# Loss Primer (§2B1.1(b)(1))

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**U.S. Sentencing Commission**

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# LOSS PRIMER

This primer discusses issues often raised about economic loss and loss calculation under §2B1.1.[1] Effective November 1, 2001, the Commission consolidated the theft and fraud guidelines into §2B1.1. As a part of this amendment, which is known as the Economic Crime Package, the Commission also modified the definition of loss such that it would be based on reasonably foreseeable pecuniary harm and would include intended loss. This primer focuses discussion on some applicable cases and concepts relating to this definition of loss, and is not intended as a comprehensive compilation of all case law addressing these issues.

## I. THE DEFINITION OF "LOSS" UNDER §2B1.1

The sentencing guidelines define "loss" as "the greater of actual loss or intended loss,"[2] and provide that the sentencing judge "need only make a reasonable estimate of the loss."[3] The estimate should be based on available information and the court may consider a variety of different factors.[4] In making the loss calculation, the court may also choose from competing methods of calculating loss. Furthermore, it should be noted that restitution and loss are separate issues and there is no authority supporting the idea that there must be "symmetry" between the two.[5]

### A. Actual Loss

Actual loss, which is often referred to as "but for" loss, is defined in the guideline application notes as "the reasonably foreseeable pecuniary harm that resulted from the offense."[6] As further explained by the application notes, pecuniary harm is reasonably foreseeable if it is "harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[7] For example, in *United States v. Neadle*, a defendant committed fraud in obtaining a Virgin Islands license to write property and casualty insurance.

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[1] *See* United States Sentencing Commission, Guidelines Manual, §2B1.1 (Nov. 2012) [hereinafter USSG].

[2] USSG §2B1.1, comment. (n.3(A)).

[3] USSG §2B1.1, comment. (n.3(C)).

[4] *Id.*

[5] *United States v. Patterson*, 595 F.3d 1324, 1327-28 (11th Cir. 2010); *see also United States v. Riddell*, 328 F. App'x 328, 329 (6th Cir. 2009) (per curiam) (holding that a district court may look to intended loss in calculating total loss for the purposes of §2B1.1, but must base its order of restitution on actual losses).

[6] USSG §2B1.1, comment. (n.3(A)(i)); *see United States v. Ary*, 518 F.3d 775, 787 (10th Cir. 2008) (holding that when a defendant objects to facts stated in the PSR, the government must prove those facts by a preponderance of the evidence at the sentencing hearing).

[7] USSG §2B1.1, comment. (n.3(A)(iv)).

The actual loss for which he was held accountable at sentencing included millions in losses of his insureds who suffered catastrophic damages caused by a hurricane and were unable to recover from the defendant's insurance company.[8] Thus, all reasonably foreseeable losses that flow directly, or indirectly, from a defendant's conduct should be included in the loss calculation.

Actual loss includes all relevant conduct. For example, in *United States v. Hoffman-Vaile*, the defendant was convicted of defrauding Medicare and, at sentencing, the district court included the losses not only to the Medicare program, but also to private insurers and patients.[9] The appellate court affirmed, holding that the private insurers and patients were victims of the same fraud scheme and, while not charged, those acts constituted relevant conduct for the purposes of loss calculation.[10]

Furthermore, the loss figure is not limited to the losses that are directly attributable to acts of the defendant. Losses caused by the acts of co-conspirators that were reasonably foreseeable to the defendant should also be included in the loss calculation.[11] The sentencing court should, however, limit the defendant's liability to those acts of co-conspirators that were reasonably foreseeable and part of the criminal activity that the defendant "agreed to jointly undertake."[12]

In considering the actual loss in a particular case, one of the most common issues that has arisen in litigation is whether the harm was "reasonably foreseeable." In determining whether loss is reasonably foreseeable, courts have found that the actual loss must have a causal link to the conduct of the defendant.[13] In *United States v. Whiting,* the defendant was convicted of

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[8] *See United States v. Neadle*, 72 F.3d 1104, 1108 (3d Cir. 1995), *amended by* 79 F.3d 14 (3d Cir. 1996).

[9] *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343-44 (11th Cir. 2009).

[10] *Id.*

[11] *United States v. Catalfo*, 64 F.3d 1070, 1082-83 (7th Cir. 1995); *see also United States v. Robinson*, 603 F.3d 230, 234 (3d Cir. 2010); *United States v. Treadwell*, 593 F.3d 990, 1003 (9th Cir. 2010); *United States v. Jenkins-Watts*, 574 F.3d 950, 961 (8th Cir. 2009); *United States v. Nash*, 338 F. App'x 96, 98-99 (2d Cir. 2009); *United States v. Mauskar*, 557 F.3d 219, 233 (5th Cir. 2009); *United States v. Wilkins*, 308 F. App'x 920, 929 (6th Cir. 2009); *United States v. Codarcea*, 505 F.3d 68, 72 (1st Cir. 2007); USSG §1B1.3(a)(1)(B).

[12] *See United States v. Goodheart*, 345 F. App'x 523, 525 (11th Cir. 2009) (finding that the sentencing judge "made no required individualized findings" about when the defendant actually joined the conspiracy for the purposes of establishing loss). *United States v. McClatchey*, 316 F.3d 1122, 1128 (10th Cir. 2003); *see also Treadwell*, 593 F.3d at 1002 ("[A] district court may not automatically hold an individual defendant responsible for losses attributable to the entire conspiracy, but rather must identify the loss that fell within the scope of the defendant's agreement with his co-conspirators and was reasonably foreseeable to the defendant."). Such findings may not be required, however, when a defendant's involvement in the conspiracy from the outset is apparent from the record. United States v. Ortiz, No. 13-13004, 2014 WL 1101227, at *3 (11th Cir. Mar. 21, 2014) (distinguishing *Goodheart* on this basis).

[13] *See, e.g.*, *United States v. Whiting*, 471 F.3d 792, 802 (7th Cir. 2006); *United States v. Rothwell*, 387 F.3d 579, 584 (6th Cir. 2004).

converting funds from employees' paychecks that were intended for medical benefits, and making false statements related to those employees' health benefits.[14] The "actual loss" was calculated using the total amount of unpaid medical claims made by the employees.[15] However, the sentencing judge stated on the record that he had found no "causal link" between the defendant's misstatements about benefits and the losses caused by the medical claims in the case.[16] The Seventh Circuit reversed, finding that there must be a causal link to the conduct of the defendant to determine an "actual loss."[17] Similarly, in *United States v. Rothwell,* the Sixth Circuit found that there was no reasonable link between the fraud committed by the defendant during the construction of a building and the subsequent default on the construction loan.[18] Therefore, the court held that the losses from the loan could not be attributable to the defendant during sentencing.[19]

The issue has also arisen recently in the context of mortgage fraud. For example, several circuit courts have recently rejected arguments that defendants in mortgage fraud cases could not have "reasonably foreseen" the downturn in the housing market.[20] In *United States v. McKanry*, the defendant obtained numerous mortgage loans through applications overstating the named purchaser's net worth and income, leading to default and subsequent foreclosure.[21] The district court calculated the actual loss as the difference between the unpaid principal balance of the twelve mortgages and the subsequent sales price of the properties.[22] The defendant argued that

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[14] *Whiting*, 471 F.3d at 793.

[15] *Id.* at 802.

[16] *Id.*

[17] *Id.*

[18] *Rothwell*, 387 F.3d at 584.

[19] *Id.*; *see also Harrington v. United States*, 489 F. App'x 50, 57 (6th Cir. 2012) ("*Rothwell* stands for the uncontested proposition that a sentencing court applying § 2B1.1 must make a reasonable estimate of loss using proximate cause as its measure."). *But cf.* United States v. Curran, 525 F.3d 74, 81 (1st Cir. 2008) (finding that the government need not prove "client by client" the loss amount attributable to a specific misrepresentation, when it was established that all the defendant's actions were part of a fraudulent scheme in which he pretended to be a medical doctor).

[20] *See United States v. McKanry*, 628 F.3d 1010, 1017 (8th Cir.); *see also United States v. Turk*, 626 F.3d 743, 749-51 (2d Cir. 2010);
*United States v. Crowe*, 735 F.3d 1229 (10th Cir. 2013) (adopting the *McKanry* and *Turk* rule). *But cf. United States v. Evans*, 744 F.3d 1192, 1197 (10th Cir. 2014) (distinguishing the scenario in which victims were sold real estate securities "whose value necessarily fluctuated," as opposed to being "simply promised loan payments").

[21] *McKanry*, 628 F.3d at 1014-15.

[22] *Id.* at 1019.

the government had failed to prove that the loss amount was fully attributable to him, as opposed to normal market conditions.[23] The circuit court disagreed, holding that the appropriate test is not whether market factors impact the loss amount, but whether "the market factors and the resulting loss were reasonably foreseeable."[24] The circuit court in *United States v. Turk* also rejected the argument that it was the housing crash and other "extrinsic factors" that caused investors' losses, because, had the housing market been healthy, the defendant could have sold the properties at profit and covered the investors' loans.[25] Instead, the court noted that the loss to investors was the principal value of the loans made to the defendant that were never paid back because the defendant had failed to collateralize their interests.[26]

B. Intended Loss

Intended loss is defined in the guidelines as "pecuniary harm that was intended to result from the offense."[27] For example, in *United States v. Lane*, a bank fraud case, the defendant was able to acquire a loan based on fraudulent statements and the amount of intended loss was determined to be "the amount of money that the defendant places at risk as a result of the fraudulent loan application."[28] The guidelines further explain that in determining intended loss, the court should also consider any "intended pecuniary harm that would have been impossible or unlikely to occur."[29] For example, intended loss would include pecuniary harm that a defendant intended, but could not have actually caused, in a case involving a government sting operation, or where the offense involved an insurance fraud in which the claim exceeded the insured value.[30]

"Intended loss" is not simply "potential loss," however, and the "court errs when it simply

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[23] *Id.*

[24] *Id.*

[25] *Turk*, 626 F.3d at 747.

