MITIGATION: FRAMING SENTENCING AT EVERY STAGE

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Body

The lengthy sentence imposed on former Enron CEO Jeffrey Skilling recently is a stark reminder that the U.S. Sentencing Guidelines have made federal prison a reality for many first-time offenders.

In fact, one third of all federal inmates are first-time, nonviolent offenders. Moreover, because of the length of their sentences, many of these individuals, like Skilling and WorldCom founder Bernie Ebbers, are denied placement in camp facilities.

But whether an inmate is assigned to a camp without wires and fences or a locked two-person cell, few would disagree that prison life is a profoundly dehumanizing experience.

How then can a prospective inmate obtain the most favorable placement in federal prison? Some hire sentencing consultants, the best of whom - if hired early enough in the case - can position and prepare their client for the least onerous experience the Bureau of Prisons (BOP) offers. But defense lawyers can readily develop expertise in this area and exert a positive impact on the quality of prison time their clients serve.

This article will focus on the various ways before, during and after sentencing, in which attorneys can ease their client's passage through federal prison. While a defense lawyer's primary objective will always be to avoid or reduce a prison sentence, surprisingly minimal effort can substantially improve the client's experience of prison life - from securing a coveted lower-bunk pass, to entry into a program that makes participants eligible for early release.

Before the Sentencing

The groundwork for ameliorating a federal prison sentence is laid between the plea (or trial) and the sentence. During this time the Probation Department conducts the presentence investigation and prepares the critical presentence investigation report (PSR), a detailed portrait of the client's personal and criminal history. Akin to an academic transcript, the PSR accompanies a federal inmate throughout her prison experience and is used by the BOP to make several critical determinations about the inmate, including:

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Designation: Generally, an inmate will be designated to a facility matching her security level, within 500 miles of the inmate's home. BOP facilities are classified into one of five security levels, ranging from minimum (dormitory-style accommodations, limited or no perimeter fence and the lowest staff to inmate ratio) to high (locked single and two-person cells, tightly controlled movement and the highest staff to inmate ratio). An inmate's security level is calculated using an elaborate scoring system based on the inmate's current offense behavior and prior criminal conduct, age, education, substance abuse history and whether she was permitted to surrender to prison voluntarily.[1] In this process, the BOP primarily utilizes information from the PSR, unless superseded by the sentencing court's "Judgment in a Criminal Case" and accompanying "Statement of Reasons" (collectively, the Judgment). Critically, in scoring the inmate's current and prior criminal conduct, the BOP will look beyond the actual finding of guilt and consider the often more serious underlying description of the offense, as set forth in the PSR. Certain factors, known as Public Safety Factors - such as a client's alien status, sex offender status or the length of the sentence - can preclude minimum security (camp) placement. In addition, the BOP may in its discretion apply "Management variables" to increase or lower an inmate's security level, based on such factors as the inmate's program needs or a finding that the inmate's scored security level is inconsistent with her security requirements.

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Program Eligibility: The BOP will use the PSR to determine an inmate's eligibility for a variety of educational and vocational programs. Of particular note is the Residential Drug Abuse Treatment Program (RDAP), a 500-hour, six- to 12-month intensive substance abuse treatment program, which qualifies eligible graduates for a six-month halfway house placement and a sentence reduction of up to one year.[2] Candidates for the program must volunteer for it, have a documented substance abuse disorder (i.e., usually corroborated in the PSR), and 36 months or less remaining on their sentences. The sentence reduction is not available to deportable aliens, inmates previously convicted of certain violent offenses, or those whose current offense involved violence or the possession of a dangerous weapon.[3]

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Medical Treatment: The BOP will use the PSR, as supplemented by the Judgment, to determine any medical or mental health treatment appropriate for the inmate. The BOP will generally continue to provide the inmate's medical prescriptions (or their equivalent) listed in the PSR. Documented medical issues may entitle the inmate to certain exemptions. For example, back problems may secure the client a lower-bunk pass - a not insignificant privilege when the sleeping arrangements are dormitory-style.

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Other: The PSR is used to establish, among other items, visitation lists, religious affiliations, dietary restrictions and appropriate work assignments, as well as to assist in pre-release planning.

Given the preeminence of the PSR, it is critical that the defense lawyer play an active role during the presentence investigation stage to influence this process to the client's advantage. The investigation is an opportunity for the lawyer to frame the PSR, not merely serve witness to it.

As part of the investigation, the assigned probation officer will schedule an interview with the client. In advance of that interview, the lawyer should fully debrief the client and family members on all matters pertinent to the PSR, from allergies to prescription medications to substance abuse history, in order to select the issues that need to be emphasized (or conversely downplayed) with the probation officer. A failure to mention alcohol or drug abuse problems could ruin the client's chances of getting into RDAP; an over-emphasis on medical issues could cause the client to be designated unnecessarily to a facility with specialized medical care.

A cooperative relationship with the probation officer at this stage will usually be more productive than an adversarial one. At the interview, the lawyer should not hesitate to prompt the client to give more expansive answers or interject to provide additional relevant information. It is also helpful to provide the officer with all available corroborating documents. Detailed notes should be taken, in the event there is a dispute later about what was said.

After the PSR is issued, the lawyer should review it carefully with the client for any inaccuracies or omissions and communicate any objections to the probation officer in a timely manner. See FedRCrimP 32(f)(1) (requiring objections to be made within 14 days of receipt). While no inaccuracy is too small or immaterial to correct, particular attention should be paid to the descriptions of the client's role in the current offense and any alleged past criminal conduct. An improper application of a firearm enhancement in the sentencing calculation for the current case could render the client ineligible for the RDAP sentence reduction; an erroneous description of a prior domestic violence incident could negatively impact the client's security classification.

At the Sentencing

There are several applications that can be made to the sentencing judge, either orally or in writing, with the aim of enhancing the client's prison experience.

