Before the United States Sentencing Commission
Public Hearing on Proposal 1: Loss

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My name is Daniel Dena and I am an Assistant Federal Public Defender for the Federal Community Defender in the Eastern District of Michigan. I would like to thank the Commission for holding this hearing and allowing me to testify on behalf of the Federal Public and Community Defenders about the proposed amendment to the economic crime guidelines, USSG §2B1.1, and the rule for calculating loss.

Defenders are pleased that the Commission is considering a comprehensive review of §2B1.1 during an upcoming amendment cycle as it explores ways to simplify the guidelines.[1] Section 2B1.1 is far from simple. Nor is it empirically sound or fair. What started as two separate guidelines with loss tables providing up to 11- (fraud) or 13-level (theft) offense level increases based on loss amount and an additional two (fraud) or five (theft) "specific offense characteristic" (SOC) enhancements, has morphed into a combined economic crimes guideline with up to a 30-level loss-based offense level increase and 19 other SOCs.[2]

Section 2B1.1's most impactful flaw is its over-reliance on loss as a proxy for offense seriousness and culpability, which suffers from many of the same problems as USSG §2D1.1, the drug guideline.[3] By elevating loss amount above all else, §2B1.1 fails to identify meaningful differences among cases and is unable to guide courts when dealing with nuanced fraud cases. This over-emphasis on loss, combined with many SOC enhancements, causes §2B1.1 to routinely recommend sentencing ranges that courts reject as too high in a majority of §2B1.1 cases.

After three decades of upward ratchets to the loss table and patchwork amendments that have resulted in the addition of more than a dozen multi-part and multi-subpart (at times duplicative) SOC enhancements, we are glad the Commission is contemplating taking a big-picture look at §2B1.1 soon. Defenders would welcome the opportunity to work with the Commission to reimagine economic crime sentencing policy.

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[1] *See* 88 Fed. Reg. 89142, 89145 (Dec. 26, 2023) ("2024 Proposed Amendment, Rule for Calculating Loss, Issue for Comment").

[2] *Compare* USSG §§2B1.1, 2F1.1 (1987), *with* USSG §2B1.1 (2023).

[3] *See generally* §2D1.1(c) (increasing the base offense level based on drug quantity).

Turning to this year's proposed amendment, we vigorously oppose the proposal to move the current definition of loss from §2B1.1's commentary to its text. In the name of alleviating one type of disparity (between courts in the Third Circuit, where the court of appeals has invalidated the "intended loss" commentary, and courts outside that circuit), the Commission would exacerbate another disparity: between the guideline ranges that §2B1.1 calls for and the sentences that courts are finding appropriate under § 3553(a). The rates at which courts rely on 18 U.S.C. § 3553(a) factors to sentence below the §2B1.1 guideline range suggest that it is the second disparity, not the first, that demands the Commission's attention.

The comprehensive review and revision envisioned by the Commission's Issue for Comment is exactly what is needed for §2B1.1. The Commission can—and indeed, will need to—address the definition and role of loss as part of this process. But if the Commission decides to proceed with moving the definition of loss before the comprehensive revision, it should consider modifying the rule to allow courts to select the most appropriate measure of culpability to avoid *increasing* the number of cases in which courts will need to impose below-guidelines sentences. Regardless of the immediate actions taken, a thorough overhaul of §2B1.1 is inevitable to rectify its current shortcomings. Part I of this comment outlines the history of §2B1.1 and its failure to offer meaningful sentencing guidance, advocating for a holistic revision. Part II delves into the proposal for this year, explaining why moving the "greater of actual loss or intended loss" definition into the text of §2B1.1 is a bad idea. And it emphasizes the need for modification of the definition if such a move occurs.

We repeat: Defenders look forward to working with the Commission and stakeholders to reexamine §2B1.1 in the future to create a simpler, fairer, and empirically based guideline, that provides courts meaningful sentencing advice. The proposed amendment does not address §2B1.1's core problems and, as written, it would exacerbate them. So, we oppose it.