[26] *Id.* at 748.

[27] USSG §2B1.1, comment. (n.3(A)(i)).

[28] *United States v. Lane,* 323 F.3d 568, 585 (7th Cir. 2003); *see United States v. Middlebrook*, 553 F.3d 572, 579 (7th Cir. 2009) (holding that where an owner signs a promissory note to his corporation, a district court may reasonably find that failure to list that note in the corporate bankruptcy's asset disclosure statement represents intended loss in the amount of the note if the owner had the assets to pay back the value of the note); *United States v. Neal*, 294 F. App'x 96, 103 (5th Cir. 2008) (holding that although the actual loss was calculated at $150,000, inclusion of the intended loss of $11 million was "proper" under § 2B1.1, particularly in view of the nature of the scheme which sought to leave thousands of workers without worker's compensation coverage).

[29] USSG §2B1.1, comment. (n.3(A)(ii)).

[30] *Id.*

equates potential loss with intended loss without deeper analysis."[31] Instead, the calculation of intended loss is determined by what loss the government can reasonably show the defendant *intended* to cause.[32]

In determining loss for purposes of the guidelines, the court need not calculate actual loss before the court can rely on the intended loss figure, and in some cases it may be easier "as a matter of proof" to show intended loss.[33] Additionally, actual losses, or losses actually completed before discovery, are to be included in any calculation of intended loss.[34] A defendant may not argue that the categories are mutually exclusive and cannot be combined to calculate an overall intended loss.[35]

When calculating the intended loss, absolute accuracy is not required as long as the calculation is not "outside the realm of permissible computations."[36] An estimate made by the sentencing judge "need not be determined with precision."[37] In this regard, courts have held that a sentencing court does not commit "clear error" when a loss calculation is supported by the presumptively reasonable facts from the presentence report and the defendant fails to rebut those facts.[38] For instance, in *United States v. Al-Shahin*, a case involving a fraudulent insurance claim, the court calculated the intended loss by using the figure quoted in the demand letter sent by the defendant's lawyer to the insurance company although the defendant ultimately collected a settlement amount that was less than half the demand amount from the insurance company.[39]

The scope of the intended loss definition is demonstrated in cases relating to theft of credit cards. In a case in which a defendant sold stolen credit cards to others, the sentencing

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[31] *United States v. Geevers*, 226 F.3d 186, 192 (3d Cir. 2000); *see also United States v. Diallo*, 710 F.3d 147, 153-54 (3d Cir. 2013) (finding that a sentencing court should not assume a defendant found guilty of credit card fraud intended loss up to the aggregate credit limit, absent some showing he intended to exhaust that limit).

[32] *United States v. Miller*, 316 F.3d 495, 505 (4th Cir. 2003); *see also United States v. Manatau*, 647 F.3d 1048, 1056-57 (10th Cir. 2011) ("'[I]ntended loss' means a loss the defendant *purposely* sought to inflict. 'Intended loss' does not mean a loss that the defendant merely *knew* would result from his scheme or a loss he might have *possibly and potentially* contemplated.").

[33] *United States v. Thurston*, 358 F.3d 51, 68 (1st Cir. 2004), *vacated on other grounds,* 543 U.S. 1097 (2005).

[34] *See United States v. Ware*, 334 F. App'x 49 (8th Cir. 2009).

[35] *Id.* at 50.

[36] *United States v. Lopez*, 222 F.3d 428, 437 (7th Cir. 2000).

[37] *Miller*, 316 F.3d at 503-06.

[38] *United States v. McClain*, 280 F. App'x 425, 430 (5th Cir. 2008).

[39] *United States v. Al-Shahin*, 474 F.3d 941, 950 (7th Cir. 2007).

judge fixed the intended loss at the total credit limits of all of the credit cards.[40] In upholding the sentencing court's decision, the First Circuit concluded that the defendant could reasonably expect such a loss as "the natural and probable consequences of his or her actions."[41] In *United States v. Wilfong,* the defendant fraudulently opened credit accounts at local businesses in the names of victims and the court calculated intended loss by totaling up the credit limits of all open accounts even though the defendant had not used all of the available credit.[42] In fact, at least one circuit has also concluded that simply obtaining information regarding a credit account creates an intended loss presumption that must be rebutted by the defendant.[43] In contrast, at least one circuit has held that where the defendant did not know the credit limit, the burden remains with the government to demonstrate what portion of the credit limit the defendant intended to use.[44]

Similarly, in cases involving fraudulent or forged checks, the face value of the instruments are often used to calculate the intended loss figure.[45] In such cases, courts have noted that the sentencing judge may treat the face amount of the checks as prima facie evidence of the defendant's intent, but must still allow the defendant to offer evidence to rebut that figure.[46] If the defendant does not provide "persuasive evidence" to rebut intent, then the courts are "free to accept the loss figure" taken from the face value of the instruments.[47] Further, some courts have held that the "intended loss" in a fraudulent check scheme can include the value of counterfeit checks turned over by the defendant at the time of his voluntary surrender even if

[40] *United States v. Alli*, 444 F.3d 34, 38-39 (1st Cir. 2006); *see also United States v. Harris*, 597 F.3d 242, 252-53 (5th Cir. 2010) (looking to whether the defendant "recklessly jeopardized" the full credit card limits by selling the card numbers to a third party).

[41] *Alli*, 444 F.3d at 38-39.

[42] *United States v. Wilfong*, 475 F.3d 1214 (10th Cir. 2007); *see also United States v. Edmondson*, 349 F. App'x 511, 517 (11th Cir. 2009) (placing the burden on the defendant to show her intent was not to use the entire credit limit).

[43] *United States v. John*, 597 F.3d 263, 281 (5th Cir. 2010).

[44] *United States v. Diallo*, 710 F.3d 147, 153-54 (3d Cir. 2013).

[45] *United States v. Grant*, 431 F.3d 760 (11th Cir. 2005) ("The other circuits to address this issue have held a district court does not clearly err when it uses the full face value of check to calculate intended loss."); *see also United States v. Himler,* 355 F.3d 735, 740-41 (3d Cir. 2004) (upholding the use of face value to establish intended loss in a condominium purchasing scheme using forged checks).

[46] *United States v. Dullum*, 560 F.3d 133, 138 (3d Cir. 2009); *United States v. Santos*, 527 F.3d 1003, 1008 (9th Cir. 2008) (agreeing with the Third and the Eleventh Circuits that the face value of the stolen checks is "probative" of the defendants' intended loss, but the court must also consider any evidence presented by the defendant tending to show that he did not intend to produce counterfeit checks up to the full face value of the stolen checks); *United States v. Khorozian*, 333 F.3d 498, 509 (3d Cir. 2003).

[47] *Khorozian*, 333 F.3d at 509 (quoting *United States v. Geevers*, 226 F.3d 186, 194 (3d Cir. 2000)).

those checks were never used.[48] Similarly, in a case where the defendant unsuccessfully attempts to obtain cash advances from stolen credit cards, each unsuccessful attempt represents an intended loss.[49]

Of course, the issues relating to the scope of intended loss come up in other fraud cases as well. In *United States v. Willis*, the defendant submitted at least 20 fraudulent applications for FEMA relief.[50] For some she had only received a portion of funds available which were automatically disbursed by FEMA, but for other applications she had taken more steps to obtain additional funds.[51] The Eleventh Circuit held that the sentencing judge did not clearly err by considering the full value of all the applications filed even though the defendant had not attempted to obtain all available funds from each application.[52] In *United States v. Kosth,* the intended loss was the full amount of loan commitments the defendant secured from the Small Business Administration because, although the defendant did not receive the full amount, that sum was diverted from the intended recipients.[53]

Another issue that has arisen regarding intended loss involves cases where the criminal scheme is ongoing. In such cases, a sentencing judge may have to extrapolate to find the intended loss. For example, in *United States v. Rettenberger*, where the defendant faked a disability to collect federal benefits, the sentencing judge assumed that the defendant would have continued to collect benefits until the age of 65 and assessed the intended loss as that full amount.[54] Similarly, in *United States v. Crawley*, the sentencing judge determined that the intended loss constituted the defendant's salary and pension for a five-year period when the

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[48] *United States v. Kushner*, 305 F.3d 194, 198 (3d Cir. 2002).

[49] *United States v. Ravelo*, 370 F.3d 266, 273 (2d Cir. 2004); *see also United States v. Powell*, 320 F. App'x 842, 844-45 (10th Cir. 2009) (holding that a defendant engaging in an "empty envelope" scheme is liable for the total value of the fraudulent deposit to the victim bank even though she only withdrew a portion of the amount before she destroyed the account's ATM card and the bank discovered the fraud).

[50] *United States v. Willis*, 560 F.3d 1246, 1250 (11th Cir. 2009).

[51] *Id.*

[52] *Id.* at 1250-51 (reasoning that because the defendant exhibited a pattern of applying for funds beyond FEMA's automatic disbursement on some applications, it was reasonable to infer intent to pursue additional funds on the remaining applications).

[53] *United States v. Kosth*, 257 F.3d 712, 722 (7th Cir. 2001); *see also United States v. Conroy*, 567 F.3d 174, 179-80 (5th Cir. 2009) (holding that where the defendant only asked for $70,000 in a fraudulent grant application, but was approved for $100,000, the appropriate intended loss was the higher value).

