

# PRIMER



# LOSS CALCULATIONS UNDER §2B1.1(b)(1)

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## I. INTRODUCTION

This primer discusses issues often raised about economic loss and loss calculation under §2B1.1.<sup>1</sup> Effective November 1, 2001, the Commission consolidated the theft and fraud guidelines into §2B1.1. As a part of that amendment, 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 on some applicable cases and concepts relating to this definition of loss but is not intended as a comprehensive compilation of all case law addressing these issues.

## II. THE DEFINITION OF “LOSS” UNDER §2B1.1

The sentencing guidelines define “loss” as “the greater of actual loss or intended loss,”<sup>2</sup> and provide that the sentencing judge “need only make a reasonable estimate of the loss.”<sup>3</sup> When calculating the intended loss, absolute accuracy is not required as long as the calculation is not “outside the realm of permissible computations.”<sup>4</sup> The estimate should be based on available information, and the court may consider a variety of different factors.<sup>5</sup> In making the loss calculation, the court may also choose from competing methods of calculating loss. Restitution and loss are separate issues, and there need not be “symmetry” between the two.<sup>6</sup>

Loss includes all relevant conduct, including charged, uncharged, and acquitted conduct and is not limited to losses directly attributable to the defendant.<sup>7</sup> 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 to private insurers and patients.<sup>8</sup> The appellate court affirmed, holding that the private insurers and patients were victims of the same fraud scheme and, although not charged, those acts constituted relevant

<sup>1</sup> See U.S. SENTENCING COMM’N, *Guidelines Manual*, §2B1.1 (Nov. 2018) [hereinafter USSG].

<sup>2</sup> USSG §2B1.1, comment. (n.3(A)).

<sup>3</sup> USSG §2B1.1, comment. (n.3(C)).

<sup>4</sup> *United States v. Sullivan*, 765 F.3d 712, 716 (7th Cir. 2014) (quoting *United States v. Jackson*, 25 F.3d 327, 330 (6th Cir. 1994)).

<sup>5</sup> *Id.*

<sup>6</sup> *United States v. Kuhrt*, 788 F.3d 403, 423 (5th Cir. 2015) (rejecting defendant’s argument that the government’s inability to calculate restitution demonstrates that total loss also cannot be determined because they are “wholly distinct questions”); *United States v. Patterson*, 595 F.3d 1324, 1327–28 (11th Cir. 2010); see also *United States v. Certified Envtl Serv.*, 753 F.3d 72, 103 (2d Cir. 2014) (reversing, *inter alia*, because district court conflated loss and restitution; emphasizing distinctions between these concepts); *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).

<sup>7</sup> *United States v. Cornelsen*, 893 F.3d 1086, 1089–90 (8th Cir. 2018) (district court did not err in including uncharged conduct in loss calculation); *United States v. Cavallo*, 790 F.3d 1202, 1232–35 (11th Cir. 2015) (district court did not err in mortgage fraud conspiracy case by including in its loss calculation properties for which defendant was not charged and properties named in counts on which the defendant was acquitted).

<sup>8</sup> 568 F.3d 1335, 1343–44 (11th Cir. 2009).

conduct for the purposes of loss calculation.<sup>9</sup> Losses caused by the acts of co-conspirators that were reasonably foreseeable to the defendant should also be included in the loss calculation.<sup>10</sup> 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."<sup>11</sup> A sentencing court may be reversed if there are insufficient findings on this point.<sup>12</sup>

## 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."<sup>13</sup> A loss enhancement may apply even where a defendant personally received no pecuniary gain.<sup>14</sup> As further explained by the application notes, pecuniary harm is reasonably

<sup>9</sup> *Id.*

<sup>10</sup> USSG §1B1.3(a)(1)(B) (defining relevant conduct for jointly undertaken activity). Numerous cases have addressed this issue. *See, e.g.*, *United States v. Abdulla*, 632 F. App'x 98, 101–02 (4th Cir. 2015) (proper for district court to hold both defendants responsible for full loss rather than split the loss between them); *United States v. Moran*, 778 F.3d 942, 973–75 (11th Cir. 2015); *United States v. Robinson*, 603 F.3d 230, 234 (3d Cir. 2010); *United States v. Treadwell*, 593 F.3d 990, 1002–05 (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); *United States v. Catalfo*, 64 F.3d 1070, 1082–83 (7th Cir. 1995); *see also* *United States v. Offill*, 666 F.3d 168, 180 (4th Cir. 2011) (applying same principle to financial gain imputed to defendant in conspiracy).

<sup>11</sup> *See, e.g.*, *United States v. Johnston*, 620 F. App'x 839, 854–56 (11th Cir. 2015) (district court did not err in attributing to defendants the actions of conspiracy participants operating in separate, out-of-state office where defendants had an important role in furthering income tax fraud scheme, recruited participants, and shared information between branches); *United States v. Lloyd*, 807 F.3d 1128, 1145 (9th Cir. 2015) (in securities fraud case, reversing judgment attributing loss from California telemarketing boiler room to defendant managing Florida boiler room because defendant did not design overall scheme, did not pool resources, and was compensated from commissions from only his operation); *United States v. Rodriguez*, 751 F.3d 1244, 1256–57 (11th Cir. 2014) (holding that defendant in mortgage scheme was properly attributed with losses associated with fraudulent use of her post office box because she "participated in the conspiracy and did not withdraw from it" and moreover because "rerouting the mail was essential to the success of the fraudulent scheme"); *United States v. Arojjoye*, 753 F.3d 729, 737–39 (7th Cir. 2014) (holding that defendant was properly attributed with losses caused by co-defendants when he created fraudulent documents and false address used in scheme; emphasizing that the district court properly considered supporting evidence "in context and cumulation"); *see also* *United States v. Sykes*, 774 F.3d 1145, 1150–52 (7th Cir. 2014) (analyzing concept of foreseeability in detail).

<sup>12</sup> *See, e.g.*, *United States v. Anor*, 762 F. App'x 707, 711–12 (11th Cir. 2019) (vacating and remanding because "the district court did not make a particularized finding regarding the scope" of the agreement in determining loss); *United States v. McClatchey*, 316 F.3d 1122, 1128 (10th Cir. 2003) (emphasizing distinction between involvement in conspiracy and scope of jointly undertaken activity); *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."). Findings may not, however, be required when a defendant's involvement in the conspiracy from the outset is apparent from the record. *See, e.g.*, *United States v. Ortiz*, 560 F. App'x 894, 897 (11th Cir. 2014) (distinguishing *Goodheart* on this basis).

<sup>13</sup> USSG §2B1.1, comment. (n.3(A)(i)).

<sup>14</sup> *See, e.g.*, *United States v. Ledee*, 772 F.3d 21, 38 (1st Cir. 2014).

foreseeable if it is “harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.”<sup>15</sup> All reasonably foreseeable losses that flow directly, or indirectly, from a defendant’s conduct should be included in the loss calculation. For example, in *United States v. Neadle*, a defendant committed fraud in obtaining a Virgin Islands license to write property and casualty insurance. 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.<sup>16</sup>

In considering the actual loss in a particular case, one of the most commonly litigated issues is whether the harm was, in fact, “reasonably foreseeable.” In determining whether loss is reasonably foreseeable, courts have found that the actual loss must have a causal link to the defendant’s conduct.<sup>17</sup> For example, in *United States v. Whiting*, the defendant was convicted of converting funds from employees’ paychecks that were intended for medical benefits and making false statements related to those employees’ health benefits.<sup>18</sup> The “actual loss” was calculated using the total amount of unpaid medical claims made by the employees.<sup>19</sup> However, the Seventh Circuit reversed because the trial court stated on the record that there was no “causal link” between the defendant’s misstatements about benefits and the losses caused by the medical claims in the case.<sup>20</sup> 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.<sup>21</sup> Accordingly, the loan losses could not properly be attributed to the defendant at sentencing.<sup>22</sup>

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<sup>15</sup> USSG §2B1.1, comment. (n.3(A)(iv)); *see also, e.g.*, *United States v. Domnenko*, 763 F.3d 768, 775–76 (7th Cir. 2014) (rejecting enhancement for loss that lender sustained on sale of home because district court had not made a finding that it was a “reasonably foreseeable” consequence of defendants’ own fraud, as sellers were not aware that the purchaser was “fictional” and remanding for further explanation).

<sup>16</sup> 72 F.3d 1104, 1108 (3d Cir. 1995), *amended by* 79 F.3d 14 (3d Cir. 1996).

<sup>17</sup> *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).

<sup>18</sup> 471 F.3d at 793.

<sup>19</sup> *Id.* at 802.

<sup>20</sup> *Id.*

<sup>21</sup> *Rothwell*, 387 F.3d at 584.

<sup>22</sup> *Id.*; *see also* *United States v. Isaacson*, 752 F.3d 1291, 1305–06 (11th Cir. 2014) (remanding because government failed to establish that fraudulent valuations caused losing investment; to the contrary, “Morgan Stanley was going to make this investment, and had made its own internal decision that despite significant risk factors, it was going to invest, because it thought it was a good deal, and it was willing to overlook certain red flags, like the audited financial statements . . . being late”) (quotation marks omitted); *United States v. Stein*, 846 F.3d 1135, 1154 (11th Cir. 2017) (remanding because government failed to prove that investors relied upon fraudulent information); *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).