I. Section 2B1.1 is fundamentally flawed and in need of holistic reform.

When the Commission adopted the original economic crime guidelines, it did not apply the empirical approach it used in other guidelines, based on prior sentencing practices.[4] Instead, the Commission determined that courts' past sentencing practices revealed a significant number of "white-collar" cases received probation, which the Commission believed was too low.[5] So, it "intentionally crafted the initial set of guidelines to require more severe punishment, and more frequent use of imprisonment . . . ."[6] The result was a guideline and loss table flawed from its inception because its design was based not on empirical data but on a desire to make sentences harsher under the flawed presumption that longer sentences "might deter future crime."[7]

Nearly three decades of amendments have only exacerbated the flaws, resulting in a harsh, empirically unsound, and cumbersome §2B1.1. Section 2B1.1 now "routinely recommends arbitrary, disproportionate, and often draconian sentences" for people with no criminal history.[8] The chart below compares the original fraud guideline (§2F1.1), which was designed to be harsher than pre-Guidelines sentencing practice, and the current §2B1.1, which is far harsher still:

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[4] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* vii, 15 (2004) ("*Fifteen Year Review*") (discussing empirical approach used in overall Guideline formation).

[5] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20–22 (1988).

[6] Mark H. Allenbaugh, *"Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, Federal Sentencing Reporter, 26 Fed. Sent'g Rep. 19, 19 (2013). A great many crimes that would come within these guidelines would not involve the sort of "white collar criminals" that the public might picture—Gordon Gekko, perhaps, from the 1987 film *Wall Street*. Federal Public and Community Defenders represent, by appointment, a great many indigent individuals convicted of economic crimes.

[7] *See Breyer, supra* note 5, at 22. It is now well understood that "increasing the severity of punishment does little to deter crime." National Institute of Justice, *Five Things About Deterrence*, http://tiny.cc/iqczwz (June 5, 2016).

[8] Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost Its Way, and How to Save It*, 18 Ohio St. J. Crim. L. 605, 605–06 (2021).

	Original §2F1.1	**Today's §2B1.1**
Base offense level	6	7
Number of loss brackets	12	16
Loss bracket increments	1-level	2-levels
Median loss increment	$50,000 – $100,000	$200,000 – $1,050,000
Highest loss bracket	$5,000,000	$550,000,000
Highest loss levels added	11-levels	30-levels
Number of specific offense characteristics in addition to loss	2 (one of which has subparts)	20 (many with multiple subparts)
Highest base offense levels based solely on loss	17	37
Base offense level based on fiscal year 2022 median loss for theft, property destruction, and fraud offenses[9]	12	17
The guideline range recommended for someone with no criminal history with $1,000,000 loss, multiple victims, and use of sophisticated means[10]	6 (base) + 9 (loss) + 2 (more than minimal planning and number of victims) = 17 17/I = 24 – 30 months[11] (or 18 – 24 months, inflation-adjusted)[12]	7 (base) + 14 (loss) + 2 (number of victims) + 2 (sophisticated means) = 25 25/I = 57 – 71 months[13] (2x – 3x the 1987 guidelines range)

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[9] *See* USSG, *Quick Facts Theft, Property Destruction, Fraud Offenses*, http://tinyurl.com/ypc9c3z9 (providing that median loss for these offenses was $160,737 in Fiscal Year 2022).

[10] The disparity between the 1987 and today's fraud guidelines is even more pronounced when accounting for inflation: $1 million in 2023 dollars is equivalent to $360,550.81 in 1987. *See* U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*,

A. The history of §2B1.1 and its loss table, through 2015, is of a one-way upward ratchet.

How did we get here? A history of §2B1.1 reveals an evolution influenced more by reaction to high-profile corporate fraud cases that captured media attention than institutional expertise and/or study of courts' sentencing practices.

1. The Commission's initial approach.

To go back to the start, the Commission initially divided economic crimes into two categories: (1) crimes involving theft, embezzlement, and the like under USSG §2B1.1; and (2) crimes involving fraud and deceit under USSG §2F1.1. Under both guidelines, a loss table was the primary SOC designed to "drive the severity of sentences for [people convicted of fraud] based primarily on the magnitude of the loss."[14] The Commission explained that "[e]mpirical analyses of current practices" established loss amount as one of the two "most important factors that determine sentence length."[15] Thus, the Commission relied on loss as one of the "primary factors" when designing the inaugural fraud guidelines.[16]

This approach was questionable from the start. Although past sentencing practices supported using loss as a factor in the fraud guidelines, past practices did not justify loss taking on such a large role, as if it were the best measure of culpability. As noted, the Commission believed pre-guidelines sentences for "white-collar" cases were too low.[17] So, the

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http://tinyurl.com/2zh445k3 (providing $360,550.81 as buying power in January 1987 when inputting $1,000,000 in January 2024).

