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THE 2015 ECONOMIC CRIME GUIDELINE
AMENDMENTS*

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* This article is adapted from an April 14, 2015 Keynote Address at the Regulatory Offenses and Criminal Law Conference Center on the Administration of Criminal Law at the New York University School of Law. The full text of the speech is available on the Commission's website, <http://www.uscc.gov>. Jill Baisinger of the United States Sentencing Commission staff contributed to this article.

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INTRODUCTION

For several years, the United States Sentencing Commission (Commission) heard concerns from some judges and members of the bar that the economic crime guideline was too high, that it produced unreasonable sentences, and that it was “fundamentally broken.” At the same time, and to the contrary, the great majority of federal judges who responded to a survey in 2010 reported that the economic crime guideline was “generally appropriate” or too low, and only about ten percent reported that the guideline was “too high.”² Because it had been more than a decade since it had comprehensively analyzed this provision, in 2012, the Commission formally initiated a multi-year review of sentencing for economic crime offenses.

After looking at data, considering public comment, and analyzing a wide range of academic and legal sources, the Commission ultimately concluded that the economic crime guideline is not “fundamentally broken.” To the contrary, in cases involving loss amounts less than \$1 million—that is, about eighty-three percent of the cases—courts sentenced defendants consistent with the guideline range. However, in “high-loss cases,” the Commission found high rates of government and non-government sponsored variances from the recommended sentence.³ The Commission concluded that the economic crime guideline could be improved by focusing more closely on individual offender culpability and considering factors such as whether an offender had a mitigating role in the offense or, conversely, was personally involved in sophisticated criminal conduct. The Commission also shifted its attention to the qualitative harm experienced by victims rather than just the number of victims affected by a given offense.

This article discusses the Commission’s review of the economic crime guideline and the resulting amendments. Part I provides background on the economic crime guideline and briefly discusses some of the unique aspects of that provision. Part II analyzes the Commission’s efforts to examine the

2. U.S. Sentencing Comm’n, Results of Survey of U.S. District Judges January 2010 through March 2010 tbl.8 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

3. See *infra* § III(B)(1).

guideline, the sources that influenced its thinking, and its conclusions. Finally, Part III reviews the most significant amendments submitted to Congress in April 2015.

I.

KEY FEATURES OF THE ECONOMIC CRIME GUIDELINE

Section 2B1.1 of the guidelines covers offenses involving “larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; [and] offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States.”⁴

This guideline addresses a sentencing area in which Congress has been deeply involved for many years. Part of the impetus for the Sentencing Reform Act of 1984,⁵ the statute that formed the Commission and ultimately led to the guidelines, was a belief that sentences for economic crimes had historically been too lenient. Congress emphasized that punishment and deterrence were “particularly important in the area of white collar crime. Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses . . . can be written off as a cost of doing business.”⁶ Although the Judiciary Committee “expect[ed]” that most sentences under the revised system would not “be materially different” from then-current sentences, the Committee also predicted that there would be “some logical changes from historical patterns, of course, as in the case of . . . white collar offenses for which plainly inadequate sentences have been imposed in the past.”⁷

4. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM’N 2014).

5. Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 and 28 U.S.C.).

6. S. REP. NO. 98-225, at 76 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259; *see also* S. REP. NO. 98-225, at 77 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 (“some major offenders, particularly white collar offenders . . . frequently do not receive sentences that reflect the seriousness of their offenses”); S. REP. NO. 98-225, at 91, *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3274 (emphasizing importance of deterrence and punishment).

7. S. REP. NO. 98-225, at 116, 1984 U.S.C.C.A.N. 3182, 3299; *see also* S. REP. NO. 98-225, at 177, 1984 U.S.C.C.A.N. 3182, 3360 (“[T]he commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment

Congress continued to express its interest in this area in the years after the guidelines were formulated, particularly in response to scandals or particular problems. For example, in 2002, Congress enacted the Sarbanes-Oxley Act,⁸ which included various directives to the Commission and required it to issue emergency amendments within 180 days.⁹ The Act specifically required the Commission to “review and amend as appropriate” the fraud guidelines and policy statements to address conduct that endangered the financial security of a “substantial number of victims”¹⁰ and to ensure that the guidelines adequately punished and deterred white collar crimes generally.¹¹ Congress also directed the Commission to consider an “enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses.”¹²

In the years after the Sarbanes-Oxley Act, there have been numerous congressional directives that have led to amendments to this guideline.¹³ For example, in the Dodd-Frank

because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration. The commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment or deterrence.”).

8. Pub. L. No. 107-204, 116 Stat. 745 (2002).

9. *Id.* §§ 805(b), 905(c), 1104(c).

10. *Id.* § 805(a)(4); *see also id.* § 805(b) (providing the Commission with emergency authority to promulgate amendments).

11. *Id.* § 905(b).

12. *Id.* § 1104(a)(2).

13. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 hist. note (U.S. SENTENCING COMM’N 2014) (listing amendments); *see also, e.g.*, U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 587 (U.S. SENTENCING COMM’N 2014) (providing specific enhancement for mass marketing in response to “directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1988, Pub. L. 105-184”); *id.* amend. 596 (adding enhancements in response to “directives to the Commission contained in section 4 of the Identity Theft and Assumption Deterrence Act of 1988, Pub. L. 105-318 (b)(1) . . . and section 2 of the Wireless Telephone Protection Act, Pub. L. 105-172”); *id.* amend. 665 (responding to directive in section 4(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. 108-187); *id.* amend. 699 (responding to directive in section 307(c) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 Improvement and Reauthorization Act of 2005, Pub. L. 109-177); *id.* amend. 714 (responding to section 5 of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110-179); *id.* amend. 726 (re-

Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act),¹⁴ Congress instructed the Commission to review and, “as appropriate,” amend the guidelines related to mortgage and financial institution fraud.¹⁵ In short, although the Commission has certainly made its own revisions over the years, this is an area in which Congress has been particularly important in shaping the guideline.

Some background is helpful in understanding why the guideline evolved in the way that it did. Until the 2001 amendment cycle, the guidelines had two provisions addressing different types of economic crimes: section 2F1.1 covered fraud-related offenses, and section 2B1.1 covered theft, embezzlement, receipt of stolen property and property destruction.¹⁶ In 2001, the Commission combined the two guidelines into existing section 2B1.1 as part of the wide-ranging “Economic Crime Package,” which, among other goals, aimed to avoid artificial distinctions between different types of economic crimes and to make interpretation of “loss” consistent.¹⁷ The consolidation resulted in a single guideline that must address many different offenders and many types of economic crimes.¹⁸

In just the past three fiscal years, more than 8300 offenders each year were sentenced using section 2B1.1 as the pri-

sponding to section 209 of the Identity Theft Enforcement and Restitution Act of 2008, Title II of Pub. L. 110–326); *id.* amend. 733 (responding to Let Our Veterans Rest in Peace Act of 2008, Pub. L. 110–384); *id.* amend. 749 (responding to section 10606(a)(2) of the Patient Protection and Affordable Care Act of 2010, Pub. L. 111–148); *id.* amend. 771 (responding to the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–269); *id.* amend. 772 (responding to the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112–186).

14. Pub. L. No. 111-203, 124 Stat. 1376.

15. *Id.* § 1079A(a)(1)(A)–(B).

16. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, 2F1.1 (U.S. SENTENCING COMM’N 1987).

17. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (eff. Nov. 1, 2001).

18. The scope of the conduct covered by this post-consolidation guideline is also illustrated by its length. In 1987, section 2F1.1 had three specific offense characteristics and fifteen application notes spanning three pages. U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (U.S. SENTENCING COMM’N 1987). Today, it has nineteen specific offense characteristics and twenty application notes spanning twenty pages. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM’N 2014).

mary guideline,¹⁹ a group that has consistently accounted for more than eleven percent of all offenders.²⁰ As part of the Commission's overall analysis of this guideline, it also took a particularly close look at the data from fiscal year 2012 to obtain a more detailed understanding of the full range of offenses covered by this guideline. Although theft and embezzlement made up about one-quarter of fraud cases,²¹ the cases included mortgage, financial institution, government benefits, health care, and credit card fraud.²² A few examples illustrate the variety of crimes sentenced under this guideline as well as the significant differences between the jurisdictions. The Southern District of Florida (which had the highest number of economic offenses and the third highest median loss amount)²³ was the leader in the number of health care offenses, mortgage frauds, and credit card frauds.²⁴ The Southern District of New York had a smaller absolute number of fraud cases, but, at 21.3%, it had the highest percentage of

19. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 [hereinafter 2014 SOURCEBOOK], <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014> (identifying 8,359 offenders); U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 [hereinafter 2013 SOURCEBOOK], <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (identifying 8,359 offenders); U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 [hereinafter 2012 SOURCEBOOK], <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012> (identifying 8,701 offenders).