This issue has received particular attention in the context of mortgage fraud. For example, the Eighth Circuit has rejected arguments that defendants could not have “reasonably foreseen” the downturn in the housing market.<sup>23</sup> In one frequently cited case, the defendant obtained numerous mortgage loans through applications overstating the named purchaser’s net worth and income, leading to default and subsequent foreclosure.<sup>24</sup> 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.<sup>25</sup> Although the defendant argued that the government failed to prove that the loss amount was fully attributable to him, as opposed to normal market conditions,<sup>26</sup> the Eighth Circuit held that the appropriate test is not whether market factors affected the loss amount but whether “the market factors and the resulting loss were reasonably foreseeable.”<sup>27</sup> The majority of circuits have also rejected arguments that a defendant’s loss amount should be reduced because the downturn in the housing market was unforeseeable, but have instead held that the foreseeability analysis applies only to the calculation of loss and not to the future value of collateral.<sup>28</sup>

Courts have similarly refused to reduce actual losses by “legitimate market factors and business expenses” in a case involving investment losses. In *United States v. Walker*, the court explained that the net-loss analysis required by §2B1.1 inquires whether the defendant transferred something of value to the victim, not whether the victim’s total losses were affected by market forces.<sup>29</sup> The Eighth Circuit held that the district court did not commit clear error in estimating the losses resulting from defendant’s fraud offenses by calculating the total amounts lost by all investors who submitted Victim Impact Statements.<sup>30</sup>

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<sup>23</sup> *United States v. Mshihiri*, 816 F.3d 997, 1011 (8th Cir. 2016) (“[W]e have recognized that it was reasonably foreseeable that a scheme premised on false loan applications and inflated real estate prices would unravel, and that market conditions could exacerbate the losses.” (quoting *United States v. Engelmann*, 720 F.3d 1005, 1014 (8th Cir. 2013) (quotation marks and alteration omitted))).

<sup>24</sup> *United States v. McKanry*, 628 F.3d 1010, 1014–15 (8th Cir. 2011).

<sup>25</sup> *Id.* at 1019.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g., United States v. Cavallo*, 790 F.3d 1202, 1235–36 (11th Cir. 2015) (“The sentencing guidelines, therefore, require foreseeability of the loss of the unpaid principal, but do not require foreseeability with respect to the future value of the collateral.” (quoting *United States v. Wendlandt*, 714 F.3d 388, 394 (6th Cir. 2013) (quotation marks omitted))); *United States v. Rosenbaum*, 628 F. App’x 923, 934–35 (6th Cir. 2015) (“When a defendant commits mortgage fraud, the amount of foreseeable loss is the loan amount less the recovery by the victim.”); *United States v. Morris*, 744 F.3d 1373, 1375 & n.1 (9th Cir. 2014); *United States v. Crowe*, 735 F.3d 1229 (10th Cir. 2013) (adopting the *Mallory* and *Turk* rule); *United States v. Mallory*, 461 F. App’x 352, 361 (4th Cir. 2012) (per curiam); *United States v. Turk*, 626 F.3d 743, 749–51 (2d Cir. 2010); *accord United States v. Foley*, 783 F.3d 7 n.14 (1st Cir. 2015) (noting in passing that other circuits do not apply a foreseeability analysis to the calculation of credits against loss). *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”). *See infra* Section VI.B (discussing collateral in context of mortgage and loan losses).

<sup>29</sup> 818 F.3d 416, 422–23 (8th Cir. 2016).

<sup>30</sup> *Id.* at 23; *see also United States v. Davis*, 767 F. App’x 714, 731–32 (11th Cir. 2019) (district court did not clearly err in holding defendant accountable for full estimate of investor loss).

## B. INTENDED LOSS

### 1. Generally

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Intended loss is defined in the guidelines as “pecuniary harm that the defendant purposely sought to inflict.”<sup>31</sup> In 2015 the Commission amended the definition to clarify that the defendant’s subjective intent is relevant to the intended loss inquiry.<sup>32</sup> Prior to the amendment, courts had differed as to whether the intended loss amount is based on the defendant’s subjective intent or on an objective standard.<sup>33</sup>

The guideline includes “pecuniary harm that would have been impossible or unlikely to occur.”<sup>34</sup> 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 in a case where the offense involved insurance fraud in which the claim exceeded the insured value.<sup>35</sup> In determining loss for purposes of the guidelines, there is no requirement that the court calculate actual loss before relying on intended loss; indeed, in some cases, it may be easier “as a matter of proof” to show intended loss.<sup>36</sup> However, actual losses, or losses actually completed before

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<sup>31</sup> USSG §2B1.1, comment. (n.3(A)(ii)).

<sup>32</sup> USSG App. C, amend. 792 (effective Aug. 1, 2015).

<sup>33</sup> Compare *United States v. Iwuala*, 789 F.3d 1, 14 (1st Cir. 2015) (“The test for intent is based primarily on the defendant’s objectively reasonable expectations at the time of the fraud. Even so, the defendant’s subjective intent plays a role in the analysis.”) (internal citations omitted), *United States v. Killen*, 761 F.3d 945, 949–50 (8th Cir. 2014) (applying subjective standard but agreeing that district court properly concluded that defendant intended to obtain fraudulent SSI benefits until she reached 65 and thus was properly attributed with full amount of intended loss), *United States v. Diallo*, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this determination, we look to the defendant’s subjective expectation, not to the risk of loss to which he may have exposed his victims.”), *United States v. Manatau*, 647 F.3d 1048, 1050 (10th Cir. 2011) (intended loss requires subjective analysis and must be the object of the defendant’s purpose), *United States v. John*, 597 F.3d 263, 279–80 (5th Cir. 2010) (“In ascertaining the intended loss, the district court must determine the defendant’s actual intent.”), *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had “proven a subjective intent to cause a loss of less than the aggregate amount” of fraudulent loans), and *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim) with *United States v. Innarelli*, 524 F.3d 286, 291 (1st Cir. 2008) (“[W]e focus our loss inquiry for purposes of determining a defendant’s offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes.”); *United States v. Lane*, 323 F.3d 568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct.”), and *United States v. Durham*, 766 F.3d 672, 687–88 (7th Cir. 2014) (rejecting defendant’s argument that district court improperly failed to consider subjective intent; noting that the appropriate question is the “amount placed at risk by the scheme”).

<sup>34</sup> USSG §2B1.1, comment. (n.3(A)(ii)).

<sup>35</sup> *Id.*; see also *United States v. Alphas*, 785 F.3d 775, 780–84 (1st Cir. 2015) (discussing intended loss in context of inflated insurance claims).

<sup>36</sup> *United States v. Thurston*, 358 F.3d 51, 68 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

discovery, are to be included in any calculation of intended loss.<sup>37</sup> That is, the categories are not mutually exclusive and may be combined to calculate an overall intended loss.<sup>38</sup>

“When calculating intended loss, the appropriate inquiry is what the loss would have been if the defendant had not been caught.”<sup>39</sup> For example, in *United States v. Lemons*,<sup>40</sup> a case related to government disability benefits, the Eighth Circuit held that the district court’s calculation of loss based on finding that defendant intended to collect disability benefits through the age of 62, the age she would qualify for retirement, was not clearly erroneous. The Eighth Circuit first noted that loss is the greater of actual or intended loss and that “a district court may reasonably conclude that the defendant intended continued receipt of illegal benefits until retirement without additional *mens rea* evidence.”<sup>41</sup>

## 2. *Specific Factual Circumstances*

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Determining intended loss is often a fact-specific inquiry, and courts have adapted their analysis depending on the particular case.<sup>42</sup> A court’s determination of whether it is appropriate to calculate intended loss at the full face value of the property at issue or some lesser amount often turns on whether the defendant intended to jeopardize, or in fact recklessly jeopardized, the full amount of the property.<sup>43</sup> Thus, for example, in *United States v. Moran*, the Eleventh Circuit agreed that intended loss amounts varied in health care fraud cases depending on whether specific defendants were aware of reimbursement details: for those defendants with such awareness, the intended loss was the lower reimbursable amount; for the defendant *without* such knowledge, the intended loss was a higher, billed rate.<sup>44</sup> While the analysis is fact-specific,

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<sup>37</sup> See *United States v. Sesay*, 937 F.3d 1146, 1153 (8th Cir. 2019) (“Intended loss . . . includes actual losses suffered.”); *United States v. Carboni*, 204 F.3d 39, 47 (2d Cir. 2000).

<sup>38</sup> *Sesay*, 937 F.3d at 1153.

<sup>39</sup> *United States v. Frisch*, 704 F.3d 541, 544 (8th Cir. 2013).

<sup>40</sup> 792 F.3d 941 (8th Cir. 2015) (rejecting defendant’s argument that court should use actual loss incurred).

<sup>41</sup> *Id.* at 950 (finding, however, that there was additional evidence to support the court’s finding that the defendant intended to continue receiving benefits through retirement, including statements in reports filed with the Social Security Administration and three appeals of cessation of benefits); see also *United States v. Rettenberger*, 344 F.3d 702, 708 (7th Cir. 2003). 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]”).

<sup>42</sup> See *United States v. Ainabe*, 938 F.3d 685, 692 (5th Cir. 2019) (“[T]he appropriate method of calculating the amount of intended loss is determined by the facts of the case.”); *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).

<sup>43</sup> See, e.g., *United States v. Harris*, 597 F.3d 242, 256–59 (5th Cir. 2010) (defendant recklessly jeopardized by selling to third parties).

<sup>44</sup> 778 F.3d at 974–75.

certain schemes and claims are particularly common, and some of these situations are discussed below.