[11] USSG Ch. 5, Pt. A (Sentencing Table) (1987).

[12] *See id.*

[13] USSG Ch. 5, P. A (Sentencing Table) (2023).

[14] Boss & Kapp, *supra* note 8, at 608.

[15] §2F1.1, comment. (Background) (1987).

[16] *Id.*

[17] *See Fifteen Year Review*, *supra* note 4, at vii, 15.

Commission calibrated the loss table so that individuals "who caused modest-to-high losses . . . would have to spend at least some time in prison."[18]

The resulting §2F1.1 set the base offense level at 6, contained two SOCs with four subparts, and included a loss table going up to "over $5,000,000" with an 11-level increase to the base offense level:[19]

§2F1.1. Fraud and Deceit

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the estimated, probable or intended loss exceeded $2,000, increase the offense level as follows:

	Loss	Increase in Level
(A)	$2,000 or less	no increase
(B)	$2,001 - $5,000	add **1**
(C)	$5,001 - $10,000	add **2**
(D)	$10,001 - $20,000	add **3**
(E)	$20,001 - $50,000	add **4**
(F)	$50,001 - $100,000	add **5**
(G)	$100,001 - $200,000	add **6**
(H)	$200,001 - $500,000	add **7**
(I)	$500,001 - $1,000,000	add **8**
(J)	$1,000,001 - $2,000,000	add **9**
(K)	$2,000,001 - $5,000,000	add **10**
(L)	over $5,000,000	add **11**

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by **2** levels, but if the result is less than level **10**, increase to level **10**.

(3) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level **12**, increase to level **12**.

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[18] Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission's Economic Crime Project (and What They Should Do Now)*, 27 Fed. Sent'g Rep. 270, 271 (2015).

[19] USSG §2F1.1 (1987).

Correspondingly, the first §2B1.1 set the base offense level at 4, contained six SOCs, and included a loss table going up to "over $5,000,000" with a 13-level increase to the base offense level:[20]

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

(1) If the value of the property taken exceeded $100, increase the offense level as follows:

	Loss	Increase in Level
(A)	$100 or less	no increase
(B)	$101 - $1,000	add **1**
(C)	$1,001 - $2,000	add **2**
(D)	$2,001 - $5,000	add **3**
(E)	$5,001 - $10,000	add **4**
(F)	$10,001 - $20,000	add **5**
(G)	$20,001 - $50,000	add **6**
(H)	$50,001 - $100,000	add **7**
(I)	$100,001 - $200,000	add **8**
(J)	$200,001 - $500,000	add **9**
(K)	$500,001 - $1,000,000	add **10**
(L)	$1,000,001 - $2,000,000	add **11**
(M)	$2,000,001 - $5,000,000	add **12**
(N)	over $5,000,000	add **13**

(2) If a firearm, destructive device, or controlled substance was taken, increase by **1** level; but if the resulting offense level is less than **7**, increase to level **7**.

(3) If the theft was from the person of another, increase by **2** levels.

(4) If the offense involved more than minimal planning, increase by **2** levels.

(5) If undelivered United States mail was taken, and the offense level as determined above is less than level **6**, increase to level **6**.

2.15 October, 1987

(6) If the offense involved organized criminal activity, and the offense level as determined above is less than level **14**, increase to level **14**.

The first fraud guideline included the rule for intended loss: "[I]f a probable or intended loss that the defendant was attempting to inflict can be

[20] USSG §2B1.1 (1987).

determined, that figure would be used if it was larger than the actual loss."[21] Significantly, this rule was based on the Commission's policy judgment and not on past sentencing practices.[22]

The Commission's decision to depart from its empirical approach therefore generated a first-generation fraud guideline that recommended increasing sentences based on loss that would result in imprisonment in all but the very least serious cases.[23]

2. Amendments related to the "savings and loan" crisis.

Between 1989 and 2003, the Commission made three significant changes to the fraud guidelines—each shifting the guideline range upward.

