousness of the offense," PAG July 2013 Letter at 4, the PAG continues to urge the Commission to explore amendments that would broadly incorporate and substantially elevate "factors that would prevent overreliance on loss, such as motivation(s) for committing the crime, the extent to which the offender personally profited or intended to gain from the crime, the offender's level of participation in, and knowledge of, the scheme, and the nature and extent of actual impact on actual victims." Id. at 6.

Notwithstanding our continuing hope that at some point in the near future the Commission will consider larger-scale revisions, we applaud the Commission for the proposals we are here to discuss today, which begin the hard work of moving toward a sentencing framework for economic crimes that takes greater account of many of these important non-loss-centric considerations. So let me now turn to the Commission's specific proposed amendments.

¹ See U.S. Sentencing Comm'n, Economic Crime Public Data Briefing: Analysis of Federal Sentencing Data for Economic Crime Offenders, fig.5, at 10 (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf (hereinafter "Economic Crime Briefing").

I. PROPOSED AMENDMENT 8 (PART A): REVISING THE DEFINITION OF “INTENDED LOSS”

Let me start with the Commission’s proposed revision to the definition of “intended loss.” The PAG encourages the Commission to consider adopting a more fundamental change – reflected in the ABA Criminal Justice Section Task Force Report – by eliminating “intended loss” entirely for purposes of § 2B1.1 loss calculations, and making actual loss the exclusive measurement of loss for sentencing purposes.² The PAG believes that the most accurate and reliable measure of loss for purposes of punishment is actual loss or, when gain exceeds actual loss, the offender’s gain. Because actual loss is defined as “the reasonably foreseeable pecuniary harm that resulted from the offense,”³ actual loss is a recognized measure of the seriousness of the offense conduct. Actual loss (like gain) is also more concrete and easily calculated than intended loss. Indeed, some of the circuit disagreement that the Commission’s proposed amendments are designed to address arises out of the difficulty in measuring intended loss, versus the much more easily quantified actual loss (or gain). Eliminating “intended loss” would therefore go a long way toward resolving circuit disagreement and addressing the widespread criticism from judges and commentators that overemphasis on intended loss is contributing to unjust sentences.

Issue 1(A): Intended Loss and Amounts Intended by Others

If the Commission is not inclined to adopt actual loss (or gain) as the exclusive measure of loss, the PAG supports the Commission’s proposal to resolve the circuit disagreement over the definition of “intended loss” by adopting Option 1 and relying on the subjective inquiry approach adopted in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). Under this approach, intended loss would be limited to the amount of loss “the defendant purposely sought” to inflict.

The Manatau case itself provides the most compelling analysis why Option 2 is inconsistent with the notion of subjectively intended loss and why saddling an offender with losses he or she did not subjectively intend to inflict but were intended only by other participants would contradict and distort the meaning of “intended.”⁴ Option 2 would, in effect, punish an offender for acts of co-participants that were “reasonably foreseeable” but that the offender himself did not consciously or purposely intend.⁵ As Manatau states, a definition of “intended”

² Am. Bar Ass’n Criminal Justice Section, A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes, at 1 (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf (hereinafter “ABA Task Force Report”) (recommending modifying Application Note to § 2B1.1 to specify that “loss means actual loss”).

³ U.S.S.G. § 2B1.1, comment. n.(3)(A)(i).

⁴ See 647 F.3d at 1050-56.

⁵ See U.S.S.G. § 1B1.3(a)(1); Manatau, 647 F.3d at 1050-54.

that includes things an offender never contemplated makes no sense “ – except perhaps in an Opposite Day game.”⁶

Stated another way, Option 1 accurately reflects “intent” while Option 2 reflects the lesser mens rea showing of “knowledge” or, worse still, something less than knowledge (e.g., should have known). Adopting Option 2 would render the Commission’s choice of the word “intended” meaningless, and would expand the concept of intended loss beyond its current application in many of the circuits, likely adding to the chorus of criticism already being heaped upon this guideline provision.

The PAG further recommends that the Commission strike the words “the actions and intentions of other participants” from the final sentence of Option 1, because including it will contribute to confusion over whether losses caused by others but not intended by the offender should be included in the measurement of losses the offender purposely sought to inflict. The guideline will be less confusing or ambiguous if this phrase is excised from Option 1.