The potential 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 judge fixed the intended loss at the total credit limits of all of the credit cards.<sup>45</sup> 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."<sup>46</sup> In another case, 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.<sup>47</sup> In fact, circuits have also concluded that simply obtaining information regarding a credit account creates an intended loss presumption that must be rebutted by the defendant.<sup>48</sup> Conversely, 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.<sup>49</sup>

Similarly, in cases involving fraudulent or forged checks, the face value of the instruments are often used to calculate the intended loss figure.<sup>50</sup> In such cases, courts have held 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.<sup>51</sup> If the defendant does not provide "persuasive evidence" to rebut intent, the courts are "free to accept the loss figure" taken from the face value of the instruments.<sup>52</sup> Further, some courts have held

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<sup>45</sup> United States v. Alli, 444 F.3d 34, 38–39 (1st Cir. 2006); *see also* Harris, 597 F.3d at 252–53 (looking to whether the defendant "recklessly jeopardized" the full credit card limits by selling the card numbers to a third party).

<sup>46</sup> Alli, 444 F.3d at 38.

<sup>47</sup> United States v. Wilfong, 475 F.3d 1214 (10th Cir. 2007).

<sup>48</sup> John, 597 F.3d at 281; *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).

<sup>49</sup> United States v. Diallo, 710 F.3d 147, 153–54 (3d Cir. 2013); *see also* United States v. Manatau, 647 F.3d 1048 (construing loss and intended loss in this context).

<sup>50</sup> *See, e.g.,* United States v. Grant, 431 F.3d 760, 762 (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."); *cf.* United States v. Chappell, 6 F.3d 1095, 1101 (5th Cir. 1993) (district court did not err in calculating loss by assigning each seized counterfeit blank check the average value of checks actually forged and cashed). *But see* United States v. Vysniauskas, 593 F. App'x 518, 524–25 (6th Cir. 2015) (comparing non-circular and circular check-kiting schemes and explaining that where defendant used overdraft and insufficient funds checks to maintain trading activity, loss was properly calculated as the value of the overdraft fees rather than face value of all checks).

<sup>51</sup> 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 holding that court must also consider any evidence tending to show that defendant did not intend to produce counterfeit checks up to the full face value of the stolen checks).

<sup>52</sup> United States v. Khorozian, 333 F.3d 498, 509 (3d Cir. 2003) (quoting United States v. Geevers, 226 F.3d 186, 194 (3d Cir. 2000)); *see also* United States v. Adejumo, 772 F.3d 513, 527 (8th Cir. 2014) (basing intended loss on face value of stolen checks, even though many were photocopies that could not be negotiated, when defendant "presented no contrary evidence that he did not intend to use the full face value of the checks").

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 or her voluntary surrender even if those checks were never used.<sup>53</sup> Similarly, in a case where the defendant unsuccessfully attempted to obtain cash advances from stolen credit cards, the court held that the total amount the defendant attempted to withdraw was the appropriate intended loss figure, even where it exceeded the cash advance limits.<sup>54</sup>

The question of intended loss has also been addressed in the context of various government programs and benefits. For example, in *United States v. Willis*, the defendant submitted at least 20 fraudulent applications for FEMA relief.<sup>55</sup> For some such applications, 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.<sup>56</sup> 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.<sup>57</sup> Similarly, 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.<sup>58</sup>

However, in the context of insurance, the Fifth Circuit concluded that the trial court erred in calculating intended loss based on the face value of fraudulently obtained life insurance policies.<sup>59</sup> The court compared life insurance policies to loans, explaining that in the context of insurance, the amount put at risk by the defendant is not the full amount of the life insurance policy because, if the insurance policy lapses, the insurer can retain the premiums and withhold benefits. In contrast, the risk to a lender with respect to a loan is non-payment of the full amount.<sup>60</sup>

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<sup>53</sup> *United States v. Kushner*, 305 F.3d 194, 198 (3d Cir. 2002).

<sup>54</sup> *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 was 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).

<sup>55</sup> 560 F.3d 1246, 1250 (11th Cir. 2009).

<sup>56</sup> *Id.*

<sup>57</sup> *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).

<sup>58</sup> 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). *See infra* Section IV.C.2.

<sup>59</sup> *United States v. Bazemore*, 608 F. App'x 207, 213–16 (5th Cir. 2015) (remanding to determine loss because there was no dispute that defendant accurately represented age and health status of applicants and government had burden of establishing that misrepresentations regarding applicants’ financial status and financing arrangement “posed a risk of financial harm to the insurers that would not have existed if the information in applications were true”).

<sup>60</sup> *Id.* at 214.

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.<sup>61</sup>

### ***3. No “Economic Reality Principle” Under the Guidelines***

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Before the November 2001 amendments to the sentencing guidelines, some courts did not calculate intended loss in cases involving schemes that were obviously doomed to fail and that caused little or no economic loss.<sup>62</sup> The current definition of intended loss, however, instructs courts to include harm that would have been “impossible or unlikely to occur.”<sup>63</sup>

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, 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 judge to consider a departure based on “economic reality.”<sup>64</sup>

## **C. 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.<sup>65</sup> In *United States v. Hilgers*, the presentence report first suggested an “intended loss” based on the down payments and fees that lenders would have required but for the defendant’s fraud.<sup>66</sup> The sentencing judge agreed with the defendant’s argument that the PSR’s calculation was “too speculative,” and found a guideline loss of zero.<sup>67</sup> 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—an upward variance of over three years above the applicable guideline range.<sup>68</sup> On appeal, the Ninth Circuit emphasized that “the district court’s consideration of the large potential loss that could result from Hilgers’ action was not unreasonable” and that “the potential loss to

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<sup>61</sup> *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 VI.B.

<sup>62</sup> *See, e.g., United States v. Fleming*, 128 F.3d 285, 288 (6th Cir. 1997).

<sup>63</sup> USSG §2B1.1, comment. (n.3(A)(ii)).

<sup>64</sup> *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.”); *see also United States v. Johnston*, 620 F. App’x 839, 857 (11th Cir. 2015) (affirming district court’s use of higher intended loss, rather than actual loss, but noting that where intended loss amount is impossible or unlikely to occur, it may impact the substantive reasonableness of a sentence).

<sup>65</sup> 560 F.3d 944, 947–48 (9th Cir. 2009).

<sup>66</sup> *Id.* at 945.

<sup>67</sup> *Id.* at 946.

<sup>68</sup> *Id.*

victims” was an important section 3553(a) factor.<sup>69</sup> Other courts have also suggested that a proper review of the section 3553(a) factors includes consideration of the loss caused by the defendant’s action.<sup>70</sup>

While courts may consider loss in determining whether a variance is appropriate, at least one circuit has held that simply rejecting the government’s loss evidence without a sufficient explanation constitutes reversible procedural error.<sup>71</sup> In *United States v. Wilkinson*, the sentencing judge stated on the record that the government’s loss expert was knowledgeable and credible. The court nonetheless rejected the expert’s calculations and found zero loss, without providing any explanation.<sup>72</sup> Given the absence of a record explaining the trial court’s decision, the Fourth Circuit held that the sentence was procedurally unreasonable.<sup>73</sup>

In contrast, when procedural errors in loss calculation do not affect the sentence, there is no clear error.<sup>74</sup> 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.<sup>75</sup>

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<sup>69</sup> *Id.* at 947–48.

<sup>70</sup> *See, e.g.*, *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (remanding case with a very large intended loss amount, but “low risk that any actual loss would result”; commenting that the district court may have been overly influenced by the guidelines range in imposing lengthy sentence); *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) (varying upwards by almost 25% over the calculated guideline range when additional loss amounts attributable to unidentified victims could not “be determined precisely enough” to apply the guidelines; finding the evidence sufficient to “consider a greater loss in judging the seriousness of the defendant’s conduct”).

<sup>71</sup> *United States v. Wilkinson*, 590 F.3d 259, 269–70 (4th Cir. 2010).

<sup>72</sup> *Id.* at 270.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, *United States v. Belfrey*, 928 F.3d 746, 751 (8th Cir. 2019) (any error in calculating loss harmless where district court stated that whether loss was \$18 million or \$4 million, it would not affect the sentence because the guideline range was higher than the sentence the court deemed appropriate); *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).

<sup>75</sup> *United States v. Medina*, 485 F.3d 1291, 1304–05 (11th Cir. 2007); *United States v. Ali*, 508 F.3d 136, 144–45 (3d Cir. 2007); *United States v. Burns*, 843 F.3d 679, 688–89 (7th Cir. 2016); *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 mitigating proof of lawful usage).

### III. 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.”<sup>76</sup> However, the guidelines previously noted,<sup>77</sup> and courts have continued to hold, that substituting the gain for the loss is not the preferred method as it “ordinarily underestimates the loss.”<sup>78</sup> 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.”<sup>79</sup> Courts cannot use gain “as a proxy for each defendant’s culpability” and must properly calculate loss when possible to do so.<sup>80</sup> A sentencing court cannot sentence based on gain if it has previously determined that there is “no loss” as opposed to an incalculable loss.<sup>81</sup>

### IV. ESTIMATING LOSS

#### A. GENERALLY

As discussed above, the sentencing court “need only make a reasonable estimate of the loss.”<sup>82</sup> 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.<sup>83</sup> The government must prove the loss attributable to the defendant by a

<sup>76</sup> USSG §2B1.1, comment. (n.3(B)). *See, e.g.*, *United States v. Jimenez*, 946 F.3d 8, 14 (1st Cir. 2019) (“[H]ere the gain to the homeowners serves as a good economic proxy for loss: what the owners did not pay, the banks did not receive.”); *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).

<sup>77</sup> *See* USSG §2F1.1, comment. (n.9) (2000).