20. 2014 SOURCEBOOK, *supra* note 19; 2013 SOURCEBOOK, *supra* note 19; 2012 SOURCEBOOK, *supra* note 19.

21. U.S. SENTENCING COMM'N, 2012 FRAUD TEAM DATAFILE (2012) [hereinafter FRAUD TEAM DATAFILE]. Although this datafile is not publicly available, the Commission discussed this special data collection project at the January 9, 2015 Public Briefing. See U.S. Sentencing Comm'n, Economic Crime Public Data Briefing [hereinafter Economic Crime Briefing], <http://www.ussc.gov/videos/economic-crime-presentation> (Jan. 9, 2015). The data collection project and review was limited to cases that used section 2B1.1 as the primary guideline, that had complete guideline application information, and that were sentenced using a Guidelines Manual in effect on November 1, 2001 or later. Cases were assigned to categories based on a combination of the statute of conviction and/or review of the offense conduct. See also *id.* (discussing special project).

22. FRAUD TEAM DATAFILE, *supra* note 21.

23. *Id.*

24. *Id.*

fraud cases as a portion of its docket.²⁵ Also, although securities and investment fraud cases made up only about 3.3% of cases sentenced under this guideline, 9.6% of the Southern District of New York's fraud docket included securities cases.²⁶ The District of South Carolina and the Eastern District of Pennsylvania each handled a high number of financial institution and identity-theft offenses.²⁷

Finally, the guideline covers many different types of offenses. The provision applies not only to relatively low-level, single defendant fraud schemes that result in little, if any loss to victims, but also to complex securities fraud, mortgage and Ponzi schemes.²⁸ Moreover, although the guideline includes a base offense level of either six or seven (which results in sentencing ranges of zero to six months assuming no criminal history),²⁹ the most commonly-used enhancements can have a very significant effect on sentences. The loss table is probably the most important example of the way that particular offense characteristics can affect the advisory guideline range. Under this provision, a judge must determine the amount of loss a defendant actually caused or intended to cause victims.³⁰ Once that determination is made, the judge applies the "loss table," which provides for enhancements of up to thirty levels for losses over \$400 million.³¹ To put the potential consequences of this enhancement in context, a four-level enhancement leads to approximately a fifty-percent increase in the sentencing range, and a six-level enhancement approximately

25. *Id.*

26. *Id.*

27. *Id.*

28. *See, e.g.*, *United States v. Kuhrt*, 788 F.3d 403, 408–12 (5th Cir. 2015) (describing defendants' role in multi-billion Ponzi scheme initiated by Allen Stanford; sentenced under section 2B1.1); *United States v. Rubashkin*, 655 F.3d 849, 853–54 (8th Cir. 2011) (addressing complex scheme involving money laundering, wire and bank fraud, accounting fraud, and immigration violations; sentenced under section 2B1.1); *United States v. Mateos*, 623 F.3d 1350, 1354–55 (11th Cir. 2010) (describing health-care fraud involving falsely diagnosing patients with condition that would justify treatments using a particularly expensive drug; calculating guidelines under section 2B1.1).

29. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (U.S. SENTENCING COMM'N 2014); *id.* ch. 5, pt. A (sentencing table).

30. *Id.* § 2B1.1(b)(1); *see also id.* § 2B1.1 cmt. n.3(A)(i)–(iv) (providing instructions on calculating loss).

31. *Id.* § 2B1.1(b)(1)(P).

doubles that range. A large loss finding can obviously lead to an exponential increase in a sentence—a loss enhancement of thirty levels would take a sentencing range of zero to six months to 188 to 235 months without considering any other possible adjustments.³² In calculating the guidelines, the Court must also determine the number of victims harmed as another proxy for the gravity of the harm.³³ The victims enhancement, which can be two, four, or six levels depending on the number of victims “involved,”³⁴ can also lead to substantial increases in the recommended sentence, particularly when combined with high loss amounts. To use the same example, a defendant whose sentence was calculated at level 36 based on loss would jump to an offense level of 42—and a sentencing range of 360 months to life—if the highest victims enhancement were applied as well.

II.

RETHINKING THE ECONOMIC CRIME GUIDELINE

A. *Public Comment*

Over the years, the Commission heard comments from judges, litigants, and others about the economic crime guideline. Some judges, particularly those who regularly sentence defendants with high loss calculations, have criticized the role that loss plays as well as the overall length of the recommended sentences resulting from that factor.³⁵ On the other

32. *Id.* ch. 5, pt. A (sentencing table). That is, a defendant with no enhancements under the fraud guideline would have an offense level of six and a corresponding sentencing range of zero to six months. The addition of thirty-levels of loss enhancements takes the offense level to a 36 with a corresponding range of 188 to 235 months. *Id.*

33. *Id.* § 2B1.1(b)(2); *see also id.* § 2B1.1 cmt. n.1 (defining “victim”).

34. *Id.* § 2B1.1(b)(2)(A–C).

35. *See, e.g.,* *United States v. Gupta*, 904 F. Supp. 2d 349, 350–51 (S.D.N.Y. 2012) (Rakoff, J.) (criticizing both length of recommended ranges and role of loss; suggesting focus instead on the “heart” of offense—defendant’s “egregious breach of trust”); *United States v. Parris*, 573 F. Supp. 2d 744, 745, 754 (E.D.N.Y. 2008) (Block, J.) (imposing sixty months sentence notwithstanding “advisory guidelines range of 360 to life”; “[W]e now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.”); *see also United States v. Corsey*, 723 F.3d 366, 377–82 (2d Cir. 2013) (Underhill, J., concurring) (criticizing role

hand, a 2010 survey of federal judges showed that a majority considered the economic crime guideline to be “generally appropriate” and that twenty-four percent considered the ranges to be too low.³⁶ Only ten percent believed that the range for this guideline was generally too high.³⁷ Because of these divergent comments and because it had been more than ten years since the Commission had systematically analyzed the provision,³⁸ the Commission included study of the economic crime guideline as one of its priorities beginning in 2012.³⁹

As part of this process, the Commission held a symposium on economic crimes at John Jay College in New York City in September 2013. Symposium participants included judges, public defenders, private defense counsel, prosecutors, and various groups with a particular interest in sentencing practices.⁴⁰ The American Bar Association took an active role and submitted its own proposal for debate.⁴¹

At the symposium, the Commission heard about the deep-felt concerns that some attorneys and judges had with this guideline. To take an example brought to the Commission’s attention by one of the judges, one matter involved a defen-

of loss in general and of intended loss in particular; collecting cases and commentary).

36. U.S. Sentencing Comm’n, RESULTS OF SURVEY OF U.S. DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.8 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf. 639 district judges responded to this survey. *Id.* at 3. 594 responded to the fraud question. *Id.* tbl.8.

37. *Id.*

38. *See supra* notes 16–17 and accompanying text; *see also* U.S. Sentencing Comm’n, REPORT TO THE CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002, at 1, 7 (2003) (discussing 2001 amendments).

39. Notice of Final Priorities, 77 Fed. Reg. 51,113 (Aug. 23, 2012); Notice of Final Priorities, 78 Fed. Reg. 51,820 (Aug. 21, 2013); Notice of Final Priorities, 79 Fed. Reg. 49,378 (Aug. 20, 2014).

40. *See* U.S. Sentencing Comm’n, *Symposium on Economic Crime*, USSC.GOV, <http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commission-symposium-economic-crime> (last visited Sept. 14, 2015) (containing information on the symposium, including participant lists and transcripts).

