



February 10, 2026

Honorable Carlton W. Reeves  
Chair, United States Sentencing Commission  
One Columbus Circle, N.E., Suite 2-500  
Washington, D.C. 20002-8002

**Re: Comments to the US Sentencing Commission on Proposed 2025-2026 Amendments**

Dear Judge Reeves:

Thank you for the opportunity to present NACDL's comments on these important proposed amendments. This submission addresses the proposed amendments to drug sentencing; economic crimes, including the loss table and special offense characteristics, the post-offense rehabilitation adjustment; and the sophisticated means enhancement. On all other proposed amendments and issues for comment not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

**Comment on Proposed Amendment 1: Drug Sentencing**

**1. Part A: Methamphetamine Guidelines**

NACDL applauds the Sentencing Commission for continuing to revisit the drug guidelines, which have driven the exponential growth in the federal prison population since the late 1980s, fueled racial, economic, and gender disparities, and yielded unnecessarily lengthy prison sentences that have devastated individuals, families and communities. Indeed, it is no exaggeration to say that these guidelines have played a key role in quintupling the federal prison population from the mid-1980s to the 2010s,<sup>1</sup> and generating a dramatic expansion in racial disparities.<sup>2</sup> While state prison systems have radically reduced their numbers of imprisoned drug offenders,<sup>3</sup> those convicted of drug offenses continue to form the backbone of the Bureau of

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<sup>1</sup> National Research Council, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* at 33 (2014) (The US incarceration rate--measured as the proportion of the population held in state and federal prisons plus local jails--nearly quintupled from 1972 (161 per 100,000) to its peak in 2007 (760 per 100,000)).

<sup>2</sup> See USSC, *Demographic Differences* at 4 (Nov. 2023), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114\\_Demographic-Differences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf) (noting that Black and Hispanic males receive longer sentences than white counterparts, and more likely to be sent to prison in the first place).

<sup>3</sup> Only one in five incarcerated individuals at the state level is locked up for a drug offense. See Prison Policy Initiative, *Mass Incarceration, the Whole Pie*, 2025, available at <https://www.prisonpolicy.org/reports/pie2025.html>

Prisons population. Current BOP statistics reveal that 42.9% of its population is serving time for a drug offense.<sup>4</sup> That only tells part of the story. Over 50% of the current population is serving sentences of over 10 years – a function primarily of lengthy drug sentences, given the number of imprisoned drug offenders.<sup>5</sup>

A key reason for excessive sentences in drug cases is the Commission’s fateful decision to abandon its empirical role in setting sentencing ranges based on past practices, and to instead link its drug guideline ranges to drug weights.<sup>6</sup> By structuring the guidelines around the quantity of drugs involved and, relatedly, around statutory mandatory minimum sentences<sup>7</sup>, rather than assessing individual culpability, the system frequently imposes severe sentences on low-level offenders who have little to no leadership or proprietary role in trafficking operations.<sup>8</sup> For methamphetamine in particular, as the statutory mandatory minimum penalties had a 10:1 ratio based on purity, the Commission revised the Drug Quantity Table to distinguish actual/pure methamphetamine from methamphetamine mixtures at the same 10:1 ratio.<sup>9</sup> In 1998 Congress again amended the statutory penalties for methamphetamine offenses, cutting in half the amount that triggered the mandatory minimum sentences<sup>10</sup>, and again the Commission increased the base offense levels for methamphetamine offenses to better align with the mandatory minimum sentences.<sup>11</sup>

NACDL supports doing away with the distinction between methamphetamine (mixture) and methamphetamine (actual) in the Guidelines and thus supports proposed Option 1 in which the same quantity threshold is used for all methamphetamine offenses. In an ideal world, the quantity threshold would be set at powder cocaine levels. Of the four bracketed alternatives set forth in Option 1, however, NACDL supports proposed Alternative 1 to amending §2D1.1 – setting the same quantity threshold for all methamphetamine offenses (matching those of methamphetamine

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<sup>4</sup> Bureau of Prisons, Sentences Imposed, available at [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last visited February 4, 2026).

<sup>5</sup> 55.8% of the BOP inmate population is serving sentences of 10 years or more. Bureau of Prisons, Sentences Imposed, available at [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sentences.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp) (last visited February 4, 2026).

<sup>6</sup> See *United States v. Diaz*, 2013 WL 322243, at \*1 (E.D.N.Y. Jan. 28, 2013) (“The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.”).

<sup>7</sup> See *Diaz*, 2013 WL 322243, at \*1 (“The genesis of the structural flaw is easily traced. It is rooted directly in the fateful choice by the original Commission to link the Guidelines ranges for all drug trafficking defendants to the onerous mandatory minimum penalties in the Anti-Drug Abuse Act of 1986 (“ADAA”) that were expressly intended for only a few.”).

<sup>8</sup> In a series of articles, the Dallas Morning News has profiled typical low-level, non-violent individuals subject to harsh sentences under the drug guidelines, and the patterns of childhood deprivation and abuse, undiagnosed mental illness, and drug addiction are painfully familiar to federal defense lawyers in NACDL’s membership. See Kevin Krause, *Clemency gave these North Texas Moms a Second chance at Life after Meth Imprisonment*, Dallas Morning News, December 5, 2024, available at <https://www.dallasnews.com/news/investigations/2024/12/05/clemency-gave-these-north-texas-moms-a-second-chance-at-life-after-meth-imprisonment/>; Kevin Krause, *Biden Clemencies Free more North Texans Serving Long Meth Sentences*, Dallas Morning News, February 14, 2025, available at <https://www.dallasnews.com/news/courts/2025/02/14/biden-clemencies-free-more-north-texans-serving-long-meth-sentences/>.

<sup>9</sup> See *United States v. Pereda*, 2019 U.S. Dist. LEXIS (19183 at \*4 (D. Colo. Feb. 6, 2019).

<sup>10</sup> *Methamphetamine Trafficking Penalty Act of 1998*, Pub. L. No. 105-277.

<sup>11</sup> See USSG App. C, amend. 594 (effective Nov. 1, 2000); see also *Pereda*, *supra*, at \*\*4-5

mixture); and, further, NACDL supports the proposed deletion of all references to “Ice” in §2D1.1.methamphetamine (actual) in the Guidelines. As discussed *infra*, NACDL supports proposed Option 1, Alternative 1 to amending §2D1.1 – setting the same quantity threshold for all methamphetamine offenses (matching those of methamphetamine mixture); and, further, NACDL supports the proposed deletion of all references to “Ice” in §2D1.1.

## **2. NACDL Supports Option 1, Alternative 1: Set the Same Quantity Threshold for All Methamphetamine Offenses (Matching Methamphetamine Mixture)**

NACDL supports Option 1, Alternative 1 of the Commission’s proposal to revise the methamphetamine purity distinction, specifically setting the same quantity thresholds for all methamphetamine offenses, thus erasing the empirically unjustifiable 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture. NACDL supports Option 1, Alternative 1, matching the quantity thresholds of current meth-mixture quantity levels, and opposes Option 2. As the Federal Defenders discuss in their comments, Option 2 creates serious administrability problems and would only serve to generate new uncertainty, new disparities, and extensive litigation.

The Commission’s proposal reflects the growing awareness among sentencing judges across the country that the methamphetamine guidelines, like the crack guidelines to which they were linked, lack any empirical basis. The U.S. Supreme Court statements in *United States v. Kimbrough*, 552 U.S. 85 (2007), about the crack cocaine guidelines – that the Commission abandoned its usual empirical approach based on past sentencing practices for a weight-driven approach, *id.*, at 96 – applies with equal force to the methamphetamine guidelines, which were based in part on the crack guidelines.<sup>12</sup> In fact, it applies to all drug guidelines that are based on mandatory minimums, rather than empirical data.<sup>13</sup> As noted *supra*, the Sentencing Commission has consistently linked the meth guideline ranges to statutory penalties, even though not required to do so.<sup>14</sup> None of these sentencing increases had anything to do with an examination of sentencing practices or any of the sentencing objectives set out in 18 U.S.C. § 3553. In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine and all stimulants combined are less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is now punished more severely than any other drug.<sup>15</sup>

Not only does the 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture in the current meth guidelines lack a legislative basis, it also lacks any practical empirical basis. Historically, between the 1980s and 2007, the average purity of

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<sup>12</sup> See, e.g., *United States v. Valdez*, 268 Fed. App’x 293, 297 (5th Cir. 2008); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1010-11, 1016 (D. Neb. 2008).

<sup>13</sup> See *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting “Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses”).

<sup>14</sup> See, e.g., USSC, Methamphetamine: Final Report of the Working Group 7 (1999), [https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911\\_Meth\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf).

<sup>15</sup> *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, United States Sentencing Commission, June 2024, p.4 (Key Finding 2: average sentence for methamphetamine trafficking – 91 months (compare: crack cocaine (70 months), heroin (66 months), fentanyl (65 months)).

methamphetamine fluctuated between 30% and 80%.<sup>16</sup> Thus, at one time, the methamphetamine Guidelines' harsher treatment of higher purity methamphetamine may have been more grounded in fact.<sup>17</sup> However, it now is rare to find methamphetamine that tests lower than 90% pure.<sup>18</sup> Thus, with the current statistics, if the drugs are tested for purity, nearly all methamphetamine cases will be charged as involving actual methamphetamine.<sup>19</sup> All else being equal, a 90% pure methamphetamine sample, untested, would lead to a Guidelines range of 51–63 months; tested, it would lead to a Guidelines range of 97–121 months.<sup>20</sup> The chances that a sample will receive testing is subject to factors unrelated to culpability, like whether the lab had a chance to complete testing, when in the case the defendant pled guilty, or even in which federal district the case is prosecuted.<sup>21</sup>

In the current market, the evidence no longer supports the assumption that purity is an accurate indicator that an individual is close to the source of the drugs and must have played a leadership role.<sup>22</sup> The underlying theory behind increasing a defendant's sentence based on a drug's purity was that "individuals sentenced for trafficking highly pure methamphetamine were considered to have a higher function in a drug distribution chain, and therefore greater culpability in the offense."<sup>23</sup> Given that methamphetamine today is highly and uniformly pure, the increase based on purity inherent in the methamphetamine guidelines itself is outdated and no longer reflects the market reality.

Moreover, many low-level offenders do not know the quantity or quality of the product they are involved in distributing. A qualitative research study of federal prisoners charged with drug

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<sup>16</sup> *Id.* at p.3 ("When Congress established the different statutory penalties for actual methamphetamine and methamphetamine mixture in the Anti-Drug Abuse Act of 1988, the average purity of the methamphetamine being trafficked in the United States was seldom greater than 50 percent."); *see also United States v. Bean*, 2019 U.S. Dist. LEXIS 32944 at \*12 (D.N.H. March 1, 2019) (McCafferty, J.).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at p.4 ("The methamphetamine tested in fiscal year 2022 was on average over 90 percent pure (93.2%) with a median purity of 98.0 percent."); *see also DEA 2018 National Drug Threat Assessment*, <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf> p.60 (the average purity of methamphetamine between 2012 and 2017 was over 90%).