Adoption of Option 1 with this revision would, we respectfully submit, be much more consistent with Manatau, any fair reading of the word “intended,” and the sound principle that punishment should focus on culpability for conduct purposefully undertaken.

Issue 1(B): Intended Loss and Partially Completed Offenses

The Commission also seeks comment on how “intended loss” should interact with the commentary in Application Note 18 to § 2B1.1, relating to “partially completed offenses.” The PAG submits that the interaction between these two concepts is already adequately addressed in the existing Guidelines.

Application Note 18 to § 2B1.1 specifies that in cases involving partially completed offenses, § 2X1.1 must be referenced in fixing the offense level. And Application Note 4 to § 2X1.1 provides a straightforward roadmap for how to calculate offense levels in cases involving partially completed offenses (the greater of intended loss minus three levels, or actual loss for the completed portion of the offense). Courts have encountered little difficulty in applying § 2X1.1 in its current form to partially completed offenses for § 2B1.1. Indeed, the principal (and, perhaps, sole) source of confusion in the case law on this topic appears to be whether a particular defendant’s conduct counts as a “partially completed offense” or not.

However, this concept is inherently murky and defies specificity, given the sizeable range of offenses encompassed within § 2B1.1. The example given in Application Note 18 to § 2B1.1, coupled with Application Note 4 to § 2X1.1, provides adequate guidance for district courts to assess whether a given defendant’s conduct qualifies as a “partially completed offense” or not.

In sum, the PAG believes the manner in which the Guidelines presently account for the interaction between intended loss and partially completed offenses is adequate because (i) they do account for it, (ii) in a manner that is reasonably clear and understandable, and (iii) courts have not encountered significant difficulties in applying the existing framework.

⁶ 647 F.3d at 1053.

Issue 2: Limitations on Intended Loss

The Commission seeks comment on whether intended loss should be limited in some manner. As stated above, the PAG encourages the Commission to consider adopting the approach of the ABA Task Force Report and eliminate “intended loss” from the § 2B1.1 loss calculation altogether.

II. PROPOSED AMENDMENT 8 (PART B): VICTIMS TABLE

Issue 1: The Victims Table in Current § 2B1.1(b)(2)

The PAG supports the Commission’s efforts to amend the victims table as part of the Commission’s long-term study of the fraud guidelines. The victims table is the second-most-often-used specific offense characteristic (“SOC”) applied under § 2B1.1, applied in 22.8% of cases in Fiscal Year 2012 to enhance the advisory sentencing ranges of almost 2000 offenders in that fiscal year.⁷

In the PAG’s experience, the victims table too frequently is applied as an enhancement disparately, sometimes to offenders who exercised their right to a trial but not co-defendants who pled guilty in the same case, and often differently from district to district, with inclusion of the enhancement as a requirement of a guilty plea in some districts, while being largely ignored when an offender pleads guilty in other districts. It is also our experience that judges who are rejecting within-guideline sentences in § 2B1.1 cases often do so because they believe the overlapping enhancements in § 2B1.1 – such as the victims table – overstate offender culpability. The PAG therefore hopes that amendment of the victims table and of the provisions related to victims within § 2B1.1 will reduce unwarranted disparity.

Against this backdrop, the PAG wholeheartedly agrees with the Commission’s decision to reduce the impact of the enhancement for victim numerosity vel non, and instead attempt to better account for the severity of the harm suffered by victims. The Background Commentary to § 2B1.1 states that, “[t]he 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.” The PAG submits that the current § 2B1.1 fails to accomplish this goal by double-counting the magnitude of the harm – by enhancing based on both loss amount and number of victims – while insufficiently accounting for the nature of the harm. The Seventh Circuit has noted this imbalance in § 2B1.1 analysis, observing that “the adjustments in (b)(1) and (b)(2) do not take into account how slight or devastating the victims’ financial losses were for their lives or businesses.”⁸

⁷ See Economic Crime Briefing, tbl.1, at 15, fig.13, at 22.