[54] *United States v. Rettenberger*, 344 F.3d 702, 708 (7th Cir. 2003); *see United States v. Frisch*, 704 F.3d 541, 544 (8th Cir. 2013) ("When calculating intended loss, the appropriate inquiry is what the loss would have been if the defendant had not been caught."). *But see United States v. Peel*, 595 F.3d 763, 772 (7th Cir. 2010) (noting that if a defendant "present[ed] credible evidence for discounting a stream of future payments to [a lower future] value, the district court must consider [that evidence]").

defendant committed fraud to obtain the position of union president.[55] On appeal, the circuit court concluded that the sentencing judge's reasonable estimate of the intended loss was not "clearly erroneous."[56] The defendant had also argued that any loss figure should be reduced by the amount of "legitimate services" he provided the union, but the sentencing judge determined that there were no "legitimate services" provided because he procured the position by fraud.[57]

In the case of real property, unless the defendant was "so 'consciously indifferent or reckless' about the repayment of the loans as to impute to him the intention that the lenders should not recoup their loans," intended loss will not likely be the appropriate measure of loss since the real property serves as collateral and will be recoverable should the owner default.[58] However, at least one Circuit has suggested that a defendant's disguising the identity of the actual owners (through straw purchase) along with false statements regarding encumbrances makes foreclosure by the victim banks more difficult and adds to the intended loss figure.[59]

C. No "Economic Reality Principle" Under the Guidelines

Prior to the November 2001 amendments to the sentencing guidelines, some courts noted an exception to the use of intended loss when a defendant had devised a scheme obviously doomed to fail which caused little or no economic loss.[60] Under the revised definition of intended loss, this exception is no longer available. As noted above, the revised loss definition instructs courts to include harm that would have been "impossible or unlikely to occur."[61] It is, of course, still possible that the sentencing judge might consider these same factors as a basis for a downward departure, or, as noted below, than an "impossible" loss amount might bear on the reasonableness of the sentence. For example, in *United States v. McBride*, the court ruled that impossible losses are to be included in the loss figure, but remanded the case for the sentencing

[55] *United States v. Crawley*, 533 F.3d 349, 355-56 (5th Cir. 2008) (noting that although the defendant was arrested midway through his term as union president, he intended to continue serving and thus, continue the criminal scheme).

[56] *Id.* at 356-57.

[57] *Id.* at 356-58.

[58] *United States v. Goss*, 549 F.3d 1013, 1018 (5th Cir. 2008) (quoting *United States v. Morrow*, 177 F.3d 272, 301 (5th Cir. 1999)); *see infra* Section V(B).

[59] *United States v. Stathakis*, 320 F. App'x 74, 77-78 (2d Cir. 2009).

[60] *See, e.g.*, *United States v. Fleming*, 128 F.3d 285, 288 (6th Cir. 1997).

[61] USSG §2B1.1, comment. (n.3(A)(ii)); *see also United States v. Dinnall*, 313 F. App'x 241, 245 (11th Cir. 2009); *United States v. Messervey*, 317 F.3d 457, 464 (5th Cir. 2003) (intended loss can include impossible losses).

judge to consider a departure based on "economic reality."[62]

D. Loss Calculations Post-*Booker*

At least one circuit has explored the application of the 18 U.S.C. § 3553(a) factors to the calculation of loss in conjunction with the application of upward variances based on loss.[63] In *United States v. Hilgers*, the presentence report first suggested an "intended loss" based on the down payments and fees which lenders would have required but for the defendant's fraud.[64] The sentencing judge agreed with the defendant's argument that the PSR's calculation was "too speculative," and found a guideline loss of zero.[65] The court then stated, however, that "I have set the guidelines aside because we are outside the heartland" and sentenced the defendant to five years which constituted an upward variance of over three years above the top of the applicable guideline range.[66] Upon review, the Ninth Circuit panel made a point of noting that "the district court's consideration of the large potential loss that could result from Hilger's action was not unreasonable," and further stated that considering "the potential loss to victims" was chief among the various § 3553(a) factors to be considered in the sentence.[67] Other courts have also suggested that a proper review of the criteria in § 3553(a) would include consideration of the loss caused by the defendant's actions.[68]

While courts may consider loss in determining whether a variance is appropriate, at least

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[62] *United States v. McBride*, 362 F.3d 360, 374, 376 (6th Cir. 2004) ("[T]here is surely some point at which a perpetrator's misperception of the facts may become so irrational that the words 'intended loss' can no longer reasonably apply.").

[63] *See United States v. Hilgers*, 560 F.3d 944, 947-48 (9th Cir. 2009).

[64] *Id.* at 945.

[65] *Id.* at 946.

[66] *Id*.

[67] *Id*. at 947-48.

[68] *See, e.g., United States v. Corsey,* 723 F.3d 366 (2d Cir. 2013) (in a case with a very large intended loss amount, but "low risk that any actual loss would result," the district court may have been overly influenced by the guidelines range); *United States v. Edwards*, 595 F.3d 1004, 1010, 1018 (9th Cir. 2010) (upholding a probationary sentence far below the guideline range as substantively reasonable in a fraud case where the sentencing judge stated that the guideline range calculated using intended loss "overstated the circumstances" of the defendant's case); *United States v. Livesay*, 587 F.3d 1274, 1278-79 (11th Cir. 2009) ("[A] sentence of probation for a high-ranking officer in a corporation where over a billion dollars of fraud was perpetrated . . . is not reasonable" under the factors listed in § 3553(a)); *see also United States v. Carroll*, 691 F. Supp. 2d 672, 676 (W.D. Va. 2010) (in a case where additional loss amounts attributable to unidentified victims could not "be determined precisely enough" to apply the guidelines, the sentencing judge found sufficient evidence to "consider a greater loss in judging the seriousness of the defendant's conduct" and vary upwards nearly 25% over the top of the calculated guideline range).

one circuit has held that simply rejecting the government's evidence as to loss without a sufficient explanation on the record constitutes procedural error on the part of the sentencing judge and is grounds for reversal.[69] In *United States v. Wilkinson*, the sentencing judge stated on the record that he found the government's loss expert to be knowledgeable and credible, but then rejected the expert's calculations completely, finding zero loss, without any explanation.[70] Without any record of what argument (if any) the sentencing judge accepted for loss, the Fourth Circuit found the sentence procedurally unreasonable.[71] However, other courts have concluded that some procedural errors in the calculation of loss are harmless, and do not rise to the level of clear error.[72] The government bears the burden of showing an error was harmless by demonstrating beyond a reasonable doubt that the error did not contribute to the sentence the defendant received.[73]

Although the guidelines are now advisory, a sentencing judge must still make factual findings as to the amount of loss and a "reasonable estimate" of loss to satisfy the evidentiary requirements. A court's failure to do so will render a loss calculation invalid.[74]

## II. GAIN AS ALTERNATIVE MEASURE

The sentencing guidelines instruct the sentencing court to "use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."[75] However, the guidelines previously noted,[76] and courts have continued to hold,

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[69] *United States v. Wilkinson*, 590 F.3d 259, 269-70 (4th Cir. 2010).

[70] *Id.* at 270.

[71] *Id.*

[72] *See, e.g.*, *United States v. Hussein*, 664 F.3d 155, 160-61 (7th Cir. 2011) (finding incomplete loss calculation to be harmless error where it would not have changed the applicable offense level enhancement); *United States v. Griffith*, 584 F.3d 1004, 1017 (10th Cir. 2009) (finding the inclusion of $28,130 in extra loss to be harmless despite its effect of increasing the offense level enhancement because the district court stated on the record it would have sentenced defendant to same term of imprisonment notwithstanding a lower loss amount).

[73] *E.g.*, *United States v. Olis*, 429 F.3d 540, 544 (5th Cir. 2005).

[74] *United States v. Medina*, 485 F.3d 1291, 1304-5 (11th Cir. 2007); *United States v. Ali*, 508 F.3d 136, 144-45 (3d Cir. 2007); *cf. United States v. Johnson*, 270 F. App'x 839, 844 (11th Cir. 2008) (finding total disbursements to be a reasonable estimate of loss where defendant commingled those proceeds with his personal funds precluding any mitigatory proof of lawful usage).

[75] USSG §2B1.1, comment. (n.3(B)). *See, e.g.*, *United States v. Randock*, 330 F. App'x 628, 629-30 (9th Cir. 2009) (holding that where the loss to victims in a fraudulent academic credential scheme could not reasonably be determined, gain was a reasonable alternative); *United States v. Munoz*, 430 F.3d 1357, 1369-71 (11th Cir. 2005) (using gain as an alternate calculation of loss where it was highly impractical to identify and contact the victims

that substituting the gain for the loss is not the preferred method as it "ordinarily underestimates the loss."[77] Sentencing judges are cautioned against "abandoning a loss calculation in favor of a gain amount where a reasonable estimate of the victims' loss . . . is feasible."[78] Courts cannot use gain "as a proxy for each defendant's culpability" and must properly calculate loss when possible to do so.[79] In this regard, it is also noteworthy that a sentencing court cannot substitute gain where it is previously determined that there is "no loss" as opposed to an incalculable loss.[80]

## III. ESTIMATING LOSS

As discussed above, the sentencing court "need only make a reasonable estimate of the loss."[81] This estimate may be made using available information to determine the value and the sentencing judge is "entitled to appropriate deference" because of the court's unique position to assess the evidence.[82] For example, the court may consider the value of assets concealed in a

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because many were elderly and spoke only Spanish); *see also United States v. McMillan*, 600 F.3d 434, 458-59 (5th Cir. 2010) (holding that where a trial court cannot reasonably calculate the loss for a company that, while victimized by fraud, was already struggling financially, the court was justified in calculating the loss based on the defendant's salaries).