<sup>19</sup> "Ice" is defined as methamphetamine having a purity of 80% or more (*see* USSG § 2D1.1(c), Notes to Drug Quantity Table (C)); as the same weight of ice and actual methamphetamine result in the same base offense level, "ice" and actual methamphetamine are treated identically under the Guidelines.

<sup>20</sup> *United States v. Weimer*, 2024 WL 2959187, at \*2 (D. Idaho June 11, 2024).

<sup>21</sup> *Id.* at \*3 ("Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher purity is not a good indicator of a defendant's place in the chain of distribution. The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level."); *see also Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, United States Sentencing Commission, June 2024, p.5 ("Testing also varied by judicial circuit. More than 85 percent (85.6%) of methamphetamine offenses sentenced in the Ninth Circuit involved laboratory testing, compared to 58.0 percent of methamphetamine offenses sentenced in the Seventh Circuit.").

<sup>22</sup> *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, United States Sentencing Commission, June 2024, p.3 ("The increasing purity of methamphetamine has caused some courts to question whether the guidelines distinction between pure or actual methamphetamine and methamphetamine mixture serves as a reliable proxy for the sentenced individual's culpability."); *see also Comment to the United States Sentencing Commission Public Hearing on Methamphetamine*, Dr. Jonathan Caulkins, Aug. 5, 2025, p.4.

<sup>23</sup> *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, United States Sentencing Commission, June 2024, p.3 (previously reflected in USSG §2D1.1, comment (n.27(C)) (Nov. 2023).

crimes shows that the organizational structure of drug trafficking includes smaller, decentralized units operating independently of others.<sup>24</sup> Individuals had limited knowledge of others' roles in the enterprise and the structure of the larger operation.<sup>25</sup> It was common that members of the drug smuggling trade were involved in other enterprises, including legitimate means of employment, but found themselves in a tight spot that led to the drug world.<sup>26</sup>

Noting the arbitrariness and disparities outlined above, numerous courts have determined that the treatment of methamphetamine (actual) versus methamphetamine (mixture) produces inequitable and unusually long sentences and have elected to deviate from the guidelines.<sup>27</sup> Indeed, the Commission's own data reveals substantial and extensive below-guidelines sentences in methamphetamine cases.<sup>28</sup> Simply put, purity of methamphetamine is no longer a proxy for relative culpability and must not be the basis for an increase in one's sentence.

In sum, NACDL supports the elimination of the 10:1 actual/ice to mixture ratio, and favors adopting Option 1, Alternative 1, which would set all methamphetamine guidelines at the mixture level. This proposal is better aligned with sentencing practices, where courts already treat meth-mixture cases as the baseline, and apply larger variances in cases involving meth-ice/actual.

### **3. NACDL Would Also Support Setting Quantity Thresholds Matching Those of Cocaine**

In its Issues for Comment, the Commission queried if it should adopt quantity thresholds for methamphetamine that are less severe than the current levels for methamphetamine mixture and proffered as an example matching the quantity thresholds of cocaine. NACDL would support an amendment that enacts this proffered example.

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<sup>24</sup> Jana S. Benson & Scott H. Decker, *The Organizational Structure of International Drug Smuggling*, 38 J. CRIM. JUSTICE 130, 135 (2010).

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

<sup>26</sup> *Id.* at 136.

<sup>27</sup> See e.g. *United States v. Celestin*, 2023 WL 2018004, at \*3 (E.D. La. Feb. 15, 2023) (citations omitted); *United States v. Robinson*, 2022 WL 17904534, \*3 (S.D. Miss. Dec. 23, 2022) (noting that in a recent case, “the United States conceded that there is no empirical basis for the Sentencing Commission's 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture,” and that other district courts had concluded there was no empirical basis for the disparity); *United States v. Ferguson*, 2018 WL 3682509, at \*8 (D. Minn. Aug. 2, 2018) (“[M]ethamphetamine purity is no longer a proxy for, and thus not probative of, the defendant's role or position in the chain of distribution.”); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) (“This issue [of punishing a pure substance more than a mixed substance] is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting.”); *United States v. Ortega*, No. 8:09CR400, 2010 U.S. Dist. LEXIS, at \*21 (D. Neb. May 17, 2010) (“To punish [a street-level distributor] as harshly as an upper-level distributor because of a presumptive ten-to-one ratio does not reflect his position in the hierarchy nor will it promote respect for the law.”); *Castro*, 2018 U.S. Dist. LEXIS 39367, at \*7 (“The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.”).

<sup>28</sup> See USSC, *Methamphetamine Trafficking Offenses Quick Facts* (FY 2024) (in fiscal year 2024, 41% of sentences were downward variances averaging a 35% reduction), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine\\_FY24.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY24.pdf).

Comments submitted, and testimony given, to the United States Sentencing Commission on August 5, 2025, by Dr. Jonathan Caulkins, Professor at Carnegie Mellon University’s Heinz College, support setting quantity thresholds for the methamphetamine guidelines to match those of cocaine. Specifically, Dr. Caulkins notes that “[b]oth cocaine and methamphetamine are powerful, addictive psychostimulants [that] fill broadly similar roles in the illegal marketplace.”<sup>29</sup> Moreover, an assessment of the market value of both drugs demonstrates that a given weight of methamphetamine is worth less than the same weight of cocaine, leading to greater incentive for committing market-related violence and other offenses, which supports the conclusion that “a greater not a lesser quantity of methamphetamine should be required to trigger the same sentence as a given quantity of cocaine.”<sup>30</sup>

In sum, NACDL supports the adoption of Option 1, which would set all methamphetamine guidelines at a unified level. Said level should be set at powder cocaine levels or, at most, current methamphetamine-mixture levels. As the Federal Defenders lay out in detail in their submission, this proposal is aligned with science, data, and current sentencing practices.

#### **4. NACDL Supports the Deletion of All References in §2D1.1 to “Ice”**

As noted in the Commission’s historical summary of §2D1.1, inclusion of “Ice” in the Guidelines finds its origin in admitted confusion as to how the Commission should implement Congress’s directive to assign a two-level increase to methamphetamine offenses involving “smokable crystal methamphetamine” (as opposed to other forms of the drug).<sup>31</sup> Indeed, the Commission admits that it added “Ice” to the Drug Quantity Table, despite that term never being used in the legislation, and ultimately set the base offense level for “Ice” equivalent to the base offense levels for methamphetamine (actual).<sup>32</sup>

The Commission’s proposed amendment to delete all references to “Ice” and, instead, add a new specific offense characteristic that provides a two-level reduction if the offense involved only methamphetamine in a non-smokable, non-crystalline form serves to better comply with Congress’s 1990 directive that “convictions for offense involving smokable crystal methamphetamine will be assigned an offense level under the Guidelines which is two levels above” other forms of methamphetamine; and serves to rid the Guidelines of the term “Ice,” which is not used elsewhere.

#### **Comment on Proposed Amendment 3 Part (A): Restructuring the Loss Table**

The National Association of Criminal Defense Lawyers (NACDL) appreciates the Commission’s effort to simplify the loss table in §2B1.1. However, we respectfully submit that the proposed restructuring, while well-intentioned, does not adequately address the fundamental disconnect between the current Guidelines and actual sentencing practice in economic crime cases. Consolidating loss categories fails to address necessary reforms that calibrate the role of

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<sup>29</sup> *Comment to the United States Sentencing Commission Public Hearing on Methamphetamine*, Dr. Jonathan Caulkins, Aug. 5, 2025, p.5.

<sup>30</sup> *Id.* at pp.5-6.

<sup>31</sup> *Proposed Amendments to the Sentencing Guidelines*, United States Sentencing Commission, Dec. 12, 2025, p.3 (discussing USSG App. C, amend. 370 (effective Nov. 1, 1991)).

<sup>32</sup> *Id.*

monetary impacts (and potential impacts) while centering individual culpability and *mens rea* in offense level calculations.

## **1. The Empirical Reality: Courts Consistently Reject Loss-Driven Guidelines as Excessive**

In practice, judges routinely reject loss calculations as too severe. The Commission’s own FY 2024 data demonstrates this reality: judges impose below-Guidelines sentences in 56.2% of economic crime cases, with downward variances averaging 57% below the guideline range. Courts impose above-Guidelines sentences in only 2.3% of cases—meaning judges are approximately 25 times more likely to find §2B1.1 ranges too harsh rather than too lenient.<sup>33</sup> This pattern does not reflect case-specific anomalies but rather a systemic judicial determination that loss-driven calculations routinely produce ranges that are “greater than necessary” under 18 U.S.C. § 3553(a).

This judicial rejection of §2B1.1 ranges is not a recent phenomenon. Research demonstrates that the disconnect between Guidelines recommendations and actual practice in economic crimes has persisted for decades, with below-Guidelines sentences being the norm rather than the exception.<sup>34</sup> As one comprehensive study concluded, the loss table “routinely recommends arbitrary, disproportionate, and often excessive sentences” that courts across the country consistently find unmoored from actual culpability.<sup>35</sup>

## **2. The Loss Table’s Disconnect from Culpability**

Focusing appropriate sentences on hypothetical or even actual monetary losses serves as a poor proxy for individual culpability. Academic research and judicial commentary have documented numerous scenarios in which rigid adherence to monetary calculations produces sentences grossly disproportionate to blameworthiness. Courts encounter the following issues:

**Unforeseeable Cascading Losses.** Courts have repeatedly confronted cases where a defendant’s modest fraudulent conduct triggered unforeseen cascading consequences resulting in massive losses under the “reasonably foreseeable” standard. The loss table treats such defendants identically to those who deliberately orchestrated schemes to cause precisely such harm—a result fundamentally at odds with basic principles of proportionality in punishment.<sup>36</sup>

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<sup>33</sup> U.S. SENTENCING COMM’N, QUICK FACTS: THEFT, PROPERTY DESTRUCTION, AND FRAUD OFFENSES (Fiscal Year 2024), <https://www.ussc.gov/research/quick-facts/theft-property-destruction-fraud>.

<sup>34</sup> See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 93-99 (2004) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap3.pdf> (documenting persistent below-Guidelines sentencing patterns in economic crime cases).

<sup>35</sup> Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost Its Way, and How to Save It*, 18 OHIO ST. J. CRIM. L. 605, 605-06 (2021).

