Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Keynote Address at the Regulatory Offenses and Criminal Law Conference
Center on the Administration of Criminal Law
New York University School of Law
"The 2015 Economic Crime Amendments"[1]
April 14, 2015

Thank you to NYU's Center on the Administration of Criminal Law for hosting this event. I also particularly want to thank Professor Rachel Barkow, who serves as a commissioner with me at the U.S. Sentencing Commission, and the students on the editorial board at the NYU Journal of Law & Business, who have agreed to publish an article expanding on this speech for their fall 2015 issue.

Today the focus has been on regulatory offenses, which are so vexing for many right now in Congress and for many of the practitioners in this room. In fact, troubling accounts of prosecutions for these kinds of offenses were one of the primary factors that led to the creation of the bipartisan Over-Criminalization Task Force of the Committee on the Judiciary in the House of Representatives to look at regulatory offenses. You share concerns about regulatory offenses — that sometimes individuals prosecuted for regulatory offenses have very limited culpability, no bad purpose, and maybe no victims. And it is hard to figure out how many regulatory offenses there are and how many are prosecuted annually. Today, my focus is on economic fraud where some have voiced similar concerns about the fairness of sentences.

In 2010, we heard from a broad range of stakeholders concerning the fraud guideline. Those stakeholders include the Department of Justice, the Federal Public Defenders, a few federal judges, the Commission's advisory groups, and the American Bar Association. The Commission heard concerns from some judges that the economic crime guideline was too high, that it produced unreasonable sentences, and that it was "fundamentally broken." Yet in a survey of all federal district judges a few years earlier, 65 percent told us the guideline ranges for fraud were just right. Another 24 percent said they were too low. Only ten percent thought they were too high. We were perplexed: how could we reconcile this seemingly contradictory input from the judges?

Let me give you some background on the fraud guideline. Congress has had a long-standing interest in the sentences for economic crime offenses. In fact, one of the reasons underlying enactment of the Sentencing Reform Act of 1984 and creation of the Commission was a concern that sentences for certain types of economic crimes, such as fraud, embezzlement, and tax offenses were unduly lenient, particularly as compared to those imposed for the substantially equivalent crime of larceny. In the Sentencing Reform Act, Congress expressed a concern that sentencing white collar offenders to a small fine and little or no imprisonment created the impression that certain offenses could be written off as a cost of doing business and

[1] A version of this speech will be found in the NYU Journal of Law & Business. 12 N.Y.U. J. L. & Bus. ___ (forthcoming 2015).

directed the Commission to ensure white collar offenders received appropriate sentences. The Commission determined that the amount of actual or intended loss involved in the offense would be the primary factor used to determine severity of an offense sentenced under this guideline.

Congress has continued to be active in the fraud area in recent years, directing the Commission to consider amendments in the Sarbanes-Oxley Act of 2002, the Patient Protection and Affordable Care Act of 2010, and the Dodd-Frank Act of 2010. In Sarbanes-Oxley, the Commission was directed to ensure the guidelines "reflect the serious nature of the offenses and the penalties . . . [and] deter, prevent, and punish" fraud offenses. The Patient Protection Act specifically directed the Commission to increase penalties for federal health care fraud offenses and Dodd-Frank created entirely new securities fraud offenses and directed the Commission to review and amend the guidelines related to these types of fraud.

Prosecution for fraud cases remains an important part of the federal system. In fiscal year 2014, there were 8,216 fraud offenders who accounted for 12.1 percent of all offenders sentenced under the guidelines. Cases come from every district in the country and they are varied. For example, the Southern District of Florida not only has the highest number of economic offenses on a yearly basis, but also has a wide variety of offenses. The Southern District of Florida is the leader in the number of health care offenses, mortgage cases, credit card offenses, and is among the leaders in terms of many other types of economic crime offenses. We see other districts with a larger focus in other types of economic crimes, with the District of South Carolina and the Eastern District of Pennsylvania handling a high number of financial institution- and identity theft-related offenses. There is tremendous variation in the types of cases that are sentenced at §2B1.1. While theft and embezzlement make up about one-quarter of fraud, there is also a lot of mortgage fraud, financial institution fraud, government benefits fraud, health care fraud, and credit card fraud. In fact, only 282 cases, or 3.4 percent of all fraud, were related to securities fraud.