⁸ United States v. Castaldi, 743 F.3d 589, 598-99 (7th Cir. 2014). See also id. at 599 (illustrating the importance of the point by contrasting the case of “a fraud scheme [that] imposes an average loss of \$100 on each of 300,000 victims [,] . . . [where] [t]hose losses might be noticed but would not change most victims’ lives” with a fraud scheme with “a few more than 300 victims . . . , [with] an average loss of around \$100,000 per victim” that is considerably

The PAG endorses the view that where no victim has been substantially harmed, the loss enhancement in subsection (b)(1) sufficiently captures the magnitude of the harm caused by the fraud. Indeed, the guideline itself equates “loss” with harm.⁹ Thus, the loss table in subsection (b)(1) generally accounts for the magnitude of the harm caused by the offense.

The purpose of any additional harm-based SOC enhancements should be to capture a dimension of that harm that is not already captured by the loss enhancement in subsection (b)(1). The PAG agrees with the Commission that the current victim table in subsection (b)(2) fails to fulfill that role, by focusing on a feature – numerosity of victims – that generally duplicates the measurement of magnitude already accounted for in subsection (b)(1). By ratcheting up a defendant’s offense level based on number of victims alone, without consideration of the extent or nature of the harm suffered by each victim, the current § 2B1.1(b)(2) simply double-counts the same dimension of harm already incorporated into the offense level through application of the loss provision of subsection (b)(1). Accordingly, the victim provision of current subsection (b)(2) fails to provide an incrementally meaningful measure of the harm caused by the fraud.¹⁰

By contrast, an assessment of the nature of the harm suffered by victims will provide an incrementally meaningful measure of the harm caused by the fraud, and thus will more directly advance the guideline’s purpose as stated in the Background Commentary.

Accordingly the PAG endorses the Commission’s suggestion, raised in the first Issue for Comment, to limit the impact of the victims table where no victims were substantially harmed by the offense. The PAG proposes the Commission do so by eliminating the current subsection (b)(2) entirely, which enhances based solely on numerosity of victims without regard for substantial harm, and instead replace it with the new proposed subsection (b)(3), Option 2, which provides for an enhancement if and only if the offense resulted in substantial financial hardship to at least one victim.

Adopting Option 2 of the new proposed subsection (b)(3) will fully satisfy the aims of the victim-related SOCs by incorporating the considerations of substantial harm and victim numerosity into a single combined enhancement. By making substantial harm to even a single victim the initial aggravator, and then providing for additional enhancements where larger numbers of victims suffered substantial harms, Option 2 of the new proposed subsection (b)(3)

more devastating, where “the victims ... are people of relatively modest means who were not sophisticated in financial matters, and what they lost was virtually all of their savings”).

⁹ See U.S.S.G. § 2B1.1 comment. n.3(A)(i), (ii) (defining “[a]ctual loss” as “the reasonably foreseeable pecuniary harm that resulted from the offense” and “[i]ntended loss” as “the pecuniary harm that was intended to result from the offense” (emphases added)).

¹⁰ For example, under the current operation of § 2B1.1, a fraud that causes \$1 of loss each to 100,000 people is punished twice as harshly as a fraud that causes \$100,000 of loss to 1 person, even in the absence of any additional aggravating characteristics. This result likely leads many judges to conclude that the advisory range produced by § 2B1.1 overstates the extent of the harm caused by the fraud, and to downwardly depart.

adequately accounts for victim-impact aggravators that are not captured in the loss calculation in (b)(1), without posing the double-counting and redundancy problems of the current subsection (b)(2). With respect to the bracketed offense levels proposed in Option 2, the PAG suggests the subsection's adjustment levels be set at 1, 2, and 3 levels, respectively.

The PAG believes this approach – eliminating the current subsection (b)(2) and adopting in its place Option 2 of the new proposed subsection (b)(3) – will implement the Commission's intended modification of § 2B1.1 in the simplest and most effective way. By eliminating the overlap between subsections (b)(1) and (b)(2), and instead enhancing the offense level based on a dimension of harm not already accounted for in the loss amount, the resulting offense level calculation will better reflect offender culpability. The PAG further observes that Application Note 20(A)-(B), providing for upward departure considerations, sufficiently addresses the small minority of cases in which the measurement of loss combined with the assessment of substantial harm to victims somehow fails to fully account for the victim-impact or harm resulting from the offense.