[76] *See* USSG §2F1.1, comment. (n.8) (eff. Nov. 1, 1991).

[77] *United States v. Triana,* 468 F.3d 308, 323 (6th Cir. 2006) (citing *United States v. Snyder*, 291 F.3d 1291, 1295 (11th Cir. 2002)).

[78] *Munoz*, 430 F.3d at 1371 (quoting *United States v. Bracciale*, 374 F.3d 998, 1004 (11th Cir. 2004)).

[79] *United States v. Gallant*, 537 F.3d 1202, 1240 (10th Cir. 2008). *But see United States v. Vrdolyak*, 593 F.3d 676, 681 (7th Cir. 2010) (finding that a sentencing judge's refusal to consider gain as an alternative measure in a case where a "probable" but difficult to calculate loss exists is reversible error); *United States v. Armstead*, 552 F.3d 769, 778 (9th Cir. 2008) (holding that gain can be "used as a proxy for a portion of the total loss where some, but not all, of the loss can be determined.").

[80] USSG §2B1.1, comment. (n.3(B)). As part of the Economic Crime Package, Note 3(B) resolved a circuit split between those courts that permitted use of gain as a reasonable estimate of loss even where no actual or intended loss occurred and those that required a demonstration only where loss did occur, but was incalculable. *Compare United States v. Haas*, 171 F.3d 259, 270 (5th Cir. 1999) ("[I]f the loss is either incalculable or zero, the district court must determine [loss] by estimating the gain to the defendant as a result of his fraud."), *with United States v. Andersen*, 45 F.3d 217, 221 (7th Cir. 1995) (while gain is usually appropriate to estimate an incalculable loss, it cannot be a "reasonable estimate" of loss if there is no evidence that the victims suffered any loss), *and United States v. Chatterji*, 46 F.3d 1336, 1342 (4th Cir. 1995) (holding that gain is not an appropriate measure of loss where there is "no actual, monetary loss attributable to the regulatory fraud).

[81] USSG §2B1.1, comment. (n.3(C)); *see United States v. Gordon*, 495 F.3d 427, 431 (7th Cir. 2007); *United States v. Schaefer*, 384 F.3d 326, 334 (7th Cir. 2004); *United States v. Bennett*, 252 F.3d 559, 565 (2d Cir. 2001).

[82] USSG §2B1.1, comment. (n.3(C)); *see United States v. Brooks*, 681 F.3d 678, 713-14 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 839 (2013); *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009).

bankruptcy fraud as relevant evidence in determining intended loss.[83]

The evidence the sentencing judge uses to calculate loss can include hearsay if the hearsay has a sufficient indicia of reliability.[84] In *United States v. Flores-Seda,* the sentencing judge relied on the hearsay testimony of the victim's attorney to estimate loss.[85] In *United States v. Humphrey,* the sentencing judge utilized the defendants' personal journal which detailed the names of their victims and amounts collected in a loan fraud scheme.[86] On appeal, the court agreed that such material provided "sufficient indicia of reliability" to be used to calculate an estimated loss.[87] In *United States v. Hahn*, the sentencing judge relied on the cash deposits made into the defendant's account to determine the loss from multiple cash thefts.[88] A defendant who challenges a district court's loss calculation carries a heavy burden and must show that the calculation was not just inaccurate, but "outside the realm of permissible computation."[89]

The sentencing judge also may choose the method to calculate loss that he or she prefers, even if there is a viable competing method.[90] There is a "heavy burden" placed on the defendant to disprove the reasonableness of the sentencing judge's calculation of loss.[91] The factual findings supporting a sentencing judge's loss calculation are reviewed by the appellate courts

[83] *United States v. Holthaus*, 486 F.3d 451, 456-57 (8th Cir. 2007); *cf. United States v. Kimoto*, 588 F.3d 464, 495-96 (7th Cir. 2009) (affirming decision to base actual loss on amount gained in telemarketing debit card scam because a speculative calculation of intended loss based on number of targets and a 0.5% conversion rate yielded an almost identical loss figure).

[84] *United States v. Sliman,* 449 F.3d 797, 802 (7th Cir. 2006).

[85] *United States v. Flores-Seda*, 423 F.3d 17, 21 (1st Cir. 2005).

[86] *United States v. Humphrey*, 104 F.3d 65, 71 (5th Cir. 1997).

[87] *Id.*

[88] *United States v. Hahn*, 551 F.3d 977, 980-81 (10th Cir. 2008).

[89] *E.g.*, *United States v. Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008).

[90] *See United States v. King*, 257 F.3d 1013, 1025 (9th Cir. 2001); *see also United States v. McMillan*, 600 F.3d 434, 458-59 (5th Cir. 2010) (holding that when the sentencing court has contradictory and "hotly contested" testimony and evidence regarding loss, the appellate court cannot conclude that the sentencing court committed clear error in selecting one or the other theory); *cf. United States v. Scher*, 601 F.3d 408, 413 (5th Cir. 2010) (holding that the defendant has the burden "to produce reliable evidence supporting an alternate number or demonstrating that the information [the sentencing judge relied on] was inaccurate or materially untrue").

[91] *United States v. Harris*, 335 F. App'x 623, 626 (7th Cir. 2009); *United States v. Ameri*, 412 F.3d 893, 901 (8th Cir. 2005); *United States v. Hassan*, 211 F.3d 380, 373 (7th Cir. 2000); *see also United States v. Lewis*, 594 F.3d 1270, 1289 (10th Cir. 2010) (holding that a defendant must provide "substantial ground for rejecting the district court's determination that the evidence used by the government was reliable").

under a clear error standard.[92]

The sentencing judge, however, cannot assign a loss figure "arbitrarily" or with no findings. The court must develop some evidence to support the loss figure rather than settle on a number.[93] In *United States v. Liveoak*, the sentencing judge's adoption of a loss figure taken from a co-defendant's plea (without fact-finding in the defendant's case) was held to be unreasonable.[94] Neither can a sentencing judge ignore a defendant's offer of proof to rebut a loss calculation.[95] Further, it is not the defendant's burden to disprove loss amounts; the government must prove loss by a preponderance of the evidence.[96] If, however, a defendant fails to rebut evidence as to loss, he cannot expect the sentencing judge to draw favorable inferences.[97]

Some circuits allow a sentencing judge to consider the stipulated loss figure in the defendant's plea agreement as long as the court also considers any loss evidence that is presented by the parties and "the record clearly demonstrates that the defendant fully understood the

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[92] *E.g.*, *United States v. McKanry*, 628 F.3d 1010, 1019 (8th Cir. 2011); *United States v. Harris*, 597 F.3d 242, 250 (5th Cir. 2010) (noting, however, that the method of calculating loss chosen by the district court is reviewed de novo).

[93] *United States v. Renick*, 273 F.3d 1009, 1027 (11th Cir. 2001); *United States v. Oseby*, 148 F.3d 1016, 1025-1027 (8th Cir. 1998) (reversing the sentence due to insufficient findings on loss calculations); *see also* "*United States v. Warshak*, 631 F.3d 266, 329-30 (6th Cir. 2010) (remanding where the district court's explanation of its loss determination was inadequate); *United States v. Hall*, 610 F.3d 727, 745 (D.C. Cir. 2010) (remanding for resentencing where the district court provided no reason for finding loss to be in excess of one million dollars); *United States v. Drayer*, 364 F. App'x 716, 720-21 (2d Cir. 2010) (remanding for resentencing where the application of the guidelines is heavily dependant on factual findings and "the absence of a developed record affords no basis for meaningful review."); *United States v. Gupta*, 572 F.3d 878, 889 (11th Cir. 2009) (reversing loss calculation where the sentencing judge "pick[ed] a figure . . . about halfway in between" two competing estimates without giving any non-arbitrary reason therefor); *United States v. Ross,* 502 F.3d 521, 531 (6th Cir. 2007) ("[T]he court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence."); *United States v. Higgins*, 270 F.3d 1070, 1075-76 (7th Cir. 2001) (sentencing judge made insufficient findings regarding loss).

[94] *United States v. Liveoak*, 377 F.3d 859, 866-67 (8th Cir. 2004); *see also United States v. Pierce*, 409 F.3d 228, 234-35 (4th Cir. 2005) (ruling that the court is not bound by the loss figure in the co-defendant's sentencing).

[95] *United States v. Newson*, 351 F. App'x 986, 988-89 (6th Cir. 2009) (holding that it was clear error for the sentencing judge to ignore the defendant's offer of proof that she had refused to accept an automobile after she filled out a fraudulent loan application, thus showing her intention to abandon the scheme).

[96] *United States v. Hartstein*, 500 F.3d 790, 796-97 (8th Cir. 2007) (when defendant argues that some alleged losses were in fact legitimate investments, the government bears the burden of showing otherwise). *But see United States v. Hatchett*, 622 F.3d 984, 987 (8th Cir. 2010) (when a defendant has not argued that he accepted any money for a legitimate purpose, the government is not required to present evidence about each individual victim's "circumstances").