Most importantly, the lawyer should move for any amendments to the PSR that have not already been made by the Probation Department in response to the lawyer's previous objections.[4] The lawyer may also request judicial recommendations for designation to a particular facility or class of facilities, and admittance to a particular BOP program, such as the RDAP. While not binding on the BOP, such recommendations have persuasive power, assuming the client meets the requisite eligibility criteria. In fact, the BOP must explain in writing to the court why it rejected the court's recommendation.[5]

Specific medical or mental health treatment may be requested for the client, mindful, of course, of the potential impact this application can have on the client's ultimate designation. If the judge imposed a fine or restitution, the lawyer can move for payment to commence after the completion of the prison sentence.[6] Finally, the lawyer should always request permission for the client to self-surrender (not just to spare the client the hospitality on "Con Air," but to improve the client's security score) and sufficient time for the client to get his or her affairs in order.[7]

After the Sentencing

By the time the sentencing is over, most of the foundations of the client's federal prison experience are already set in stone. There are, nonetheless, several constructive steps the lawyer can take at this stage.

It is important to follow up with the probation officer to make sure the PSR is corrected according to the sentencing judge's instructions and that the corrected version is forwarded to the BOP. In addition, the Judgment should be reviewed to confirm it accurately reflects the rulings made at sentencing, and the court immediately petitioned for amendments if it does not. In certain situations, it might be helpful for the defense lawyer to write directly to the BOP on the issue of the client's designation, for example, where the lawyer believes the client's likely security level will overstate her security needs. If so, this letter should be written as soon as possible after the sentencing, as it is much harder to change a designation decision once it has been made. The lawyer should make sure the client is designated before the surrender date, or move for an adjournment of the surrender date to permit completion of the designation process.

Finally, the lawyer can help the client prepare practically and psychologically for the transition to prison life. The client can be introduced to the wealth of Internet resources[8] and literature[9] on the subject. A meeting with a former inmate, if it can be arranged, can also be a valuable way of dispelling unnecessary fears. The client should also be encouraged to schedule full medical and dental check-ups prior to surrender.

Conclusion

For many prison inmates, the quality of the time they serve is as important as the length of the sentence. Time will certainly pass faster for most, for example, if one is in the relatively freer and less volatile environment of a camp facility. Thus, in federal criminal cases, once the client has pleaded guilty or has been convicted after trial, it is in the client's interest for the defense lawyer to adopt the dual strategy of mitigating the sentencing exposure and simultaneously positioning the client for a favorable prison placement. This is true even if the likelihood of incarceration appears to be remote. Once a prison sentence has been pronounced, it is often too late to take the measures that can make that sentence more palatable.

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Endnotes:

1. See BOP Program Statement 5100.08, Security Designation and Custody Classification Manual, Chapters. 3, 4 (available at ***www.bop.gov/policy/progstat/5100_008.pdf***).

2. The sentence reduction is authorized by statute. See 18 USC ?3621(e)(2).

3. The policies and procedures of RDAP are set forth in BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, available at ***www.bop.gov/policy/progstat/5330_010.pdf***. Further information on early release eligibility can be found in BOP Program Statement 5331.01, Early Release Procedures Under 18 USC ?3621(e), available at ***www.bop.gov/policy/progstat/5331_001.pdf***; see also Ellis & Henderson, "Getting Out Early: BOP Drug Program," Criminal Justice 20, No. 2 (A.B.A. 2005). The other sentence-reducing program at the BOP (the boot-camp program for nonviolent, first-time offenders) was phased out last year.

4. Such amendments cannot be made after the sentencing. See, e.g.,

United States v. Giaimo, 880 F2d 1561, 1563 (2d Cir.1989) (no jurisdiction under FedRCrimP 32 to correct inaccuracies in PSR after a defendant has been sentenced).

5. See BOP Program Statement 5070.10, Responses to Judicial Recommendations and U.S. Attorney Reports, available at ***www.bop.gov/policy/progstat/5070_010.pdf***. In the U.S. Court of Appeals for the Second Circuit, the BOP might, but not necessarily will, honor recommendations that an inmate with a sentence of 12 months or less be designated to a community confinement center (halfway house), as a result of the Court's decision in

Levine v. Apker, 455 F.3d 71 (2d Cir. 2006) (holding that the BOP's rule limiting inmate's placement in a halfway house to the lesser of the last 10 percent or six months of the sentence was an improper exercise of the BOP's rulemaking authority). Such a designation would be guaranteed, however, through a sentence of probation with a condition of community confinement. In addition, the BOP might not necessarily honor recommendations of camp placement for eligible offenders with sentences of 15 months or less, since such inmates may be required to man the work cadres of pretrial detention centers.

6. If the court grants this application, the inmate will usually not be required to participate in the Inmate Financial Responsibility Program (the program by which the BOP assists in the collection of court-ordered financial obligations), which can result in substantial deductions from the inmate's commissary account every month.

7. A discussion of the interplay between state and federal sentences is outside the scope of this article. If the client is primarily subject to state jurisdiction, the lawyer should review "Interaction of State and Federal Sentences," available at ***www.bop.gov/news/publications.jsp***.

8. See, e.g., ***www.bop.gov*** (downloadable copies of all BOP program statements as well as other information on BOP facilities, rules and procedures); ***www.prisontalk.com*** (message board on federal prisons with up to date information provided by former inmates and the families of current inmates); ***www.michaelsantos.net*** (Web site of long-term federal prisoner, with articles on prison life and advice to the newly sentenced); ***www.fedcure.org*** (advocacy group for federal inmate population, with news, publications and links).

9. See, e.g., Alan Ellis, "Federal Prison Guidebook" (2005); David Novak, "Down Time: A Guide to Federal Incarceration" (2005); Michael Santos, "What if I Go to Prison?" (2003); Clare Hanrahan, "Jailed for Justice: A Woman's Guide to Federal Prison Camp" (2002).