Issue 2: The Proposed Enhancement and Factors in Proposed New § 2B1.1(b)(3)

With respect to the scope of the enhancement and the factors provided in the proposed Application Note 5, the PAG generally endorses the Commission's proposal, with the following caveats.

First, the PAG suggests that the enhancement be limited to substantial financial hardship, which is consistent with the guideline's overall requirement of a pecuniary dimension to any harm that serves as an aggravating specific offense characteristic, other than bodily harm. See, e.g., § 2B1.1 comment. n.1 (absent bodily injury, limiting definition of "victim" to those persons who "sustained any part of the actual loss determined under subsection (b)(1)" (emphasis added)); § 2B1.1 comment. n.3(A)(i) (defining "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense" (emphasis added)).

Second, the PAG suggests that the Commission eliminate factors (F), (G), and (H) from the proposed Application Note 5, and allow them to continue to be addressed by Application Note 20(A), governing upward departures. Generally, the guideline addresses most non-financial harms through the upward departure power.¹¹ We are aware of no basis to conclude that this practice is in need of modification. The Commission has supplied no data to suggest that these existing provisions are underutilized, inadequately applied, or fail to provide the necessary tools to address offenses that have caused non-monetary harm worthy of additional

¹¹ Application Note 20(A) to § 2B1.1 provides a non-exhaustive list of reasons to upwardly depart, including for offenses that "caused or risked substantial non-monetary harm" to a victim; included as a primary objective "an aggravating, non-monetary objective"; or caused non-economic harm through identity theft. See U.S.S.G. § 2B1.1 comment. n.20(A)(i), (ii), (vi). Moreover, the guideline also provides several cumulative enhancements for certain specific non-monetary harms, such as theft from the person of another, misuse of identification, and unauthorized public dissemination of personal information. See U.S.S.G. § 2B1.1(b)(3), (b)(11), (b)(17)(B).

punishment. Accordingly, in the absence of an impact study quantifying the likely impact of such a sweeping change, the PAG recommends that such non-financial factors continue to be addressed through the departure power.

Issue 3: § 2B1.1(b)(16)(B)(iii)

The Commission has asked whether the 4-level enhancement at § 2B1.1(b)(16)(B)(iii) should be eliminated as reflected in the proposed amendment. The PAG supports the Commission’s proposed deletion of that enhancement as duplicative of the proposed new subsection (b)(3) for substantial financial hardship.

III. PROPOSED AMENDMENT 8 (PART C): SOPHISTICATED MEANS

The PAG welcomes the Commission’s proposed amendment to the sophisticated means enhancement set forth in subsection (b)(10)(C).

The proposed clarification helpfully requires that the defendant himself be engaged in the conduct that is deemed sophisticated. The amendment properly directs that the enhancement should not apply to a defendant who may have no knowledge of or participation in the sophisticated aspects of the crime because he or she is performing a role, such as driver or messenger, which does not involve sophistication. In addition, the proposed amendment removes language suggesting that certain types of conduct inherently involve sophisticated means. By omitting the laundry list of “sophisticated means,” such as “use of offshore accounts,” the proposed amendment properly enhances punishment only for activity that is truly complex, rather than for conduct that is ubiquitous in typical or “garden variety” fraudulent schemes. All fraud cases involve some form of planning and concealment. The enhancement should not be imposed unless such planning and concealment were greater than normal in that type of scheme.

In addition, the PAG supports the proposed amendment’s clarification that for purposes of determining sophistication, the defendant’s conduct should be evaluated in comparison to offenses of the same kind, rather than to all offenses that could fall within the scope of § 2B1.1.

We do however have some concern about the second proposed paragraph in Application Note 9(B).¹² The language appears to be borrowed wholesale from the relevant conduct provision at § 1B1.3(a)(1)(A), without regard to whether it serves a salutary purpose in the context of this enhancement. The PAG observes that some of the language could be interpreted quite broadly, subverting the Commission’s intent to narrow the application of the enhancement to offenders who themselves used sophisticated means. For example, verbs such as “caused,”

¹² The paragraph states as follows: “In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant engaged in or caused such conduct, i.e., the defendant committed such conduct or the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused such conduct.” See Proposed Amendment to § 2B1.1, comment. n.9(B) (Jan. 16, 2015) (citing U.S.S.G. §1B1.3(a)(1)(A)).