The first of the major transformations occurred in the late 1980s when over 1,000 savings and loan institutions failed. Congress responded with new regulations, and the Commission responded with amendments to both §2B1.1 and §2F1.1, including harsher loss tables.[24]

Empirical data did not drive these amendments. Rather, the Commission said the reason for the amendments was to "conform the theft and fraud loss tables to the tax evasion table" and to "increase the offense levels with larger losses to provide additional deterrence and better reflect the seriousness of conduct."[25] As former Sentencing Commissioner Michael Block, and former Deputy Chief Counsel to the Sentencing Commission Jeffrey Parker, put it, the amendments were driven by the Commission's belief that "recent congressional enactments had given oblique 'signals' to the Commission to increase fraud penalties," although the statutes "said no such

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[21] §2F1.1, comment. (n.7) (1987).

[22] *See id.* (providing that rule for intended loss was derived "[i]n keeping with the Commission's policy on attempts"); *see also* Allenbaugh, *supra* note 6, at 19.

[23] *See* David Debold & Matthew Benjamin, "*Losing Ground" – In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. Pa. L. Rev. PENNumbra 141, 144 (2011).

[24] *See* USSG App. C, Amend 99, 154 (Nov. 1, 1989).

[25] USSG App. C, Amend 154, Reason for Amendment (Nov. 1, 1989).

thing."[26] These insiders complained that the "Commission prescribed gratuitous punishment" for fraud cases based on an "overtly political and inexpert" process rather than empirical analysis.[27]

The new loss tables included range increases for offenses involving losses exceeding $40,000, and the tables also included four more loss categories:[28]

§2F1.1. **Fraud and Deceit**

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18.

[26] Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 319 (1989).

[27] *Id.* at 319–20.

[28] USSG §§2F1.1(b)(1), 2B1.1(b)(1) (1989).

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add **1**
(C)	More than $1,000	add **2**
(D)	More than $2,000	add **3**
(E)	More than $5,000	add **4**
(F)	More than $10,000	add **5**
(G)	More than $20,000	add **6**
(H)	More than $40,000	add **7**
(I)	More than $70,000	add **8**
(J)	More than $120,000	add **9**
(K)	More than $200,000	add **10**
(L)	More than $350,000	add **11**
(M)	More than $500,000	add **12**
(N)	More than $800,000	add **13**
(O)	More than $1,500,000	add **14**
(P)	More than $2,500,000	add **15**
(Q)	More than $5,000,000	add **16**
(R)	More than $10,000,000	add **17**
(S)	More than $20,000,000	add **18**
(T)	More than $40,000,000	add **19**
(U)	More than $80,000,000	add **20**.

Shortly after, the Commission made small clarifying amendments to §2F1.1's commentary "to give additional guidance for determining loss,"[29] and "to provide guidance in cases in which the monetary loss does not adequately reflect the seriousness of the offense."[30] But during this time, the Commission took no steps to ameliorate the influence of loss amount in calling for higher sentencing ranges.

[29] USSG App. C, Amend. 393, Reason for Amendment (Nov. 1, 1991).

[30] USSG App. C, Amend. 482, Reason for Amendment (Nov. 1, 1993).

3. Amendments related to the Commission's 2001 economic crimes package.

A little over a decade later, on the heels of a multiyear study of economic crimes—culminating in a national symposium[31]—the Commission implemented an "Economic Crime Package," which merged three guidelines (§2B1.1, §2F1.1, and §2B3.1) into a single guideline: §2B1.1.[32] And it made §2B1.1 harsher: it increased §2B1.1's base offense level from 4 to 6, added additional SOCs, and introduced a new loss table that increased the increments between the loss levels and also included higher loss amounts.[33]

Here is the §2B1.1 loss table as promulgated in 2001:

§2B1.1. **Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**
(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**.

[31] *See* USSC*, Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses* (2000), http://tinyurl.com/4mwxbfwf.

[32] USSG App. C, Amend. 617 (Nov. 1, 2001); USSG App. C, Amend. 617, Reason for Amendment (Nov. 1, 2001).