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Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline

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I. Introduction

The Sentencing Commission's 2015 proposed amendments to the federal sentencing guideline for economic crimes make a number of small but welcome changes that will have an overall ameliorative impact. But I had hoped that the Commission would do more to address the problems with the present guideline. The proposed amendments did not reduce the guideline's unwarranted emphasis on both loss and multiple specific offense characteristics that, alone and especially in combination, tend to overstate the seriousness of many offenses. The Commission should have amended the guidelines to permit consideration of *mens rea*, motive, and other circumstances that better reflect the culpability of the offender and the severity of the offense. And the Commission should have amended the guidelines for economic crimes to ensure that they "reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. . . ."[1]

II. What the Sentencing Commission has Done in the Past

The Commission entered the 2015 amendment cycle with guidelines for economic crimes that had been criticized in recent judicial decisions as patently absurd on their face,"[2] "a black stain on common sense,"[3] and ultimately, "of no help."[4] The result of relentless upward ratcheting, the guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. I told the Commission this year[5] what I had told the Commission in 2002[6] as it was considering the further increases in severity directed by the Sarbanes-Oxley Act—that history will reveal this period of our nation's history as a time of a failed experiment with the imprisonment of first-time nonviolent offenders for periods of time previously reserved only for those who had killed someone. In short, I felt the present guidelines for economic crimes, especially those with high loss amounts, were in need of significant change.[7] It did not happen this year.

III. What the Sentencing Commission Did in 2015

To be sure, the Commission's proposed 2015 amendments are a welcome change. The Commission has proposed substantive amendments to the victims table and the sophisticated means enhancement, and clarifying amendments to the definition of intended loss and the calculation of loss in "fraud on the market" cases. Although not limited to economic crimes, the Commission has also proposed changes to the mitigating role adjustment that will impact economic crime cases, and has proposed adjustments to all of the monetary tables in the guidelines to account for inflation, including the loss table in the economic crimes guideline. These are important and helpful changes, if modest in their overall impact.

A. The New Victims Table

The Commission amended the victims table to focus on the actual impact of the offense on victims rather than simply counting them. The present guideline provides tiered enhancements of two, four, and six levels as the numbers of victims moves from ten to fifty to 250 or more. The proposed amendment provides a two-level enhancement if the offense involved ten or more victims or mass-marketing, or if at least one victim suffered "substantial financial hardship," and tiered enhancements of four and six levels as the number of victims suffering such hardship moves from five to twenty-five or more. The amendment provides a nonexclusive list of factors to consider in determining whether a victim's financial hardship as a result of the offense was "substantial"—whether the offense resulted in the 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.

I think focusing on the impact on the victims rather than their number is a good thing, but the specificity and complexity of the new table, and the need to delve into the details of the finances of numerous third parties to arrive at a guidelines range strikes me as out of step with the advisory nature of the guidelines. I would have preferred a more general directive to courts to consider the overall nature of the impact on the victims and to assess whether it generally was minimal, low, moderate, or high. I fear that one of the consequences of the Commission's continued adherence to very specific factual inquiries of the sort perhaps

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appropriate in the context of binding guidelines will be a significant increase in sentencing litigation. This may be particularly true in the context of victim impact because much of this information may be unknown to the prosecution (and almost certainly to the defense) at the time of plea negotiations. The parties are understandably focused on evidence relating to guilt or innocence, and have no reason to focus effort on the details of the financial affairs of the victims when assessing whether the case should proceed to trial. Then when it comes to the sentencing proceedings, the procedural rules under which these third-party impacts will be litigated are wholly inadequate to the task. There are no rules requiring the government or victims to disclose to the defendant evidence relating to victim impact. Such information will likely come to defendants in the form of hearsay attributed to victims in the presentence investigation report. I envision significant difficulties and failures of fairness in the process by which defendants endeavor to challenge such victim assertions. I have advocated the need for procedural reform in federal sentencing for many years.[8] I fear the new victims table, and the need to litigate, for example, whether the changes to twenty-five or more third parties' employment were "substantial," or whether the claims of twenty-five or more people to have postponed their retirement plans (by how long?) are accurate, will exacerbate the unfairness of the current procedural framework.

B. The Revised Sophisticated Means Enhancement

The present guideline provides for a two-level enhancement where "the offense otherwise involved sophisticated means." The Commission has proposed amending this enhancement to limit its application to cases in which the defendant personally and intentionally engaged in or caused the sophisticated means. This change will permit greater proportionality by meting out more severe penalties for those defendants whose unlawful conduct was especially sophisticated, and providing lesser penalties for defendants whose conduct was unsophisticated (even if it contributed to an offense where the conduct of others was sophisticated). I do not know whether this change will impact a significant number of cases, but it is a welcome improvement to the guideline.

C. The Clarification of Intended Loss

The guidelines direct that courts use the greater of actual or intended loss in applying the loss table. There has been some disagreement in the cases about whether the determination of intended loss requires a subjective or objective inquiry. Those courts using an objective inquiry appeared at times to stray into an inquiry of "risk of loss"—what funds were placed at risk as a result of the offense without regard to whether the defendant actually wished or intended that such losses take place. The Commission clarified that which I always found to be the better view—that intended loss means just that: losses that the defendant subjectively and purposely sought to inflict.

This clarification is helpful so far as it goes, but I had hoped the Commission would instead either eliminate or cap the impact of intended loss. In my view, in many, if not most, circumstances there exist palpable differences in culpability between offenses that cause actual loss to real people—and thus also potential actual gains to the defendant—and offenses in which the losses exist only in the mind of the defendant. This disparity in impact is exacerbated by the fact that intended losses may be quite large as they are limited only by the imagination of the offender. Losses that are merely intended count under the guideline even if were unlikely and indeed impossible to occur. The Commission's clarification that intended loss requires a subjective inquiry does nothing to address the frequent and unwarranted disparities in the sentencing of offenses causing actual loss as compared with offenses involving losses that are solely intended.