I'll be talking a lot about the "loss table" and the "victims table" and other specific offense characteristics, and while I'm sure some of you could write a treatise on the fraud guidelines, I want to highlight a few things to make sure everyone understands what I am talking about.

First, the base offense level in fraud is 6 or 7 (at that offense level, for a first time offender, the sentence would be zero to six months and would permit probation). Key specific offense characteristics in the fraud guideline are the loss and victim tables. The loss table provides for an increase in offense level depending on the amount of loss. A difference in loss amount can make a tremendous impact on a defendant's final sentence. A 4-level increase represents approximately a 50 percent increase in sentencing range and a 6-level increase approximately doubles the sentencing range. What that means, in the real world, is that a loss amount can increase an offense level by as many as 30 levels. You are literally talking about a sky-high increase — going from a sentence of zero to six months to 188 to 235 months based solely on loss amount.

The guideline has grown increasingly complex with 19 specific offense characteristics and four cross references. Some have called it a Christmas tree or a Chanukah bush. As a result, the Commission has heard criticism of the guideline that the specific offense characteristics lead to a "piling on" for many defendants, particularly at high loss amounts.

So let's return to the concerns of the judges and other stakeholders. To begin the analysis, we held a major economic crimes symposium right here in New York City. We invited judges, prosecutors, defense attorneys, probation officers, academics, the Commission's advisory groups, and other interested stakeholders from around the country to attend the symposium to discuss how the Commission can improve §2B1.1. We received input from the Department of Justice, and the ABA came forth with a specific proposal. We also heard the Congressional perspective from former Congressman Michael Oxley, the lead House sponsor of the Sarbanes-Oxley Act.

What did we learn from the symposium? Most of all, we learned that there are no easy solutions to the problems identified with the fraud guideline, which covers a variety of different frauds. The various stakeholders in the federal criminal justice system do not speak with a unified voice on this issue, and expressed varying levels of satisfaction with the current guideline.

With all of the concerns voiced at the symposium in mind, we went back to the data. We found that in 2003, the average guideline minimum for §2B1.1 offenses and the average sentence was the same at ten months. We see that the average guideline minimum has more than tripled to 33 months. Across the same time period, average sentences have increased but not at the same rate. They have increased to 24 months. We can easily detect that these lines began to diverge in 2005 — the year of the *Booker* opinion, which made guidelines advisory — and there is a widening gap between the average guideline minimum and average sentence imposed.[2] So we continued to ask whether the divergence was due to a consideration of individual offender characteristics or due to dissatisfaction with the guidelines.

The median loss in fraud offenses is lower than you would imagine based on some of the problem cases we heard about at the symposium. For fiscal year 2014 the median loss was $118,081. Almost 82 percent of §2B1.1 offenders had a loss amount of $1 million or less and the percentage of cases at the top of the loss table drastically decreases as we continue. Just under ten percent of cases have a loss amount of $2.5 million or more. As we get into the highest part of the loss table, less than one percent of cases are in the top four categories — exactly 64 cases in 2014 with loss calculations of greater than $50 million.

Most offenders do not receive many specific offense characteristics. While there are some instances of offenders who may have a "piling on" of specific offender characteristics, that is not representative of most cases. In fact, almost half of all offenders received an enhancement only for loss amount and another large portion received the loss table enhancement and only one other specific offense characteristic. After loss, the most common enhancement was for the

[2] *United States v. Booker*, 543 U.S. 220 (2005).

number of victims, which continued to point out to the Commission that there was a need to meaningfully account for harm to victims in a way that didn't rest exclusively on the number of victims.

Based on our analysis, we found that in most cases, the fraud guideline works well to distinguish the more- and less-culpable offenders. However, the high loss cases continue to present a more troubling picture. Let me explain. What we found is that in most of those cases — those 82 percent of cases at or under $1 million — judges are imposing sentences consistent with the guideline range, a strong indicator that the guidelines are providing an anchoring effect in those cases.