<sup>78</sup> *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) (italics omitted)).

<sup>79</sup> *United States v. Munoz*, 430 F.3d 1357, 1371 (11th Cir. 2005) (quoting *United States v. Bracciale*, 374 F.3d 998, 1004 (11th Cir. 2004) (internal quotations omitted)).

<sup>80</sup> *United States v. Gallant*, 537 F.3d 1202, 1240 (10th Cir. 2008); *see also* *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”).

<sup>81</sup> 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”).

<sup>82</sup> USSG §2B1.1, comment. (n.3(C)); *see, e.g.*, *United States v. Moran*, 778 F.3d 942, 973 (11th Cir. 2015).

<sup>83</sup> USSG §2B1.1, comment. (n.3(C)); *Moran*, 778 F.3d at 973–74; *United States v. Brooks*, 681 F.3d 678, 713–14 (5th Cir. 2012); *United States v. Parish*, 565 F.3d 528, 534 (8th Cir. 2009).

preponderance of the evidence and the factual findings supporting a sentencing judge’s loss calculation are reviewed by the appellate courts under a clear error standard.<sup>84</sup> The loss-calculation method, however, is reviewed *de novo*.<sup>85</sup> 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.<sup>86</sup> The Ninth Circuit, however, requires the government to establish facts that have a “ ‘disproportionate effect on the sentence relative to the offense of conviction’ ” by clear and convincing evidence.<sup>87</sup>

In keeping with these principles, a wide range of approaches have been approved in various factual settings. For example, the sentencing court properly considered the value of assets concealed in a bankruptcy fraud as relevant evidence in determining intended loss.<sup>88</sup> In another case in which defendants induced homeowners to refinance their homes to pay for renovations that the defendants did not perform, the district court appropriately estimated loss by totaling the gross income from the refinance jobs above a certain price level and deducting labor and material costs.<sup>89</sup> Similarly, in a health care fraud, the district court properly based loss on the amounts billed to Medicare even though “some beneficial therapy” may have taken place: the difficulty of analyzing individual claims and the defendant’s failure to provide evidence supporting his contention that some therapy legitimately justified the court’s conclusion that “ ‘for the most part, [the organization overall] was a fraud, and the relevant amount is the entire scheme.’ ”<sup>90</sup> Where the defendant fraudulently registered vehicles to avoid state tax, the

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<sup>84</sup> *E.g.*, *United States v. Cavallo*, 790 F.3d 1202, 1232 (11th Cir. 2015); *United States v. McKanry*, 628 F.3d 1010, 1019 (8th Cir. 2011); *see also 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*).

<sup>85</sup> *United States v. Iwuala*, 789 F.3d 1, 12 (1st Cir. 2015).

<sup>86</sup> *United States v. Villa*, 589 F. App’x 532 (11th Cir. 2015) (“When a defendant challenges the loss amount provided in his PSI, the government bears the burden of establishing the loss by a preponderance of the evidence, and the district court must make factual findings sufficient to support the attributed amount. However, when a defendant does not object, a court may properly rely on undisputed statements of loss in the PSI, even when those statements are conclusory.” (internal citations omitted)); *United States v. Ross*, 502 F.3d 521, 531 (6th Cir. 2007) (“[I]f the defendant raises a dispute to the presentence report, the 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.” (quotations and citation omitted)).

<sup>87</sup> *United States v. Hymas*, 780 F.3d 1285, 1289–90 (9th Cir. 2015) (quoting *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000); clarifying 6-factor test for “disproportionate effect” analysis); *see also United States v. Robertson*, 946 F.3d 1168, 1171 (10th Cir. 2020) (rejecting a heightened standard, noting that only the Ninth Circuit has adopted this standard and five others have rejected it).

<sup>88</sup> *United States v. Holthaus*, 486 F.3d 451, 456–57 (8th Cir. 2007). Courts have varied in using the amount sought to be discharged in bankruptcy and the amount concealed from the bankruptcy court. For a discussion of different approaches, *see United States v. Yurek*, 925 F.3d 423, 442–43 (10th Cir. 2019) (affirming use of the amount defendant was trying to discharge in bankruptcy and collecting circuit cases discussing approaches in bankruptcy fraud cases).

<sup>89</sup> *United States v. Sullivan*, 765 F.3d 712, 716 (7th Cir. 2014).

<sup>90</sup> *United States v. Rojo*, 610 F. App’x 878, 881 (11th Cir. 2015).

combined lost sales tax for each of the vehicles—charged and uncharged—was a reasonable estimate of loss to the state.<sup>91</sup>

The evidence the sentencing judge uses to calculate loss can also include a wide variety of sources. For example,

- In *United States v. Flores-Seda*, the sentencing judge relied on the hearsay testimony of the defrauded insurance company’s attorney to estimate loss.<sup>92</sup>
- 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.<sup>93</sup> On appeal, the court agreed that such material provided “sufficient indicia of reliability” to be used to calculate an estimated loss.<sup>94</sup>
- 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.<sup>95</sup>
- In *United States v. Norman*, the trial court properly considered the defendant’s own trial testimony in evaluating loss;<sup>96</sup>
- In *United States v. Kushimo*, the court properly relied on testimony from an FBI agent who sampled ten percent of the bank accounts affected by an identity theft scheme to calculate intended loss and determined, based on that sampling, that 18 percent of the accounts were attributable to the defendant and his co-defendants.<sup>97</sup>

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.”<sup>98</sup> The sentencing judge also may choose the method to calculate loss that he or she prefers, even if there is a viable competing method.<sup>99</sup>

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<sup>91</sup> *United States v. Harmon*, 944 F.3d 734, 736–38 (8th Cir. 2019).

<sup>92</sup> 423 F.3d 17, 21 (1st Cir. 2005).

<sup>93</sup> 104 F.3d 65, 71 (5th Cir. 1997).

<sup>94</sup> *Id.*

<sup>95</sup> 551 F.3d 977, 980–81 (10th Cir. 2008).

<sup>96</sup> 776 F.3d 67, 79–80 (2d Cir. 2015).

<sup>97</sup> *United States v. Kushimo*, No. 18-3222, 2019 WL 6033418, at \*2–3 (3d Cir. 2019); *see also* *United States v. Annamalai*, 939 F.3d 1216, 1235–37 (11th Cir. 2019) (affirming loss figure that assumed all credit card disputes related to fraudulent activity based on evidence that related to a portion of those disputes, and collecting cases “approv[ing] of statistical extrapolation or sampling to determine a reasonable estimate of loss”).

<sup>98</sup> *United States v. Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008); *United States v. Ameri*, 412 F.3d 893, 901 (8th Cir. 2005); *see also* *United States v. Sullivan*, 765 F.3d 712, 716 (7th Cir. 2014) (“To succeed on appeal, a defendant must show that the court’s loss calculation was not only inaccurate but outside the realm of permissible computations” (citations, internal punctuation omitted)); *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”).

<sup>99</sup> *United States v. King*, 257 F.3d 1013, 1025 (9th Cir. 2001); *see also* *United States v. Campbell*, 765 F.3d 1291, 1304 (11th Cir. 2014) (rejecting defendant’s argument that court was required to examine itemized proof of individualized fraudulent transactions; emphasizing fact-specific nature of proof); *United States v. McMillan*, 600 F.3d 434, 458–59 (5th Cir. 2010) (holding that when the sentencing court has contradictory and “hotly contested”

The sentencing judge, however, cannot assign a loss figure “arbitrarily” or with no findings, and the court must develop some evidence to support the loss figure.<sup>100</sup> For example, in one case, 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.<sup>101</sup> Neither can a sentencing judge ignore a defendant’s offer of proof to rebut loss calculation.<sup>102</sup> But, it is not the defendant’s burden to disprove loss amounts; the government must generally prove loss by a preponderance of the evidence.<sup>103</sup>

Courts have taken different approaches with respect to stipulated loss amounts. Some circuits allow a sentencing judge to consider the stipulated loss figure so long as the court also considers loss evidence that is presented by the parties, and “the record clearly demonstrates that the defendant fully understood the potential consequences of his [stipulation].”<sup>104</sup> The Seventh and Tenth Circuits, however, have determined that stipulated facts waive any challenge by the defendant at sentencing.<sup>105</sup> 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.<sup>106</sup> Despite the defendant’s reservation of the argument, the Fifth Circuit determined that, if the sentencing judge found that there was a loss, the defendant had no

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testimony and evidence regarding loss, the appellate court cannot conclude that the sentencing court committed clear error in selecting one or the other theory).

<sup>100</sup> See, e.g., *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 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 was heavily dependent on factual findings and “the absence of a developed record afford[ed] 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. Higgins*, 270 F.3d 1070, 1075–76 (7th Cir. 2001) (holding that trial court made insufficient findings regarding loss); *United States v. Oseby*, 148 F.3d 1016, 1025–1027 (8th Cir. 1998) (same).

<sup>101</sup> *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).

<sup>102</sup> *United States v. Grusd*, 787 F. App’x 922, 925 (9th Cir. 2019) (district court erred by failing to consider whether any deduction was appropriate for procedures performed); *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).

<sup>103</sup> *United States v. Markert*, 774 F.3d 922, 927–28 (8th Cir. 2014) (reversing sentence when government failed to prove that nominee loans used to conceal customer overdraft resulted in pecuniary loss; finding that burden to disprove loss had improperly been shifted to defendant).

<sup>104</sup> *United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004) (brackets in original).