D. The Clarification of Loss in "Fraud on the Market" Cases

Securities fraud cases involving false statements or material omissions in connection with the purchase or sale of securities present particularly compelling examples of excessive severity in the application of the economic crime guideline because the loss figures in such cases, combined with other specific offense characteristics in the guideline, frequently dictate sentences at or near life without possibility of parole. They are also complex loss calculation cases because many factors may contribute to changes in stock price in addition to the offense, and teasing out the losses attributable to the offense can be difficult. The Commission had recently amended the guideline to provide a detailed special rule for determining such losses involving a formula using differences between average prices of the securities during and after the offense. During this amendment cycle, the Commission published for comment an amendment providing for the use of the defendant's gain as an alternative to loss in these types of cases. This proposal evidently failed to gain sufficient support within the Commission, and it instead opted for a broad invitation that courts "may use any method that is appropriate and practicable under the circumstances" to calculate loss, and that its recent detailed formula is now only "one such method the court may consider."[9] The ball is now in the Courts' court to determine what other methods are "appropriate and practicable." I submit that under some circumstances, the amount of the defendant's gain may be an appropriate method of estimating loss, but whether that methodology will be employed remains to be seen.

E. The Revised Mitigating Role Adjustment

Although not specifically addressed to economic crimes, the Commission's revisions to the mitigating role adjustment could have an impact on such offenses because they expand the criteria to qualify for a mitigating role. This is a welcome development given that a paltry 6 percent of economic crime defendants receive a mitigating role

adjustment under the present guideline.[10] The most significant aspect of the Commission's mitigating role amendment for economic crimes is the addition of a non-exhaustive list of factors to be considered in applying the adjustment. Included in this list is "the degree to which the defendant stood to benefit from the criminal activity."[11] And the Commission added a specific example: "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline."[12] I believe this language may be applicable in an array of economic crimes where the defendant derived minimal or zero personal gain from the offense.

The Commission made a few smaller changes to the mitigating role adjustment that may also increase its application in economic offenses. The adjustment directs courts to consider whether the defendant's role was "substantially less culpable than the average participant."[13] The Commission clarified that "average participant" means only those who participated in the instant offense, and rejected the more restrictive test used by some courts that had required the defendant's conduct to be "minor" or "minimal" as compared to the entire set of offenders who commit similar crimes. The Commission further clarified that a defendant may receive a mitigating role adjustment even if he or she "performs an essential or indispensable role in the criminal activity."[14] These changes also may be expected to increase the percentage of economic crime defendants who receive a mitigating role adjustment.

F. The Inflationary Adjustment to the Monetary Tables

Much of the criticism of the economic crimes guideline has focused on the loss table and the manner in which it swiftly increases the severity of the sentences advised by the guideline, but a number of other guidelines also contain similar monetary tables. None of these tables have ever been adjusted to account for the effects of inflation. This year the Commission did so, with the result that some economic crimes will now fall at a point on the loss table that is two offense levels lower than at present. Remarkably, the Department of Justice opposed this change (along with virtually all of the others discussed above), but the Commission viewed it as a simple exercise of good government. Indeed, Congress has generally required executive branch agencies to adjust the civil monetary penalties they impose to account for inflation every four years.[15] This change was long overdue, and it will have a mildly mitigating impact on a significant percentage of economic offenses.

G. The 2015 Amendments are likely to take effect on November 1, but are not likely to be made retroactive

Although the Department of Justice opposed nearly everything the Commission did regarding economic crimes, I do not think it is likely that the Congress will reject any of these amendments. Congress has done this only once in the history of the Commission, and I do not sense any movement to intervene in the amendment process here. The Commission's changes are exceedingly modest and the result of lengthy and careful deliberation. Thus, I expect that they will take effect on November 1, 2015. Defendants may be well advised to seek continuances of their sentencings until after that date unless the government and the court agree to apply the amendments early.

On the other hand, I think it is unlikely that the Commission will vote to make any of these amendments retroactive. The Commission generally does this only where the record of the sentencing hearing or the pre-sentence report prepared for the hearing would likely contain the factual information necessary to apply the amended guideline. That does not appear to be the case regarding these revisions. Indeed, retroactive application of the inflationary adjustment would seem justified only if the loss table were adjusted to the period at issue in each case, which would seem mathematically daunting.

IV. What the Sentencing Commission Did Not Do in 2015

Unfortunately what the Commission did not do in 2015 was address the fundamental and profound deficiencies in the structure of the economic crimes guideline. The guideline's overemphasis on loss, cumulative piling on of specific offense characteristics, and overall excessive severity remain largely unaffected by the Commission's tweaks. And the new amendments do virtually nothing to allow courts to consider the host of culpability considerations absent from the guideline. I had hoped that the Commission would make more significant structural revisions to the guideline and do more to bring the guideline into compliance with the statutory directive to ensure that guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment."[16] except in the most serious cases. The Commission had signed a willingness to consider a significant overhaul and had explicitly focused on the need to re-examine the operation of the guideline in high-loss cases. But as pointed out by Professor Frank Bowman at the Commission's hearing on the proposed amendments,[17] the Commission's actions do not target the difficulties presented by high-loss cases at all. Although the inflationary adjustment and the small modifications to mitigating role, the victims table, and sophisticated means may lower a significant number of cases by a handful of levels, in the end this guideline will continue frequently to advise sentencing ranges that are "patently absurd on their face."