“aided,” “abetted,” “induced,” and “procured” – unmodified by a requirement of willfulness and without the sophisticated conduct itself as their specific object – all threaten to reach defendants who did not themselves willfully use sophisticated means. For example, this language may inappropriately be held to reach a defendant who aided another participant in a scheme that involved sophisticated conduct, without himself knowing or intending to use sophisticated means. It could also potentially be held to reach an underling or secretary who was tasked with implementing part of a scheme, devised by someone else, that as a whole could be considered “sophisticated.” If the Commission seeks to exclude such people from receiving a sophisticated means enhancement, then the language may be inadvertently broad. Thus, the PAG proposes modifying the second paragraph of the proposed Application Note 9(B) to read: “In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant willfully committed, engaged in, aided, abetted, counseled, commanded, induced, procured, or caused the conduct constituting sophisticated means.”

The PAG also suggests that a similar amendment should be promulgated for Section 2T1.1(b)(2). Application Note 5 to § 2T1.1 explains that the term “sophisticated means,” for purposes of subsection (b)(2), “means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.” As currently drafted, that enhancement would apply to a defendant who opens a bank account in an offshore tax haven and fails to report the income earned on the account. In this context, such conduct is not especially complex, and does not have the advanced methods of execution, planning or concealment that merit the enhancement.

Regarding the specific Issue for Comment, the PAG recommends that the Commission not attempt to itemize a list of “offenses of the same kind,” and instead leave it up to the courts to determine the relevant classes of “offenses of the same kind.” The PAG suggests the Commission offer only the general guidance that the class should be defined specifically enough to avoid the result of automatically imposing the enhancement on certain types of fraud based on their broad type (e.g., all public company accounting frauds) rather than the specifics of the particular species of crime (e.g., a public company accounting fraud involving off-books entities and complex accounting gimmicks).

IV. PROPOSED AMENDMENT 8 (PART D): FRAUD ON THE MARKET

Issue 1: Proposed Amendments for Fraud on the Market Cases

The PAG endorses the Commission’s suggestion in Issue 1 for Comment and suggests that all fraud on the market cases be sentenced under § 2B1.4 (insider trading), rather than § 2B1.1. The PAG sees many benefits to this change. For one, § 2B1.4 already relies on gain rather than loss – a move the Commission now recognizes is warranted for fraud on the market cases. In addition, such a change would require no dramatic modification or elaboration of § 2B1.4. The PAG notes that because fraud on the market cases generally follow a relatively prototypical format, the lengthy list of specific offense characteristics set out in § 2B1.1 would

not need to be imported. However, the PAG observes that some form of § 2B1.1(b)(19), which is specific to securities fraud, could be moved or added to § 2B1.4.

More generally, the PAG expresses concern that the amendment as proposed will not reach the universe of fraud on the market cases it is intended to reach. In this regard, the PAG observes that the amendment as proposed expressly applies only in the case of “submission of false information in a public filing.” This language does not seem to embrace the appropriate universe of fraud on the market cases, which are sometimes based on misleading disclosures or material omissions. The PAG recommends the Commission revise the language of the proposed amendment to capture those cases too.

Issue 2: Use of “Gain” Rather than “Loss”

The PAG wholeheartedly endorses the Commission’s recognition that at least in cases of fraud on the market, loss just doesn’t fit, and gain is the more meaningful and more readily measurable gauge of the seriousness of the offense. The PAG further agrees that the Commission should remove the “modified rescissory method” (MRM) as the means for determining loss in fraud on the market cases and related offense conduct.