<sup>36</sup> See U.S. SENTENCING COMM’N, LOSS CALCULATION UNDER §2B1.1, PRIMER at 4 (2025) (discussing “reasonably foreseeable” standard and cases applying it); *United States v. Mshihiri*, 816 F.3d 997, 1011 (8<sup>th</sup> Cir. 2016) (individuals convicted of mortgage fraud that resulted in excessively high loss amounts due to the 2008 downturn in the market as the byproduct of poor large bank investments, found to be reasonably foreseeable to

**Divergence Between Loss and Gain.** Federal defenders and scholars have documented cases where defendants received minimal personal benefit from conduct that produced substantial losses to victims. The Third Circuit recognized that the loss table “may well overstate both the degree of [a defendant’s] criminality and his need to be corrected” where loss far exceeds the defendant’s gain. *United States v. Stuart*, 22 F.3d 76, 82 (3d Cir. 1994). A defendant who received \$2,000 from a scheme causing \$129,000 in losses faces the same enhancement as one who pocketed the entire loss amount—despite dramatically different levels of culpability.<sup>37</sup> *Id.*

**Intended Loss Without Actual Harm.** The Guidelines’ invocation of “intended loss” can produce dramatically elevated sentences even where little or no actual harm occurred and where larger losses were functionally impossible. This approach enables the government to construct artificial loss theories untethered from real-world consequences, producing guideline ranges disconnected from any concrete harm.<sup>38</sup>

**Role and Sophistication Disparities.** The loss table applies uniformly regardless of whether a defendant was the mastermind of a sophisticated scheme or a peripheral participant with limited understanding of the broader operation. While other adjustments theoretically account for role, the overwhelming weight accorded to loss calculations often subsumes or nearly eradicates these considerations.<sup>39</sup>

### 3. Research on Sentencing Disparity and the Loss Table

Extensive empirical research demonstrates that the current loss-focused approach systematically produces unwarranted disparities:

**Prosecutorial Discretion and Hidden Disparities.** Research has shown that focusing exclusively on judicial sentencing decisions obscures crucial earlier stages where prosecutors

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individual defendants); *see also United States v. Needle*, 557 F.3d 1102 (9th Cir. 2009) (holding defendant accountable for millions in hurricane losses to insurance policyholders despite fraud limited to obtaining insurance license).

<sup>37</sup> *See also* Kathryn N. Nester, Written Statement to the U.S. Sentencing Commission at 7-9 (Mar. 14, 2012) (documenting additional cases where loss substantially exceeded gain); *United States v. Forchette*, 220 F. Supp. 2d 914, 925-31 (E.D. Wis. 2002) (departing downward where loss was \$454,300 but gain was substantially less); *United States v. Duncan*, No. 24-1822, Dkt. No. 18 (7th Cir. Ct. App. filed May 13, 2024) (Defendant who received \$85,171 sentenced three months below a guideline range to 84 months, based upon a \$1.7 million total loss).

<sup>38</sup> *See* U.S. SENTENCING COMM’N, LOSS CALCULATION UNDER §2B1.1, PRIMER at 10, fn66 (2025) (discussing issues with intended loss and *citing United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (per curiam) (remanding case with a very large intended loss amount but “low risk that any actual loss would result”); *United States v. Edwards*, 595 F.3d 1004, 1010, 1018 (9th Cir. 2010) (upholding a probationary sentence below the guideline range of 27–33 months as substantively reasonable in a fraud case where the sentencing judge stated that the guideline range calculated using intended loss “overstated the circumstances” of the defendant’s case); *United States v. Livesay*, 587 F.3d 1274, 1278–79 (11th Cir. 2009) (“A sentence of probation for a high-ranking officer in a corporation where over a billion dollars of fraud was perpetrated . . . is not reasonable” under the factors listed in § 3553(a) (emphasis omitted)); *See also United States v. McBride*, 362 F.3d 360, 374, 376 (6th Cir. 2004) (discussing limits on intended loss calculations); *United States v. Cedeno*, 471 F.3d 1193, 1195-96 (11th Cir. 2006) (intended loss calculation in credit card fraud case).

<sup>39</sup> Boss & Kapp, *supra* note 3, at 615-20 (discussing how loss calculations dominate guideline calculations despite role adjustments).

exercise enormous influence over loss calculations through charging decisions, plea negotiations, and fact stipulations.<sup>40</sup> These prosecutorial choices—which are themselves subject to demographic disparities—become baked into the “presumptive” Guidelines sentence that judges then use as a starting point, potentially perpetuating rather than reducing unwarranted disparity<sup>41</sup>.

**Demographic Disparities in Guidelines Application.** The Commission’s 2023 report on demographic differences found that Black males receive sentences 13.4% longer and Hispanic males 11.2% longer than similarly situated White males—disparities that persist even when controlling for Guidelines calculations.<sup>42</sup> When Guidelines ranges are driven primarily by loss amounts rather than individualized culpability assessments, there is greater opportunity for demographic disparities to influence which losses are attributed to which defendants and how aggressively prosecutors pursue particular loss theories.

**Geographic Disparities in Loss Calculations.** Research has documented significant inter-district variation in how courts interpret and apply loss calculations under §2B1.1, particularly regarding the “reasonably foreseeable” standard for actual loss and the proper calculation of intended loss.<sup>43</sup> This geographic disparity undermines the Guidelines’ core mission of promoting uniformity in sentencing.

**The “Anchoring Effect” Problem.** Psychological research on judicial decision-making has identified the “anchoring effect”—the tendency for initial numerical benchmarks to unduly influence subsequent judgments even when the anchor is arbitrary or unreliable.<sup>44</sup> When loss calculations produce guideline ranges that systematically overstate culpability, these inflated ranges nevertheless create powerful anchors that may influence ultimate sentences even when judges vary downward. This makes it essential to ensure that the Guidelines themselves produce defensible starting points, not arbitrary anchors requiring routine rejection.

#### 4. The Loss Table Creates Rather Than Reduces Disparity

Paradoxically, the very feature of §2B1.1 designed to promote uniformity—its detailed loss table—has instead perpetuated deep sentencing disparities. As research by Boss and Kapp

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<sup>40</sup> M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, 122 J. POL. ECON. 1320 (2014); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 14-28 (2013); See also, *United States v. McClain*, No. 20-cr-812 (N.D. Ill. July 22, 2025) (Shah, J.), Dkt. 439, at 45. (four defendants charged in a bribery scheme which resulted in multi-billion-dollar legislation where government argued loss resulted in recommended life sentences for individuals who did not personally profit and who had no criminal history).

<sup>41</sup> See e.g., *United States v. McClain*, No. 25-2350 (7th Cir. Aug. 5, 2025), Dkt. 24 at 224 *c.f.* *United States v. Madigan*, No. 25-2249 (7th Cir. Nov. 3, 2025), Dkt. 23, at A.433–34 (two related cases of the exact same bribery conspiracy where separate District Court Judges concluded that loss amounts were approximately \$1.2 million and at least \$400 million respectively on identical facts).

<sup>42</sup> U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING: AN UPDATE OF THE COMMISSION’S 2017 REPORT 3-4 (Nov. 2023), <https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing>.

<sup>43</sup> Richard D. Hartley et al., *Inter-district Variation and Disparities in Federal Sentencing*, 19 CRIM. JUST., L. & SOC’Y 50, 61-65 (2019) (documenting inter-district disparities in economic crime sentencing).

<sup>44</sup> David M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439-41 (2011); Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1159-62 (2002).

documented, the “gap in the relative lengths of sentences issued to 2B1.1 offenders is also likely deep, given that courts granting downward variances under Section 2B1.1 tend to vary substantially, close to 50 percent below the Guideline range.”<sup>45</sup>

This pattern reveals that the current loss table design itself perpetuates a “deep chasm in sentencing practice.” Excessive penalties for high-loss offenses drive judges to vary deeply below Guidelines ranges, but different judges vary to different degrees based on their assessment of actual culpability, producing the very disparity the Guidelines were meant to prevent. As a witness providing testimony before the Commission on this issue observed, current loss calculations “bear no meaningful connection to offense seriousness or offender culpability,” leading judges across the country to reject Guidelines recommendations as fundamentally flawed.<sup>46</sup>

### **Response to Issue for Comment 1: The Restructured Loss Table and Alternative Approaches**

The proposed revisions do not sufficiently account for financial harm because they perpetuate the Guidelines’ overreliance on loss as a proxy for culpability.

**Broader loss categories alone will not solve this fundamental problem.** While consolidating the loss table from its current 16 levels may modestly reduce fact-finding burdens, this approach risks creating only the veneer of reform while entrenching a flawed framework. The core issue is not the granularity of loss categories but rather the Guidelines’ treatment of loss amounts—often artificially constructed through the “greater of actual or intended loss” formulation—as the primary driver of punishment severity.

Academic commentators have noted that the Commission deviated from empirical sentencing data when initially crafting the loss table, deliberately creating harsher sentences for fraud offenses than past practice warranted.<sup>47</sup> This departure from the Commission’s usual empirical approach has never been adequately justified, and decades of data now demonstrate that courts consistently find the resulting ranges excessive and disconnected from culpability.

#### **The Commission should consider more transformative approaches that:**

1. **Dramatically reduce the weight accorded to loss calculations** by compressing the loss table into significantly fewer categories with variable enhancement ranges rather than fixed point values and reduce the offense levels on the loss table at every category; and
2. **Replace the current proliferation of aggravating enhancements** in §2B1.1(b)(2) with a culpability-focused enhancement/mitigation provision that directs courts to assess the defendant’s intent, the foreseeability of harm, and individual circumstances.

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<sup>45</sup> Boss & Kapp, *supra* note 3, at 626-27 (analyzing Commission data on variance rates and magnitudes).

<sup>46</sup> Nester, *supra* note 5, at 4-6.

<sup>47</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20-22 (1988); Mark H. Allenbaugh, *Drawn from Nowhere: A Review of the U.S. Sentencing Commission’s White-Collar Sentencing Guidelines and Loss Data*, 26 FED. SENT’G REP. 19, 19 (2013).

Such reforms would better align the Guidelines with judicial practice and ensure that punishment is proportionate to individual blameworthiness rather than driven by loss amounts that may bear little relationship to a defendant's intent.

### **1. Proposed Dual-Prong Reform**

NACDL urges the Commission to adopt a two-prong reform that fundamentally restructures §2B1.1:

#### **First Prong: Simplified Loss Categories with Variable Ranges**

Replace the current loss table, which contains a multitude of categories and creates unfair and arbitrary “cliffs” that may lead to harsh and disparate sentencing, with a table with significantly fewer categories and variable ranges. We are generally supportive of the approach adopted by the 2014 ABA Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes, which proposed significantly reducing the number of categories on the loss table and also reducing offense levels for those categories.<sup>48</sup>

This structure preserves loss as a relevant consideration while preventing crude loss calculations from determining outcomes. The variable enhancement ranges would allow courts to calibrate sentences based on the totality of circumstances, including the relationship between loss and defendant culpability.

#### **Second Prong: Culpability-Focused Enhancement/Mitigation**

Replace the current proliferation of specific offense characteristics with a comprehensive culpability assessment that would allow courts to enhance or reduce the offense level based on factors including:

- The defendant's *mens rea* and criminal intent
- The foreseeability and likelihood of the harm that occurred
- The defendant's role and degree of participation
- The degree of trust betrayed
- The defendant's efforts at restitution, remediation, or cooperation
- The disparity between the defendant's personal gain and the total loss<sup>49</sup>
- Whether the defendant acted under coercion or duress
- The defendant's acceptance of responsibility and efforts to mitigate harm

This approach empowers courts to fashion guideline ranges that reflect actual culpability rather than serving as arbitrary numerical exercises. It would also address the Commission's stated goal of simplification by replacing multiple overlapping enhancements with a unified culpability framework. We also recommend considering the elimination of the consideration of intended,

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<sup>48</sup> See generally Am. Bar Ass'n, ABA Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes, Final Report (Nov. 10, 2014).