41. *See* AM. BAR ASS’N, A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Plenary_Session_III_Report.pdf.

dant in a fraud scheme that caused total losses of hundreds of millions of dollars.⁴² The defendant in question, however, entered the fraud relatively late in the scheme and received no direct financial gain.⁴³ Moreover, aside from his criminal conduct, he was described to the Commission as having an unparalleled commitment to the community and to volunteerism.⁴⁴ His guideline range, based in large part on the total amount of loss involved, was functionally equivalent to a life sentence although he was a first-time offender.⁴⁵ He received a sentence of one year and a day.⁴⁶ On the other hand, the Department of Justice generally opined that there was no basis for wholesale revision to the guideline or to the loss table, although it also acknowledged that, particularly in some securities fraud cases, the loss and victims tables could lead to disproportionate sentences.⁴⁷

The Commission also solicited input more broadly. For example, after announcing economic crimes as one of its priorities, the Commission received extensive public comment in

42. See Transcript of Sentencing at 29, *United States v. Collins*, No. 07-CR-1170 (S.D.N.Y. July 15, 2013), ECF No. 244.

43. *Id.* at 21–22, 35. The underlying scheme involved a company that provided execution and clearing services for financial instruments. The company tried to conceal significant losses by various improper accounting methods and financial transactions, including use of a series of sham loans. The losses associated with the fraud were approximately \$2.4 billion. The defendant was the outside lawyer for the company, and his sentencing range was calculated based on the full amount of loss. See U.S. Sentencing Comm’n, Symposium on Economic Crime (Sept. 18, 2013) [hereinafter Symposium on Economic Crime], <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Transcript-of-Symposium-on-Economic-Crime.pdf> (comments by J. Loretta Preska).

44. See Symposium on Economic Crime, *supra* note 43 (comments by J. Loretta Preska); see also *Collins*, Sentencing Transcript at 22; *United States v. Qualls*, 25 F. Supp. 3d 248, 260 (E.D.N.Y. 2014) (describing *Collins* and contrasting it with case at hand).

45. *Collins*, Sentencing Transcript at 3, 20.

46. *Id.* at 35.

47. Symposium on Economic Crime, *supra* note 43 (comments by Melinda Haag, U.S. Attorney, N.D. Cal.); see also Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep’t of Justice, to J. Saris, Chair, U.S. Sentencing Comm’n 14 (Mar. 12, 2012), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/publiccomment/20120329/2012%20Comment%20Letter%20on%20Proposed%20Amendment%20FINAL%20031212.pdf>.

both 2013 and 2014.⁴⁸ The Commission also heard from the public generally and interested parties in response to the publication of proposed amendments in early 2015 and during a public meeting in March 2015 that considered those amendments.⁴⁹

Just as the comments that had prompted the review reflected stark divergences in opinion, public comment during the Commission's study revealed no consensus about the guideline or how it should function. Certainly, the proper role of loss was a frequent topic of discussion, particularly (but not exclusively) in cases with very high loss calculations,⁵⁰ and many commenters expressed concerns that defendants faced multiple enhancements for the same conduct.⁵¹ For example, Frank O. Bowman, III, a professor at the University of Missouri School of Law who has written extensively on these issues,⁵² contended that the overall effect of various enhancements is

48. See U.S. Sentencing Comm'n, *Public Comment*, USSC.GOV, <http://www.ussc.gov/amendment-process/public-comment> (last visited Sep. 14, 2015) (compiling selected public commentary on priorities for each amendment cycle).

49. See *id.*; see also U.S. Sentencing Comm'n, *Agenda for March 12, 2015 Public Hearing*, USSC.GOV, <http://www.ussc.gov/amendment-process/public-hearings-and-meetings/20150312/agenda-march-12-2015-public-hearing> (last visited Sep. 14, 2015) (containing agenda, witnesses, and transcript of public hearing).

50. See, e.g., James E. Felman, American Bar Association, Testimony on Proposed Amendments to the Federal Sentencing Guidelines 1–7 (Mar. 12, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Felman.pdf>; Eric A. Tirschwell, Practitioners Advisory Group, Testimony before the United States Sentencing Commission 2, 9 (Mar. 12, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Tirschwell.pdf>.

51. See, e.g., National Association of Criminal Defense Lawyers, Comment Letter on Proposed Amendments for 2015 Cycle 8 (Mar. 18, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/NACDL.pdf>.

52. U.S. Sentencing Comm'n, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines 161–62 (Mar. 12, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/transcript.pdf> (comments by J. Saris); see also, e.g., Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014); Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373 (2004); Frank O. Bowman, III,

“(1) to give loss amount ever-increasing weight, while (2) progressively teasing out a long list of factors that are highly correlated with big-dollar frauds—and for which, therefore, the large enhancements in the Loss Table are already a proxy—and giving those factors independent, cumulative, logarithmic weight in setting a sentence.”⁵³ Similarly, the Practitioners Advisory Group argued that the existing version of section 2B1.1 effectively “double-count[s] the *magnitude* of the harm—by enhancing based on both loss amount and number of victims—while insufficiently accounting for the *nature* of the harm.”⁵⁴

The different commenters, though, did not come to the same conclusions about how to handle these issues. The Department of Justice, for example, contended that the fraud guideline was generally functioning appropriately but acknowledged, as it did at the symposium, that amendments may be needed, particularly in certain high-loss cases.⁵⁵ Some commenters suggested a complete re-write of the economic crime guideline, including, for example, an approach that would decrease the emphasis on enhancements based on loss and look to other measures of culpability and effects on victims.⁵⁶ Still

Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 ST. LOUIS U. L.J. 299 (2000).

53. Frank O. Bowman, III, Comment Letter on Proposed Amendments to Economic Crime Guideline, §2B1.1, at 7 (Feb. 19, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf>; *see also id.* at 6 (criticizing “stacking” of specific offense characteristics); U.S. Sentencing Comm’n, *supra* note 52, at 174 (comments by Frank O. Bowman, III); *id.* at 178-80 (arguing that application of multiple specific offense characteristics in high loss cases would be more extensive but for fact bargaining by parties).

54. Tirschwell, *supra* note 50, at 4; *see also id.* at 5.

55. Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep’t of Justice, to J. Saris, Chair, U.S. Sentencing Comm’n 18 (July 29, 2014), <http://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>; Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep’t of Justice, to J. Saris, Chair, U.S. Sentencing Comm’n 27 (Mar. 9, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf> (“We agree with the Commission’s conclusion that while the fraud guideline is not fundamentally broken for most forms of fraud, it can be improved in some limited ways.”).

56. AM. BAR ASS’N, REPORT ON BEHALF OF THE ABA CRIMINAL JUSTICE SECTION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES (2014), <http://www.ussc.gov/sites/default/files/pdf/amendment->

others recommended changes to different aspects of the guideline. For example, the Victims Advisory Group emphasized its belief that the current guideline structure, with its focus on numbers of victims, did not appropriately consider the degree of harm suffered by victims of economic crime and suggested substantial revisions primarily to the victims table.⁵⁷

B. *Review of Data*

1. *Loss*

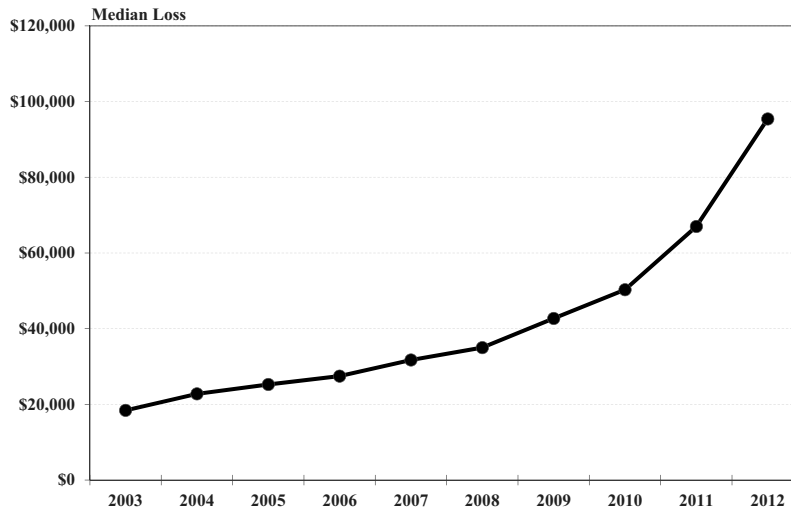
Because of its prominence in public comment and in sentencing economic offenders, the Commission looked carefully at loss.