Of course, there are variances based on individual offenders' characteristics, but variances are legal under the post-*Booker* system. They do not indicate a broken guideline. It is those cases in the high end of the loss table where judges were varying at high rates and in large degrees. Indeed, the rate of government-requested variances is also high. In fiscal year 2014, for the top four loss table categories (amounts at or over $50 million) the government-sponsored, below-guidelines rate was 48.4 percent! That's compared to 20.9 percent overall for government-sponsored below-range sentences that aren't immigration-related "fast track" departures (which aren't typically used in fraud cases).

So let's describe a case that highlights the problems judges face in these high-loss cases. One health care scheme in Brooklyn involved medically unnecessary treatments. Patients who agreed to participate were paid in a "kickback room." The defendant was a receptionist who was eventually promoted to the kickback room, where she made payments to patients and was involved in some aspects of overbilling. The scheme was lucrative for the business owners and the loss amount was $77 million, but the defendant was a salaried employee — she made no bonuses, received no kickbacks, and shared no part of the profit. Her guidelines range was 70 to 87 months, but the Court gave her a sentence of probation.

As another example, there was a fraud case here in the Southern District of New York with an enormous loss amount of over $2 billion. One defendant in particular entered the fraud relatively late in the scheme and had no direct financial gain. In addition, this defendant had an unparalleled commitment to the community and volunteerism. The court accepted the guideline range of 49, equating to a life sentence, but imposed a sentence of one year and one day.

It's clear that judges struggle with high loss amounts, particularly for first-time, low-level offenders who have no gain. After our symposium, hearing, and data analysis, we concluded that there was a need to explore better ways to account for victim harm and offender culpability in high-loss cases. Here's how we voted last week to address the problem.

First, we focused meaningfully on harm to victims. The Commission's Victims Advisory Group and others explained that that the existing guideline overemphasizes the number of victims to the detriment of qualitative harms that a smaller number of victims may suffer. We voted to include a victim enhancement if even one victim suffers a substantial financial harm like

filing for bankruptcy, has a substantial loss to a retirement or savings account, or otherwise makes changes to employment or living situation as a result. However, we eliminated 4- and 6-level enhancements based only on the same number of victims, without looking at the quality of the harm. We feel that those higher enhancements, which were more common at the top of the loss table, contributed to a piling-on effect not related to the offender's culpability. Such enhancements will now only be given if the requisite number of victims suffers substantial financial harm.

We also shifted the focus to the offender's individual intent to ensure that when the court is calculating "intended loss" that only the amounts the defendant purposely sought to inflict are counted. We modified the enhancement for sophisticated means to instruct courts to consider the defendant's own intentional conduct. We found that lower-level offenders who participated in complex schemes were sometimes unfairly held responsible even if their own actions were not sophisticated.

And we looked to see whether minor or minimal participants in fraud offenses were not receiving reductions for mitigating role. Our review of data found that mitigating role reductions were applied in only 7.6 percent of federal cases and three-quarters of those were applied in drug offenses. The Commission never intended for mitigating role reductions to apply so rarely or to apply primarily in drug offenses.

We amended the mitigating role enhancement to add a non-exhaustive list of factors that judges should consider in determining whether any offender is a minor or minimal participant and it makes clear that the focus should rest on crucial questions that go to the offender's culpability. These questions provide guidance in the fraud context and include whether the offender was aware of the scope of the offense, had a proprietary interest in the outcome of the offense, or was involved in the planning or organizing of the offense. We also instructed judges that whether an offender played an indispensable or integral role in the offense is not dispositive.

Finally, we caution that there are a very few cases at the high end of the loss table — 64 in the top four levels and only 14 in the top two levels in fiscal year 2014 — and there were only a very small number of fraud-on-the-market cases (about 12) in fiscal years 2012 and 2013. These very high loss levels are rarely reached and can result in tremendously contentious and costly litigation. We believe these changes will assist judges to make appropriate determinations for many offenses including low-level, less-culpable fraud offenders, and we hope that the shift to a greater emphasis on individual culpability will make these sentences more proportionate and fairer.

The guidelines themselves are evolutionary. We believe that our feedback loop worked as intended here, where stakeholders identify real problems, and the Commission researches, analyzes, and addresses them. In this case, we were presented with a problem and looked at the data. The narrative of a "broken guideline" sounded compelling at first, but it turned out to be far more complicated. The Commission hopes to continue this feedback loop, and we invite you to continue to participate in this discussion on fraud. Thank you, and I welcome your questions.