<sup>49</sup> See *supra*, n. 37, *United States v. Duncan*, No. 24-1822, Dkt. No. 18 (7th Cir. Ct. App. filed May 13, 2024).

rather than actual, loss as it allows the government to seek sentencing based on the higher of the two numbers, rather than on the factors listed above that are more directly related to culpability.

## **2. Alternative Incremental Approach**

If the Commission is unwilling to undertake comprehensive reform at this time, NACDL proposes a more modest alternative: **cut all loss enhancements in half and cap the maximum loss enhancement at 15 levels** rather than the current 30 levels.

Given that §2B1.1(b)(2) provides more than 20 other aggravating enhancements beyond loss—enhancements that can contribute to offense levels extending literally “off the chart”—cutting loss enhancements in half would more appropriately calibrate the relative importance of various factors.<sup>50</sup> Even a 15-level enhancement would increase applicable guideline ranges by many years or decades, particularly when combined with other enhancements, but would better reflect the reality that loss alone should not drive sentences to the degree the current table demands.

This incremental approach would also help address the false precision problem inherent in the current 16-level table. There is no empirical or theoretical justification for treating a defendant with \$75,000 in loss dramatically differently from one with \$95,000 in loss, yet the current table creates sharp sentencing cliffs at arbitrary dollar thresholds. Broader categories with reduced enhancement levels would mitigate this arbitrariness.

### **Response to Issue for Comment 2: The \$15,000 Enhancement Threshold**

NACDL supports establishing \$15,000 as the threshold for triggering an enhancement. This represents a reasonable inflation adjustment from previous thresholds and appropriately reserves guideline enhancements for cases involving more than de minimis economic harm.

However, this threshold alone cannot remedy the Guidelines’ overemphasis on loss amounts. The threshold question cannot be evaluated in isolation from the broader structure of the loss table and the cumulative effect of other enhancements. Even with a \$15,000 threshold, defendants facing multiple §2B1.1(b)(2) enhancements can receive offense levels that extend literally “off the chart”—a result that no inflation adjustment can address.

Moreover, while \$15,000 is appropriate as an inflation adjustment, the Commission should consider whether the threshold should be higher to better distinguish between relatively minor economic offenses and those warranting substantial federal prison sentences. Many cases involving losses between \$15,000 and \$100,000 involve defendants with minimal criminal history who present low recidivism risk and whose culpability may be better addressed through probation, restitution, and community sanctions rather than imprisonment.

### **Response to Issue for Comment 3: Offense Level Enhancements for Loss Categories**

The Commission should not maintain current offense level enhancements when restructuring the loss table. The existing enhancements were calibrated to a 16-level table and reflect an excessive emphasis on loss as the determinative sentencing factor. Broader loss categories require

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<sup>50</sup> See *supra*, fn8, *United States v. McClain*, No. 20-cr-812 (N.D. Ill. July 22, 2025) (Shah, J.), Dkt. 439, at 45.

corresponding recalibration of enhancement levels to avoid compounding the Guidelines' existing severity.

The current enhancement structure produces offense level increases that, when combined with the Commission's sentencing table, can result in guideline ranges exceeding natural life for conduct involving no violence, no weapons, and often no actual victims with complete losses. This severity cannot be justified under any theory of proportionate punishment and contributes to the pattern of systematic judicial rejection documented in the Commission's data.

## **1. NACDL proposes two options for recalibrating enhancements:**

### **Option 1: Reduce Enhancement Levels by Half (Incremental Reform)**

If the Commission maintains separate fixed enhancement levels for each loss category, it should reduce those enhancements by at least half, capping the maximum loss enhancement at 15 levels rather than 30. Even this reduced structure would produce substantial sentence increases (a 15-level enhancement for a Category I defendant moves the guideline range from 0-6 months to 108-135 months, an increase of 9-11 years) while better reflecting the reality that loss should not single-handedly determine punishment to the degree the current Guidelines demand.

### **Option 2: Adopt Variable Enhancement Ranges (Comprehensive Reform)**

Preferably, the Commission should adopt the variable enhancement structure described above, which ties enhancement levels to individualized culpability assessments within each loss category. This approach would:

- Preserve loss as one relevant factor without making it determinative
- Empower courts to calibrate sentences to actual blameworthiness
- Reduce the need for variances by producing more defensible guideline ranges
- Better align Guidelines with the § 3553(a) factors courts must consider
- Reduce unwarranted disparities by focusing on legally relevant distinctions in culpability rather than arbitrary dollar thresholds

## **2. The Problem with “False Precision”**

The current 16-level loss table creates an illusion of precision that is fundamentally misleading. Loss calculations in economic crime cases are inherently imprecise, involving contested factual determinations about foreseeability, causation, valuation, and intent. As numerous courts have recognized, sentencing judges often must make rough estimates based on incomplete information.<sup>51</sup>

Layering artificially precise enhancement levels onto inherently imprecise loss calculations produces a false sense of mathematical objectivity. A defendant with \$9.5 million in calculated loss receives a 20-level enhancement, while one with \$10.5 million receives a 22-level

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<sup>51</sup> See *United States v. Vrdolyak*, 593 F.3d 676, 681 (7th Cir. 2010) (“The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence.”); U.S. SENTENCING COMM’N, LOSS CALCULATION UNDER §2B1.1, PRIMER at 3-5 (2022) (discussing inherent imprecision in loss calculations).

enhancement—a difference that can translate to years of additional imprisonment despite the loss calculations themselves potentially involving millions of dollars in disputed valuation questions. Broader loss categories with variable enhancement ranges would better reflect the inherent imprecision in loss calculations while giving courts flexibility to account for culpability factors that truly matter. This approach would also reduce satellite litigation over marginal loss amounts, advancing the Commission's simplification goals.

### **3. The Profound Inequity of Loss-Driven Sentencing: Academic and Judicial Consensus**

Beyond the Commission's own data, extensive academic research and judicial commentary document the fundamental problems with loss-driven economic crime sentencing:

#### **The Commission's Departure from Empirical Foundations**

Unlike most Guidelines, which were grounded in empirical analysis of past sentencing practices, the economic crimes Guidelines departed significantly from historical norms. As Judge Jed Rakoff has noted, the Commission deliberately chose to impose harsher sentences for fraud offenses than past practice warranted, seeking to “encourage judges to issue sentences of incarceration” and to “equalize sentences for ‘white collar’ fraud and ‘blue collar theft offenses.’”<sup>52</sup> This policy-driven approach, rather than empirical grounding, has never been adequately justified. Decades of subsequent data now demonstrate that courts consistently reject these policy choices as producing excessive and disproportionate sentences. The Commission's 2001 amendments further exacerbated the problem by increasing maximum loss enhancements and adding numerous new SOC's, creating what commentators have termed an “upward ratcheting” that drove sentences even further from empirical foundations.<sup>53</sup>

#### **Judicial Criticism and the Crisis of Guidelines Legitimacy**

Federal judges across the political spectrum have criticized the loss table's disconnect from culpability. This bipartisan judicial consensus that §2B1.1 systematically produces excessive sentences represents a profound crisis of Guidelines legitimacy. When judges across ideological lines consistently find guideline ranges disconnected from § 3553(a)'s requirement of sentences “sufficient, but not greater than necessary,” the Guidelines fail in their fundamental mission of providing meaningful guidance.<sup>54</sup>

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<sup>52</sup> Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 226, 228 (2013); *see also* Breyer, *supra* note 14, at 20-22.

<sup>53</sup> Boss & Kapp, *supra* note 3, at 609-14 (documenting “upward ratcheting” of §2B1.1); Federal Public and Community Defenders, Comments on Proposed Amendments to U.S. Sentencing Guidelines at 3-7 (Mar. 14, 2012) (same).

<sup>54</sup> *See United States v. Paroline*, 591 F. Supp. 2d 919, 928 (E.D. Tex. 2008) (Cassell, J.) (criticizing economic crime Guidelines as “fundamentally flawed”); *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (Rakoff, J.) (same); *United States v. Channell*, 955 F. Supp. 2d 1046, 1059 (D. Mass. 2013) (Gertner, J.) (same).

## **The Comparative Injustice Problem**

Research has documented troubling disparities between how the Guidelines treat economic offenses versus other serious crimes. A white-collar defendant with zero criminal history and a calculated loss of \$50 million faces a guidelines range potentially exceeding life imprisonment, when factoring in typical SOCs. This is greater than the range for many intentional killings.<sup>55</sup> A defendant who commits assault causing serious bodily injury might face 51-63 months; a defendant whose mortgage fraud scheme caused no physical harm but resulted in \$5 million in losses faces 87-108 months. These disparities cannot be justified by any coherent theory of punishment. They reflect the loss table's artificial escalation of sentences beyond levels proportionate to culpability, harm, or deterrence needs.

## **Research on Deterrence and Excessive Sentences**

The National Institute of Justice's research synthesis on deterrence found that "increasing the severity of punishment does little to deter crime."<sup>56</sup> Research specific to white-collar crime has failed to demonstrate that the Guidelines' harsh loss-based sentences produce measurably greater deterrent effects than more moderate alternatives. This research suggests that the current loss table—which escalates sentences far beyond what deterrence theory would support—imposes enormous human and fiscal costs without corresponding public safety benefits. Reform that reduces loss-driven severity while enhancing culpability-based calibration would better serve all sentencing purposes.

## **Important Related Issue for Review: The Cross-Reference to §2B1.1 Loss Table in Bribery and Public Corruption Cases**

NACDL wishes to highlight a particularly problematic application of the loss table that warrants urgent Commission attention: the cross-reference from §2C1.1 (bribery, extortion under color of official right, and honest services fraud) and §2C1.2 (gratuities) to the §2B1.1 loss table.

Under §2C1.1(b)(2), if "the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000," courts must "increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount."

This cross-reference produces guideline calculations that routinely run off the chart and are completely disconnected from actual culpability in bribery and corruption cases. The problems with this approach are manifold:

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<sup>55</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1684-85 (2012) (documenting comparative severity disparities).

<sup>56</sup> National Institute of Justice, *Five Things About Deterrence* (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> (finding that "increasing the severity of punishment does little to deter crime").

## 1. Bribery Is Fundamentally Different from Fraud

Bribery and public corruption offenses involve different harms and culpability factors than the fraud and theft offenses for which §2B1.1 was designed. The core harm in bribery is the corruption of governmental processes and the breach of public trust—harms that are qualitative rather than quantitative and that bear no necessary relationship to dollar amounts. A state legislator who accepts a \$5,000 bribe to vote against environmental regulations may cause enormous public harm that cannot be meaningfully quantified in dollars. Conversely, a city inspector who accepts \$100,000 in bribes but whose corrupt inspections cause no actual harm to the government presents a serious corruption problem but not one commensurate with a massive fraud scheme causing equivalent financial losses.