[97] *United States v. Ravelo*, 370 F.3d 266, 272-73 (2d Cir. 2004).

potential consequences of his [stipulation]."[98] The Seventh Circuit, however, has determined that such stipulated facts waive any challenge by the defendant at sentencing.[99] In another notable case, the defendant reserved his right to argue that there was "no loss" while contemporaneously stipulating in the plea agreement to a specific loss figure (should a loss be found).[100] Despite the defendant's reservation of the argument, the Fifth Circuit determined that, if the sentencing judge found that there was a loss, then the defendant had no further grounds to challenge the stipulated figure even if there was "no evidence" to support the calculation of the stipulated figure in the plea agreement.[101]

As noted above, the estimate of the loss must be based on available information, taking into account, as appropriate and practicable under the circumstances, a number of factors that are set forth in the guidelines. Several of these factors are discussed below:

A. Fair Market Value

The first factor that courts may consider is "[t]he fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property."[102] "Fair market value" can be determined by the court through comparison or replacement cost to the victim. In *United States v. Whitlow,* an odometer fraud case where the court took judicial notice of the National Automobile Dealers Association guide to determine the value of the vehicles,[103] the appellate court noted that a value determination by the district court in such cases cannot be disturbed unless it is "clearly erroneous."[104]

A number of cases have discussed how "fair market value" is determined. "Fair market value" of certain services, such as insurance coverage, can be determined by their cost or

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[98] *United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004) (brackets in original); *see also United States v. Camacho*, 348 F.3d 696, 699-700 (8th Cir. 2003).

[99] *United States v. Gramer*, 309 F.3d 972, 975 (7th Cir. 2002); *see also United States v. Woods*, 554 F.3d 611, 614 (6th Cir. 2009).

[100] *United States v. Elashyi*, 554 F.3d 480, 509 (5th Cir. 2008).

[101] *Id.*

[102] USSG §2B1.1, comment. (n.3(C)(i)).

[103] *United States v. Whitlow*, 979 F.2d 1008, 1011 (5th Cir. 1992).

[104] *Id*. at 1012 (quoting *United States v. Bachynsky*, 949 F.2d 722, 734-35 (5th Cir. 1991)). The Tenth Circuit has noted, however, that there is "more than one permissible way to measure loss in criminal odometer tampering cases" and a court's choice between them cannot be clearly erroneous. *See United States v. Sutton*, 520 F.3d 1259, 1264 (10th Cir. 2008) (upholding district court's decision not to use NADA estimates where they would be inaccurate in capturing the value of vehicles with "Not Actual Mileage" titles).

premium value.[105] "Fair market value" of items that have a wholesale or retail value are typically determined on a case by case basis. In *United States v. Hardy,* the court determined that the loss should be the wholesale value of the stolen items, because the true owner intended to sell the items at wholesale prices.[106] In contrast, when the items in question were taken from retailers, the courts have reasoned that "the price at which the retailers would have sold that merchandise serves as a reasonable estimate of loss."[107]

The court can assess the "fair market value" of a loss even if the replacement cost or production costs are lower than the determined market value.[108] For instance, in *United States v. Bae,* a lottery retailer generated $525,586 in lottery tickets with a winning redemption value of $296,153 and argued that the losing tickets had no "fair market value."[109] The district court reasoned that the value of the tickets at the time they were purchased (their sale value of $525,586) was the appropriate fair market value.[110]

The sentencing judge should determine "fair market value" on the date the fraud ceased in cases where loss may fluctuate.[111] The courts have ruled that there is "no error in selecting the end of the conspiracy as an appropriate date from which to calculate loss."[112] In a case involving the fair market value of real property that has not been recently sold (at foreclosure or otherwise), however, the defendant may rebut the government's proposed value or the basis on which that value was calculated.[113] When a current market value for real property is not available, the court need not use the most recent valuation if more than one prior valuation exists.[114]

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[105] *United States v. Simpson*, 538 F.3d 459, 463 (6th Cir. 2008).

[106] *United States v. Hardy*, 289 F.3d 608, 613-14 (9th Cir. 2002) (quoting *United States v. Warshawsky*, 20 F.3d 204, 213 (6th Cir. 1994)).

[107] *United States v. Wasz*, 450 F.3d 720, 727 (7th Cir. 2006) (collecting cases from different circuits).

[108] *See, e.g.*, *United States v. Bae*, 250 F.3d 774, 775-76 (D.C. Cir. 2001).

[109] *Id. at* 776; *see also United States v. Onyiego*, 286 F.3d 249, 253, 256 (5th Cir. 2002) (holding that face value is the accurate value to use when determining loss of stolen airline tickets).

[110] *Bae*, 250 F.3d at 776.

[111] *United States v. Hart*, 273 F.3d 363, 374 (3d Cir. 2001) (upholding the sentencing judge's decision to decline to calculate loss at the time of sentencing where defendant argued the victims could have mitigated losses by selling at a later date).

[112] *Id.*

[113] *United States v. Siciliano*, 601 F. Supp. 2d 623, 633 (E.D. Pa. 2009).

[114] *See United States v. Nathan*, 318 F. App'x 273, 275-76 (5th Cir. 2009) (upholding the district court's decision to rely on a 1998 purchase price rather than a 2000 bank appraisal).

As noted above, replacement costs can also be used to make a loss estimate where "fair market value is impracticable to determine or inadequately measures the harm."[115] For example, in *United States v. Shugart,* the court determined that actual cash value was inadequate to measure the harm caused by burning down a church, relying on replacement cost as the "only effective way to return to the victims the fair equivalent of what they lost."[116] Alternatively, in the case of theft of trade secrets or other proprietary information, it is often difficult to estimate fair market value, in which case the cost of developing that information may be used.[117]

[115] *United States v. Lige*, 635 F.3d 668, 672 (5th Cir. 2011) (quoting USSG §2B1.1 comment. (n.3(C)(i)).

[116] *United States v. Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999).

[117] USSG §2B1.1, comment. (n.3(C)(ii)); *cf. United States v. Howley*, 707 F.3d 575, 582-83 (6th Cir. 2013) (holding it was clear error for the sentencing court to find the value of stolen trade secrets was zero, when it cost $520,000 to develop those secrets).

B. Cost of Repairs

The cost of repairing property can also be used to estimate loss as long as the cost does not exceed the property's fair market value. In *United States v. Cedeno*, the Eleventh Circuit remanded for resentencing, because the sentencing judge included both the original fair market value of damaged watches and the costs to repair the watches in the loss calculation.[118] The circuit court noted that "there is no damage that can be done beyond total destruction."[119] Courts cannot "double count" fair market value and repair costs.[120]

Improvements of property *can* be included in loss if they are necessary to repair the damage caused by the defendant. In *United States v. Lindsley,* the court concluded that improvements made to a victim company's computer system after a hacker broke in could be attributed to the loss figure as necessary repair costs.[121]

There are some estimated repair costs that are specific to certain offenses. For example, in *United States v. Shumway,* the court had to apply special provisions relating to the Archaeological Resources Protection Act to determine "repair costs" to damaged Native American sites on federal lands.[122]

C. Number of Victims Multiplied by Loss

It is appropriate for the sentencing judge to take an average loss per victim and multiply it across an approximate number of victims to generate a total loss figure in cases where specific losses for individual victims are not easily calculated.[123] In *United States v. Mei*, a credit card fraud case, the sentencing judge estimated intended loss based on the average credit card limit

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[118] *See United States v. Cedeno*, 471 F.3d 1193, 1196 (11th Cir. 2006).

[119] *Id.* at 1195.

[120] *Id.* at 1196.

[121] *United States v. Lindsley,* 254 F.3d 71, slip op. at *3-4 (5th Cir. 2001) (per curiam) (noting that the security improvements "were the only means available to prevent continued intrusion into [the victim's] computer systems caused by the defendants' activities").

[122] *United States v. Shumway*, 112 F.3d 1413, 1424-26 (10th Cir. 1997); *see also United States v. Christianson,* 586 F.3d 532, 535-37 (7th Cir. 2009) (holding that the loss was properly calculated as the cost of replacing a government experiment the defendants destroyed by cutting down trees that were the subjects of the experiment).

[123] USSG §2B1.1, comment. (n.3(C)(iv)); *see United States v. Barnes*, 375 F. App'x 678, 680 (9th Cir. 2010); *United States v. Showalter*, 569 F.3d 1150, 1161 (9th Cir. 2009); *United States v. Abiodun*, 536 F.3d 162, 167-68 (2d Cir. 2008) .

multiplied by the number of cards used.[124] Further, such an estimation can include victims who are not aware they have been defrauded or even those who "relay[] their satisfaction with [the] fraudulent treatment."[125]

D. Reduction in Value of Securities

The guidelines state that the reduction in value of securities and other corporate assets due to the defendant's conduct may be considered in the estimate of loss.[126] "Determining the extent to which a defendant's fraud, as distinguished from market or other forces, caused shareholders' losses inevitably cannot be an exact science. The Guidelines' allowance of a 'reasonable estimate' of loss remains pertinent."[127] Such determinations must still be made on the evidence when available.[128]
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Prior to November 2012, the guidelines did not expressly provide for any particular method of loss calculation in the context of securities or commodities cases.[129] Courts employed a number of varying methods of loss calculation when sentencing securities fraud offenders, including the rescissory method,[130] the modified rescissory method,[131] the market capitalization

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[124] *United States v. Mei*, 315 F.3d 788, 792 (7th Cir. 2003).

[125] *United States v. Curran*, 525 F.3d 74, 80 (1st Cir. 2008). *But see United States v. Sutton*, 582 F.3d 781, 785-86 (7th Cir. 2009) (distinguishing *Curran* by omitting fraud victims who did not suffer a pecuniary loss).

[126] USSG §2B1.1, comment. (n.3(C)(v)).