<sup>105</sup> *United States v. Sloan*, 492 F.3d 884, 893 (7th Cir. 2007); *United States v. Jackson*, 459 F. App’x 747, at \*6 (10th Cir. 2012); see also *United States v. Mahbub*, 818 F.3d 213, 232 (6th Cir. 2016) (district court’s reliance on stipulated loss amounts not clear error).

<sup>106</sup> *United States v. Elashyi*, 554 F.3d 480, 509 (5th Cir. 2008).

further grounds to challenge the stipulated figure even if there was “no evidence” to support that amount.<sup>107</sup>

## **B. RELEVANT FACTORS**

As noted above, the estimate of the loss must be based on available information, taking into account various factors that are appropriate and practicable under the circumstances. The sentencing judge’s estimated loss can consider general factors, such as the scope and duration of the offense and the revenues that have been generated by similar operations.<sup>108</sup> Various specific factors are also set forth in the guidelines, some of which are discussed below.

### ***1. Fair Market Value***

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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.”<sup>109</sup> “Fair market value” can be determined by the court through comparison or replacement cost to the victim.

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 premium value.<sup>110</sup> “Fair market value” of items that have a wholesale or retail value are typically determined on a case by case basis. For example, 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 such prices.<sup>111</sup> 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.”<sup>112</sup> Courts must determine the intended victims and the market in which the goods would be sold to determine whether it is appropriate to measure loss using wholesale value or retail value.<sup>113</sup>

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<sup>107</sup> *Id.* at 509–10.

<sup>108</sup> USSG §2B1.1, comment. (n.3(C)(vi)).

<sup>109</sup> USSG §2B1.1, comment. (n.3(C)(i)).

<sup>110</sup> *United States v. Simpson*, 538 F.3d 459, 463 (6th Cir. 2008).

<sup>111</sup> *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)).

<sup>112</sup> *United States v. Wasz*, 450 F.3d 720, 727 (7th Cir. 2006) (collecting cases from different circuits).

<sup>113</sup> *United States v. Qazah*, 810 F.3d 879, 889–90 (4th Cir. 2015) (vacating and remanding sentence based on loss amount calculated at retail value because district court did not adequately gather facts to determine, for example, whether intended victim was only a large cigarette wholesaler or also included retailers); *United States v. Lige*, 635 F.3d 668, 671–72 (5th Cir. 2011).

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.<sup>114</sup> 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.”<sup>115</sup> 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.<sup>116</sup>

When loss may fluctuate, the sentencing judge should determine “fair market value” on the date the fraud ceased.<sup>117</sup> There is “no error in selecting the end of the conspiracy as an appropriate date from which to calculate loss.”<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup>

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.”<sup>121</sup> 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.”<sup>122</sup>

## **2. Development Costs**

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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

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<sup>114</sup> See, e.g., *United States v. Bae*, 250 F.3d 774, 775–76 (D.C. Cir. 2001).

<sup>115</sup> *Id.* at 776; see also *United States v. Onyiego*, 286 F.3d 249, 253, 256 (5th Cir. 2002) (holding that face value accurately determines “loss” with respect to stolen airline tickets).

<sup>116</sup> *Bae*, 250 F.3d at 776.

<sup>117</sup> *United States v. Hart*, 273 F.3d 363, 374 (3d Cir. 2001) (upholding decision to calculate loss at the time fraud ceased and rejecting defendant’s argument that victim could have mitigated losses by selling at a later date).

<sup>118</sup> *Id.*

<sup>119</sup> *United States v. Siciliano*, 601 F. Supp. 2d 623, 633 (E.D. Pa. 2009).

<sup>120</sup> See *United States v. Nathan*, 318 F. App’x 273, 275–76 (5th Cir. 2009) (district court’s decision to rely on a 1998 purchase price rather than a 2000 bank appraisal was not plain error); see also *United States v. Plato*, 593 F. App’x 364, 381 (5th Cir. 2015) (district court did not abuse its discretion in crediting production-value report as evidence of loss rather than tax appraisal valuation; though defendant objected that appraisal is a more credible measure because production had dropped as a result of his arrest and conviction, defendant did not provide sufficient evidence).

<sup>121</sup> *United States v. Lige*, 635 F.3d 668, 672 (5th Cir. 2011) (quoting USSG §2B1.1 comment. (n.3(C)(i)); see also *United States v. Howard*, 887 F.3d 1072, 1077 & n.1 (10th Cir. 2018) (collecting cases using replacement value as proper measure in the context of determining loss for purposes of the Mandatory Victims Restitution Act).

<sup>122</sup> 176 F.3d 1373, 1375 (11th Cir. 1999).

may be used.<sup>123</sup> But, the government still must prove that the development costs are either an appropriate measure of actual loss<sup>124</sup> or that the defendant intended that amount of loss.<sup>125</sup>

### **3. Cost of Repairs**

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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. For example, 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.<sup>126</sup> The circuit court noted that “there is no damage that can be done beyond total destruction.”<sup>127</sup> Courts cannot double count fair market value and repair costs.<sup>128</sup>

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*, for example, 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.<sup>129</sup>

Some estimated repair costs 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.<sup>130</sup>

### **4. Number of Victims Multiplied by Loss**

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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

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<sup>123</sup> 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).

<sup>124</sup> *See* *United States v. Snowden*, 806 F.3d 1030, 1033–34 (10th Cir. 2015) (explaining that it is inappropriate to use costs of development as actual loss where evidence in the record indicated that the company suffered no business losses, but affirming as harmless error).

<sup>125</sup> *United States v. Pu*, 814 F.3d 818, 824–27 (7th Cir. 2016) (clear error to base loss amount on development costs where there was no evidence in record of whether defendant intended any loss).

<sup>126</sup> 471 F.3d 1193, 1196 (11th Cir. 2006).

<sup>127</sup> *Id.* at 1195.

<sup>128</sup> *Id.* at 1196.

<sup>129</sup> 254 F.3d 71, 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”).

<sup>130</sup> 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 loss was properly calculated as the cost of replacing a government experiment that defendants destroyed by cutting down trees that were experiments’ subjects).

losses for individual victims are not easily calculated.<sup>131</sup> In *United States v. Mei*, a credit card fraud case, the sentencing judge estimated intended loss based on the average credit card limit multiplied by the number of cards used.<sup>132</sup> 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.”<sup>133</sup>

## ***5. Reduction in Value of Securities***

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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.<sup>134</sup> “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.”<sup>135</sup> Such determinations must still be made on the evidence when available.<sup>136</sup>

Before November 2012, the guidelines did not expressly provide for any particular method of loss calculation in the context of securities or commodities cases.<sup>137</sup> Courts employed several varying methods of loss calculation when sentencing securities fraud offenders, including

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<sup>131</sup> USSG §2B1.1, comment. (n.3(C)(iv)); *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).

<sup>132</sup> 315 F.3d 788, 792 (7th Cir. 2003).

<sup>133</sup> *United States v. Curran*, 525 F.3d 74, 80 (1st Cir. 2008).

<sup>134</sup> USSG §2B1.1, comment. (n.3(C)(v)).

<sup>135</sup> *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (citation omitted).

<sup>136</sup> *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 continued to have residual value, even if the value is close to zero; “close to zero is not zero”).

<sup>137</sup> *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 securities fraud case and that loss need not be established with precision).

the rescissory method,<sup>138</sup> the modified rescissory method,<sup>139</sup> the market capitalization method,<sup>140</sup> and standards of loss causation established in civil fraud cases.<sup>141</sup>

Effective November 1, 2012, the Commission adopted the modified rescissory method to calculate actual loss in securities and commodities fraud cases,<sup>142</sup> while also noting that 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 multiplying that difference by the number of shares outstanding. 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.<sup>143</sup> Examples of changes that might affect share prices include changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events.<sup>144</sup> At that time, the guideline provided a rebuttable presumption that this calculation yields the actual loss attributable to the fraud.<sup>145</sup>

In 2015 the Commission promulgated amendments that eliminated language establishing the rebuttable presumption that the modified rescissory rule offered the best method of calculating loss in such cases. Instead, the guideline now provides that courts should use

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<sup>138</sup> See *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. 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.

<sup>139</sup> See *United States v. Brown*, 595 F.3d 498, 523–27 (3d Cir. 2010); *United States v. Snyder*, 291 F.3d 1291, 1296 n.6 (11th Cir. 2002); *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 takes into account factors other than the fraud, such as overall growth or decline in the price of the stock.

<sup>140</sup> 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.

<sup>141</sup> See *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 Pharmaceuticals, 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. Georgiou*, 777 F.3d 125, 146 (3d Cir. 2015) (rejecting argument that trial court erred by failing to apply *Dura* standards); *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”).

<sup>142</sup> See USSG App. C, amend. 761 (effective Nov. 1, 2012).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> USSG §2B1.1, comment. (n.3(F)(ix)).

whatever method is “appropriate and practicable” under the circumstances and the modified rescissory rule is included as one specific method that may be used.<sup>146</sup>

## C. SPECIAL RULES

### 1. *Stolen or Counterfeit Credit Cards and Access Devices*

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“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.”<sup>147</sup> 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.<sup>148</sup> 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.”<sup>149</sup> Further, a majority of circuits have held that the \$500 per unauthorized access device applies to all devices seized in a case, even if the device was not used or usable.<sup>150</sup> However, this amount is a floor, not a ceiling. For example, in *United States v. Alli*, the court used the higher intended loss amount—the total amount of the credit limit of all stolen credit cards—rather than the amount reached by applying the credit card provision because the defendant had “a reasonable expectation, if not knowledge, that the cards would be used to the fullest extent possible.”<sup>151</sup> That is, the \$500 figure is effectively the *minimum* amount applicable; in situations in which the sentencing judge can determine that there is a higher intended loss, that figure should be used.<sup>152</sup>

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<sup>146</sup> USSG App. C, amend. 792 (effective Nov. 1, 2015).