## 2. The “Loss to Government” Standard Is Unworkably Vague

The cross-reference requires courts to calculate “the loss to the government from the offense” using §2B1.1’s loss methodology. But bribery often involves harms that are impossible to quantify with any precision:

- How does one calculate the “loss” when a bribed official awards a contract to a qualified bidder who paid a bribe, but the contract work is completed satisfactorily?
- What is the “loss” when a legislator accepts a bribe to vote a particular way, but would have voted that way anyway based on ideology?
- How should courts quantify the “loss” from corruption of regulatory processes where the harm is diffuse and speculative?

Courts have struggled mightily with these questions, often resorting to arbitrary formulations that bear little relationship to actual harm or defendant culpability.

## 3. The Cross-Reference Produces Absurd Results

Because §2B1.1’s loss table can add up to 30 levels to a base offense level, applying it to bribery cases produces guideline ranges that frequently run off the sentencing table:

**Example 1:** A government procurement official receives \$50,000 in bribes from a contractor over two years. The government calculates that contracts improperly awarded due to the bribery totaled \$25 million. Under §2C1.1’s cross-reference to §2B1.1, this produces a 24-level enhancement (for loss exceeding \$25 million), plus additional enhancements under §2C1.1(b)(3) for the official holding a “high-level decision-making or sensitive position” (4 levels, with a minimum offense level of 18). The defendant’s total offense level easily exceeds 40—off the chart—despite the bribe amount being relatively modest and there being no evidence that the government actually suffered monetary harm from the contracts awarded.

**Example 2:** A city councilmember accepts \$10,000 to vote in favor of a zoning variance. The government argues that the “benefit received” by the developer was the increased property value resulting from the variance—\$5 million. This produces a 20-level enhancement under the cross-reference, resulting in a guideline range that may exceed ten years in prison for a \$10,000 bribe where the government suffered no financial loss.

**Example 3:** A state official accepts \$25,000 to influence the award of a government contract worth \$100 million. Even though the contract work was completed satisfactorily and the government received full value, prosecutors argue the “loss to government” equals the contract value because a non-corrupted process might have yielded a lower bid. The resulting loss calculation produces a guideline range approaching natural life.

#### **4. The Cross-Reference Is Disconnected from Statutory Maximums**

Many bribery statutes carry maximum penalties of 10, 15, or 20 years. Yet the cross-reference to §2B1.1’s loss table routinely produces guideline ranges that approach or exceed these statutory maxima, even for defendants with no criminal history. This suggests that the guideline structure is miscalibrated. If Congress deemed a 15-year maximum appropriate for the most serious bribery offenses, guideline ranges approaching that maximum should be reserved for the most culpable defendants, not applied routinely based on arbitrary loss calculations.

#### **5. The Cross-Reference Exacerbates Prosecutorial Discretion Problems**

The cross-reference gives prosecutors enormous power to manipulate guidelines ranges by deciding how to characterize and calculate “loss to government” or “benefit received.” Since these calculations often involve contested valuations and causal theories, prosecutors can choose aggressive or conservative approaches that dramatically impact ultimate sentences—power that creates opportunities for unwarranted disparity based on geographic location, prosecutorial philosophy, or characteristics of individual defendants.

#### **6. Honest Services Fraud Cases Present Special Problems**

Section 2C1.1 also covers honest services fraud under 18 U.S.C. §§ 1341-1343, which the Supreme Court in *Skilling v. United States*, 561 U.S. 358 (2010), limited to bribery and kickback schemes. These cases often involve no actual financial loss to anyone—the “fraud” consists of the deprivation of the intangible right to honest services. Yet the cross-reference to §2B1.1 requires courts to calculate “loss” in cases where the entire theory of prosecution is that the harm was intangible. Courts have struggled with this conceptual mismatch, sometimes calculating “loss” based on the value of contracts or decisions influenced by the bribery, sometimes based on the bribe amount or kickback received, and sometimes declining to apply the enhancement at all. This inconsistency produces exactly the kind of unwarranted disparity the Guidelines were meant to prevent.

#### **7. The Need for Separate Treatment of Bribery Offenses**

NACDL urges the Commission to eliminate or substantially limit the cross-reference from §2C1.1 and §2C1.2 to the §2B1.1 loss table. Bribery and corruption offenses should be sentenced under a framework that accounts for the distinctive harms and culpability factors involved in public corruption, not one designed for fraud and theft cases.

If the Commission restructures the §2B1.1 loss table as proposed, it should concomitantly revise §2C1.1 to eliminate the automatic cross-reference. Instead, §2C1.1 should establish its own graduated enhancement structure based on factors genuinely probative of corruption severity:

- The amount and duration of corrupt payments
- The level and sensitivity of the official position compromised
- The actual harm to governmental functions and public trust
- The sophistication and scope of the corrupt scheme
- Whether the corruption was systematic or isolated

These factors are more directly related to the core wrongfulness of bribery and corruption than the arbitrary “loss” calculations currently imported from §2B1.1. They would also produce more proportionate and defensible guideline ranges that courts would be more likely to follow, advancing the Guidelines’ core mission.

At minimum, if the Commission retains some form of cross-reference, it should cap the enhancement available through §2C1.1(b)(2) at a reasonable level (perhaps 12 or 15 levels maximum) to prevent the absurd results currently produced when massive “loss to government” calculations drive bribery sentences off the chart.

### **Conclusion: The Path Forward**

Modest restructuring of the loss table, while beneficial, cannot address the fundamental disconnect between current Guidelines and sentencing practice in economic crime cases. The Commission’s data demonstrates that the loss-focused approach systematically produces ranges that courts find too severe. Academic research and judicial commentary confirm that loss calculations serve as poor proxies for culpability and that the current Guidelines framework perpetuates rather than reduces unwarranted disparity.

NACDL respectfully urges the Commission to undertake more ambitious reforms that:

1. **Dramatically compress the loss table** into fewer broad categories with variable enhancement ranges tied to individualized culpability assessments;
2. **Replace the proliferation of specific offense characteristics** with a unified culpability framework that empowers courts to enhance or mitigate based on *mens rea*, foreseeability, role, gain, victim vulnerability, and other factors genuinely probative of blameworthiness;
3. **Eliminate the “greater of actual or intended loss” formulation** that enables arbitrary loss constructions untethered to defendants’ actual culpability;
4. **Eliminate or substantially limit the cross-reference** from bribery and corruption Guidelines (§2C1.1 and §2C1.2) to the §2B1.1 loss table, which produces off-the-chart calculations disconnected from the distinctive harms and culpability factors in public corruption cases;

5. **Cap maximum loss enhancements** at levels that preserve loss as one relevant factor without making it determinative of punishment; and
6. **Ground any revised Guidelines in empirical analysis** of actual sentencing practices rather than policy preferences for increased severity.

These changes would advance the Commission’s stated goals of simplification and reduced fact-finding burdens while ensuring that the Guidelines better fulfill their role as the “starting point and initial benchmark” for sentences that are “sufficient, but not greater than necessary” to serve the purposes of punishment.

The Commission now has before it overwhelming evidence—from its own data, from academic research, from judicial commentary, and from decades of sentencing practice—that §2B1.1’s loss-focused approach has failed. Fundamental reform is both necessary and long overdue.

### **Comment on Proposed Amendment 3 Part (B): Consideration of Non-Economic Impact on Victims**

This proposed “culpability factor” amendment is offered because, “some stakeholders have suggested that the Guidelines should measure an individual’s culpability by considering the non-economic harm to victims, in addition to the economic impact and number of victims.” [Proposed Amendments, at 65.] The Commission seeks to accomplish this goal with the introduction of a new Specific Offense Characteristic (“SOC”) at (new) §2B1.1(b)(3):

If the offense resulted in substantial non-economic harm to one or more victims, increase by [2][3][4] levels. For purposes of this provision, “*non-economic harm*” includes such harms as physical harm, psychological harm, emotional trauma, harm to reputation or credit rating, and invasion of privacy interest.

NACDL does not recommend the addition of this SOC, as it neither connects to the defendant’s culpability, nor is it something properly adjudicated at a federal criminal sentencing proceeding.

The original version of §2B1.1 of the Guidelines was fewer than 800 words in length, including Advisory Notes.<sup>57</sup> Before adding these new, proposed amendments, the current version of 2B1.1 is over 9,000 words long.<sup>58</sup> This has made application of this guideline a more difficult, arduous, and confusing process—without improving sentencing outcomes.

By bringing in this and other amendments, there are now 23 Specific Offense Characteristics for the district court to include in its process of using the Guidelines score as a starting point. In so doing, the Commission continues to create ways to punish from which the defendant has to climb the ever-higher mountain of justifying a variance. Therefore, adding new SOCs that have the impact of giving presentence investigation report writers and sentencing courts more reasons and ways to escalate a defendant’s sentence of incarceration should be approached with caution.

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<sup>57</sup> See [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/Chapter\\_2\\_A-C.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/Chapter_2_A-C.pdf).

<sup>58</sup> See [2025 Guidelines Manual](#).

Under the Sentencing Reform Act, the Commission was directed to prepare Guidelines that “assure the meeting of the primary purposes of sentencing” (retribution, deterrence, incapacitation, and rehabilitation)—and, in particular, “provide certainty and fairness in meeting the purposes of sentencing.” 28 U.S.C. § 991(b)(1)(A)-(B). One of the original seven Commissioners, Michael K. Block, Ph.D., was a professor of economics and management at the University of Arizona who had “published widely in the field of law and economics, including on the subject of criminal justice[.]”<sup>59</sup> In the course of working on the original Guidelines, Dr. Block distributed a memo entitled “Optimal Sentence Structure” which advocated that because “what offenders place greater weight on the immediate loss of liberty and correspondingly diminishing weight on subsequent loss of liberty,” that “optimal sentence lengths for deterrence purposes will be moderate.”<sup>60</sup> Likewise, Judge John Gleeson (ret.), a former federal prosecutor and Commission member, wrote shortly before his retirement from the bench that:

As a nation, we need to deal with – and not just talk about – our over-incarceration problem. We need to make smart, bold choices about two things: (1) the lengths of the prison terms we impose on those who need to be imprisoned; and (2) the categories of defendants we routinely incarcerate who don’t need to be imprisoned in the first place.<sup>61</sup>

Therefore, amendments that ratchet up periods of incarceration should only be considered when there is no other way to remedy the wrong addressed. This is not the case here. The proposed “culpability” amendment, standing alone, does not address any of the 18 U.S.C. § 3553(a)(2) factors that are not or cannot be addressed elsewhere in either the federal criminal code, the Sentencing Guidelines, or somewhere else more appropriate in the justice system.