[127] *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (citation omitted); *cf. United States v. Rigas*, 583 F.3d 108, 120 (2d Cir. 2009) (holding that the district court properly reasoned that even if the defendants' fraud only minimally affected share price, the loss would still meet the guidelines threshold found at sentencing).

[128] *United States v. Zolp,* 479 F.3d 715, 720-21 (9th Cir. 2007) (holding that the sentencing court's determination that the stock was "worthless" was erroneous when the stock continues to have residual value, even if the value is close to zero because "close to zero is not zero").

[129] *See*, *e.g.*, *United States v. Berger*, 587 F.3d 1038, 1045 (9th Cir. 2009) (noting that courts may employ various methodologies to determine loss in a criminal fraud action and that loss need not be established with precision).

[130] *United States v. Grabske*, 260 F. Supp. 2d 866, 872-74 (N.D. Cal. 2002). The rescissory method calculates loss based upon the price that the victim paid for the security and the price of the security as it existed after the fraud was disclosed. Notably, this method does not require the court to consider any other variable (related to the individual stock or the larger market) that might have had an effect on the stock during the period of the fraud.

[131] *United States v. Snyder*, 291 F.3d 1291, 1296 n.6 (11th Cir. 2002); *see also United States v. Brown*, 595 F.3d 498, 523-27 (3d Cir. 2010); *United States v. Bakhit*, 218 F. Supp. 2d 1232, 1240-42 (C.D. Cal. 2002). The modified rescissory method looks at the difference between the average price of the stock during the period that the fraud occurred and the average stock price during a set period after the fraud was disclosed; the difference between these two average prices is the loss. By averaging the stock price during these periods, the modified rescissory

method,[132] and by relying on the well established principles of loss causation used in civil fraud cases.[133]

Effective November 1, 2012, the Commission adopted the modified rescissory method to calculate actual loss in securities and commodities fraud cases.[134] Specifically, the guidelines instruct the court to calculate the difference between the average price of the security during the period that the fraud occurred and the average price of the security during the 90-day period after the fraud was disclosed to market, then multiply that difference by the number of shares outstanding. There is a rebuttable presumption that this calculation yields the actual loss attributable to the fraud.[135] In determining whether the amount is a reasonable estimate of the actual loss, the court may consider, among other factors, the extent to which the calculation includes significant changes in value not resulting from the offenses.[136] Examples of changes that might impact share prices include changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events.[137]

### E. More General Factors

The sentencing judge's estimated loss can also include more general factors, such as the scope and duration of the offense and the revenues that have been generated by similar operations.[138]

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method takes into account factors other than the fraud, such as overall growth or decline in the price of the stock.

[132] *See United States v. Peppel*, 707 F.3d 627, 643 (6th Cir. 2013); *United States v. Moskowitz*, 215 F.3d 265, 272 (2d Cir. 2000). The market capitalization method determines loss based upon the change in the price of the stock during the very short period of time immediately before and after the disclosure of the misrepresentation.

[133] *United States v. Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005); *accord United States v. Nacchio*, 573 F.3d 1062, 1078-79 (10th Cir. 2009); *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007). This method relies on the civil loss causation standard enunciated in *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), and excludes from the loss amount any decline in the price of a security caused by factors other than the fraud. *But cf. United States v. Berger*, 587 F.3d 1038, 1043 (9th Cir. 2009) (declining to apply *Dura Pharmaceutical*'s "strict loss causation standard" and instead endorsing "a more general loss causation principle permitting a district court to impose sentencing enhancements only for losses that 'resulted from' the defendant's fraud").

[134] *See* USSG, App. C, amend. 761 (effect. Nov 1, 2012).

[135] USSG §2B1.1, comment. (n.3(F)(ix)).

[136] *Id.*

[137] *Id.*

[138] USSG §2B1.1, comment. (n.3(C)(vi)).

## IV. EXCLUSIONS FROM LOSS

### A. Interest, Finance Charges, Late Fees, Penalties and Similar Costs

The application notes to §2B1.1 of the Sentencing Guidelines create an exclusion from loss for any interest, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or similar costs.[139] In *United States v. Morgan,* for example, the court concluded that the sentencing judge was in error to include interest and finance charges in the amount of loss determined.[140]

### B. Costs to the Government and Costs Incurred by Victims

The costs to the government and the costs to the victims to aid in the prosecution of the defendant are not included in any loss calculation.[141] In *United States v. Schuster*, the court reversed a loss figure that included the victims' costs and expenses to aid in the prosecution of the defendant through testimony.[142] By contrast, costs incurred by a bank for investigating its own employee (the defendant) are not consequential damages barred from loss by §2B1.1, Application Note 3(D), because the investigation was an "immediate response" to the defendant's conduct.[143]

## V. CREDITS AGAINST LOSS

### A. Money and Property Returned

Loss shall be reduced by money and property returned, as well as the fair market value of services rendered, by the defendant (or those acting jointly with the defendant) to the victim *before* the offense was detected.[144] The time of detection is the earliest of: (1) the time the

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[139] USSG §2B1.1, comment. (n.3(D)(i)).

[140] *United States v. Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004); *see also United States v. Dunn*, 300 F. App'x 336, 338-39 (6th Cir. 2008) (holding that the sentencing court improperly included interest in its loss calculations for sentencing purposes).

[141] USSG §2B1.1, comment. (n.3(D)(ii)).

[142] *United States v. Schuster*, 467 F.3d 614, 618-20 (7th Cir. 2006); *cf. United States v. Klein*, 543 F.3d 206, 214-15 (5th Cir. 2008) (holding that in the context of health-care fraud, an insurer's actual loss caused by a doctor's fraudulent billings does not include the value of medicines properly delivered to patients because the money was returned long after the victim discovered the theft). *But cf. United States v. Sharma*, 703 F.3d 318, 325-26 (5th Cir. 2012) (distinguishing the facts in *Klein* from a situation where there was no evidence that any of the services defendants provided were "medically necessary").

[143] *United States v. DeRosier*, 501 F.3d 888, 895 (8th Cir. 2007).

[144] USSG §2B1.1, comment. (n.3(E)(i)).

offense was discovered by the victim or the government; *or* (2) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.[145]

Property returned after detection will not be credited against the loss figure. In *United States v. Swanson,* the sentencing judge declined to subtract the value of money returned after discovery of the offense reasoning that "the fact that a victim has recovered part of its loss after discovery of a fraud does not diminish a defendant's culpability for purposes of sentencing."[146] Restitution paid prior to sentencing but subsequent to detection, whether voluntarily or not, will not be subtracted from the loss amount.[147] Similarly, property that is forfeited by the defendant in the same or related proceeding will also not be credited to the defendant's loss figure.[148]

The value of any property returned prior to discovery is set at the time the property is returned, not at the time of sentencing. In *United States v. Holbrook,* the defendant argued that loss should not include the value of a software company that the victim bank acquired via lien after discovery of the fraud.[149] The software company was not producing a profit prior to the time the victim bank took it over via lien and invested $10 million to turn the company profitable. The defendant did not contest the sentencing court's finding that the value of the software company at the time of the sentencing was "either entirely or almost entirely" due to the victim bank's post-acquisition investment, but rather argued for a "literal interpretation" of Note 3(E)(ii).[150] The court held the company's value was properly determined at the time it was returned, stating that allowing the victim's investment in property to count as a reduction in the victim's loss would "create an absurd result."[151]

Timing is not the only consideration when determining whether a credit applies against the loss figure. In *United States v. Hausmann,* a personal injury lawyer who directed kickbacks from a chiropractor to whom he referred clients, argued at sentencing that the loss figure should be reduced by the "valuable free services" and legal fee reductions he provided the victim

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145 *Id.; see, e.g.*, *United States v. Stennis-Williams,* 557 F.3d 927, 929-30 (8th Cir. 2009) (rejecting the defendant's request to credit money returned in the context of a civil settlement six months prior to the criminal indictment).

146 *United States v. Swanson,* 360 F.3d 1155, 1168-69 (10th Cir. 2004) (quoting *United States v. Nichols*, 229 F.3d 975, 979 (10th Cir. 2000)).

147 *United States v. Akin,* 62 F.3d 700, 702 (5th Cir. 1995).

148 *United States v. Cacho-Bonilla*, 404 F.3d 84, 92 (1st Cir. 2005).

149 *United States v. Holbrook*, 499 F.3d 466, 468-70 (5th Cir. 2007).

150 *Id.* at 469.

151 *Id.* at 469 n.2.

clients.[152] The court declined to adopt this approach since these services were routinely provided to all of the lawyer's clients, not just those defrauded, and the "net detriment" to those victims was not lessened relative to the other clients.[153]

Additionally, even if property is returned or services are rendered prior to discovery, it may not qualify the defendant for a credit against loss if the beneficiaries of the property or service were not eligible to receive them. In *United States v. Ekpo*, the defendant did not return any of the monies received from the government to provide wheelchairs to Medicare participants and failed to present evidence that the beneficiaries would have been medically eligible to receive the wheelchairs provided, so the court did not allow a credit for the wheelchairs' value.[154] Similarly, a defendant who intentionally defrauded Social Security by collecting disallowed disability payments cannot seek a credit against loss based on unintentional overpayment of Social Security taxes on unrelated income.[155] However, when a defendant does provide the requested valuable services, he can get credit against loss for that value.[156] In *United States v. Anders*, the court determined that while a construction contractor committed fraud in the bidding process to secure a contract, the contractor was to be credited the value of services rendered prior to the customer cancelling the contract.[157]

In *United States v. Warner*, the defendant's employer had a policy whereby it would match any donation to charity made by an employee with five times the donated amount.[158] The defendant organized a scheme with a charity whereby he would receive a kickback of a portion of these funds after he fraudulently informed his employer he (and other employees with money fronted by the defendant) had made such donations.[159] At sentencing, the defendant argued that he should be credited the amounts sent by his employer that actually went to the charities. The Third Circuit disagreed and noted that "but for" the defendant's fraud, the employer would not have donated any money to the charity.[160] Similarly, a defendant who embezzled money from his employer disguised as commissions for auto loans argued that his loss calculation should be

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[152] *United States v. Hausmann*, 345 F.3d 952, 959-60 (7th Cir. 2003).