V. What the Sentencing Commission Might Do by 2020

I do not think it is very likely that the Commission will return to the economic crime guideline in isolation for comprehensive review in the near term. It appears the Commission focused on the issues, gave it their full attention, and this is the most its members have agreed upon at this time. But I do think many of the Commissioners, given that the current manual was written for a binding system, believe that advisory guidelines need not be so complex or require such elaborate fact finding and extensive litigation

as the current manual. Over the next five years I would not be surprised to see the Commission consider fundamental change not simply to the economic crimes guideline, but also to the manual as a whole. Perhaps in the context of this broader structural review we can obtain the more fundamental overhaul of this guideline that I believe our system of justice sorely needs.

VI. What the Courts Should Do Starting Now

In the meantime, it is my hope that courts will find helpful sentencing advice not only in the new proposed amendments by the Commission, but also in the work of the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes. Knowing that our exhortations for reform to the Commission would benefit from concrete suggestions, the ABA Criminal Justice Section formed a special Task Force to draft a model economic crime guideline that would effectuate the reforms we believe are needed. We are very proud of our Task Force, which consisted of five professors,[18] three judges,[19] six practitioners,[20] two organizational representatives,[21] and observers from the Department of Justice and the Federal Defenders.[22] We presented an initial draft of our Task Force work at the Commission's symposium on economic crimes in the fall of 2013. After additional meetings and drafts, the Task Force arrived at a consensus final proposal for the Commission's consideration in November 2014.[23]

Our Task Force Final Report reflects a proposed guideline that would reduce the weight placed on loss, eliminate the use of loss that is purely "intended" rather than actual, and introduce the concept of "culpability" as a measure of offense severity working in conjunction with loss. Through the culpability factor, the Task Force proposal would permit consideration of numerous matters ignored by the current guideline, including the defendant's motive, the nature of the offense, the correlation between the amount of the loss and the amount of the defendant's gain, the duration of the offense and the defendant's participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The Task Force proposal also sets forth a simplified approach to victim impact, recognizing that in many instances the harm to victims is fully captured by consideration of the amount of the loss caused by the offense, and that in some circumstances the nature of the harm suffered by the victims will be more significant than their number. Finally, the Task Force proposal would implement the statutory directive of 28 U.S.C. § 994(j) by providing an offense level cap where the offense is not "otherwise serious."

Although the Commission did not adopt the structural reforms proposed by the Task Force, this does not mean that courts may not draw advice from the proposal. Indeed, a few courts have already done so.[24] The work of the Task Force provides a specific framework for the evaluation of the full array of potentially relevant considerations in the sentencing of economic crimes. I believe courts will accomplish greater compliance with the purposes of sentencing and the avoidance of unwarranted disparity using the Task Force proposal as an alternative sentencing framework.

Notes

* Also serving as the American Bar Association's Liaison to the U.S. Sentencing Commission, and as Reporter to the ABA's Task Force on the Reform of Federal Sentencing for Economic Crimes; former co-chair of the Practitioners' Advisory Group to the U.S. Sentencing Commission.

1 28 U.S.C. § 994(j).

2 United States v. Adelson, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006).

3 United States v. Parris, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).

4 United States v. Watt, 707 F.Supp.2d 149, 151 (D. Mass. 2010).

5 U.S. Sentencing Commission, Public Hearing On Proposed Amendments to the Federal Sentencing Guidelines (transcript), at 203 (Mar. 12, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/transcript.pdf.

6 Minutes of the November 19, 2002, U.S. Sentencing Commission Public Meeting, *available at* http://www.ussc.gov/amendment-process/public-hearings-and-meetings/20021119-20/minutes-november-19-2002.

7 *See, e.g.*, James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23(2) Fed. Sent'g Rep. 138 (2010).

8 *See, e.g.*, James E. Felman, *The Need for Procedural Reform in Federal Criminal Cases*, 17(4) Fed. Sent'g Rep. 261 (2005).

9 U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines*, at 30 (Apr. 30, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf.

10 U.S. Sentencing Commission, *Economic Crime Public Data Briefing*, at Fig. 9 (Jan. 9, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.

11 U.S.S.C., *supra* note 9, at 48.

12 *Id.*

13 *Id.* at 47.

14 *Id.* at 48.

15 *See* Section 4 of the Federal Civil Penalties Inflationary Adjustment Act of 1990, 28 U.S.C. § 2461 note.

16 28 U.S.C. § 994(j).

17 U.S. Sentencing Commission, *supra* note 5, at 175.

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[22] Jonathan Wroblewski (DOJ Office of Policy and Legislation); and A.J. Kramer (District of Columbia).

[23] American Bar Association, *A Report on Behalf of the ABA Criminal Justice Section, Task Force on the Reform of Federal Sentencing for Economic Crimes, Final Draft* (Nov. 10, 2014), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf.

[24] *See*, *e.g.*, United States v. Litvak, Case No. 3:13cr19 (D. Conn. 2014); United States v. Rivernider, Case No. 3:10cr222 (D. Conn. 2013); United States v. Ponte, Case No. 3:10cr222 (D. Conn. 2013).

The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes

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I. Introduction

The advisory federal Guidelines face perhaps their greatest initial challenge in the sentencing of high-loss economic crimes because the sentences advised by the Guidelines in these cases are frequently "patently absurd on their face,"[1] "a black stain on common sense,"[2] and, ultimately, "of no help."[3] The result of relentless upward ratcheting, the present Guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. These Guidelines are merely advisory, however, and some judges opt instead to impose significantly lower sentences. Other judges adhere to the Guidelines and mete out the called-for sentences.

To some, this disparity looks like what the Guidelines were created to avoid—a regime in which the punishment turns as much on the philosophy of the sentencing judge as it does on the facts of the offense. To others, it reflects the birth of a common law of sentencing as the courts evaluate the extent to which Guideline sentences serve the purposes of sentencing in individual cases. Under either view, in high-loss cases, the present Guidelines appear to be broken. They should be fixed.