These non-economic harms, when not attached to the defendant’s intentionality about causing non-economic harms, are ill-suited to be adjudicated through the Guidelines. In many jurisdictions, non-economic harms such as psychological harm, emotional trauma, harm to reputation or credit rating, standing alone and not connected to physical harm, do not have a common law tortious cause of action.<sup>62</sup> And for those that are cognizable in tort, it is in a civil courtroom, guided by judge and/or jury—after the availability of discovery by the defendant such as depositions, expert evaluations of harm, *etc.*, with specific standards of intent, and standards of liability at play, subject to local rules of evidence, all largely a matter of state rather than federal law—where such assessments of harm should be adjudicated. Hence, this amendment would be asking a federal prosecutor and a federal judge to stand in for an entire state civil justice system designed to determine monetary damages in the entirely different context of determining a defendant’s sentence in a criminal proceeding.

Some stakeholders may complain that separately pursuing a tort is an overly burdensome way for victims to seek relief for non-economic harms, or that it is unlikely to result in remuneration because many defendants have squandered any monetary gain, or because civil attorneys take a

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<sup>59</sup> Brent E. Newton and Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1895-1987*, 45 Hof. L. Rev. 1167, 1189 (2017).

<sup>60</sup> *Id.* at 1234.

<sup>61</sup> *United States v. Dokmeci*, 2016 WL 915185, at \*1 (E.D.N.Y. Mar. 9, 2016).

<sup>62</sup> Harm to credit rating can be considered under §2B1.1(b)(2)(A) “substantial financial hardship to one or more victims,” and need not risk a double-count here.

not insignificant percentage of any recovery. But that would be debasing due process in favor of convenience. And more importantly, the Fourteenth Amendment prohibits substituting the unavailability of funds, or a defendant's inability to pay monetary compensation, with increased jail-time. See *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983).

Moreover, despite the stated goal of adding this SOC for the purpose of “measur[ing] individual culpability by considering harm,” no such coupling between harm and culpability is taking place. Supreme Court precedent requires us to consider criminal culpability by assessing the question of *mens rea*—level of intent, from negligent to reckless (both unintentional and usually not criminal) to purposeful or knowing (intentional conduct that may be criminal). *Ruan v. United States*, 597 U.S. 450, 457 (2022) (“our criminal law seeks to punish the ‘vicious will.’ ... [w]ith few exceptions, ‘wrongdoing must be conscious to be criminal.’”) <sup>63</sup> Simply adding a list of *results* (*i.e.*, the enumerated non-economic harms) for which to add prison time, absent a connection to an assessment of intent, renders it entirely unrelated to punishing the more culpable.

Existing Guidelines provisions touch on the issue of harm outside of a direct-dollar impact by zeroing in on the status or nature of the victim such that this proposed amendment is largely superfluous and only exacerbates the overcomplication of §2B1.1. Each of these already existing provisions addresses the relationship between the acts of the defendant and the impact on the victim in a way that more clearly addresses the notion of culpability. Specifically:

- Section 3A1.1(b) already adds two levels when the Defendant *knew or should have known* that his victim was “vulnerable.” And if the defendant impacted a “large number” of vulnerable victims, there is an additional two-level increase.

The Application Notes to §3A1.1(b) define “vulnerable victims” as someone who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. And it further makes the explicit link between the culpability of the defendant as a necessary trigger to the enhancement by distinguishing between a situation where points are added when “the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim[; but not] ... in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.” *Id.* It is precisely this coincidental situation where the new non-economic harms guideline fails to focus on actual defendant intent and culpability.

- Section 2B1.1(16)(A), which adds two levels for a fraud offense that involves “the conscious or reckless risk of death or serious bodily injury[.]” Again, unlike the currently proposed amendment which adds up to a possible four levels for *any* sort of injury, this already-existing amendment does the culpability work that the newly proposed §2B1.1(3) does not.

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<sup>63</sup> Relying on *Morrisette v. United States*, 342 U.S. 246, 251 (1952) and *Elonis v. United States*, 575 U.S. 723, 734 (2015).

Finally, there are other mechanisms within federal criminal law that more directly and aptly address the impact of a victim’s non-economic injury than simply increasing a defendant’s period of incarceration. Increased incarceration time is a crude and likely ineffectual remedy to address the ills of someone who has been, for example, physically or emotionally injured as a result of a crime. This proposal needlessly lengthens the prison time of the defendant without doing anything to compensate the harms it purports to address.

Congress already has provided some more direct means of compensating non-economic injuries. For instance, the Mandatory Victims Restitution Act (MVRA) provides for the payment of costs related not just to physical harm, but also for services related to psychiatric or psychological care. 18 USC § 3663A(b)(2)(A). The defendant must pay the full fair cost, regardless of the victim’s actual out-of-pocket expenses or third-party payments. And to the extent that the defendant cannot pay, the Victims of Crime Act establishes federal funding for state compensation programs that include mental health counseling (though only if physical injury also has occurred). 34 USC § 20102. Further, victims of federal crimes must be informed of “public and private programs that are available to provide counseling [and] treatment.” See 34 U.S.C. § 20141(c).

### **Comment on Proposed Amendment 3 Part (B): Mitigation of Culpability Amendments**

To address stakeholder concern that §2B1.1 does not adequately account for mitigating factors for individuals with limited involvement in the offense, the Commission proposes two additional Specific Offense Characteristics, arguably to be read in tandem with but not to replace the Mitigating Role provisions of § 3B1.2:

- **§2B1.1(b)(22)** -- “If the defendant (A) committed the offense at the direction of his or her employer for fear of negative employment consequences; (B) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (C) was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition, decrease by [2] levels.”<sup>64</sup>
- **§2B1.1(b)(23)** – “(Apply the greatest) If, prior to the defendant’s knowledge of the criminal investigation or prosecution for the offense, the defendant—  
(A) voluntarily ceased the criminal activity, [returned the money or property to the victim] [made a good faith effort to the maximum extent possible to return the money or property to the victim], and reported the offense to appropriate governmental authorities, decrease by [2][4][6] levels;  
(B) voluntarily ceased the criminal activity and [returned the money or property to the victim] [made a good faith effort to the maximum extent possible to return the money or property to the victim], decrease by [2][4] levels; or  
(C) voluntarily ceased the criminal activity, decrease by [2] levels.”<sup>65</sup>

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<sup>64</sup> There is no corresponding Application Note.

<sup>65</sup> There is no corresponding Application Note.

Unlike some of the other amendments proposed this cycle, SOC 22 and 23 actually do tie to questions of culpability of the defendant. NACDL supports this linkage and, more importantly supports that there is a forum *within the guidelines calculation itself* to address that different kinds of perpetrators be treated differently at sentencing -- rather than leaving it to the variance phase to address these categories of actors and/or actions. However, questions remain surrounding the circumstances under which each of them may or may not be applied.

Regarding **§2B1.1(b)(22)(A) and (B)**, offering the possibility of mitigation for coercive influences on a defendant's conduct, it is not made clear in these amendments whether these mitigating factors are available only for someone who chooses to plead guilty. Under those circumstances, it is likely that there would need to be "buy-in" from the prosecutor, in order to make sure sufficient language appears in the Statement of Facts to convince the court to consider them. This gives the government the power to limit the impact of what can amount to an imperfect coercion defense, which is unfair to defendants and could limit the intended impact of the proposal.

Alternatively, should the defendant go to trial and present either a completed or an imperfect coercion defense but nonetheless be found guilty, then the three levels lost for not pleading guilty (acceptance of responsibility and doing so in a timely manner) will swallow up any two-level reduction that might be gained from this SOC. Moreover, if the jury rejects this defense at trial, the sentencing judge may be hesitant to award this mitigation, lest it be seen as a questioning of the jury's verdict. Indeed, in the case of either a plea or trial, it also seems unlikely that the probation officer handling the presentence investigator report will have sufficient information to include that in their report.

The chances of this being a useful SOC may be reflected in its analog in the drugs section of the Guidelines, section 2D1.1(b)(17)(A), which gives an additional two level reduction for those who have qualified for a four level reduction for being a minimal participant, because "the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense[.]" In July 2025, the Probation Officers Advisory Group "encourage[d] the Commission to consider eliminating" 2D1.1(b)(17)(A), citing data reflecting that the SOC never was applied in 2023.<sup>66</sup> Hence while facially presenting itself as a "fairness" counterweight to the proposed non-economic harms-enhancing SOC amendment, it may not in fact be one in practice. Accordingly, rather than eliminating 2D1.1(b)(17)(A), to give the newly proposed §2B1.1(b)(22) the best chance of usefulness, the Commission should endeavor to find out *why* 2D1.1(b)(17)(A) isn't being applied, and build in appropriate mechanisms to fix both of these sections, either in the sections themselves or in the respective Advisory Notes.

With respect to the proposed **§2B1.1(b)(22)(C)**, regarding the defendant who is "unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition," NACDL applauds the idea of addressing this possibility. However, it questions whether it creates the moral hazard of allowing the prosecutor to bring charges against an individual of this condition without causing the government to do the "up-front" work to determine whether such a person should be charged in the first place. Leaving to a sentencing

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<sup>66</sup> Letter of Probation Officers Advisory Group to Hon. Carlton W. Reeves (July 18, 2025), at 4.

judge, after conviction, the burden of sorting out what “unusually vulnerable” means, and whether such vulnerability is better responded to at this point by a non-incarceration sentence may mean that the damage already has been done to someone who perhaps should have been diverted from the criminal justice adjudication process altogether.<sup>67</sup>

Finally, regarding §2B1.1(b)(22) more generally, cabining the possible reduction to two levels seems potentially insufficient. There could be a range of circumstances that merit consideration. For instance, the “unusually vulnerable” person could be so close to being unable to form the necessary *mens rea* that, absent a decision not to charge them in the first place (per above), there should be a range -- perhaps of up to four levels -- available to differentiate them.

Regarding the new SOC §2B1.1(b)(23)(A), under the Principles of Federal Prosecution, even though, “[g]enerally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals[,]” corporate entities that meet the criteria of ceasing their criminal conduct, self-report before they are aware of a criminal investigation, and at least try to return the money they have stolen, are frequently offered a non-prosecution agreement or there is a declination of charges. See Justice Manual § 9-28.300 (Factors to Be Considered). The Justice Manual § 9-28.900 sets forth the following:

“[A] ‘voluntary self-disclosure’ occurs only when a company discloses misconduct to the Department promptly and voluntarily (*i.e.*, where it has no preexisting obligation to disclose, ... and when it does so prior to an imminent threat of disclosure or government investigation.”

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“Absent aggravating factors, the Department will not seek a guilty plea where a corporation is determined to have met the requirements of the applicable voluntary self-disclosure policy, fully cooperated, and timely and appropriately remediated the criminal conduct.”<sup>68</sup>

So while it is laudable to give sentencing credit for an individual who takes similar steps, it seems that such a person should get the same pre-indictment treatment an entity receives without having to face the perils of trial. In other words, NACDL questions how often and under what circumstances there will be an individual who takes these steps but nonetheless is prosecuted in

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<sup>67</sup> Such a concern is not and should not be outside the scope of the Commission’s mandate. Commentators have made clear that, from the start, the Guidelines “would inform general prosecutorial policies and would be used by line prosecutors in federal cases with respect to charging and plea bargaining decisions.” Newton and Sidhu, *supra*, *The History of the Original United States Sentencing Commission, 1895-1987*, 45 Hof. L. Rev. at 1213. In other words, what could happen at the back-end (sentencing implications) would affect how prosecutors approached cases at the front-end.