<sup>147</sup> USSG §2B1.1, comment. (n.3(F)(i)).

<sup>148</sup> *Id.* (“[I]f 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.”).

<sup>149</sup> *United States v. Jones*, 332 F. App’x 801, 807 (3d Cir. 2009).

<sup>150</sup> *See United States v. Rueda*, 933 F.3d 6, at \*7 (1st Cir. 2019) (Application Note 3(F)(i) necessarily requires that the \$500 minimum loss be attributed to each counterfeit or unauthorized access device, without additional proof that the device “can be used”); *United States v. Carver*, 916 F.3d 398, 403 (4th Cir. 2019) (rejecting a usability standard), *cert. denied* 140 S. Ct. 197 (Oct. 7, 2019); *United States v. Thomas*, 841 F.3d 760, 764–65 (8th Cir. 2016) (“[T]he \$500 minimum in USSG § 2B1.1 cmt. (n.3(F)(i) may be applied to fraudulent cards which have been merely possessed rather than used.”); *United States v. Moon*, 808 F.3d 1085, 1091–92 (6th Cir. 2015) (holding that the \$500 minimum applies to each device regardless of whether the device was in fact used or useable, and collecting cases for the same). *But see United States v. Onyesoh*, 674 F.3d 1157, 1159 (9th Cir. 2012) (holding that the \$500 minimum applies only to unauthorized devices that are “usable.”

<sup>151</sup> 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 that 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 II.B.

<sup>152</sup> *See Alli*, 444 F.3d at 38–39.

## 2. Government Benefits

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In cases involving government benefits (*i.e.*, grants, loans, entitlement program payments), loss should not be less than the amount of benefits obtained by unintended beneficiaries or the amount diverted to unintended uses.<sup>153</sup> 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.<sup>154</sup> 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 intended him to receive during the relevant period."<sup>155</sup> 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.<sup>156</sup> Absent such a showing by the defendant, the district court may reasonably treat the entire claim as intended loss.<sup>157</sup>

Courts have disagreed about whether to apply this special rule where defendants have improperly received benefits pursuant to a set-aside or similar program. A number of courts have held that because the purpose of the programs is to benefit minority-owned or small businesses, they are effectively "benefits" and loss cannot be reduced by the value of services actually rendered.<sup>158</sup> More recently, the Fifth and Ninth Circuits disagreed, concluding that procurement fraud involving set-aside programs should be treated under the general rules for loss calculation

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<sup>153</sup> USSG §2B1.1, comment. (n.3(F)(ii)).

<sup>154</sup> *United States v. Harms*, 442 F.3d 367, 379 (5th Cir. 2006).

<sup>155</sup> 442 F.3d 145, 154 (3d Cir. 2006); *see also* *United States v. Catone*, 769 F.3d 866, 876 (4th Cir. 2014) (construing application note 3(F)(ii) to require courts to distinguish between legitimate and illegitimate benefits in calculating loss; remanding because trial court failed to identify what, if any, portion of unemployment benefits could have been legitimately obtained). *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).

<sup>156</sup> *United States v. Hebron*, 684 F.3d 554, 563 (5th Cir. 2012).

<sup>157</sup> *Id.*

<sup>158</sup> *See, e.g.*, *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009) (appropriate amount of loss is entire value of contracts that were diverted from the intended recipient); *United States v. Leahy*, 464 F.3d 773, 790 (7th Cir. 2006) (holding a municipal minority contracting program was a "government benefits" program under §2F1.1, §2B1.1's predecessor); *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317–18 (4th Cir. 2000) (holding that fraudulent receipt of Disadvantaged Business Enterprise funds involved the diversion of "government benefits"); *see also* *United States v. Singh*, 195 F. Supp. 3d 25 (D.D.C. June 17, 2016) (noting that D.C. Circuit has not addressed but agreeing that special rule should apply and that Small Business Jobs Act included a presumption of loss based on total amount of contract). *But see* *United States v. Crummy*, 249 F. Supp. 3d 475, 486 (D.D.C. Apr. 20, 2017) (disagreeing with *Singh* and holding the Small Business Jobs Act "is best interpreted as setting the relevant baseline for the loss calculation in Section 8(a) contract fraud cases...[and] the statute says nothing about whether this initial presumptive loss amount should be, or can be, *reduced* pursuant to the credits-against-loss rule or otherwise, and there is nothing to suggest that Congress intended to alter the standard practice of crediting the value of the services rendered when the court determines the actual loss to a victim in a procurement fraud case.") (emphasis in original).

like any other procurement fraud.<sup>159</sup> For example, in *United States v. Harris*, the Fifth Circuit explained that “[t]he mere fact that a government contract furthers some public policy objective apart from the government’s procurement needs is not enough to transform the contract into a government benefit akin to a grant or an entitlement program payment.”<sup>160</sup> Similarly, the Ninth Circuit contrasted fraudulent procurement of set-aside contracts with benefits that unilaterally benefit the recipient, like food stamps, explaining that loss to the government should not be the full value of the contracts where those contracts were fully or partially performed.<sup>161</sup> In contrast, the Third Circuit held that regardless of whether loss is calculated under typical loss rules or under the government benefit rules, the appropriate measure of loss is the value of the contracts less the fair market value of the services rendered under those contracts.<sup>162</sup> In explaining its ruling, the Court determined that where the government benefits rule applied, it was not inconsistent to also apply Application Note 3(E)(i), which requires that the fair market value of the property returned and services rendered be credited against the loss.<sup>163</sup>

### ***3. Davis-Bacon Act Violations***

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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.<sup>164</sup>

### ***4. Ponzi and Other Fraudulent Schemes***

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“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.”<sup>165</sup> 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

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<sup>159</sup> *United States v. Harris*, 821 F.3d 589 (5th Cir. 2016); *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015); *cf. United States v. Nagle*, 803 F.3d 167, 180–183 (3d Cir. 2015) (loss calculation “is the face value of the contracts [the company] received minus the fair market value of the services they provided under the contracts” because the Special Rule only supplants the Note 3(A) definition of “loss” and therefore, under Note 3(E)(i), a loss reduction for services rendered is nonetheless required); *see also United States v. Kozerski*, 395 F. Supp. 3d 919, 921 (N.D. Ohio 2019) (“This court finds the reasoning of the Fifth and Ninth Circuits persuasive.”).

<sup>160</sup> *Harris*, 821 F.3d at 604.

<sup>161</sup> *Martin*, 796 F.3d at 1109–12 (remanding and suggesting possible methods to consider loss, including potential premium paid by the government above what it would have paid in competitive bidding process, non-pecuniary harm to the integrity of the program, and harm to legitimate contractors that might otherwise have been awarded the contract).

<sup>162</sup> *Nagle*, 803 F.3d at 179–83.

<sup>163</sup> *Id.* The Seventh Circuit is the only circuit to apply Note 3(F)(v) in this context. *See infra* Section IV.C.5 (citing *United States v. Giovenco*, 773 F.3d 866, 870–71 (7th Cir. 2014)).

<sup>164</sup> USSG §2B1.1, comment. (n.3(F)(iii)); *see also, e.g., United States v. Clark*, 787 F.3d 451, 464–65 (7th Cir. 2015) (finding that district court properly applied loss enhancement because defendant “caused” actual loss to employees by false statements regarding wages; explaining that government’s ability to stop payments to subcontractors meant that defendant’s lies caused “loss” within the meaning of the guidelines).

<sup>165</sup> USSG §2B1.1, comment. (n.3(F)(iv)).

for payments made to “any individual investor in the scheme in excess of that investor’s principal investment.”<sup>166</sup>

As discussed in Section V.A, losses from a fraud offense, whether actual or intended, “shall not include. . . [i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.”<sup>167</sup> 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.”<sup>168</sup> 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.”<sup>169</sup> 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.”<sup>170</sup>

## ***5. Certain Other Unlawful Misrepresentation Schemes***

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When defendants pose as licensed professionals, represent that products are approved by the government when they are not, fail properly to 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.”<sup>171</sup> 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.<sup>172</sup> In *United States v. Milstein*, 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

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<sup>166</sup> See *id.*; *United States v. Snelling*, 768 F.3d 509, 512–13 (6th Cir. 2014) (remanding case where district court failed to credit against loss amounts repaid that were *not* in excess of amounts invested); see also *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). More recently, 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).

<sup>167</sup> USSG §2B1.1, comment. (n.3(D)(i)).

<sup>168</sup> 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).

<sup>169</sup> *Id.* at 121.

<sup>170</sup> *Id.*

<sup>171</sup> USSG §2B1.1, comment. (n.3(F)(v)).

<sup>172</sup> *Id.*

that were delivered did not perform as promised.<sup>173</sup> Nor will a defendant receive credit for legal services rendered where he or she falsely claimed to be a licensed attorney.<sup>174</sup> Similarly, the Seventh Circuit has also held that this application note applies to some circumstances in which defendants falsely claim qualifications to participate in set-aside programs.<sup>175</sup>

## ***6. Value of Controlled Substances***

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The loss in a case involving controlled substances is the estimated street value of the substances involved.<sup>176</sup>

## ***7. Value of Cultural Heritage Resources or Paleontological Resources***

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The value of a “cultural heritage resource” shall include the archaeological value, the commercial value, or the cost of restoration.<sup>177</sup> The court “need only make a reasonable estimate” of the loss to a cultural heritage resource based on available information.<sup>178</sup>

## ***8. Federal Health Care Offenses Involving Government Health Care Programs***

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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,<sup>179</sup> 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 revisions first provided for tiered enhancements at particular loss amounts: 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.<sup>180</sup> Second, the Commission added a special rule to Application Note 3(F) providing that “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.”<sup>181</sup> The special

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<sup>173</sup> 401 F.3d 53, 74 (2d Cir. 2005).