[33] *See id.*

The 2001 amendments also provided a modified definition of loss, retained the rule that "loss" would be determined by the "greater of actual or intended loss," and further provided that "intended loss includes unlikely or impossible losses."[34] Before this amendment, the fraud guideline's commentary provided that a loss that was unlikely to occur may overstate the seriousness of the offense.[35] The Commission said it specifically included unlikely or impossible intended losses in the loss calculation based only on an unexplained assertion that it "better reflects [ ] culpability."[36]

The Commission explained that "for cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of . . . culpability . . . . Conversely, in cases which the actual loss is greater, that amount is a more appropriate measure of the seriousness of the offense."[37] The Commission did not explain why the best measure of culpability must always be the bigger number.

In promulgating these amendments, the Commission overlooked feedback from district courts countering the need to increase the guidelines' penalties. For instance, before the amendments, the fraud guidelines allowed for both upward departures when the loss did not "fully capture the harmfulness and seriousness of conduct," and downward departures when loss "overstate[d] the seriousness of the offense.[38] Data from 2000 showed that sentencing courts granted upward departures in only 1.2% of cases under §2F1.1, while they granted downward departures in 11.2% of cases.[39]

4. Amendments related to the Sarbanes-Oxley Act.

Less than two years later, in 2003, the Commission significantly amended the new combined guideline. Following a high-profile corporate scandal involving Enron and Arthur Anderson, Congress enacted the

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[34] *Id.*

[35] *See* Amend. 393, *supra* note 29.

[36] *See* USSG App C., Amend 617, Reason for the Amendment (Nov. 1, 2001).

[37] *Id.*

[38] §2F1.1 comment. (n.11) (2000).

[39] USSG, *2000 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2000).

Sarbanes-Oxley Act.[40] Among many other provisions, it included a set of directives to the Sentencing Commission: to "review and amend as appropriate" the fraud guidelines and policy statements to address conduct that "endangers the solvency or financial security of a substantial number of victims"; to ensure that the guidelines "reflect the serious nature of the offenses and the penalties set forth" under the Act; and to consider an "enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses."[41]

In complying with these directives, the Commission did not tailor amendments to people committing high-end corporate fraud. It increased §2B1.1's base offense level from six to seven for offenses with a statutory maximum of 20 years and further extended the loss brackets.[42]

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The cumulative effect of the amendments to the economic crime guidelines between 1987 and 2003 was to give ever more weight and consequence to the loss amount, and ratchet guideline ranges upward ever higher.[43] For decades, courts have pushed back, explaining that loss "is a relatively weak indicator of the moral seriousness of the offense or the need

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[40] Pub. L. No. 107-204, 116 Stat. 745 (2002); *see also Yates v. United States*, 574 U.S. 528, 535–36 (2015) ("The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents.").

[41] *Id.* at §§ 805(a)(4), 905(b)(1), 1104(a)(2).

[42] *See* USSG App. C, Amend 647 (Jan. 25, 2003); USSG App. C, Amend 653 (Nov. 1, 2003).

[43] Additionally, these amendments created more and more upward SOCs, some of which (e.g., number of victims) typically correspond to elevated loss amounts, compounding the focus on loss. *See* chart at section I Introduction; *see also Bowman*, *supra* note 18, at 272–73; Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 170 (2008) ("The result is that many factors for which loss already was a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table, where sentencing ranges are wide.").

for deterrence."[44] Commentators have observed that overreliance on the "mathematical computation of loss" can result in excessive sentences for individuals coming within this guideline.[45]

B. In 2015, the Commission made positive amendments but missed an opportunity to address §2B1.1's flaws.

The Commission's last substantive amendments to §2B1.1 concerning loss were made in 2015 and they were positive. The Commission needed to resolve a circuit split regarding whether the intended loss calculation requires a subjective or objective inquiry.[46] And it appropriately adopted the subjective approach, defining intended loss as "the pecuniary harm that the defendant purposely sought to inflict."[47] In doing so, it emphasized, "that sentencing enhancements predicated on intended loss . . . should focus more specifically on the defendant's culpability."[48]

The Commission also adjusted the loss table and other related dollar-based guideline measures to account for inflation, which was needed.[49] Below is the resulting loss table, which is still in place today:

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[44] *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004); *see also, e.g., United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005) ("[T]he guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child. It is true that, as the government argued in the present case, from the victim's perspective, the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference."); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (explaining that the application of §2B1.1's SOCs to the individual being sentenced "represents . . . the kind of 'piling-on' of points for which the guidelines have frequently been criticized"); *United States v. Watt*, 707 F. Supp. 2d 149, 151 (D. Mass. 2010) (stating that "[t]he Guidelines were of no help" in fashioning an appropriate sentence based on excessive loss increase).