The Commission's analysis demonstrated that the median loss amount increased steadily from 2003 through 2012. As the following chart illustrates, the median loss amount in 2003 was \$18,414, and the median amount in 2012 was \$95,068. Put another way, the median loss amount between 2003 and 2006 was equivalent to a four-level increase on the loss table; by 2012, the median loss amount was equivalent to an eight-level increase on the loss table.

process/public-hearings-and-meetings/20150312/Felman.pdf. The ABA's proposal suggested, for example, including only six loss categories with a maximum enhancement of 14-levels for losses above \$50 million. *Id.* It also provided for a more specific "culpability" assessment, with potential decreases of up to ten levels for "lowest culpability" and potential increases of up to ten levels for "highest culpability." *Id.* This proposal was a more detailed version of the report and outline provided at the earlier symposium. *See* AM. BAR ASS'N, *supra* note 41.

57. *See* Letter from T. Michael Andrews, Chair, Victims Advisory Group, to J. Saris, Chair, U.S. Sentencing Comm'n (Mar. 18, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/VAG.pdf>; *see also* Russell P. Butler, Executive Director, Md. Crime Victims' Res. Ctr., Inc., Presentation at the Symposium on Economic Crime: What [D]o Victims Want? (Sept. 26, 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Plenary_Session_II.pdf.

**Median Loss for § 2B1.1 Offenders
Fiscal Years 2003-2012**



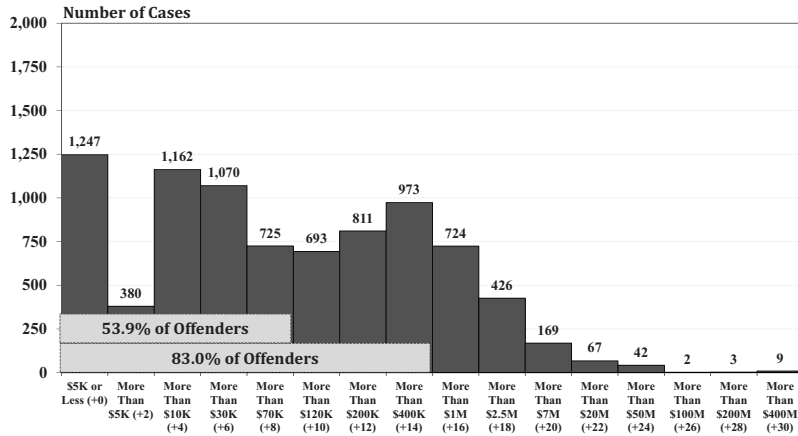
SOURCE: U.S. Sentencing Commission 2003-2011 Datafiles and 2012 Fraud Team Datafile. Of the 770,408 cases, 102,564 were excluded due to incomplete guideline application information. Of the 667,844 remaining cases, 591,892 were excluded that were not sentenced under §2B1.1. Of the remaining 75,952 cases sentenced under §2B1.1, 1,112 were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001. An additional 11,998 cases were excluded due to missing information on exact loss amount. The median is the midpoint so that half of the loss amounts are greater than the median and the remaining half of are less than the median.

Notwithstanding this general increase, the information from the 2012 special data collection project confirmed that most offenders were still concentrated at the lower levels of the loss table. More specifically, as the chart below explains, more than 1200 offenders—almost fifteen percent of the total—received *no* enhancement for loss. In addition, 53.9% were sentenced in the five lowest loss categories, where the loss amount did not exceed \$120,000; 83% of all offenders were sentenced in the lower half of the loss table, with loss amounts of less than \$1 million. In 2012, only fifty-six total offenders received enhancements from the top four levels of the loss table. These fifty-six offenders were disproportionately associated with securities and investment fraud: of the 8503 cases considered, only 282 (or 3.3%) were securities or investment fraud cases,⁵⁸ but twenty-one of the fifty-six highest loss cases (37.5%) were securities or investment fraud.⁵⁹

⁵⁸ Economic Crime Briefing, *supra* note 21 (referencing material on slide 18).

⁵⁹ FRAUD TEAM DATAFILE, *supra* note 21.

**Number of § 2B1.1 Offenders in Each Loss Table Category
Fiscal Year 2012 (N=8,503)**



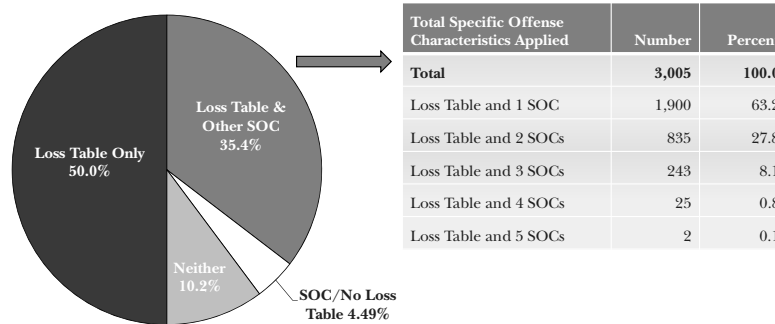
SOURCE: U. S. Sentencing Commission 2012 Fraud Team Datafile. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under §2B1.1. Of the remaining 8,510 cases sentenced under §2B1.1, seven were excluded that were sentenced using a Guidelines Manual in effect prior to November 1, 2001 or for other logical criteria.

2. Specific Offense Characteristics

The Commission also considered the intersection of various enhancements to evaluate the concern that defendants were receiving multiple, potentially duplicative enhancements (the so-called “piling on” effect). This concern appears to be largely unfounded except with respect to the enhancements involving victims.

First, the majority of defendants do not receive multiple enhancements. Ten percent of all offenders received *no* enhancements. 50% of defendants received an enhancement only for loss, and 4.4% received another specific offense characteristic enhancement but did not receive a loss enhancement. That is, 64.6% of all offenders had either no enhancements or only one enhancement. Of the remaining 35.4% of offenders who received a loss table and other enhancement, 63.2% received only one other enhancement.

**Application of Specific Offense Characteristics
for § 2B1.1 Offenders
Fiscal Year 2012 (N=8,503)**



SOURCE: U. S. Sentencing Commission 2012 Fraud Team Datafile. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under §2B1.1. Of the remaining 8,510 cases sentenced under §2B1.1, seven were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001 or for other logical criteria.

As the chart below confirms, loss was by far the most common enhancement, with 85.3% of offenders receiving this specific offense characteristic. An enhancement for the number of victims was second, with 22.8% of offenders receiving this enhancement. The third most common specific offense characteristic was applied in 13.1% of cases for conduct that (1) involved relocating an offense, (2) was committed outside the United States, or (3) “otherwise involved sophisticated means.”⁶⁰ Use of sophisticated means is the most commonly applied sub-section of this enhancement, as it applies to 10.7% of all offenders sentenced under section 2B1.1.⁶¹ The relative infrequency of the remaining characteristics is perhaps unsurprising given the specialized nature of many of the other specific offense characteristics for this guideline.⁶²

60. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENTENCING COMM’N 2014).

61. FRAUD TEAM DATAFILE, *supra* note 21.

62. As noted previously, there are nineteen enhancements to this guideline, many added as a result of congressional directive. *See* sources cited *supra* note 18. For example, one specific offense characteristic provides for an enhancement for thefts from or damage to a national cemetery or veterans’ memorial. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(5) (U.S. SENTENCING COMM’N 2014). Part of this provision implemented a directive to the Commission to provide a sentence enhancement “of not less than 2 levels for any offense against the property of a national cemetery.” Veterans’

**Application Rates for Selected § 2B1.1
Specific Offense Characteristics
Fiscal Year 2012**

Specific Offense Characteristic		Number	Percent
(b)(1)	Loss Table	7,256	85.3
(b)(2)	Victims Table	1,940	22.8
(b)(4)	Receiving Stolen Property	81	1.0
(b)(9)	Misrepresentation of Charity/Bankruptcy/Educ. Funding...	159	1.9
(b)(10)	Relocation of Offense/Outside U.S./Sophisticated Means	1,115	13.1
(b)(11)	Device Making/Means of Identification	1,055	12.4
(b)(16)	Gross Receipts/Endanger Financial Institution	148	1.7

SOURCE: U.S. Sentencing Commission 2012 Fraud Team Datafile. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under §2B1.1. Of the remaining 8,510 cases sentenced under §2B1.1, seven were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001 or for other logical criteria. Only SOCs with application rates of one percent or more are included.