[153] *Id.* at 960.

[154] *United States v. Ekpo*, 266 F. App'x 830, 834 (11th Cir. 2008) (per curiam); *see also United States v. Phipps*, 595 F.3d 243, 248 (5th Cir. 2010) (holding that without evidence provided by the defendant as to the value of property provided the court "ha[s] no reason to consider such a reduction" in loss).

[155] *United States v. Cline*, 332 F. App'x 905, 911 (4th Cir. 2009) (per curiam).

[156] *United States v. Anders*, 333 F. App'x 950, 954-55 (6th Cir. 2009).

[157] *Id.*

[158] *United States v. Warner*, 338 F. App'x 245, 246 (3d Cir. 2009).

[159] *Id.*

[160] *Id.* at 248.

reduced by the profits later made by the company from those auto loans.[161] The Eighth Circuit declined to follow this "astonishing proposition" and noted that any profits the company made were not the "fair market value" for the defendant's services.[162]

Additionally, a defendant's loss calculation is not reduced by costs incurred in defrauding victims. Thus, when a defendant engages in fraud to raise money for his business operation the portion of those funds used for business expenses cannot be credited against any loss because nothing of value is conferred on the victims.[163] In *United States v. Pelle,* the defendant marketed and sold internet kiosks by deliberately and fraudulently fabricating the value of these items and their profit potential to investors.[164] The court refused to reduce the loss amount by the value of the kiosks because that value was a cost incurred in defrauding victims, and therefore, could not be deducted from a loss calculation.[165]

B. Collateral

In a case involving collateral pledged or provided by defendant, the loss shall be reduced by the amount the victim has recovered at sentencing.[166] More specifically, the guidelines provide that loss will be reduced by, "[i]n a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."[167] Effective November 1, 2012, the Commission amended the guidelines to provide that in cases involving a mortgage loan where the property has not been disposed of by the time of sentencing, there is a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of fair market

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161 *United States v. Lange*, 592 F.3d 902, 905 (8th Cir. 2010).

162 *Id.* at 906-07 (noting that an employee is not entitled to credit for the employer's profit from business transactions that are contemporaneous with embezzlement).

163 *United States v. Byors*, 586 F.3d 222, 225-26 (2d Cir. 2009).

164 *United States v. Pelle*, 263 F. App'x 833, 835 (11th Cir. 2008).

165 *Id.* at 840; *see also United States v. Craiglow*, 432 F.3d 816, 820-21 (8th Cir. 2005) (rejecting the claim "that one who commits a fraud is entitled to his business expenses" incurred in perpetrating that fraud).

166 USSG §2B1.1, comment. (n.3(E)(ii)).

167 *Id.*

value.[168] However, where the property has been disposed, the loss amount remains the difference between the unpaid principle balance and the subsequent sale price of the property.[169]

In determining whether to issue a credit against loss, a sentencing judge should examine whether a defendant intended for the collateral to go back to the victim.[170] In *United States v. McCormac*, the court stated that a sentencing judge "must also consider whether a defendant planned to return the collateral or anticipated that such collateral would be repossessed or foreclosed on by the lending institution."[171] In *United States v. Lane*, the intended loss in a bank fraud was reduced by the value of real property used to collateralize the fraudulently obtained loan.[172] It is important to note, however, that in the case of an asset with a value "either entirely or almost entirely" due to the victim's investment subsequent to seizure by the victim, the defendant shall not receive credit for the value of the asset at the time of sentencing.[173]

At least one circuit has construed §2B1.1 (n.3(E)(ii)) to mean that the "pledge" of such collateral must, like money and property returned, be done prior to discovery of the offense.[174] In *United States v. Austin*, the court reasoned that allowing collateral to be "pledged" as late as sentencing "would be totally at odds with the principles embodied in subsection (i) and would alter the long-standing, well-recognized rule that post-detection repayments or pledges of collateral do not reduce loss."[175]

In mortgage fraud cases, courts are often met with the question of how to calculate actual loss where the defendant fraudulently obtained a loan from one lender who then sold the mortgage to a second lender. The key distinction in such cases is whether the transfer from the original lender to successor lender was foreseeable to the defendant at the time he fraudulently

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[168] USSG §2B1.1, comment. (n.3(E)(iii)).

[169] *United States v. Alexander*, 679 F.3d 721, 729-30 (8th Cir.) (affirming the sentencing court's use of the foreclosure sale amount of $50,000 rather than the alleged fair market value of at least $143,460), *cert. denied*, 133 S. Ct. 379 (2012).

[170] *United States v. McCormac*, 309 F.3d 623, 629 (9th Cir. 2002).

[171] *Id*.; *see also United States v. Lacey*, 699 F.3d 710, 720 (2d Cir. 2012) (allowing the sentencing court to draw an inference, where supported by appropriate evidence, that the intended loss in case of a loan secured by real property should include an offset for the value of the property).

[172] *United States v. Lane,* 323 F.3d 568, 590 (7th Cir. 2003); *see also United States v. Downs*, 123 F.3d 637, 642-44 (7th Cir. 1997) (the value of collateral must be deducted from the loan amount to determine loss).

[173] *United States v. Holbrook*, 499 F.3d 466, 468-70 (5th Cir. 2007).

[174] *See United States v. Austin*, 479 F.3d 363, 369 (5th Cir. 2007).

[175] *Id.*

obtained a loan.[176] In recent cases, courts seem inclined to find that mortgage reselling was reasonably foreseeable, and thus, the composite loss[177] is the proper measure of actual loss.[178]

The Second, Ninth, and Tenth Circuits have held that Application Note 3 applies the concept of reasonable foreseeability only to its calculation of "actual loss," and not to the calculation of "credits against loss."[179] These courts therefore rejected arguments that mortgage fraud defendants should receive credits against loss because they could not reasonably have foreseen the economic downturn that led the properties they purchased to be worth less than they expected. They could only receive credit for the actual value of the collateral to the lenders. These courts are explicitly at odds with the the Eighth Circuit, which has held that the concept of reasonable foreseeability applies to credits against loss as well as actual loss.[180]

Additionally, at least one circuit has adopted a rule where an intentional loss figure cannot be reduced by the return of property, even before discovery, if no property was pledged prior to or during the actual fraud.[181] In *United States v. Severson*, the defendant secured a fraudulent loan with collateral four months after originally receiving the loan proceeds, but before discovery of the fraud.[182] The court declined to credit the defendant for the value of the collateral when calculating intended loss, because at the time he received the loan, the defendant had no intention of repaying any part of it.[183]

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[176] *Compare United States v. James*, 592 F.3d 1109, 1115 (10th Cir. 2010) (because successor lender victims were not foreseeable to the defendant, the proper loss amount was initial loan minus transfer price between initial lender and successor lender) *with United States v. Smith*, 705 F.3d 1268, 1276 (10th Cir. 2013) (because successor lender victims were foreseeable victims to the defendant, the proper measure of loss was initial loan minus foreclosure sale price). In both cases, the Tenth Circuit applied the rule that the inclusion of a loss sustained by a successor lender depends on the foreseeability of the loan's transfer to a successor lender. *See also United States v. Crowe*, 735 F.3d 1229, 1242 (10th Cir. 2013) ("[W]here losses to both original and successor lenders is foreseeable, a district court can calculate loss simply by subtracting the foreclosure sales price from the amount of the outstanding balance on the loan.").

[177] Foreclosure proceeds subtracted from original loan amount, adjusted for principal repayments and foreclosure expenses.

[178] *See, e.g.*, *Smith*, 705 F.3d at 1276; *United States v. Appolon*, 695 F.3d 44, 67-68 (1st Cir. 2012); *United States v. Washington*, 634 F.3d 1180, 1184-85 (10th Cir. 2011) (finding resale foreseeable because of the defendant's experience in the real estate industry).

[179] *United States v. Morris*, 744 F.3d 1373, 1375 n.1 (9th Cir. 2014); *Crowe*, 735 F.3d at 1236-37; *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010).

[180] *See United States v. Parish*, 565 F.3d 528, 535 (8th Cir. 2009); *see also Morris*, 744 F.3d at 1375 n.1 ("[W]e join the Second Circuit in rejecting" *Parish*.); *Crowe*, 735 F.3d at 1241 & n.5 (same).

[181] *United States v. Severson*, 569 F.3d 683, 689-90 (7th Cir. 2009).

[182] *Id.* at 687.

[183] *Id.* at 690.