[45] Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L. J. Pocket Part 279, 290 (2007); *see also, e.g.,* Boss & Kapp, *supra* note 8, at 614.

[46] *See* USSG App. C, Amend 792, Reason for Amendment (Nov. 1, 2015).

[47] *Id.*

[48] *Id.*

[49] *See* USSG App. C, Amend 791, Reason for Amendment (Nov. 1, 2015).

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$6,500 or less	no increase
(B)	More than $6,500	add **2**
(C)	More than $15,000	add **4**
(D)	More than $40,000	add **6**
(E)	More than $95,000	add **8**
(F)	More than $150,000	add **10**
(G)	More than $250,000	add **12**
(H)	More than $550,000	add **14**
(I)	More than $1,500,000	add **16**
(J)	More than $3,500,000	add **18**
(K)	More than $9,500,000	add **20**
(L)	More than $25,000,000	add **22**
(M)	More than $65,000,000	add **24**
(N)	More than $150,000,000	add **26**
(O)	More than $250,000,000	add **28**
(P)	More than $550,000,000	add **30**.

Although the 2015 amendments did not continue the ratchet upward, they "in no way corrected the underlying problem—that the loss table ha[d] become entirely divorced from the empirical data that informed its creation."[50] These amendments came just one year after the American Bar Association (ABA) had released its "Report on the Reform of Federal Sentencing for Economic Crimes," calling for a fundamental rethinking of

[50] Boss & Kapp, *supra* note 8, at 613.

economic crimes sentencing.[51] During the 2015 comment period, the ABA, along with other stakeholders, recommended that the Commission amend §2B1.1 and other economic crime guidelines in line with its Report, to ensure that the guidelines "are proportional to offense severity and adequately take into consideration individual culpability and circumstances."[52] Part of this related to the need for the Commission to "reduce the reliance on loss as the primary measure of culpability."[53]

Defenders and others were pleased that the Commission made some positive changes in 2015, but the Commission missed an opportunity to rethink a guideline that courts were increasingly varying from (a trend that, as discussed below, continues today). We are heartened that the Commission appears poised to do this sort of rethinking in the near future.

[51] *See generally* American Bar Association, Criminal Justice Section Task Force, *A Report on Behalf of the American Bar Association Criminal Justice Set the Reform of Federal Sentencing for Economic Crimes* (Nov. 10, 2014), http://tinyurl.com/4nhkvk9t.

[52] Statement of James E. Felman on behalf of the American Bar Association to U.S. Sent'g Comm on Proposed Amendments to the Federal Sentencing Guidelines regarding Economic Crimes, at 8 (Mar. 12, 2015) ("2015 ABA Statement"); *see also* Letter from the National Association of Criminal Defense Lawyers to U.S. Sent'g Comm on Proposed Amendment for 2015 Cycle, at 8 (Mar. 18, 2015) ("2015 NACDL Letter") ("NACDL continues to support a wholesale reevaluation of §2B1.1 of the sort recently undertaken by the American Bar Association and submitted to the Commission for consideration."); Statement of Michael Caruso on behalf of Fed. Defenders to U.S. Sent'g Comm. on Economic Crime and Inflationary Adjustments, at 1 (March 12, 2015) ("2015 Caruso Statement") (urging the Commission to "reconsider its position on the general state of" §2B1.1 because "sentences in actual cases demonstrate that courts do not find the guideline particularly helpful in determining a just sentence . . . .").

[53] 2015 ABA Statement at 8–9; *see also* 2015 NACDL Letter at 8–9 ("NACDL continues to believe that §2B1.1 should be re-conceptualized to address . . . criticisms by reducing the outsized role that loss amount currently plays in sentencing determinations."); 2015 Caruso Statement at 5 ("The guidelines need to reduce the current overemphasis on loss as a measure of culpability, eliminate intended loss, [and] allow loss amounts to be mitigated by a variety of other factors relevant to culpability . . . .").