II. How Did the Guidelines Get Here?

The upward ratchet of the Guidelines for economic crimes began at the beginning—with the initial set of Guidelines. Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-Guidelines practice, the Commission specifically elected to increase the penalties for economic crimes in the initial 1987 Guidelines over the pre-Guidelines practices of the judiciary as a whole.[4] Although it cited no data demonstrating that these initial increased penalty levels were inadequate, the Commission waited only two years before again revising upward the penalties for economic crimes through a new loss table.[5] The Commission added numerous aggravating specific offense characteristics from 1989 to 2001,[6] when it again adopted wholesale increases through yet another new loss table.[7]

Just when the Commission thought it could rest assured that the penalties for economic crimes were now sufficiently severe, a series of high-profile corporate scandals drove Congress to enact the Sarbanes-Oxley Act, which in part directed the Commission to ratchet up the penalties for high-loss economic crimes yet again. The Commission dutifully did so.[8] A result of all this effort is that a typical officer or director of a public company who is convicted of a securities fraud offense now faces an advisory Guidelines sentence of life without parole in virtually every case:

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Officer or director, §2B1.1(b)(17)(A)(i):	+4
Role in the offense, §3B1.1(a):	+4
$7 million loss, §2B1.1(b)(1)(K):	+20[9]
Total offense level:	43 (life)

Furthermore, The advisory Guideline sentence will be life without parole for virtually *any* employee convicted of a serious securities fraud causing more than $100 million of loss:

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Substantially jeopardizing corporation, §2B1.1(b)(14)(B):	+2
$100 million loss, §2B1.1(b)(1)(N):	+26
Total offense level:	43 (life)

Thus, virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act will now face an advisory range of life without parole.[10]

III. The Judicial Reaction

Faced with such supposed advice, a number of judges have understandably declined to follow it. In *United States v. Adelson*, for example, Judge Rakoff in the Southern District of New York was confronted with a defendant convicted of joining a conspiracy "initially concocted by others" to materially overstate a public company's financial results and thereby artificially inflate the price of its stock.[11] Adelson's Guidelines score was level 46—three levels off the chart—and called for a sentence of life imprisonment. Even the government "blinked at this

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barbarity," but was unable to make a specific sentencing recommendation.[12] For Judge Rakoff, this circumstance exposed "the utter travesty of justice that sometimes results from the Guidelines' fetish with abstract arithmetic, as well as the harm that Guideline calculations can visit on human beings if not cabined by common sense."[13]

Given that Adelson had not originated the fraud, presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate—and, coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders"—the court sentenced Adelson to three-and-a-half years' imprisonment and ordered restitution in the amount of $50 million.[14] Along the way, Judge Rakoff explained that he had jettisoned the advisory Guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face."[15]

Another example is *United States v. Parris*, where Judge Block in the Eastern District of New York sentenced two defendants to five years' imprisonment "in the face of an advisory guideline range of 360 to life."[16] The offense—a pump-and-dump stock manipulation scheme—scored an offense level 42 based on upward adjustments for more that $2.5 million of loss, more than 250 victims, sophisticated means, officer or director status, role in the offense, and obstruction of justice.[17] Quoting Judge Rakoff in *Adelson*, Judge Block described this Guidelines scoring as the "kind of 'piling-on' of points for which the guidelines have frequently been criticized."[18] The court noted that it saw no valid grounds for downward departure from the Guidelines and, thus, but for their advisory status, the court "would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence."[19] Even the government agreed that "many reasonable sentences would fall outside" the advisory Guidelines range.[20] In fashioning a reasonable sentence, the court stated it "would have much preferred a sensible guideline range to give . . . some semblance of real guidance."[21]

The court found no such help in the present Guidelines, observing that "we 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."[22] Instead of using the Guidelines, the court instead assembled an extensive compendium based on submissions from the parties listing sentences in other high-loss cases.[23] After a lengthy discussion of what is essentially an emerging common law of high-loss economic crime sentences, the court concluded that a sentence of five years' imprisonment was sufficient to achieve the purposes of sentencing.

Another recent case illustrating the overkill of the present high-loss Guidelines is *United States v. Watt*, where Judge Gertner in the District of Massachusetts was presented with a 25-year-old first offender who pled guilty to what was reportedly the "largest conspiracy to commit identity theft in American history."[24] The government had resolved the matter by permitting Watt to plead guilty to a single count carrying a five-year statutory maximum penalty.[25] Watt, who received no financial benefit from the crime, sought probation; the government urged the maximum possible five-year sentence. As Judge Gertner sought to determine the sentence sufficient but not greater than necessary to achieve the purposes of sentencing, she specifically noted that "[t]he Guidelines were of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment."[26] Given Watt's zero gain from the offense, his lack of criminal history, and the court's belief that he was unlikely to recidivate, Judge Gertner sentenced him to two years' imprisonment and $171 million of restitution.

A number of similar cases did not result in published decisions. In *United States v. Ferguson*, the district court in Connecticut imposed sentences ranging from one year and one day to four years on five defendants whose Guideline ranges included the possibility of life imprisonment and who were convicted of fraud leading to more than $500 million in loss.[27] In *United States v. Stinn*, a former CEO of a public company faced a Guidelines range of life imprisonment but was sentenced to twelve years' imprisonment in the Eastern District of New York.[28] A defendant who caused approximately $25 million in losses was sentenced by the district court in the Eastern District of Missouri to one year and one day in *United States v. Turkan*.[29] In each of these cases, the courts found significant mitigating circumstances not otherwise taken into consideration by the Guidelines.