## VI. SPECIAL RULES

### A. Stolen or Counterfeit Credit Cards and Access Devices

"In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device."[184] If, however, the unauthorized access device is a means of telecommunications access, through telecommunication access codes, the loss assessed shall not be less than $100.[185] A defendant in possession of credit card numbers, whether they are actually on cards or simply on a list, having been used or not, will be responsible for each one as a separate "access device."[186] In *United States v. Alli*, the credit card provision in the application note did not overcome a larger intended loss figure where the defendant had "a reasonable expectation, if not knowledge, that the cards would be used to the fullest extent possible."[187] For this reason the $500 figure should be seen as a minimum amount applicable, not as a universal application for credit card loss, and in situations in which the sentencing judge can determine there is a higher intended loss, that figure should be used.[188]

### B. Government Benefits

The loss in cases involving government benefits (*i.e.*, grants, loans, entitlement program payments) should not be less than the amount of benefits obtained by unintended beneficiaries or the amount diverted to unintended uses.[189] A sentencing judge should not calculate loss based on the total amount of benefits received if a portion of those benefits would have been received absent the fraud.[190] For example, in *United States v. Tupone*, the court reasoned that the loss derived by the defendant's fraudulent receipt of worker's compensation benefits was "the difference between the amount of benefits actually obtained . . . and the amount the government

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[184] USSG §2B1.1, comment. (n.3(F)(i)).

[185] *Id.* ("if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall not be less than $100 per unused means").

[186] *United States v. Jones*, 332 F. App'x 801, 807 (3d Cir. 2009).

[187] *United States v. Alli*, 444 F.3d 34, 38-39 (1st Cir. 2006). *But see United States v. Diallo*, 710 F.3d 147, 153-54 (3d Cir. 2013) (finding that a sentencing court should not assume a defendant found guilty of credit card fraud intended loss up to credit limit, absent some showing he intended to exhaust that limit). For further discussion regarding calculation of a defendant's intended loss in credit card fraud cases, *see supra* Section I(B).

[188] *See Alli*, 444 F.3d at 38-39.

[189] USSG §2B1.1, comment. (n.3(F)(ii)).

[190] *United States v. Harms*, 442 F.3d 367, 380 (5th Cir. 2006).

intended him to receive during the relevant period."[191] However, where the government shows the fraud to be "so extensive and pervasive that separating legitimate benefits from fraudulent ones is not reasonably practicable, the burden shifts to the defendant" to identify which benefits were legitimate.[192] Absent such a showing by the defendant, the district court may reasonably treat the entire claim as intended loss.[193]

### C. Davis-Bacon Act Violations

The loss involving a violation of 40 U.S.C. § 3142, as prosecuted under 18 U.S.C. § 1001, will be no less than the difference between the legally required wages and the wages that were actually paid by the defendant.[194]

### D. Ponzi and Other Fraudulent Schemes

"In a case involving a fraudulent investment scheme, . . . loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment."[195] In other words, in Ponzi scheme cases where payments are routinely made to some or all of the victims, the defendant will receive no credit for payments made to "any individual investor in the scheme in excess of that investor's principal investment."[196]

As discussed above in Section IV.A, losses from a fraud offense, whether actual or intended, "shall not include . . . [i]nterest of any kind, finance charges, late fees, penalties,

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[191] *United States v. Tupone*, 442 F.3d 145, 154 (3d Cir. 2006). *But see United States v. Palmquist*, 712 F.3d 640, 648 & n.7 (1st Cir. 2013) (refusing to provide such a credit when the defendant had never actually claimed the legitimate benefits until after being caught, for the "obvious" reason that doing so would have revealed his larger fraudulent scheme).

[192] *United States v. Hebron*, 684 F.3d 554, 563 (5th Cir. 2012).

[193] *Id.*

[194] USSG §2B1.1, comment. (n.3(F)(iii)).

[195] USSG §2B1.1, comment. (n.3(F)(iv)).

[196] *See id.*; *compare United States v. Craiglow*, 432 F.3d 816, 818 n.3 (8th Cir. 2005) (upholding loss calculation performed by taking total money invested by each investor and subtracting any money the defendant repaid to that investor *with United States v. Hartstein*, 500 F.3d 790, 797-800 (8th Cir. 2007) (holding that it is the government's burden to provide evidence of the "defendant's intent as to any particular victim or group of victims" before it can be proved that any scheme was intended to be a "Ponzi scheme," and thus apply the provisions of application note 3(F)(iv) to §2B1.1. Subsequently the Eighth Circuit explained that the government "need not present direct evidence about the circumstances of each alleged victim" when a defendant "never contended that he accepted money for any purpose other than his fraudulent scheme." *United States v. Hatchett*, 622 F.3d 984, 987 (8th Cir. 2010).

amounts based on an agreed-upon return or rate of return, or other similar costs."[197] In the context of a Ponzi scheme, however, courts have recognized a distinction between the prohibition on interest and earnings reinvested by victims of a Ponzi scheme. In *United States v. Hsu*, the Second Circuit joined the Eighth Circuit in holding that "a federal sentencing court can include as part of its 'intended loss' determination those earnings that victims reinvested in a Ponzi scheme, even though those 'earnings' were invented as part of the scheme itself."[198] The court noted that "[w]hen an investor in a Ponzi scheme faces the choice either to withdraw or to reinvest, the choice to reinvest—an act frequently necessary to maintain the scheme itself—transforms promised interest into realized gain that can be used in the computation of loss for the purposes of federal sentencing."[199] The court further stated, that, "[i]n such a case, only the most recent promised or reported interest gains are excluded from sentencing consideration as per the Guidelines' exclusion of interest or rates of return from the loss calculation."[200]

E. Certain Other Unlawful Misrepresentation Schemes

When defendants pose as licensed professionals, represent that products are approved by the government when they are not, fail to properly obtain approval for regulated goods, or fraudulently obtain approval for goods from the government, the loss shall include "the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services."[201] Thus, a defendant will receive no credit in such cases where products are misbranded or falsely represented as being approved by a government agency regardless of the actual fitness or performance of those products.[202] In *United States v. Millstein*, for example, the defendant received no credit for the value of the misbranded prescription drugs sold to victims even though there was no evidence that the drugs that were delivered did not perform as promised.[203] Nor will a defendant receive credit for legal services rendered where he was falsely claiming to be a licensed attorney.[204]

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[197] USSG §2B1.1, comment. (n.3(D)(i)).

[198] *United States v. Hsu*, 669 F.3d 112, 120-21(2d Cir. 2012) (citing *United States v. Alfonso*, 479 F.3d 570 (8th Cir. 2007) and *Hartstein*, 500 F.3d at 800).

[199] *Id.* at 121.

[200] *Id.*

[201] USSG §2B1.1, comment. (n.3(F)(v)).

[202] *Id.*

[203] *United States v. Millstein*, 401 F.3d 53, 74 (2d Cir. 2005).

[204] *See, e.g.*, *United States v. Kieffer*, 621 F.3d 825, 834 (8th Cir. 2010).

F. Value of Controlled Substances

The loss in a case involving controlled substances is the estimated street value of those items.[205]

G. Value of Cultural Heritage Resources or Paleontological Resources

The value of a "cultural heritage resource" shall include the archaeological value, the commercial value, or the cost of restoration.[206] The court "need only make a reasonable estimate" of the loss to a cultural heritage resource based on available information.[207]

H. Federal Health Care Offenses Involving Government Health Care Programs

Effective November 1, 2011, the Commission promulgated an amendment to the guidelines regarding the definition of "intended loss" in cases involving "Federal health care offenses relating to Government health care programs." More specifically, in response to directives set forth in the Patient Protection and Affordable Care Act of 2010,[208] the amendment added two provisions to §2B1.1, both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program." The first provision is a new tiered enhancement at subsection (b)(8) that applies in such cases (i.e., federal health care offenses involving a government health care program) if the loss is more than $1,000,000. The enhancement is 2-levels if the loss is more than $1,000,000, 3-levels if the loss is more than $7,000,000, and 4-levels if the loss is more than $20,000,000.[209]

The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a federal health care offense involving a Government health care program. The special rule provides that, in such a case, "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted."[210] The special rule

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[205] USSG §2B1.1, comment. (n.3(F)(vi)).

[206] USSG §2B1.1, comment. (n.3(F)(vii)); USSG §2B1.5, comment. (n.2(A)); *see also United States v. Shumway*, 112 F.3d 1413, 1424-26 (10th Cir. 1997).

[207] USSG §2B1.5, comment. (n.2(B)); *see also United States v. McCarty*, 628 F.3d 284, 290-91 (6th Cir. 2010) (discussing the commentary regarding the value of a cultural heritage resource in the context of stolen antique books).

[208] Pub. L. 111–148.

[209] USSG §2B1.1(b)(8).

[210] USSG §2B1.1, comment. (n.3(F)(viii)). Some courts had adopted this position even before the new special rule was promulgated. *See*, *e.g.*, *United States v. Martinez*, 588 F.3d 301, 326-27 (6th Cir. 2009) (holding that, in cases of Medicare or Medicaid fraud the intended loss is the billed figure even when the defendant receives a

includes language making clear that the government's proof of intended loss may be rebutted by the defendant.[211]

## VII. CONCLUSION

Section §2B1.1 covers a wide range of possible loss scenarios, from a clearly defined theft or embezzlement case to complex securities frauds such as *Olis*.[212] A sentencing judge can apply case-specific facts within the guideline framework to determine loss in even the most complex cases, and even when there are competing methods of calculation. The court may be called on to review or make an estimate of loss based on available evidence, and the court's decision will be reviewed for reasonableness and fair application of the facts presented by the government and the defendant. While there are rules for exclusions, credits, and special application for loss calculation, the guidelines and reviewing courts recognize the sentencing judge's "unique position" to assess the evidence.

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much smaller payment); *United States v. Mikos*, 539 F.3d 706, 714 (7th Cir. 2008) (noting that while the payment of $1.8 million in fraudulent Medicare bills was highly unlikely, that figure did represent the intended loss regardless of whether or not Medicare paid).

[211] USSG §2B1.1, comment. (n.3(F)(viii)).

[212] *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005).