<sup>68</sup> See also “Galeotti Memo ... Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime” (May 12, 2025) (“Not all corporate misconduct warrants federal criminal prosecution. ... Prosecutors in the Criminal Division must consider additional factors when determining whether to charge corporations, including whether the company reported the conduct to the Department, its willingness to cooperate with the government, and its actions to remediate the misconduct.”); “Criminal Division Corporate Enforcement and Voluntary Self Disclosure Policy” (The Criminal Division will decline to prosecute a company for criminal conduct when the following factors are met: 1. The company voluntarily self-disclosed the misconduct to the Criminal Division; 2. The company fully cooperated with the Criminal Division’s investigation; 3. The company timely and appropriately remediated the misconduct; and 4. There are no aggravating circumstances[.]”)

the first instance and, indeed, whether offering this sentencing reduction “liberates” a prosecutor to engage in the moral hazard of indicting them. There just may be too much of a perverse incentive to charge someone in this situation so that when they testify for the government against someone further up the chain, it does not give the jury the impression that they got away scot-free.

### **Comment on Proposed Amendment 4: Post-Offense Rehabilitation Adjustment**

NACDL lauds the Commission’s efforts to more effectively account for post-offense rehabilitation. As the Commission has noted, there are currently only two downward adjustments relating to post-offense conduct: Acceptance of Responsibility under §3E1.1 and Substantial Assistance to Authorities under §5K1.1. This leaves a wide swath of behavior unaddressed by the Guidelines. We commend the Commission’s desire to fill this void. And given the undeniable weight accorded the Guidelines in fashioning a sentence under 18 U.S.C. § 3553(a), it is both appropriate and necessary that the Guidelines themselves address any rehabilitative efforts. Like the reductions for acceptance of responsibility and substantial assistance, this reduction should be considered independently of any reduction assessed under those provisions. This increases the likelihood that a sentence that is truly sufficient, but not greater than necessary, is imposed.

For the reasons stated below, we believe that, as between the two options presented, Option 1 would more effectively advance the goals of sentencing—promoting deterrence, public safety, and rehabilitation—than Option 2. However, as detailed below, we recommend a hybrid of the two options presented to avoid unwarranted sentencing disparities, another important sentencing goal. In our recommendations, we will incorporate responses to the questions posed in the Commission’s “Issues for Comment.”

#### **1. A Reduction for Post-Offense Rehabilitation Fills a Void in the Current Structure of the Guidelines.**

The proposed reduction for post-offense rehabilitation would fill a void in the structure of the Guidelines, which insufficiently accounts for the characteristics of a defendant on the day of sentencing. While the Guidelines reward and incentivize cooperation and guilty pleas, they fail to consider any other post-offense efforts. This limitation has been problematic. Not everyone has information to provide authorities, resulting in irrational results where more culpable individuals receive shorter sentences than those with little or no information to provide.<sup>69</sup> For others, cooperating with authorities involves significant risk to themselves and/or family members, rendering it an unrealistic option. Moreover, incentivized cooperation has often come at the expense of reliability.<sup>70</sup>

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<sup>69</sup> *United States v. Milken*, No. SS 89 CR 41 (KMW), 1992 WL 196797 at \*2–3 (S.D.N.Y. Aug. 5, 1992) (conceding the “inequity to individual defendants” that “it is the worst criminals who know enough to be useful in implicating others, and thus the worst offenders benefit the most from this system, while the most innocent benefit the least”).

<sup>70</sup> Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (2d ed. 2022) (detailing how informants’ desires to obtain beneficial treatment by the government have resulted in unreliable convictions); Jeffrey S. Neuschatz, et al, *The Truth About Snitches: An Archival Analysis of Informant Testimony*. Psychiatry, Psychology, and Law (Nov. 2020) (stating that unreliable informants’ testimony is “is one of the leading causes of the growing number of wrongful convictions” and that, “[i]n capital cases, false testimony from

In addition, individuals who have undertaken rehabilitative efforts, but also have legitimate challenges to some or all the charges against them may decline to go to trial based on the severity of the penalty for doing so. This amendment could ameliorate that penalty.

The proposed reduction for post-offense rehabilitation would be a welcome and necessary addition to these two post-offense reductions, with an even greater salutary effect: rewarding and encouraging positive behavioral changes would reduce the likelihood of reoffending, increase public safety, and foster continued rehabilitation. As the Federal and Community Defenders point out in their comments, since the first Guidelines Manual was published in 1987, we have a greater understanding of the factors that contribute to an individual’s recidivism risk.<sup>71</sup> We now know that an individual’s likelihood of reoffending is based on both static and dynamic factors, yet the Guidelines are skewed heavily in favor of static factors.<sup>72</sup> Further influencing recidivism risk are “protective factors,” such as substance use and mental health treatment, vocational and educational programming, and positive relationships.<sup>73</sup> Since the Guidelines are intended to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process,”<sup>74</sup> it is not just appropriate, but necessary, that the Guidelines conform to this current understanding.

It is not enough to merely address these efforts under the § 3553(a) given the undeniable weight the Guidelines still carry in fashioning an ultimate sentence. Not only does § 3553(a) require the sentencing court to consider the Guidelines’ range, but it also remains the starting point, an anchor with significant “gravitational pull” even post-*Booker*.<sup>75</sup> The parsimony principle that sentences must be “sufficient, but not greater than necessary” to achieve the purposes of punishment is not divorced from the Guidelines; rather, like the ultimate sentence, the Guidelines must comply with this principle as well.<sup>76</sup> Considering any post-offense rehabilitation in the calculation of the Guidelines range will allow for greater fine-tuning when the court turns to applying the § 3553(a) factors.

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informants is *the* leading cause of wrongful conviction). Of course, false testimony takes many forms from fabrications to exaggerations and embellishments, all of which render the testimony unreliable.

<sup>71</sup> Federal Public and Community Defenders Comment on Post-Offense Rehabilitation Adjustment (Feb. 10, 2026) at 3-5.

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

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

<sup>74</sup> 28 U.S.C. § 991(b)(1)(C).

<sup>75</sup> 18 U.S.C. § 3553(a)(4)(a)(1) (mandating consideration of sentencing guidelines range); Paul J. Hofer, Beyond the “Heartland”: Sentencing Under the Advisory Federal Guidelines, 49 Duq. L. Rev. 675, 689 (2011) (“describing the ‘gravitational pull’ of the guidelines and stating that “the guidelines’ recommendation serves as a psychological ‘anchor,’ which appears to simplify or obviate the daunting task of evaluating . . . considerations relevant to the statutory purposes). The Statement of Reasons form, required to be completed for every sentencing, illustrates the primacy of the Guidelines. <https://www.uscourts.gov/file/18475/download>.

<sup>76</sup> 28 U.S.C. § 991(b)(1)(A).

## **2. A Reduction for Post-Offense Rehabilitation Should Apply Cumulatively To Any Reductions for Acceptance of Responsibility or Substantial Assistance Because It Addresses Different Conduct.**

The proposed reduction for post-offense rehabilitation under § 3E1.2 should apply cumulatively to any reduction under § 3E1.1 for Acceptance of Responsibility or under § 5K1.1 for substantial assistance. These two sections address different conduct than the proposed reduction.

Section § 3E1.1(a) provides a 2-level reduction for those accept responsibility for the offense by admitting their conduct meets the elements of the offense. An additional level is permitted (if over offense level 16) if the government is spared the time and expense of preparing for trial, though the government, not the court, holds the power to permit whether the third level is assessed.<sup>77</sup> Section 5K1.1 authorizes the government to move for a below-guidelines sentence for those who have substantially assisted the government “in the investigation or prosecution of another person who committed an offense.” Application Note 2 to this guideline states that this reduction “shall be considered independently of any reduction for acceptance of responsibility” reasoning that it is directed to the investigation and prosecution of [another’s] criminal activities” and the acceptance of responsibility reduction “is directed to the defendant’s affirmative recognition of responsibility for his own conduct.” Neither of these reductions require the defendant to engage in any post-offense rehabilitation. Since they address different conduct, like §§3E1.1 and 5K1.1, they should be considered independently of each other.

The Guidelines also state that, absent contrary instructions, “enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively even though they “may be triggered by the same conduct.”<sup>78</sup> There is no reason why this understanding should not also apply to the proposed reduction under §3E1.2. Moreover, disallowing cumulative reductions for post-offense rehabilitation would seriously undermine the salutary goals of the reduction noted above.

## **3. To Avoid Unwarranted Disparities, the Commission Should Adopt a Combination of the Two Proposed Options.**

If forced to choose between the two proposed options, NACDL believes that Option 1 is preferable. It provides several tangible ways to both reward and encourage rehabilitation, reduce recidivism, and promote safer communities. The examples are clear and helpful to judges, defendants, practitioners, and family members or others who may be part of a defendant’s support network. However, the reduction could be improved by modifying the proposed language, and combining the best parts of each proposal. These modifications would avoid unwarranted sentencing disparities, a core Commission goal.

### **The reduction should not contain a voluntariness requirement.**

The reduction should not be limited to individuals who voluntarily undertake rehabilitative efforts. (This language appears in brackets in both options.) This would result in sentencing

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<sup>77</sup> USSG. § 3E1.1(b).

<sup>78</sup> USSG. § 1B1.1, comment. (n4(B)).

disparities, depending on the vagaries of district practices. At detention hearings, courts often condition release on enrollment in treatment programs. Precluding these individuals from receiving sentencing reductions because their participation was court-ordered rather than voluntary would disincentivize participation in these treatment programs. It would also add a complicating factor for courts to consider when setting release conditions. A magistrate judge likely would not want to decide between getting an individual treatment or allowing them the opportunity to be eligible for a sentencing reduction. This difficult choice can easily be avoided by removing any voluntariness component.

In addition, requiring voluntary participation in rehabilitative programs would give preferential treatment to individuals who can afford treatment and penalize low-income defendants who often require a court-order to obtain treatment. The Commission must ensure that the Guidelines do not give preferential treatment based on socioeconomic status.<sup>79</sup> By dispensing with any voluntariness requirement, the Commission would adhere to its mandate to be “entirely neutral” on socioeconomic status.<sup>80</sup> Furthermore, the focus on whether rehabilitative efforts are voluntarily undertaken or are court-ordered is misplaced. The focus should be on the rehabilitation efforts themselves, not how they are financed. Finally, an individual may engage in some rehabilitative efforts voluntarily and others, by order of the court. There is no need to inject uncertainty for either defendants, defense counsel, or the courts as to how those efforts would be assessed.