IV. The Legislative Reaction

Although one might have hoped that Congress would react to judicial rejection of the Guidelines in high-loss cases by reconsidering the current penalty structure, it will come as no surprise to those who follow federal sentencing policy to learn that Congress has instead done the opposite—it has called for yet *more* upward ratcheting. In the recent health care reform law, Congress directed the Sentencing Commission to amend the definition of loss to provide that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall be prima facie evidence of the amount of the intended loss by the defendant."[30]

Of course, health care fraud assumes a wide array of forms, ranging from billing for services that were simply not rendered, at one extreme, to properly billing for services actually rendered but accompanied by a false anti-kickback certification, near the other.[31] Cases in the middle of this range include *upcoding*—billing for a more expensive procedure than the one actually performed. Evidently the intent of this new law is to treat some or all of these cases identically—as if no services were provided. Coupled with this potentially expansive new definition of

loss, the law also provides for a new 2-level increase for losses between $1 million and $7 million, a new 3-level increase for losses between $7 million and $20 million, and a new 4-level increase for losses over $20 million. Thus, the combination of the new loss definition and the new high-loss upward adjustments means that a hospital executive who approves the submission of $20 million of bills for services actually rendered but obtained via the payment of unlawful kickbacks would likely face the following Guidelines calculation:

Base offense level:	7
$20 million loss:	+22
Health care fraud:	+4
Sophisticated means:	+2
Role in the offense:	+4
Total offense level:	39

Assuming no prior record, this formula yields an advisory Guidelines range of 21.8 to 27.25 years' imprisonment. It is not evident why Congress believed health care frauds are any more serious than any other frauds, or why it believed the existing penalties for health care frauds were insufficient.[32]

Congress was at it again in recent financial overhaul legislation that directs the Sentencing Commission to revisit the penalties for both securities fraud and bank fraud to ensure that they fully reflect "the serious nature of [these] offenses," the "need for an effective deterrent and appropriate punishment to prevent [these] offenses," and "the effectiveness of incarceration in furthering" these objectives.[33] Although the law does not say so explicitly, it seems all but certain that the Sentencing Commission will read this provision as a suggestion that the penalties for securities fraud and bank fraud should be increased yet again. As with the health care law, it is not possible to discern why Congress believed that these two types of fraud are any worse than other frauds, or why it believed the existing penalties for these frauds are insufficient.

Thus, the upward ratcheting continues without interruption in the face of judicial opinions describing the existing penalties as patently absurd. In at least some sense, it would appear that Congress is pushing on a rope.

V. The Department of Justice Reaction

The Department of Justice has recently announced that it has had enough of the present state of affairs. In its recent annual report to the Sentencing Commission, the Criminal Division of the Justice Department openly acknowledged that there are "certain offense types for which the Guidelines have lost the respect of a large number of judges . . . including certain frauds involving high loss amounts."[34] The letter calls for change, stating that the Commission "should conduct a review of—and consider amendments to—those Guidelines that have lost the backing of a large part of the judiciary."[35]

The Department has not, however, said much about what should be changed. After noting the "increasing frequency [of] district courts sentencing fraud offenders—especially high-loss fraud offenders—inconsistently and without regard to the federal sentencing guidelines," the Department declares that the "sentencing outcomes in these cases are unacceptable."[36] The Department suggests that the Commission "should determine whether some reforms are needed," but the extent of specificity given consists of the single sentence: "Such reforms might include amendments to the sentencing Guideline for fraud offenses, recommendations for new statutory penalties, or other policy changes."[37] The reference to new statutory penalties is presumably intended to suggest mandatory minimum penalties for certain economic offenses.

VI. Where Should the Guidelines Go from Here?

The current state of affairs in high-loss economic crimes cases looks to me like the perfect storm for reform. One possibility, of course, is that the Department of Justice and Congress will simply cram absurd penalties down the throats of the judiciary through a slew of mandatory minimums. But one can at least hope that a different option would be to recalibrate the Guidelines for economic crimes in such a manner that the respect of the judiciary would be restored. The dynamic between the judiciary and the Congress–Sentencing Commission needs to become a dialectic—a process of improvement through a synthesis of views. In simpler terms, if the Guidelines made more sense, judges would be more willing to follow them.

I have a few humble suggestions for how to accomplish this goal. First, the reliance on loss as the primary measure of culpability needs to be reduced, as perhaps best described by Judge Lynch:

> The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the Guidelines provisions for theft and fraud place excessive weight on this single factor, attempting—no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes—to assign precise weights to the theft of different dollar amounts. In many cases . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.[38]

In the initial 1987 Guidelines, the amount of the loss could result in no more than a fivefold increase in the range of imprisonment. Under the current Guidelines, the loss can increase the range nearly fortyfold. The reliance on loss to drive sentencing outcomes is simply out of control.[39]

In addition to loss, the Guidelines should look at the defendant's actual and/or intended gain from the offense. There can be no question that the harm caused by an offense is an important consideration in determining

culpability. But without consideration of gain, loss often does not tell the whole story. There is a palpable difference in culpability between a defendant who commits bank fraud to obtain a loan he fully expects and desires to repay and a defendant who commits bank fraud for the sole purpose of running off with the money—and then does so. There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting its proceeds into his pocket.

The current Guidelines fail to draw these distinctions because they are indifferent to the defendant's gain or lack thereof.[40] Many, if not all of the cases in which judges have found the current Guidelines unhelpful present circumstances in which the defendant's gain was either zero or quite small in relation to the loss. One possible approach might be to have both a simplified table for loss and a second fairly simple table for gain, with the adjustments from both tables applied cumulatively in appropriate cases.

The economic crime Guideline should also be dramatically simplified to reduce and eliminate multiple upward adjustments that, either singly or in combination, produce a piling-on effect beyond their underlying rationale and often smack of double counting. A fraud that resulted in a $100 loss to 250 victims does not necessarily warrant a sentence six levels higher (roughly doubling the sentence) than a fraud that caused a $25,000 loss to a single victim.[41] Many, if not most of the blizzard of specific offense characteristics added to the fraud Guideline over the past two decades are superfluous and frequently fail to accomplish meaningful distinctions in relative culpability across a spectrum of defendants.