Defendants who received multiple enhancements—particularly some of the most common enhancements—were clustered in the highest loss ranges.⁶³ The relationship between enhancements for loss and number of victims is particularly noteworthy. The great majority—almost eighty percent of all offenders sentenced under section 2B1.1—received *no* victim-based enhancement. Those offenders' median loss amount was \$76,817. The remaining 20.9% of offenders sentenced under section 2B1.1 who *did* receive a victim-based enhancement had substantially higher median loss amounts:

- those who received a two-level increase from the victims table (for conduct involving ten or more victims) had a median loss of \$158,364;
- those who received a four-level increase (for conduct involving fifty or more victims) had a median loss of \$195,118; and
- those who received a six-level increase (for conduct involving 250 or more victims) had a median loss of \$1,435,094.

Higher loss levels were also associated with more frequent application of the enhancement for use of sophisticated means. As noted previously, 10.7% of offenders overall re-

Cemetery Protection Act of 1997, Pub. L. No. 105–101, § 2, 111 Stat. 2202, 2202 (1997); *see also* sources cited *supra* note 13 (identifying various directives).

63. FRAUD TEAM DATAFILE, *supra* note 21.

ceived this enhancement, but 71% of offenders in the top four loss categories (forty out of fifty-six) received this enhancement.⁶⁴

In addition, offenders who received multiple specific offense characteristics were disproportionately likely to be involved in particular *types* of cases. Again, securities and investment fraud cases were notable. Out of a total of 8503 cases considered, only 282 (3.3%) were securities or investment fraud cases.⁶⁵ Offenders in 201 of these cases, or 71.3%, received both a loss enhancement and a victims table enhancement. Likewise, although only 10.7% of defendants overall received an enhancement for use of sophisticated means, 28.0% of offenders in securities and investment fraud cases received this enhancement,⁶⁶ and more than 24.0% of securities and investment fraud offenders received enhancements for loss, victims, and use of sophisticated means.⁶⁷ Securities and investment fraud offenders also had by far the highest median loss amount: as noted previously, the median loss amount overall was \$95,000,⁶⁸ but the median loss for securities and investment fraud was \$3.3 million.⁶⁹

3. *Non-Guidelines Sentences*

The third broad issue that the Commission considered was the extent to which courts sentence defendants outside of the advisory guideline range. As the chart below confirms, the percentage of such sentences has increased over time:

64. *Id.* This trend continues if one considers simultaneous application of enhancements for loss, victims, and use of sophisticated means: only 6.0% of fraud offenders overall received all three enhancements, but about 30.0% of offenders in the top four loss categories fell into this group. *Id.*

65. See Economic Crime Briefing, *supra* note 21 (referencing material on slide 18).

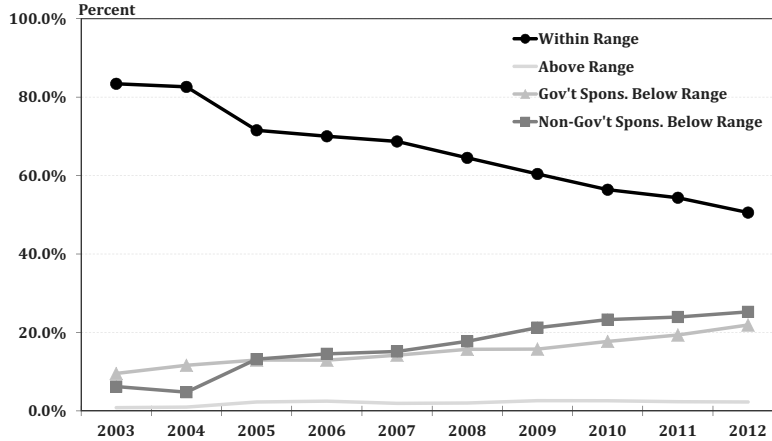
66. *Id.*

67. *Id.* That being said, the use of sophisticated means enhancement was most frequently applied to offenders who committed healthcare or financial institution fraud, both of which are categories that tend to have relatively low numbers of victims, at least as compared to securities and investment frauds. *Id.*

68. See *supra* Section II.B.1 and table therein.

69. See Economic Crime Briefing, *supra* note 21 (referencing material on slide 21).

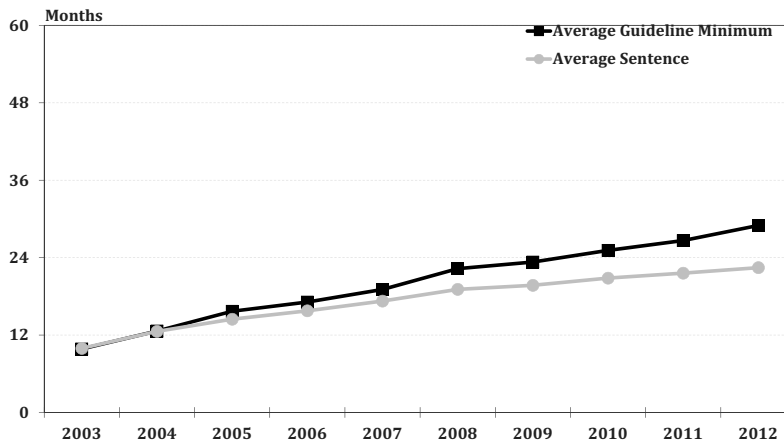
**Sentence Relative to the Guideline Range
for § 2B1.1 Offenders
Fiscal Years 2003-2012**



SOURCE: U.S. Sentencing Commission 2003-2011 Datafiles and 2012 Fraud Team Datafile. Of the 770,408 cases, 102,564 were excluded due to incomplete guideline application information. Of the 667,844 remaining cases, 591,882 were excluded that were not sentenced under §2B1.1. Of the remaining 75,962 cases sentenced under §2B1.1, 1,112 were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001. An additional 59 cases were excluded due to missing information on the position of the sentence relative to the guideline range.

Although the recommended guideline minimum and sentence imposed have generally moved in the same direction, the difference between the two has also increased slightly over time:

**Average Guideline Minimum and Average Sentence
for § 2B1.1 Offenders
Fiscal Years 2003-2012**



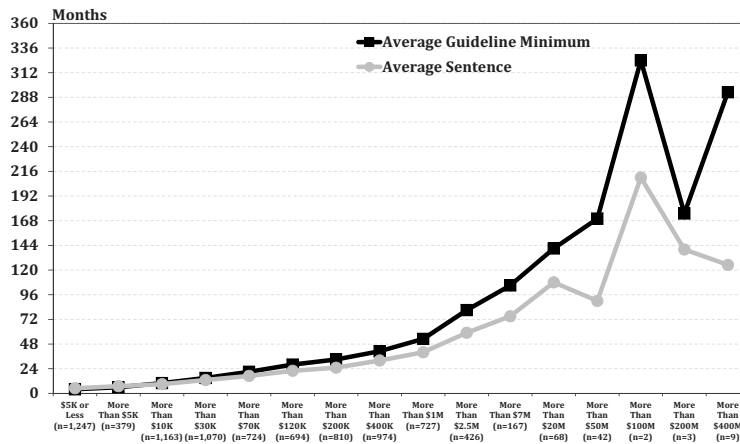
SOURCE: U.S. Sentencing Commission 2003-2011 Datafiles and 2012 Fraud Team Datafile. Of the 770,408 cases, 102,564 were excluded due to incomplete guideline application information. Of the 667,844 remaining cases, 591,882 were excluded that were not sentenced under §2B1.1. Of the remaining 75,962 cases sentenced under §2B1.1, 1,112 were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001. Calculation of the mean includes sentences of probation as zero months and any term of confinement as described in USSC §5C1.1. Sentences of 470 months or longer (including life) are included in the calculation as 470 months. An additional 85 cases were excluded due to missing information on sentence length or guideline minimum.