**The reduction should not be limited to post-offense rehabilitative efforts that exceed “typical” post-offense efforts.**

The Commission should not adopt the requirement in Option 2 that any rehabilitative efforts must “go beyond the typical actions undertaken by defendants prior to sentencing.” This requirement is vague and confusing. Is typicality to be judged based on the offense, custodial status, defendants in the district (considering the district’s resources), defendants generally, offense type, or a combination of some of these factors? As defense attorneys, we would not begin to know how to advise clients about this hypothetical benchmark. It would likewise be challenging for judges to discern how to apply this language. This proposal runs afoul of the requirement that the Commission establish sentencing policies that provide “certainty and fairness” and avoid “unwarranted sentencing disparities.”<sup>81</sup> Like the unnecessary “voluntariness” language, and like the problem of denying cumulative reductions to those who engage in post-offense rehabilitation, this language will undermine beneficial consequences of rewarding positive behavioral changes.

Another concern with limiting the reduction to those whose actions “go beyond the typical actions undertaken by a defendant prior to sentencing” is that it seems to suggest that perfect compliance is necessary to constitute successful rehabilitation. It is “typical” for individuals in recovery to have lapses, but this does not mean that they are not making progress, even if imperfectly. The focus should be on positive behavioral change. The Commission should avoid a

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<sup>79</sup> 28 U.S.C. § 994(d).

<sup>80</sup> *Id.*

<sup>81</sup> 28 U.S.C. § 994(d).

narrow interpretation that is inconsistent with the nonlinear path that successful rehabilitation often takes.

**The reduction should include a flat 4-level adjustment rather than tiered adjustments tied to a case’s investigative stages.**

The flat reduction for post-offense rehabilitation is preferable to the tiered reduction tied to the investigative stages of a case, as proposed in Option 1. The 4-level reduction proposed in Option 2 is the most sensible, given the numerical value assigned to other reductions in the Guidelines. A reduction for post-offense rehabilitation should be more than the 3-level reduction one receives for sparing the government from going to trial. Other than timely admitting the elements of an offense (and not engaging in obstructive behavior), there is nothing else one must do to qualify for a 3-level reduction under §3E1.1 It would be anomalous to impose a lesser reduction for engaging in any of the more intensive rehabilitative efforts under the proposed adjustment. Furthermore, Chapter Three of the Guidelines is replete with instances of 4-level increases in offense level.<sup>82</sup> Providing a 4-level decrease, particularly one with such positive downstream effects, contributes to the fairness of the Guidelines.

Making the reduction tiered based on which investigative stage an individual undertook rehabilitative efforts is problematic for a host of reasons. First, the timing of investigative stages of a case varies widely from district to district. Resources and priorities shift as well. And of course, the court, in applying the § 3553(a) factors can consider the timing of rehabilitative efforts, but to make every case a timing-related inquiry into rehabilitative efforts would create unwarranted sentencing disparities.

Another troubling result of a timing-related reduction is the potential for creating racial, ethnic, and socioeconomic disparities. Individuals sentenced in cases that take longer to investigate and thus present more opportunities for individuals to participate in rehabilitative actions (fraud, theft, embezzlement, antitrust, tax and technology-related cases) are more likely to be white than the average federal defendant.<sup>83</sup> By contrast, offenses such as drug, firearms, and immigration offenses, are more likely to involve immediate arrest at a traffic stop or checkpoint, with no series of investigatory stages. The majority of individuals in these cases are people of color.<sup>84</sup> Lower-income individuals are also less likely to be notified pre-arrest of opportunities to undertake rehabilitative efforts, and take advantage of a timing-based reduction. These unwarranted racial, ethnic, and socioeconomic disparities can be avoided by assessing a 4-level reduction for those who have undertaken rehabilitative steps, regardless of where in the investigatory stage of a case they did so.

**The reduction should contain additional language to ensure that all individuals, including those who are incarcerated, live in remote areas, or have limited resources are not excluded from the reduction.**

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<sup>82</sup> See, e.g., USSG §§ 3A1.1(b)(2); 3A1.2(b); 3A1.4; 3A1.5(b); 3B1.1(a); 3B1.5(2)(B).

<sup>83</sup> USSC, 2024 Sourcebook, [tbl 5](#).

<sup>84</sup> *Id.*

NACDL shares the concern, articulated by the Federal and Community Defenders, that circumstances beyond an individual’s control should not be a barrier to consideration under this new adjustment. Defendants who are incarcerated, live in remote areas, or otherwise lack access to resources, can still take meaningful rehabilitative efforts and benefit from the new Guideline. We endorse the additional language they have added in their proposed §3E1.2. We also endorse their recommendation that the non-exhaustive list of examples that the Commission included in Proposal 1 be moved to the Application Notes for consistency with the formatting of other Chapter Three Adjustments.

#### **4. Conclusion**

NACDL strongly supports the adoption of § 3E1.2 to reward and incentivize post-offense rehabilitation. This amendment is a welcome addition to the Guidelines and, with the modifications identified above to guard against unintended consequences, has great potential to make a positive impact on individuals and their communities.

#### **Comment on Proposed Amendment 7: Sophisticated Means**

The Commission proposes to amend (newly numbered) §2B1.1(b)(11) to build a definition of “sophisticated means” right into the SOC itself:

If ... (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

For purposes of this provision: “Sophisticated means” means committing or concealing an offense with a greater level of complexity than typical for an offense of that nature. Such complexity may be achieved through various methods, including by using advanced or emerging technologies [in ways not routinely employed by everyday users][in a more specialized, elaborate, or unusual way than an ordinary user would]. Sophisticated means are often used to increase the scale of the offense or to make especially difficult the detection of the offense [or the detection of the defendant’s participation in the offense].

The Commission proposes a corresponding change to Application Note 9(A):

Sophisticated Means Enhancement under Subsection (b)(11)(C).—For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For 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.

NACDL posits that codifying a definition does not add clarity or otherwise solve the problems and concerns about culpability, inconsistency in application, or about how any given defendant’s

actions vary from the norm. “[C]ommitting or concealing an offense with a greater level of complexity than typical for an offense of that nature” suggests a baseline method about how any of a number of economic crimes are “typically” committed. If that is not apparent in the predicate offense, then measuring a difference will be standardless and therefore subjective, posing a high risk of disparities across cases—contrary to the requirements of 18 USC § 3553(a)(6).

For instance, consider the example in the Application Note. In a telemarketing scheme, the notion of “locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction” is not significantly different from the behavior identified in the already existing subsections (A) and (B) of § 2B1.1(b)(11), each of which already has an element of committing a scheme across multiple jurisdictions.<sup>85</sup> Further, the proposed guideline would put the burden on the defendant to negate the “greater level of complexity” element by showing that this multi-jurisdiction approach is precisely how a significant number of telemarketing schemes already operate. And any data set that an individual defendant might seek to rely on in support of his argument against “atypical complexity” by showing what “typical” is, likely is going to be inadequate if not largely anecdotal.

Exacerbating this failure is the proposal’s explicitly calling out use, and not ordinary uses, of “emerging technology” as a hallmark of sophistication. Judges, while experienced and expert in the law, are not necessarily trained or suited to determining what should be considered “emerging technology” under this guideline. Additionally, the average age of a federal district court judge is significantly greater than the average age of the defendants they see in criminal cases,<sup>86</sup> leading to possible generational misalignment on determinations of what types of technologies may be considered novel or emerging. Moreover, there can be little argument that the speed at which technology develops, and the corresponding speed at which there are new applications of that tech, renders the notion of atypical uses of emerging tech as a benchmark specious.

The modifier in the definition of “sophisticated means” belies that it is designed to identify a perpetrator who is more culpable than another. Specifically, use of the phrases “in ways not routinely employed by everyday users” and “in a more specialized, elaborate, or unusual way than an ordinary user would” to modify how an “advanced or emerging technology” is used to commit the offense may reflect on a perpetrator’s creativity, but not his culpability. “Culpability” in the eyes of the court, when considered in a criminal context, goes to the question of *mens rea* (level of intent). An assessment of the sophistication with which a person commits an offense does not, presumptively, move someone’s conduct from “less culpable” to “more culpable” because, as shown by the definitional terms used here, degree of difficulty does not directly correspond with a determination of culpability.

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<sup>85</sup> If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; . . . .”

<sup>86</sup> The average age of an Article III judge in 2024, per the Federal Judicial Center, was 67.68 years old. <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges>. The median age of a federal criminal defendant in 2021 at the time of sentencing to prison is 35 years old, per the Bureau of Justice Statistics. <https://bjs.ojp.gov/press-release/federal-justice-statistics-2021>.

Giving an operational definition of “sophisticated means” only further exemplifies how a determination of whether that threshold is met is one that is “intensely factual” in nature which, combined with the potentially significant if not disproportionate impact it could have on a defendant’s sentence, clearly places such an inquiry in the province of the jury to find, and at a level of proof beyond a reasonable doubt. *See Erlinger v. United States*, 602 U.S. 821, 828 and 841 (2024) (suggesting that when fact-laden “qualitative assessment about the ‘character and relationship’ of the offenses” is required, that is the sort of fact-finding that the Sixth Amendment relegates to juries, not judges.)

Hence, assuming this is an important distinction to make, Congress should make “sophistication” a separate, “aggravated” version of an offense, which the government can choose to charge and prove, or not. One reason Congress might be reluctant to, or previously has failed to do this, is that it would require the drafters to identify the locus of “typical” complexity for each of the crimes against which an individual’s allegedly “sophisticated” means might be measured. The Guidelines, as well as the role of the Commission, are not supposed to be a vehicle to bypass what properly belongs as the legislative process. *E.g., Mistretta v. United States*, 488 U.S. 361, 396 (1989) (“[T]he Guidelines ... do not ... vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.”); *United States v. Ruiz-Villanueva*, 680 F.Supp. 1411, 1421 (S.D. Cal. 1988) (“[T]he [Sentencing Reform] Act did *not* direct the Commission to establish new crimes or penalties.” (emph. added.))

The sophisticated means enhancement, despite its vague definition and subjective application, often causes a potentially severe and disproportionate increase in sentence. For example, a first time offender convicted of committing a larceny offense with a statutory maximum sentence of fewer than twenty years and a loss amount of less than \$6500 would get an offense score of 6, resulting in a recommended guidelines score of 0-6 months, which is Zone A, allowing for a probationary sentence, community confinement, or home detention. But with the “sophisticated means” SOC, the defendant is driven up to a score of 12, *i.e.*, a recommended guidelines score of 10-16 months, which is Zone C, diminishing or defeating the possibility of a non-incarceration alternative. This outcome contradicts the intent of the Sentencing Reform Act of 1984, which instructs that “the Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. 28 U.S.C. § 994(j).

Finally, whether the sophisticated means enhancement is amended or not, the Commission should clarify explicitly that it should apply only to exceptional cases.

## **Conclusion**

NACDL once again thanks the Commission for this opportunity to present our comments on the proposed amendments in this cycle.

Respectfully Submitted,

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