II. The Commission should not move the current definition of "loss"—that is, the "greater of" actual or intended loss—from §2B1.1's commentary to its text.

While the Commission's suggestion (in its issue for comment) that it may comprehensively review §2B1.1 during an upcoming amendment cycle is encouraging, the proposal on the table this year is dispiriting. Relocating §2B1.1's current definition of "loss," as being the "greater of actual loss or intended loss," from commentary to guidelines text is an inelegant non-solution to the guideline's structural problems that produce sentencing ranges that courts reject more often than they accept.

In seeking to rectify the inconsistency in loss calculations between courts within and outside the Third Circuit following *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), the Commission risks worsening another: the disconnect between the guideline ranges prescribed by §2B1.1 and the sentences courts are actually imposing. To be fair, it is understandable that the Commission aims to ensure consistent loss calculations for individuals sentenced throughout the country. But the Commission's solution—ensuring that courts in every circuit use the highest possible loss calculation—is worse than the problem.

The real issue with §2B1.1 is not one circuit's treatment of "intended loss," but §2B1.1's overemphasis on loss (actual or intended), which often fails to align with culpability and leads to a recommended guideline sentence that is overly harsh. The proposed amendment does not address this problem. Instead, it doubles down by proposing to move to guideline text a rule that always results in the highest possible loss amount and the highest guideline range—regardless of whether actual or intended loss would better measure culpability in average cases, which do not involve Bernie Madoff, Enron CEOs, or anyone of that ilk. In our experience, these cases more often target individuals who play a low-level role in a larger scheme.

Consider *United States v. Alexander*.[54] She and five co-defendants were indicted for conspiracy to commit wire fraud and money laundering, aggravated identity theft, and other related charges stemming from a fraudulent sweepstakes scheme in Jamaica and the Middle District of

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[54] *United States v. Alexander*, 6:18-cr-124 (M.D Fla.).

Florida.[55] Several co-defendants entered into plea agreements,[56] but Ms. Alexander exercised her right to trial and a jury found her guilty of conspiracy to commit wire fraud, conspiracy to commit money laundering, and three counts of aggravated identity theft; it acquitted her of two counts of wire fraud.[57]

At sentencing, Ms. Alexander faced an 18-level enhancement based on loss—primarily losses caused by her co-defendants.[58] In pleading guilty, the co-defendants had stipulated that their total loss amount exceeded $3.6 million—just above the $3.5-million cutoff under §2B1.1(b)(1)(J).[59] The district court balked at this increase, and at the resulting guideline range, explaining that the 18-level loss enhancement Ms. Alexander received was "exceedingly punitive as it relates to this particular defendant in terms of her financial participation in the scheme."[60] The court therefore varied below the guidelines based on her relative culpability and other mitigating factors.[61]

Intended loss is no better. District Judge Stefan R. Underhill, sitting by designation on the Second Circuit, commented on problems associated with intended loss. He agreed with many other judges and commentators that "the loss guideline is fundamentally flawed," and further explained that "those flaws are magnified where . . . the entire loss amount consists of intended loss."[62] He explained:

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[55] *See generally* Indictment, *United States v. Alexander*, No. 6:18-cr-124 (M.D. Fla. May 31, 2018), ECF No. 1.

[56] *See* Def's Sent'g Memo. at 4, *United States v. Alexander*, No. 6:18-cr-124 (M.D. Fla. Mar. 18, 2019), ECF No. 314. (detailing co-defendant pleas and stipulations).

[57] Jury Verdict, *United States v. Alexander*, No. 6:18-cr-124 (M.D. Fla. Nov. 6, 2018), ECF No. 325.

[58] *Accord id. with* USSG §1B1.3(a)(1)(B) (defining relevant conduct for jointly undertaken activity).

[59] Def's Sent'g Memo., *supra* note 56 at 4.

[60] *See* Sent'g Tr. at 99, No. 6:18-cr-124 (M.D. Fla. Oct. 20, 2019), ECF No. 364 (determining that 18-level loss adjustment was "exceedingly punitive" and "overrepresent[ed Ms. Alexander's] culpability").