<sup>174</sup> *See, e.g.*, United States v. Kieffer, 621 F.3d 825, 834 (8th Cir. 2010).

<sup>175</sup> *See, e.g.*, United States v. Giovenco, 773 F.3d 866, 870–71 (7th Cir. 2014) (relying on application note 3(F)(v); counting as loss entire amount improperly paid under contract without credit for services provided when defendants obtained contract based on false claims that they were a minority-owned business).

<sup>176</sup> USSG §2B1.1, comment. (n.3(F)(vi)).

<sup>177</sup> USSG §2B1.1, comment. (n.3(F)(vii)); USSG §2B1.5, comment. (n.2(A)); United States v. Shumway, 112 F.3d 1413, 1424–26 (10th Cir. 1997).

<sup>178</sup> USSG §2B1.5, comment. (n.2(B)); *see also* United States v. McCarty, 628 F.3d 284, 290–91 (6th Cir. 2010) (discussing commentary regarding the value of a cultural heritage resource in the context of stolen antique books).

<sup>179</sup> Pub. L. 111–148, 124 Stat. 119.

<sup>180</sup> USSG §2B1.1(b)(7).

<sup>181</sup> USSG §2B1.1, comment. (n.3(F)(viii)). Most courts had adopted this position even before the special rule was promulgated. *See, e.g.*, United States v. Iwuala, 789 F.3d 1, 13–14 (5th Cir. 2015) (applying this principle under

rule includes language confirming that the government’s proof of intended loss may be rebutted by the defendant.<sup>182</sup> However, objections to the loss amount alone do not constitute competent rebuttal evidence.<sup>183</sup> A defendant must instead put forth evidence of legitimate services rendered<sup>184</sup> or other specific evidence that a lower loss amount was intended.<sup>185</sup>

## V. EXCLUSIONS FROM LOSS

### A. INTEREST, FINANCE CHARGES, LATE FEES, PENALTIES AND SIMILAR COSTS

The application notes to §2B1.1 of the sentencing guidelines exclude from loss any interest, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or similar costs.<sup>186</sup>

the 2008 guidelines); *United States v. Isiwele*, 635 F.3d 196, 202 (5th Cir. 2011) (remanding to district court because evidence in record demonstrated that the defendant may have intended to receive a capped amount); *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 much smaller payment); *United States v. Mikos*, 539 F.3d 706, 714 (7th Cir. 2008) (holding that \$1.8 million in fraudulent Medicare bills represent the intended loss because though defendant may have provided some legitimate services, none of the services provided were Medicaid reimbursable); *United States v. Singh*, 390 F.3d 168, 194 (2d Cir. 2004) (vacating and remanding loss amount because defendant’s trial testimony indicated that he had an intimate knowledge of Medicare’s fixed billing practices but he never specifically testified regarding what he expected to receive); *United States v. Miller*, 316 F.3d 495, 504 (4th Cir. 2003) (district court may rely on bill as prima facie evidence but parties may introduce additional evidence demonstrating that the bill either exaggerates or understates the intended loss). Following the amendment, the Ninth Circuit joined these other courts. *United States v. Popov*, 742 F.3d 911, 915–16 (9th Cir. 2014) (“In light of the express instructions in the current Guidelines and the way in which the burden shifting framework has been applied by our sister circuits, we now join those courts.”).

<sup>182</sup> USSG §2B1.1, comment. (n.3(F)(viii)).

<sup>183</sup> See, e.g., *Iwuala*, 789 F.3d at 14–15 (“[T]here is no evidence in this record that would have compelled the district court to find that the defendant knew that the amount billed was more than the scheduled amounts that Medicare routinely paid.”); *United States v. Ohia*, 618 F. App’x 225, 226 (5th Cir. 2015) (per curiam).

<sup>184</sup> See *United States v. Bikundi*, 926 F.3d 761, 797–98 (D.C. Cir. 2019) (affirming \$80 million loss calculation because defendants “did not produce evidence of [legitimate] services with any specificity”); *United States v. Age*, 614 F. App’x 141, 144 (5th Cir. 2015) (district court did not err in calculating loss as total amount billed to Medicare because defendant failed to present any evidence of legitimate services); cf. *United States v. Adebimpe*, 649 F. App’x 449, 452 (9th Cir. 2016) (“In calculating the amount of the intended loss, the district court was not required to discount the value of any wheelchairs that happened to be medically necessary, because the medical examinations mandated to determine medical necessity were not performed.”).

<sup>185</sup> Compare *United States v. Valdez*, 726 F.3d 684, 696 (5th Cir. 2013) (district court committed error in failing to consider audiotape demonstrating that defendant anticipated being paid far less than what he billed to Medicaid), with *United States v. Elliot*, 600 F. App’x 225, 228–30 (5th Cir. 2015) (district court did not err in calculating loss at full amount billed where it considered but did not find credible defendant’s evidence that he intended to a lower loss amount).

<sup>186</sup> USSG §2B1.1, comment. (n.3(D)(i)).

## 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.<sup>187</sup> By contrast, costs incurred by a bank for investigating its own employee (the defendant) may be considered under §2B1.1, Application Note 3(D), because the investigation was an “immediate response” to the defendant’s conduct and was not conducted primarily to aid the government in prosecution.<sup>188</sup>

## VI. CREDITS AGAINST LOSS

### A. MONEY AND PROPERTY RETURNED/SERVICES RENDERED

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.<sup>189</sup> For example, in *United States v. Anders*, the court determined that, although a construction contractor committed fraud in the bidding process to secure a contract, the contractor was to be credited the value of services rendered before the customer cancelled the contract.<sup>190</sup> Failure to credit such value may constitute reversible error.<sup>191</sup> However, where the fraud is so pervasive that it is not reasonably practicable to separate legitimate from fraudulent conduct, the burden shifts to the defendant to prove the legitimate amount.<sup>192</sup>

The time of detection is the earliest of: (1) the time the 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.<sup>193</sup> Property returned after detection will not be credited against the loss figure. For example, 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

<sup>187</sup> USSG §2B1.1, comment. (n.3(D)(ii)); *United States v. Schuster*, 467 F.3d 614, 618–20 (7th Cir. 2006) (reversing loss figure that included such costs).

<sup>188</sup> *United States v. DeRosier*, 501 F.3d 888, 895 (8th Cir. 2007).

<sup>189</sup> USSG §2B1.1, comment. (n.3(E)(i)).

<sup>190</sup> 333 F. App’x 950, 954–55 (6th Cir. 2009); *see also* *United States v. Campbell*, 765 F.3d 1291, 1305 (11th Cir. 2014) (noting that, although court may be justified in treating all money transfers as loss when conduct is “permeated” with fraud, “value may be rendered even amid fraudulent conduct” and defendant appropriately received credit for such value (internal citation, punctuation omitted)); *United States v. Klein*, 543 F.3d 206, 214–15 (5th Cir. 2008) (holding that district court erred by failing to offset loss to insurers by value of drugs that patients actually needed).

<sup>191</sup> *See, e.g., United States v. Alphas*, 785 F.3d 775, 784 (1st Cir. 2015) (remanding case to allow determination as to amounts, if any, that would have legitimately been paid for insurance claims that were artificially inflated but may have contained genuine claims; holding that “void-for-fraud” clauses in insurance policy did not change analysis and “intended loss”).

<sup>192</sup> *See, e.g., United States v. Mazkouri*, 945 F.3d 293, 304 (5th Cir. 2019) (internal quotations omitted) (rejecting defendant’s argument that some of the billings to Medicare were not based on fraud without specific evidence); *Alphas*, 785 F.3d at 784.

<sup>193</sup> USSG §2B1.1, comment. (n.3(E)(i)).

after discovery of a fraud does not diminish a defendant's culpability for purposes of sentencing."<sup>194</sup> Restitution paid before sentencing but subsequent to detection, whether voluntarily or not, will not be subtracted from the loss amount.<sup>195</sup> Similarly, property that is forfeited by the defendant in the same or related proceeding will not be credited to the defendant's loss figure.<sup>196</sup>

The value of any property returned before discovery is set at the time the property is returned, not at the time of sentencing. For example, in *United States v. Holbrook*,<sup>197</sup> the defendant sold non-existent accounts to another entity; the purchaser eventually learned of the scheme and acquired all defendant's corporate assets, including a software company. At the time of transfer, the software company was not profitable, but the purchaser invested \$10 million in the entity.<sup>198</sup> Although the defendant agreed that the value of the software company was "either entirely or almost entirely" due to the purchaser's post-acquisition investment, he argued that a "literal interpretation" of Note 3(E)(ii) required that the court reduce loss amounts attributable to him by the \$10 million valuation placed on the company at the time of sentencing.<sup>199</sup> The court rejected this argument and valued the software company at the time of the transfer, stating that allowing the victim's investment in property to count as a reduction in the victim's loss would "create an absurd result."<sup>200</sup>

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 clients.<sup>201</sup> 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.<sup>202</sup>

Courts have found a defendant is not entitled to credit when the defendant's objective in repaying is the perpetuate ongoing fraud. In *United States v. Callaway*,<sup>203</sup> the Eighth Circuit agreed with the district court that the defendant should receive no credit for amounts he had returned to the victim. This defendant's first cousin had sought assistance in investing funds that her disabled sister had received in an abuse and neglect suit against a nursing home. The

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<sup>194</sup> 360 F.3d 1155, 1168–69 (10th Cir. 2004) (quoting *United States v. Nichols*, 229 F.3d 975, 979 (10th Cir. 2000)).