However, this picture gained considerable nuance when the Commission looked more closely at the sentences for offenders at specific loss levels.

Most notably, variation from the recommended guideline range is strongly correlated with high loss amounts. For offenders with loss amounts in the bottom half of the loss table, the average sentence imposed was very close to the recommended guideline range. Indeed, it is only when loss amounts approach or exceed \$1 million that the two lines begin to diverge substantially. Only about seventeen percent of offenders are sentenced based on losses in these amounts.⁷⁰ Although, after *United States v. Booker*, judges are permitted to impose a sentence outside the recommended guideline range based on individual offender characteristics,⁷¹ the significant increases in the amount of the variance sponsored by the government and approved by the judge in high-loss cases is an important signal that the guidelines may be too severe.

The following chart illustrates both the divergence and the small number of offenders in the highest loss categories:

**Average Guideline Minimum and Average Sentence
for § 2B1.1 Offenders in Each Loss Table Category
Fiscal Year 2012**



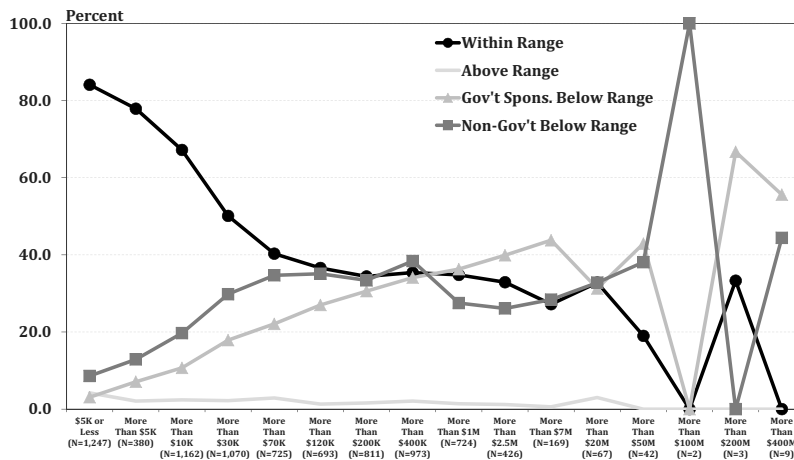
SOURCE: U. S. Sentencing Commission 2012 Fraud Team Datafile. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under §2B1.1. Of the remaining 8,510 cases sentenced under §2B1.1, seven were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001 or for other logical criteria. An additional two cases were excluded due to missing information on sentence imposed.

70. *Id.*

71. 543 U.S. 220, 259 (2005) (striking section of Sentencing Reform Act making guidelines mandatory); *id.* at 261 (directing courts to consider statutory factors in determining an appropriate sentence).

Government-sponsored motions for below-range sentences also steadily increased up through loss amounts of \$7 million and continued to play an important role for cases at the highest loss amounts:

**Sentence Relative to the Guideline Range
for § 2B1.1 Offenders in Each Loss Table Category
Fiscal Year 2012**



SOURCE: U.S. Sentencing Commission 2012 Fraud Team Datafile. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under §2B1.1. Of the remaining 8,510 cases sentenced under §2B1.1, seven were excluded that were sentenced using a *Guidelines Manual* in effect prior to November 1, 2001 or for other logical criteria.

For example, as the chart above demonstrates, at loss amounts of \$5,000 or less, 84.1% of sentences are within the recommended guideline range. Only 3.1% of the outside-range sentences are the result of a government-sponsored motion. The percentage of government-sponsored below-range sentences climbs steadily and reaches 38.4% of all below-range sentences for loss amounts between \$400,000 and \$1 million. For loss amounts of more than \$1 million, more than \$2.5 million, more than \$7 million, and more than \$20 million, government-sponsored below-range sentences are, respectively, 27.5, 26.1, 28.4, and 32.0% of below-range sentences. Even in the four highest loss categories, government-sponsored below range sentences continue to play a significant role: of the fifty-six cases in this category, twenty-five (44.6%) received government-sponsored below-range sentences. Again, though, these

cases include less than one percent of all offenders sentenced under the fraud guideline.⁷²

4. *Mostly Unbroken*

In the end, the Commission concluded that available data did not demonstrate that the fraud guideline was “fundamentally broken” across most loss amounts for most defendants.

Although the Commission heard concerns about the “piling on” of multiple specific offense characteristics, this was generally not the case. The great majority of defendants received few, if any, specific enhancements. Cases that *did* receive multiple enhancements tended to be high-loss cases—particularly securities and investment fraud cases—where offenders affected numerous victims and often held positions that subjected them to additional enhancements, like use of sophisticated means.

The Commission also concluded that offenders with relatively low loss amounts—*i.e.*, amounts under \$1 million—were generally sentenced at or near the advisory guideline range or received a government-sponsored motion for a sentence reduction. These defendants account for the vast majority of economic crimes sentences. Offenders with high loss amounts, however, were typically not being sentenced within range, and, the further up the loss table these defendants moved, the farther their sentences diverged from the recommended range. This data helped explain the concern about the guideline from judges who sentenced defendants in high-loss cases. It appears that most judges, particularly those who do not routinely sentence high-loss defendants, view the guideline as generally appropriate, while judges who more frequently see cases involving very high loss amounts may have serious concerns about the guideline’s operation. This information is also consistent with the opinions expressed by the Department of Justice that the guideline generally works well but has flaws when applied to certain types of cases with particularly high loss levels: although government-sponsored below-range sentences played an important role in fraud cases overall, the highest overall percentage—44.6%—occurred in the four highest loss categories.

72. *See supra* Section II.B.1.

The defendants who did receive multiple enhancements, high loss amounts, and sentences deviating significantly from the recommended range were concentrated among an extremely small group relative to the total number of fraud cases.⁷³ Indeed, many of the criticisms regarding this guideline and particularly the role that loss plays have centered on that even smaller group of offenders with loss amounts above \$50 million. Although less than one percent of all 2012 fraud offenders fall into this range, these defendants constitute the subset of cases with the most substantial divergence from the recommended sentencing range. The fact that a court varies based on individual offender characteristics (such as efforts at restitution), though, does not mean a guideline is “broken” because courts must consider the nature and characteristics of the offense among a whole range of other statutory factors in a post-*Booker* sentencing regime.⁷⁴

Based on this information, the Commission ultimately concluded that, for most defendants in most cases, the guideline is functioning properly. However, the Commission also concluded that the current guideline did not necessarily take individual culpability into account as well as it could. Although this is true across the board, it was clear that judges particularly struggled with cases involving high loss amounts and first-time, relatively low-level offenders. The Commission decided that the guideline could incorporate more effective ways to account for victim harm and offender culpability, especially in high-loss cases.

III.

THE 2015 AMENDMENTS

In the amendments promulgated on April 30, 2015, which will be effective on November 1, 2015 unless rejected by

73. See *supra* notes 63–67 and accompanying text.

74. *Booker*, 543 U.S. at 259–60 (describing statutory requirements); 18 U.S.C. § 3553 (2012) (identifying statutory factors relevant to sentencing). The Sentencing Commission has adopted a new “statement of reasons” form, designed to elicit more detailed information about the statutory factors driving imposition of sentences outside of the applicable guideline range. The revised form will go into effect in October 2015, provided that it is approved by the Judicial Conference at its September 2015 meeting.