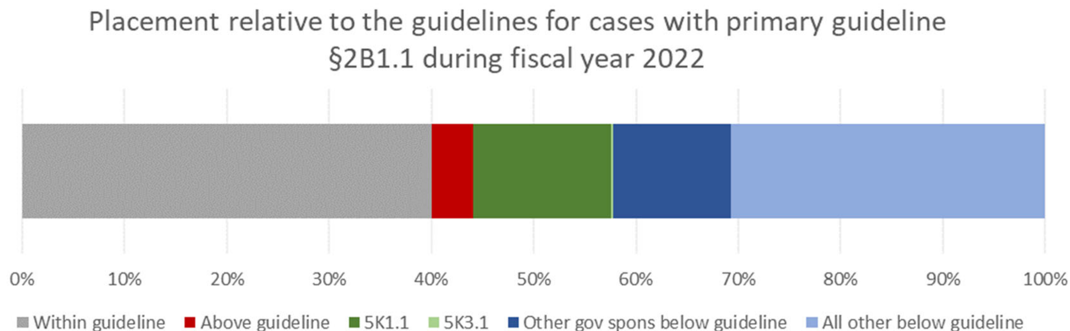
[61] *See id.* at 99–100, 174–75.

[62] *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring).

> The absence of any actual loss whatsoever and especially the absence of a victim significantly undercut any argument that [a] crime was particularly serious. Outside the context of Sentencing Guidelines calculations, intended loss is always less serious than actual loss, so its value as a proxy for seriousness of a crime must be carefully examined.[63]

As Judge Underhill explained, a hapless person who imagines a fanciful scheme to raise $10 million from banks to fund a business venture is treated as more culpable than someone who swindles $1 million of individuals' retirement savings to support a lavish lifestyle.[64]

Whether a court is measuring loss according to actual loss or intended loss, the steep enhancements in the loss table, combined with the many upward SOCs, result in a guideline range that is too high *in most cases*. As illustrated below, data from fiscal year 2022 (before *Banks*) show that courts imposed below-guideline sentences in 55.9 percent of cases using primary guideline §2B1.1:[65]



These data are consistent with the trend over the past years. For example, from fiscal year 2018 through 2022, courts imposed below

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[63] *See id.* at 381.

[64] *See id.* (discussing "a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars," and explaining that "[a]ppellants' conduct was not dangerous because they had absolutely no hope of success.").

[65] The data used for this analysis, which includes cases involving USSG §5K1.1 departures, was extracted from the Commission's "Individual Offender Datafiles" for fiscal year 2022, which are available at https://bityl.co/HBGG.

guidelines sentences in 54.8 percent of cases using primary guideline §2B1.1.[66]

In the face of this data, it would be unwise to entrench into the text of §2B1.1 the rule that a court should rely on either actual or intended loss, depending on whichever one is greater—that is, whichever one would result in the higher guideline range. Courts are telling the Commission, through both their written opinions and the sentences they are imposing, that §2B1.1 is not appropriately calibrated and results in guideline ranges that are too high. It is great that the Commission may be looking to overhaul §2B1.1 in the future. But in the meantime, the Commission should not take an action that would further bake into §2B1.1 the idea that courts imposing sentences in economic crimes cases should always choose the harshest measure of loss.

If the Commission decides that it needs to move the loss definition from §2B1.1's commentary to its text this year, it should modify that definition to eliminate the "greater of" rule. Based on the sentences that courts are imposing, the Commission could peg the measure of loss to culpability, with something like: "Loss may be measured with reference to actual loss or intended loss. The court should use the measure of loss that better reflects the defendant's culpability." Regardless, it would still be critical for the Commission to take a big-picture look at §2B1.1 during an upcoming amendment cycle.

If the Commission is not prepared to modify the definition of "loss" in line with these suggestions and will only contemplate moving the current definition from the commentary to the text, then the Commission should reject the proposed amendment and leave things as is for the time being. The Commission can consider the definition of loss along with other potential amendments, holistically, in the near future.

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[66] *See id.* (spanning fiscal years 2018–2022). Cases involving USSG §5K1.1 departures were also included in the below-guideline metric.