<sup>195</sup> *United States v. Akin*, 62 F.3d 700, 702 (5th Cir. 1995).

<sup>196</sup> *United States v. Cacho-Bonilla*, 404 F.3d 84, 92 (1st Cir. 2005).

<sup>197</sup> 499 F.3d 466 (5th Cir. 2007).

<sup>198</sup> *Id.* at 468.

<sup>199</sup> *Id.* at 469 (quotations omitted).

<sup>200</sup> *Id.* at 469 n.2.

<sup>201</sup> 345 F.3d 952, 959–60 (7th Cir. 2003).

<sup>202</sup> *Id.* at 960.

<sup>203</sup> 762 F.3d 754 (8th Cir. 2014).

defendant encouraged his cousin to allow him to invest the money in an organization that would supposedly provide substantial yields with little risks. In fact, he appropriated the funds for his own use. Over several years, he returned about one-third of the money, but “only when repeatedly confronted with [the victim’s] desperate medical needs or threats of legal action by third parties, either of which could have foreseeably led to discovery of the scheme.”<sup>204</sup> Under the circumstances, the court concluded that the defendant should receive no credit because he had effectively intended to defraud his relatives of the entire amount invested.

Additionally, even if property is returned or services are rendered before 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. Various cases have addressed different permutations of this situation. For example, 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. Accordingly, the court did not allow a credit for the wheelchairs’ value.<sup>205</sup> However, in *United States v. Mahmood*, where the defendant was convicted of defrauding Medicare, the Fifth Circuit found that, “Medicare is not a patient; as such, it never receives ‘value’ as does a patient . . . .” Where the evidence indicated that Medicare beneficiaries at the defendant’s hospitals received legitimate services, the services only became illegitimate when the defendant fraudulently billed them to Medicare, and the defendant was entitled to a credit against loss.<sup>206</sup> Conversely, a defendant who intentionally defrauded Social Security by collecting disallowed disability payments could not seek a credit against loss based on unintentional overpayment of Social Security taxes on unrelated income.<sup>207</sup> In *United States v. Warner*, the defendant’s employer matched employee donations to charities with five times the donated amount.<sup>208</sup> 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 that he and other employees with money fronted by the defendant had made such donations.<sup>209</sup> The Third Circuit declined to credit him with amounts contributed by his employer that went to the charities, explaining that, “but for” the defendant’s fraud, the employer would not have donated any money to the charity.<sup>210</sup> 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

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<sup>204</sup> *Id.* at 759–60 (payments to victim were “necessary to give [defendant’s] scheme a veneer of legitimacy”); *see also* *United States v. Stochel*, 901 F.3d 883, 890–91 (7th Cir. 2018) (defendant not entitled to offset where he paid some funds towards genuine receivership expenses because they were made to conceal and “were essentially the cost of perpetuating the scheme”).

<sup>205</sup> 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).

<sup>206</sup> *United States v. Mahmood*, 820 F.3d 177, 195 (5th Cir. 2016).

<sup>207</sup> *United States v. Cline*, 332 F. App’x 905, 911 (4th Cir. 2009) (per curiam).

<sup>208</sup> 338 F. App’x 245, 246 (3d Cir. 2009).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 248.

period when the defendant committed fraud to obtain the position of union president.<sup>211</sup> On appeal, the circuit court concluded that the sentencing judge’s reasonable estimate of the intended loss was not “clearly erroneous.”<sup>212</sup> 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.<sup>213</sup>

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.<sup>214</sup> For example, 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.<sup>215</sup> The court refused to reduce the loss amount by the value of the kiosks because that value was a cost incurred in defrauding victims.<sup>216</sup>

## **B. COLLATERAL**

In a case involving collateral pledged or provided by defendant, the loss should be reduced by the amount the victim has recovered by the time of sentencing.<sup>217</sup> 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.”<sup>218</sup> 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 value.<sup>219</sup> However, where the property has been disposed, the loss amount remains

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<sup>211</sup> *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).

<sup>212</sup> *Id.* at 356–57.

<sup>213</sup> *Id.* at 356–58.

<sup>214</sup> *United States v. Byors*, 586 F.3d 222, 225–26 (2d Cir. 2009); *United States v. Spalding*, 894 F.3d 173, 191–92 (5th Cir. 2018) (applying *Byors*); *United States v. Evans*, 744 F.3d 1192, 1198 (10th Cir. 2014) (same).

<sup>215</sup> 263 F. App’x 833, 835 (11th Cir. 2008).

<sup>216</sup> *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).

<sup>217</sup> USSG §2B1.1, comment. (n.3(E)(ii)).

<sup>218</sup> *Id.*; *see also* *United States v. Cavallo*, 790 F.3d 1202, 1232–405 (11th Cir. 2015) (district court correctly used property value at the time of sentencing, rather than value of property years earlier when the defendant claimed, without substantiation, that he withdrew from mortgage fraud conspiracy).

<sup>219</sup> USSG §2B1.1, comment. (n.3(E)(iii)).

the difference between the unpaid principal balance and the subsequent sale price of the property.<sup>220</sup>

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.<sup>221</sup> For example, 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.”<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup>

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 before discovery of the offense.<sup>225</sup> For example, 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 the loss.”<sup>226</sup>

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 the successor lender was foreseeable to the defendant at the time he or she fraudulently obtained a loan.<sup>227</sup> In recent cases, courts seem inclined to find that mortgage

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<sup>220</sup> *United States v. Alexander*, 679 F.3d 721, 729–30 (8th Cir. 2012) (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); *see also* *United States v. Foley*, 783 F.3d 7, 23 (1st Cir. 2015) (stating that, in mortgage fraud cases, the actual loss is “‘always the difference between the original loan amount and the final foreclosure price (less any principal repayments)’”; accordingly, “‘actual loss usually can be calculated by subtracting the value of the collateral—or, if the lender has foreclosed on and sold the collateral, the amount of the sales price—from the amount of the outstanding balance on the loan’” (quoting *United States v. Appolon*, 695 F.3d 44, 67 (1st Cir. 2012))).

<sup>221</sup> 309 F.3d 623, 629 (9th Cir. 2002).

<sup>222</sup> *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).

<sup>223</sup> 323 F.3d 568, 590 (7th Cir. 2003).

<sup>224</sup> *United States v. Holbrook*, 499 F.3d 466, 469 (5th Cir. 2007).

<sup>225</sup> *United States v. Austin*, 479 F.3d 363, 369 (5th Cir. 2007).

<sup>226</sup> *Id.*; *see also* *United States v. Brown*, 877 F. Supp. 2d 736, 749–50 (D. Minn. 2012) (defendant not entitled to a reduction in loss because condominium and note not pledged to the victim until after discovery of the fraud).

<sup>227</sup> *Compare* *United States v. James*, 592 F.3d 1109, 1115 (10th Cir. 2010) (holding that, where district court determined that 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) (holding that, because successor lender victims were foreseeable victims to the defendant, the

reselling was reasonably foreseeable, and thus, the composite loss<sup>228</sup> is the proper measure of actual loss.<sup>229</sup>

Most 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.”<sup>230</sup> 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. Instead, could only receive credit for the actual value of the collateral to the lenders. These courts are explicitly at odds with the Eighth Circuit, which has held that the concept of reasonable foreseeability applies to credits against loss as well as actual loss.<sup>231</sup>

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 before or during the actual fraud. In *United States v. Severson*,<sup>232</sup> the defendant secured a fraudulent loan with collateral four months after originally receiving the loan proceeds but before discovery of the fraud.<sup>233</sup> 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.<sup>234</sup>

## 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.<sup>235</sup> A sentencing judge can apply case-

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. Howard*, 784 F.3d 745, 748 (10th Cir. 2015) (reiterating that total loss may include both original and downstream loans); *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.”).

<sup>228</sup> “Composite loss” means the foreclosure proceeds subtracted from original loan amount, adjusted for principal repayments and foreclosure expenses.

<sup>229</sup> *See, e.g., Howard*, 784 F.3d at 748–49; *United States v. Hymas*, 780 F.3d 1285, 1293 (9th Cir. 2015); *Smith*, 705 F.3d at 1276; *United States v. Appolon*, 695 F.3d 44, at 67–68 (1st Cir. 2012); *see also* *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).

<sup>230</sup> *United States v. Cavallo*, 790 F.3d 1202, 1235 (11th Cir. 2015); *United States v. Morris*, 744 F.3d 1373, 1375 & n.1 (9th Cir. 2014); *United States v. Wendlandt*, 714 F.3d 388, 393–94 (6th Cir. 2013); *Crowe*, 735 F.3d at 1236–37; *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010); *accord* *United States v. Mallory*, 461 F. App’x 352, 361 (4th Cir. 2012).

<sup>231</sup> *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).

<sup>232</sup> 569 F.3d 683, 689–90 (7th Cir. 2009).

<sup>233</sup> *Id.* at 687–90.

<sup>234</sup> *Id.* at 690.

<sup>235</sup> *See, e.g., United States v. Olis*, 429 F.3d 540 (5th Cir. 2005).

specific facts within the guideline framework to determine loss in even the most complex case and may make discretionary decisions regarding 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.