The PAG observes that using “gain” as the monetary measurement of the seriousness of the offense holds many advantages over using “loss” in fraud on the market cases. For one, gain is often a better measure of culpability than loss when loss is driven largely by the severity of the stock market reaction to the public disclosure of the fraud multiplied by the number of outstanding shares. Neither the market’s reaction nor the number of outstanding shares is necessarily or even usually well-correlated to the seriousness of fraud itself or the defendant’s culpability. Secondly, in almost all cases, gain is far easier to calculate than loss. Trying to measure loss in securities fraud cases involving publicly traded companies is often extremely complex and time consuming. See, e.g., Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005). The complexity comes in large part from the multitude of extrinsic factors that must be extricated from the effect of the fraud, such as market forces, the informational efficiency of the market itself, and the financial situations of individual investors. Thirdly, gain is less prone to overstate the seriousness of the offense conduct than loss. Given the inherent and substantial role extrinsic factors play on the price of stock, it is more likely that loss will often substantially over-represent the seriousness of the offense conduct than gain. Accordingly, the PAG fully endorses the use of “gain” rather than “loss” for purposes of subsection (b)(1).

Issue 3: Proposed Minimum “Floor”

The Commission has simultaneously proposed a “floor” on gain of anywhere from 14 to 22 offense levels. Under the current iteration of the loss table at § 2B1.1, this floor would assume that every fraud on the market defendant realized a gain of at least \$400,000 to \$20 million. We are puzzled as to why the Commission is proposing a floor on gain without providing an explanation of why such a floor is necessary. Indeed, the Commission’s own Issue for Comment expresses a concern that the use of gain could sometimes over-punish and sometimes under-punish, yet its proposed “floor” does nothing to address the situation where a gain calculation might over-punish a defendant.

In addition, the selection of the number of offense levels for the proposed floor seems tenuously supported at best. According to the Commission's synopsis of the proposed amendment, the floor has apparently been derived from seven unidentified securities fraud cases from fiscal years 2012 and 2013; in those cases, the Commission determined that the median loss enhancement was 14 levels. How that equates to a principled floor for gain, or even why a floor is necessary, is left unexplained. While relying on loss in criminal securities fraud rightly should be set aside given its inherent complexity and overdetermination by extrinsic variables, replacing it with an irrebuttably presumed baseline amount of gain questionably derived from a paltry few cases necessarily introduces needless arbitrariness into the offense level calculation. The PAG therefore proposes that the Commission simply eliminate MRM from § 2B1.1 and in its place indicate that the offender's gain (if any) is to be used for purposes of measuring offense seriousness.

V. PROPOSED AMENDMENT 4: INFLATIONARY ADJUSTMENTS

The PAG agrees that the monetary tables should be adjusted for inflation. Further, while the Commission's Prison and Sentencing Impact Assessment ("Impact Assessment") reveals little difference between the two options in terms of numbers of defendants affected – Option 1 will reach 18.8% of § 2B1.1 defendants, while Option 2 will reach 18.7%¹³ – the PAG nevertheless believes Option 2 is preferable over Option 1 inasmuch as Option 2 specifically accounts for and is calibrated to the larger loss amounts currently set forth in the loss tables at § 2B1.1(b)(1) and § 2T4.1. The Impact Assessment, however, does illustrate that Option 2 provides a not insignificant cost savings over Option 1.¹⁴

With respect to whether Option 2 should be applied across the board to all monetary tables, such as the fine tables for individuals and organizations set forth in Chapters Five and Eight, the PAG believes further study is required. While in principle it makes sense that criminal fines, like civil fines, should be adjusted for inflation, the PAG respectfully urges the

¹³ U.S. Sentencing Comm'n, Prison and Sentencing Impact Assessments for Proposed 2015 Amendments for Inflationary Adjustments to Monetary Tables in the Federal Sentencing Guidelines, at 2-3, 5, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/2014_2015_Proposed_Impact.pdf (hereinafter "Impact Assessment").

¹⁴ According to the Impact Assessment, Option 2 will save 1,354 bed-years versus 1,322 bed-years for Option 1. See Impact Assessment at 4, 6. According to the Administrative Office of the U.S. Courts, the average cost for a bed-year is \$29,291.62. See Letter from Mathew G. Rowland, Chief, Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, to Chief Pretrial Services Officers and Chief Probation Officers, Re: Cost of Incarceration and Supervision (June 24, 2014). Thus, Option 2 will provide a total savings of \$39,660,853.48, while Option 1 would provide a total savings of only \$38,723,521.64. Both would reduce the average sentence imposed under § 2B1.1 for those affected by eight months (from 35 to 27 months for Option 1; from 37 to 29 months for Option 2). See Impact Assessment at 3, 5. On balance, therefore, and given the near-million dollar savings, the PAG recommends Option 2.