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial,[42] the Guideline should attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in midstream under coercive circumstances? Did the offense risk or cause some significant nonmonetary harm? Did the defendant commit the offense because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?

The Sentencing Commission should take to heart the congressional directive to revisit the penalties in cases of securities fraud and bank fraud, as well as the Department of Justice's request to revisit the Guidelines in high-loss cases as a whole. But in doing so, it should begin not simply with what it thinks Congress or the Justice Department want but also with what the judiciary will respect and follow. This approach means taking a careful look at the cases in which the courts have declined to follow the current Guidelines and why they did so. The Sentencing Commission might find a host of rather refined and nuanced advice coming to them from the judiciary they seek to advise.

Notes

* Also serving as the American Bar Association's liaison to the U.S. Sentencing Commission and cochair of the Sentencing Committee of the Criminal Justice Section of the American Bar Association; former cochair of the Practitioners' Advisory Group to the U.S. Sentencing Commission.

1 United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006).

2 United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).

3 United States v. Watt, ___ F. Supp. 2d ___, 2010 WL 1676439 (D. Mass. 2010).

4 *See* U.S.S.G. ch. 1 pt. A. The other exception to pegging Guideline penalties to pre-Guidelines practices was in drug cases, where the Commission was driven upward to avoid cliffs caused by the mandatory minimum penalties enacted in 1986.

5 U.S.S.G. app. C, amends. 99, 154 (1989).

6 U.S.S.G. app. C, amend. 317 (1990); U.S.S.G. app. C, amend. 551 (1997); U.S.S.G. app. C, amend. 576 (1997); U.S.S.G. app. C, amend. 596 (2000).

7 U.S.S.G. app. C, amend. 617 (2001).

8 U.S.S.G. app. C, amends. 647, 653 (2003).

9 A $7 million loss is rather easy to come by in securities fraud cases because it is often equated with the drop in market capitalization that follows the disclosure of the fraud.

10 Lest it appear that the author was derelict in his duties, these extraordinary results were explained to the Commission by its Practitioners' Advisory Group at the time it enacted the post–Sarbanes-Oxley Act amendments. *See* Minutes of the November 19, 2002 U.S. Sentencing Commission Public Meeting, *available at* http://www.ussc.gov/MINUTES/11-19-02.htm ("Mr. Felman stated that the PAG believes history will look at a decision to adopt these enhancements as the moment in time when a new experiment in incarcerating first time nonviolent offenders began."). *See also* Barry Boss & Jude Wikramanayake, *Sentencing in White Collar Cases: Time Does Not Heal All Wounds*, 13 FED. SENT. REP. 15 (2001); James E. Felman, February 8, 2001 Submission of the PAG to the USSC, *reprinted in* 13 FED. SENT. REP. 19 (2001).

11 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006).

12 *Id.* at 511–13.

13 *Id.* at 512.

14 *Id.* at 514–15.

15 *Id.* at 515.

16 573 F. Supp. 2d 744, 745.

17 *Id.* at 747–48.

18 *Id.* at 745 (quoting *Adelson*, 441 F. Supp. 2d at 510).

19 *Id.* at 750–51.

20 *Id.* at 751.

21 *Id.*

22 *Id.* at 754.

23 *Id.* at 756–63. The compendium includes thirty-four cases with loss amounts ranging from $6 million to $14 billion and sentences ranging from probation to twenty-five years' imprisonment.

24 2010 WL 1676439 at *1 (D. Mass. 2010).

25 Going forward, this means of case resolution is the likely norm in such cases. Where the Guidelines routinely call for a lifetime of imprisonment, a significant portion of the sentencing function is transferred to the prosecutors, who select the statutory maximum penalties of the counts to which the defendant will be permitted to plead guilty.

[26] *Watt*, 2010 WL 1676439 at *1. *See also id.* at *4 ("It should be noted that the Guidelines are almost irrelevant here, to the extent that they are completely trumped by the maximum sentence.").

[27] United States v. Ferguson, No. 3:06-cr-00137-CFD (D. Conn. 2009).

[28] United States v. Stinn, No. 07-CR-00113(NG) (E.D.N.Y. 2009).

[29] United States v. Turkan, No.4:08-CR-428 DJS (E.D. Mo. 2009).

[30] The Patient Protection and Affordable Care Act (hereinafter PPACA), § 10606(a)(2)(B), 124 Stat. 1007 (2010).

[31] Bills submitted to federal health care programs routinely require providers to certify that they have not paid any kickbacks to obtain the referral of the services. *See* 42 U.S.C. § 1320a–7b(b).

[32] The law also directs the Sentencing Commission more broadly to "provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances," but left it to the Commission to decide what such circumstances are. PPACA, § 10606(a)(3)(A)(ii), 124 Stat. 1007 (2010).

[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1079A (2010).

[34] June 28, 2010, letter to William K. Sessions, chair of the Sentencing Commission, from Jonathan Wroblewski, director, Office of Policy and Legislation (on file with the author).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] United States v. Emmenegger, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004).

[39] The present loss table is also needlessly complex given the advisory status of the ending Guideline calculation. There is no need for a table that slices loss sixteen different ways to afford judges appropriate advice in determining a reasonable sentence.

[40] A defendant's gain may be considered only in cases of a loss that cannot reasonably be measured, such that the defendant's gain is used to estimate the loss. U.S.S.G. § 2B1.1, Application Note 1(B).

[41] I agree that an offense with a large number of victims should be viewed more harshly than one with a small number of victims under some circumstances, but typically that would be so only where the harm caused to the large number of victims was highly significant to each or most of them. In any event, I think it is difficult to justify punishing otherwise identical frauds with the same loss and gain figures with more than a 25 percent variance based solely on the spread of the loss across a number of victims.

[42] U.S.S.G. § 2B1.1(b)(6).