Congress,⁷⁵ the Commission included several revisions to the victims table, the definition of intended loss, and the sophisticated means enhancement. In addition, the Commission made two changes to the guidelines overall that will have particular effect on economic crime offenders. These include revisions to the mitigating role adjustment, a guideline of general applicability, and incorporation of inflationary adjustments that will affect the loss table in section 2B1.1. Taken together, these amendments “reflect[] the Commission’s overall goal of focusing the economic crime guideline more on qualitative harm to victims and individual offender culpability.”⁷⁶

A. *Victims*

The Commission “continues to believe that the number of victims is a meaningful measure of the harm and scope of an offense and can be indicative of its seriousness.”⁷⁷ However, the Commission also concluded that the guideline should “place greater emphasis on the extent of harm that particular victims suffer as a result of the offense.”⁷⁸ The revisions to the victims enhancement will “ensure[] that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.”⁷⁹

Since the 2001 amendments, this provision has included an enhancement ranging from two to six levels predicated on the number of victims “involved” in the crime.⁸⁰ Based on public comments and its data analysis,⁸¹ the Commission became convinced that this enhancement should focus more directly on the *degree* of harm rather than simply the numbers of victims. In addition, the Commission was influenced by the extent to which the victim enhancement tended to correlate with

75. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. 25,782 (May 5, 2015).

76. *Id.* at 25,791.

77. *Id.*

78. *Id.*

79. *Id.*

80. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2) (U.S. SENTENCING COMM’N 2014).

81. See *supra* notes 56–57 and accompanying text; *supra* Section II.B.2.

the loss enhancement. Although, as noted previously, most defendants did not receive multiple enhancements, cases with high levels of loss, particularly securities and investment frauds, also tended to receive an enhancement for the number of victims.⁸²

The Commission's 2015 amendments accordingly shift the enhancement's focus from sheer numbers of victims to a qualitative assessment of the harm. The promulgated amendments continue to apply a two-level enhancement for crimes that involve more than ten people.⁸³ This acknowledges that, to some extent, the extent of the impact of a fraud on victims is an important index of culpability. However, the same enhancement is also available for a crime that causes "substantial financial" harm to even one victim. Additional four- and six-level enhancements, respectively, apply to crimes that cause "substantial financial" harm to five and twenty-five victims, respectively.⁸⁴

Application of this enhancement, in short, will require a showing that the defendant caused particular, meaningful harm to individual victims, a requirement that may increase, at least to some extent, the burden on the government. However, should this showing be met, defendants who *do* cause such harm—even if to only one victim—will receive punishment commensurate with that substantial harm.

82. *See supra* Section II.B.2.

83. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. 25,782, 25,790 (May 5, 2015) (amend. 3).

84. *Id.* The amendment also provides guidance to courts with respect to determining "substantial financial harm." In particular, courts should consider whether the offense resulted in a victim (i) becoming insolvent; (ii) filing for bankruptcy . . . ; (iii) suffering substantial loss of a retirement, education, or other savings or investment fund; (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans; (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and (vi) suffering substantial harm to his or her ability to obtain credit. *Id.*

B. *Intended Loss*

A sentence may be enhanced by up to thirty levels for either actual or intended loss.⁸⁵ “Actual loss” is “reasonably foreseeable pecuniary harm that resulted from the offense,”⁸⁶ but “intended loss” is loss that was not actually realized. In the 2015 amendments, the Commission revised the definition of “intended loss” to focus more carefully on harm the defendant personally sought to achieve rather than on harm that was reasonably foreseeable.

“Intended loss” presently (i) means the pecuniary harm that was intended to result from the offense; and (ii) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).⁸⁷

Over the years, the courts had begun construing the intended loss definition in different ways. One group of courts focused on the defendant’s *own* intent, while others took a more “objective” approach. For example, in *United States v. Manatau*,⁸⁸ the Tenth Circuit held that a subjective inquiry is required, which is similar to holdings in the Second, Third and Fifth Circuits.⁸⁹ On the other hand, the First and Seventh Circuits have issued decisions that support a more objective

85. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1), cmt. n.(3)(A) (U.S. SENTENCING COMM’N 2014); *see also supra* note 32 and accompanying text.

86. § 2B1.1 cmt. n.(3)(A)(i).

87. § 2B1.1 cmt. n.(3)(A)(ii).

88. 647 F.3d 1048 (10th Cir. 2011).

89. *See 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.’”) (quoting *United States v. Yeaman*, 194 F.3d 442, 460 (3d Cir. 1999)); *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); *United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003) (“[O]ur case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level”); *United States v. Kopp*, 951 F.2d 521, 529–531 (3d Cir. 1991) (finding that intended loss is the loss the defendant subjectively intended to inflict on the victim), *overruled in part by statute on other grounds*, *United States v. Corrado*, 53 F.3d 620, 624 (3d Cir. 1995).

inquiry focusing on the financial risk to victims caused by the conduct.⁹⁰

The promulgated amendment revises the initial portion of the definition to read that “intended loss” means the “pecuniary harm that the defendant purposely sought to inflict.”⁹¹ This language reflects certain principles discussed in the Tenth Circuit’s decision in *United States v. Manatau*.⁹² In that case, the defendant was convicted of bank fraud and aggravated identity theft. The district court held that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was, in the government’s words, “both *possible* and *potentially contemplated* by the defendant’s scheme.”⁹³ The Tenth Circuit reversed, holding that “intended loss” contemplates “a loss the defendant purposely sought to inflict,” and that the appropriate standard was one of “subjective intent to cause the loss.”⁹⁴ Such an intent, the court held, may be based on making “reasonable inferences about the defendant’s mental state from the available facts.”⁹⁵ “The amendment reflects the Commission’s continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant’s culpability.”⁹⁶

90. See *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.”) (emphasis omitted).

91. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. 25,782, 25,791 (May 5, 2015) (amend. 4).

92. *Manatau*, 647 F.3d 1048.

93. *Id.* at 1049–50 (quoting appellate record).

94. *Id.* at 1050, 1055.

95. *Id.* at 1056.

96. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,791 (amend. 4).

C. *Sophisticated Means*

As with the changes to the definition of intended loss, the revision to the enhancement for use of “sophisticated means” shifts its focus to the defendant rather than the offense as a whole. Some critics argued that imposing the enhancement based on the *offense* rather than the defendant’s own conduct unfairly penalized low-level participants in a scheme.⁹⁷ For example, the American Bar Association commented, “defendants’ culpability is much more justifiably increased where they are themselves responsible for the sophistication of the offense.”⁹⁸ “The Commission concluded that basing the enhancement on the defendant’s own intentional conduct better reflects the defendant’s culpability and will appropriately minimize application of this enhancement to less culpable offenders.”⁹⁹

The current enhancement applies if the “*offense* otherwise involved sophisticated means.”¹⁰⁰ “Sophisticated means,” in turn, is defined as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.”¹⁰¹ This enhancement may be used without a determination of whether the defendant’s own conduct was “sophisticated.” To take just one example, a defendant in a mortgage scheme acted as a “straw buyer” who fraudulently applied for mortgage loans at the direction of others. He argued that the district court improperly applied the sophisticated means enhancement without considering his own con-

97. See, e.g., Tirschwell *supra* note 50, at 7 (supporting proposed amendment because it would “properly direct[] that the enhancement should not apply to a defendant who may have no knowledge of or participation in the sophisticated aspects of the crime because he or she is performing a role, such as driver or messenger, which does not involve sophistication”).

98. Felman, *supra* note 50, at 15.

99. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,791.

100. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(10)(C) (U.S. SENTENCING COMM’N 2014) (emphasis added).

101. *Id.* § 2B1.1 cmt. n.(9)(A). The definition goes on to say, “[f]or example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.” *Id.*

duct. The Seventh Circuit rejected this claim, finding that his argument was inconsistent with the guideline's plain language, which provided that the enhancement should be applied if the scheme overall was sophisticated, so long as that conduct was reasonably foreseeable to the defendant.¹⁰² The promulgated amendment narrows this enhancement to circumstances in which "the offense otherwise involved sophisticated means . . . and the defendant intentionally engaged in or caused the conduct constituting sophisticated means."¹⁰³

D. *Mitigating Role Adjustment*

The promulgated amendments also revise the mitigating role adjustment found in chapter three of the Guidelines to clarify the circumstances in which a defendant may receive a reduction of either two or four levels.¹⁰⁴ Some public comment contended that the "mitigating role adjustments are applied less frequently than the facts of individual cases warrant."¹⁰⁵ In reviewing the application of this guideline, the Commission did ultimately conclude that "mitigating role is applied inconsistently and more sparingly than the Commission intended."¹⁰⁶ With respect to economic crimes in particular, the adjustment is applied in a "limited fashion" and

102. *United States v. Green*, 648 F.3d 569, 572–73, 576–77 (7th Cir. 2011); *see also United States v. Bishop-Oyedepo*, 480 F. App'x 431, 433–34 (7th Cir. 2012) (affirming enhancement for mortgage loan officer who submitted three fraudulent applications because the other schemer's actions were "reasonably foreseeable"; stating that "because [the defendant] knew of the scheme and the scheme as a whole was sophisticated, the adjustment was appropriate regardless of the sophistication of her individual actions"); *United States v. Jenkins-Watt*, 574 F.3d 950, 965 (8th Cir. 2009) (affirming enhancement because defendant was "aware of how the conspiracy worked" and, "[a]t the very least, the conspiracy's criminal conduct was reasonably foreseeable").

103. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,790.

104. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (providing for four-level reduction for a "minimal" participant, a two-level reduction for a "minor" participant, and a three-level reduction for cases in between).

105. Testimony Before the U.S. Sentencing Comm'n, David Debold, Chair, Practitioners Advisory Group, at 6 (Mar. 12, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Debold.pdf>.

106. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,792.

often denied to “otherwise eligible defendants if the defendant was considered ‘integral’ to the successful commission of the offense.”¹⁰⁷

The current guideline includes a provision emphasizing that this is a “fact-based determination” but includes no factors to assist the court in assessing those facts.¹⁰⁸ In general, this adjustment applies to defendants who play a “part in committing the offense that makes him [or her] substantially less culpable than the average participant.”¹⁰⁹ The Commission noted that this adjustment was applied relatively infrequently: only six percent of economic crime offenders received this reduction in fiscal year 2012.¹¹⁰ The Commission concluded that additional explanation of the circumstances in which the reduction may be appropriate would be helpful to courts.¹¹¹

The promulgated guideline accordingly provides a non-exhaustive list of factors for the court to consider in determining whether a reduction might be appropriate, including:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity. For example, a defendant who does not have a proprietary interest in the criminal activity and

107. *Id.* at 25,793.

108. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 cmt. n.3(C).

109. *Id.*

110. FRAUD TEAM DATAFILE, *supra* note 21.

111. *See, e.g.*, Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,792 (amend. 5). The revisions also uniformly replace the phrase “is not precluded from consideration for” with the words “may receive.” *Id.*

who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.¹¹²

The promulgated amendments also include language specifically providing that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.”¹¹³ This revision provides an important clarification given that the decisions of numerous jurisdictions have held that such defendants cannot receive a mitigating role adjustment.¹¹⁴

As noted above, although these revisions apply to *all* guidelines, the Commission’s awareness that the mitigating role adjustment was applied infrequently to economic crime offenders influenced its selection of the factors. Again, as with the changes to intended loss and sophisticated means, these revisions aim to emphasize the importance of the defendant’s *own* role, *mens rea*, and culpability.

E. *Inflationary Adjustments*

Finally, in an amendment applicable to the Guidelines as a whole, the Commission incorporated inflationary adjustments to various monetary tables, including section 2B1.1’s loss table. This table was last comprehensively revised in 2001, but it has never specifically been adjusted to account for the effects of inflation.¹¹⁵ As a result, the monetary amounts re-

112. *Id.*

113. *Id.*

114. *United States v. Verburg*, 588 F. App’x 434, 439 (6th Cir. 2014) (“A defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme.”); *United States v. Faucher*, 464 F. App’x 674, 675 (9th Cir. 2012) (affirming denial of mitigating role adjustment in “phishing” scheme originating overseas for defendant who opened fraudulent bank accounts and withdrew unlawfully transferred proceeds: “although Defendant was not as active as the main participants in the conspiracy, his role was nevertheless an ‘essential’ one. In light of the district court’s finding, we find no clear error in the district court’s denial of a minimal role mitigating adjustment.”).

115. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,789 (amend. 2); *see also supra* notes 16–17 and accompanying text (discussing 2001 amendments).

flect, to some extent, “a lower degree of harm and culpability than did equivalent amounts” at the time that the table was “last substantively amended.”¹¹⁶

This inflationary amendment had near universal support,¹¹⁷ both as a general good government measure and as an acknowledgement that, by virtue of inflation, punishment for the “same crime” has increased over time purely because of changes in the value of the dollar. The Commission is not required to incorporate such changes, but doing so is consistent with the practices of other agencies.¹¹⁸

Although not targeted specifically to offenders sentenced under the fraud guideline, the widespread use of the loss table¹¹⁹ means that these changes will affect a large number of offenders. In particular, the Commission’s analysis suggested that, if 2012 offenders were “resentenced” using a loss table incorporating inflationary adjustments, about nineteen percent of those offenders would be affected, and, on average, their sentence would have been almost twenty-three percent lower.¹²⁰ For example, under the current table, an offender who causes a loss of more than \$10,000 is subject to a four-

116. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,789. In particular, \$1.00 in 2001 is equivalent to \$1.34 today. *Id.*

117. *See, e.g.*, Letter from Richard Bohlken, Probation Officers Advisory Group, to J. Saris, U.S. SENTENCING COMM’N 3 (Mar. 3, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bohlken.pdf> (advocating for excluding robbery and extortion tables because of unique qualities of those crimes: “[i]n essence, a defendant sentenced today is being punished for the same period of time as someone 10 years ago, even though the true value of the \$10,000.00 is less than it was 10 years ago”); Letter from Marjorie Meyers, Federal Defender Sentencing Guidelines Committee, to J. Saris, U.S. SENTENCING COMM’N14 (Mar. 18, 2015) (expressing support), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FPD.pdf>.

118. *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,789 (requiring executive branch agencies to adjust civil monetary penalties using the Consumer Price Index to account for inflation) (citing 28 U.S.C. § 2461 historical note).

119. *See supra* Section II.B.2 (noting that almost 85 percent of offenders sentenced under this guideline receive a loss enhancement).

120. *See* U.S. SENTENCING COMM’N, PRISON AND SENTENCING IMPACT ASSESSMENTS FOR PROPOSED 2015 AMENDMENTS FOR INFLATIONARY ADJUSTMENTS TO MONETARY TABLES 3, <http://www.ussc.gov/sites/default/files/pdf/research->

level enhancement; under the revised table, a loss of more than \$10,000 would result in a two-level enhancement.¹²¹ Moving higher up the loss table, an offender who causes more than \$1 million in loss under the current table is subject to a sixteen-level enhancement; under the revised table, the same offender would be subject to a fourteen-level enhancement.¹²² This change was not adopted to lower sentences but rather to keep sentences for the same crime from rising without Commission action.

CONCLUSION

The amendments seek to address the most significant concerns for the group of offenders who were sentenced based on a high loss amount but who had relatively low culpability because, for example, they did not have a proprietary interest in the enterprise, were low level participants in the enterprise, had little gain, or did not engage in sophisticated conduct. However, the Commission believes that significant sentences are appropriate for defendants who intentionally cause significant economic harm. The revisions to the victims table ensure that the degree of harm will be a significant factor influencing the length of a sentence. In contrast, though, for that small group of defendants who are involved in offenses with large loss amounts but who personally played a small role

and-publications/prison-and-sentencing-impact-assessments/2014_2015_Proposed_Impact.pdf.

121. More specifically, under the amended loss table, an offender with a two-level enhancement (and no others) and a base offense level of six would be subject to a sentencing range of zero to six months. Moreover, this offender would fall within Zone A of the sentencing table, potentially permitting a sentence of probation or other alternatives to incarceration. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,787 (including amended loss table); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5B1.1(a), cmt. n.1. Under the existing guidelines, the same offender with a four-level enhancement would be subject to a sentencing range of six to twelve months and fall within Zone B, permitting relatively fewer alternatives to incarceration. §§ 2B1.1(b)(1)(A), 5B1.1(a), cmt. n.1.

122. *Compare* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg. at 25,787 (including amended loss table), *with* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1)(I), 5B1.1(a), cmt. n.1.

or who did not personally engage in particularly sophisticated conduct, the amendments will help ensure that their sentences more closely reflect their own culpability.