Commission to further study the data on the imposition of criminal fines on individuals and organizations before making any changes, and more specifically to use the proposed inflationary adjustments as an opportunity to study the extent to which the current fine tables as opposed to inflation-adjusted fine tables would best serve the punishment and deterrent purposes of imposing such fines. The PAG believes the fine tables are categorically different from loss tables, inasmuch as they do not attempt to measure the pecuniary harm – and thereby the seriousness – of offense conduct. Further, there is no indication from the judiciary or practitioners that the fine tables, in their current form, are in need of revision, by contrast to the sustained criticism of the loss table at § 2B1.1(b)(1). Accordingly, the PAG suggests that the Commission refrain from any modifications to the fine tables before conducting a study to determine whether any change may be warranted.

Second, the PAG believes that the inflationary adjustment should be made during the instant amendment cycle; there is no principled reason for delay. Further, the PAG believes an adjustment made every four years is both appropriate and practical: appropriate because it will give courts a more accurate, up-to-date assessment of the actual harm caused by economic offenses; practical because it would not impose an undue burden on either the Commission, its staff, courts or practitioners. Such loss table updates would be no different than the amendments made to the Guidelines each year.

The PAG does not believe a mechanism for automatically adjusting for inflation is either required or wise, especially if the Commission will, at regular four-year intervals, adjust the monetary tables anyway. Any methodology incorporated directly into the Guidelines inevitably will result in protracted litigation and, more pertinently, disparate application. Accordingly, the PAG believes a periodic adjustment alone is sufficient, but of course believes the Commission should publish the method utilized when promulgating such adjustments.

Third, while the PAG believes an inflationary adjustment based on the CPI ought to be implemented now, at least with regard to those portions of the Guidelines mentioned above, the PAG also strongly believes that basing the adjustment on the last modified date of the loss tables is not particularly principled, especially where those modifications of § 2B1.1 – made in 2001 as part of the comprehensive Economic Crimes Package – did not take into account any inflationary adjustment. See Synopsis of Proposed Amendment 4 (acknowledging that the Chapter Two monetary values “have never been revised specifically to account for inflation”).¹⁵ The PAG believes a more principled approach would be to revert the loss tables at § 2B1.1(b)(1) and § 2T4.1 to their original forms in 1987, and adjust appropriately therefrom.

¹⁵ As Professor Frank Bowman noted at the time of the 2001 amendments, as the result of a “compromise” resulting from the consolidation of the theft and fraud loss tables, “[t]he Commission adopted a new loss table for the newly consolidated economic crime guideline . . . [that] increased sentences for high-loss offenders, and reduced sentences for low-loss offenders.” Frank O. Bowman, III, The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History, 35 Ind. L. Rev. 5, 30 (2001). That, rather than any consideration of inflation, was what drove the structure of the loss table revisions in 2001.

Fourth, the Commission asks “whether, in addition to or instead of any of the options above, the Commission should consider any other changes to the monetary tables, such as to promote proportionality or to reduce complexity.” As noted at the outset, the PAG continues to believe that bigger and bolder changes are required. The proposed adjustments for inflation, while helpful, do not remedy the underlying arbitrariness and artificial precision of the loss table with its 15 discrete loss categories. The PAG therefore suggests – at least for possible future amendments – that in addition to making periodic inflationary adjustments, the Commission should consider substantially reducing the number of loss ranges under the table, potentially to the following classes: minimum [+0], minimal [+2], low [+4], medium [+6], and high [+8]. Fewer loss categories of course will lower the instance and complexity of litigation, and most importantly, reduce the disproportionate reliance on loss in sentencing for economic offenses.¹⁶

* * *

Let me end by thanking you again, on behalf of the PAG, for providing us with this opportunity to provide input on amending the economic crime guidelines. We look forward to continuing to work with the Commission and the Staff.

¹⁶ See Frank O. Bowman, III, Editor’s Observations: The 2001 Economic Crime Package: A Legislative History, 13 Fed. Sent. R. 3, 4 (2010) (noting that “[t]here appears to be a consensus . . . [that] it is . . . a good idea to simplify the loss table by reducing the number of levels on the table”).