
Frank O. Bowman III
University of Missouri School of Law, bowmanf@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs
Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation
Model Sentencing Guidelines §2B1

(a) Base Offense Level: The base offense level for all offenses covered by this guideline is 1.

(b) Specific Offense Characteristics

Loss: If the loss exceeded $10,000, increase the offense level as follows:

(A) More than $10,000 add 1
(B) More than $50,000 add 2
(C) More than $200,000 add 3
(D) More than $1 million add 4
(E) More than $100 million add 6

Other financial harms: If the offense involved one or more of the following indicators of special financial harmfulness, increase the offense level by one level:

(A) The offense substantially jeopardized the safety and soundness of a financial institution;
(B) The offense substantially endangered the solvency or financial security of an organization that, at any time during the offense, (a) was a publicly traded company, or (b) had 1,000 or more employees.

Victims: If the offense involved twenty-five or more victims, increase the offense level by one level.

Particularly blameworthy offenses or conduct: If the offense involved one or more of the following circumstances, increase the offense level by one level:

(A) The offense involved receiving stolen property, and the defendant was in the business of receiving and selling stolen property;
(B) The defendant was, at the time of the offense, an officer or director of a publicly traded company which was a victim of the offense;
(C) The offense of conviction was a criminal violation of securities law and, at the time of the offense, the defendant was a registered broker or dealer, or an investment adviser;
(D) The offense of conviction involved a violation of commodities law and, at the time of the offense, the defendant was an officer or director of a futures commission merchant or an introducing broker, a commodities trading advisor, or a commodity pool operator;
(E) The offense involved a violation of a prior specific judicial or administrative order, injunction, or decree;
(F) The defendant was convicted of an offense under 18 U.S.C. § 1030(a)(5)(A)(i);
(G) The defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure.

(c) Mandatory factors to be considered in setting sentence within applicable range

If the offense involved one or more of the following circumstances, the court [shall/should ordinarily] impose a sentence above the midpoint of the applicable sentencing range:

(1) Other financial harms: The offense substantially endangered the solvency or financial security of ten or more persons;
(2) Planning activity: The offense involved "sophisticated means."

(d) Advisory factors to be considered in setting sentence within applicable range

(1) Aggravating factors: In determining the sentence within the applicable sentencing range, the court should consider whether any of the following aggravating factors exist:

(A) The offense involved theft from a person;
(B) The offense involved multiple victims;
(C) The offense was substantially more serious than the offense described in subsection (b)(2); or
(D) The offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentalities, or foreign agents;
(E) The offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or government agency;
1. **Definitions.** For purposes of this guideline:

   "Financial institution" includes any institution described in 18 U.S.C. §§ 20, 656, 657, 1005, 1006, 1007, or §1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

   "Foreign instrumentality" and "foreign agent" have the meanings given those terms in 18 U.S.C. §§ 1839(1) and (2), respectively.

   "Mass marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the internet or other means to induce a large number of persons to purchase goods or services, participate in a contest or sweepstakes, or invest for financial profit.

   "Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the (15 U.S.C. § 78c).

   "Sophisticated means" means especially complex or especially intricate conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means. The use of mass marketing establishes the existence of sophisticated means.

   "Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms reach. Examples include pickpocketing and nonforcible purse-snatching, such as the theft of a purse from a shopping cart.

   "Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

   "Victim" means any person who sustained any part of the actual loss determined under subsection (b)(1), or any person that the defendant intended should sustain a loss.

   "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. **"Loss."**

A. Subject to the exclusions in subsection E below, loss is the greater of actual loss or intended loss.

i. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

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

iii. “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

iv. “Reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

B. Determination of loss for purposes of determining offense level—The finder of fact need not determine the amount of loss with precision. However, any increase in the defendant’s offense level based on loss amount pursuant to Section 2B1(b)(1) must be supported by an admission by the defendant or a finding beyond a reasonable doubt pursuant to the provisions of Model Sentencing Guidelines §1.3 that the loss was greater than the amount necessary to trigger a particular offense level increase. For example, in a jury trial, an increase of three offense levels pursuant to Section 2B1(b)(1)(C) could only be imposed based on a finding by the jury beyond a reasonable doubt that the loss was more than $200,000.

C. Estimate of loss for purposes of determining a sentence within range—In order to determine an appropriate sentence within the applicable guideline range, the sentencing court will ordinarily find it necessary to have a more precise estimate of loss than the finding that the amount of the loss is greater than the amount necessary to trigger a particular offense level increase. For example, in a jury trial, an increase of three offense levels pursuant to Section 2B1(b)(1)(C) could only be imposed based on a finding beyond a reasonable doubt that the loss was more than $200,000.

D. Gain—The finder of fact may use the gain that resulted from the offense as an alternative measure of loss, but only if it finds, pursuant to the provisions of Model Sentencing Guidelines §1.3 (if the finder of fact is a jury or a judge presiding in a bench trial) or §1.5 (if the finder of fact is a judge deciding facts relevant to determination of the sentence within the applicable guideline range), that there was a loss, but that the amount of that loss cannot reasonably be determined.

E. Exclusions from loss—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based upon an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

F. Credits against loss—In determining the amount of loss for purposes of adjusting the offense level pursuant to Section 2B1(b)(1), and for purposes of determining the defendant’s sentence within the applicable range, the amount of loss shall be reduced by the following:

(i) The money returned and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

G. [DRAFTER’S NOTE: THE FOREGOING SECTION INCLUDES MOST OF THE IMPORTANT RULES ON THE DEFINITION OF LOSS. SOME OF THE MORE PARTICULAR RULES RELATING TO SPECIAL CASES OR CIRCUMSTANCES WOULD DOUBTLESS ALSO BE INCLUDED IN A FINAL VERSION OF THIS GUIDELINE.]

3. Multiple-count indictments

Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. In determining the loss for purposes of applying the offense level increases of Section 2B1(b)(1), the cumulative loss caused or intended to be caused by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. However, an actual or intended loss may only be counted if it was intended by the defendant to result from, or was the reasonably foreseeable result of, a scheme or course of conduct alleged in at least one of the counts of conviction. In determining the loss for purposes of setting a defendant’s sentence within the applicable guideline range,
the court may consider, in addition, such other loss, if any, that should properly be considered by application of Model Sentencing Guidelines §1.6 (Determination of Aggravating Factors Relevant to Sentence Within Range).

4. Enhancements for 25 or more victims and endangering financial institutions and other large business entities, double counting

A case of sufficient magnitude to endanger the safety or soundness of a financial institution, or the solvency or financial security of a publicly traded company or a corporation with more than 1,000 employees, is highly likely to involve more than 25 victims. Accordingly, in order to avoid over-punishment for closely correlated factors, if one of the enhancements in Model Sentencing Guidelines §2B1(b)(2) is applied, do not apply the enhancement for more than 25 victims of Model Sentencing Guidelines §2B1(b)(3).

5. Enhancements for officer or director of publicly traded corporation and role in the offense, double counting

A defendant who receives an enhancement pursuant to Model Sentencing Guidelines §2B1(b)(4)(B) as “an officer or director of a publicly traded company which was a victim of the offense” is also highly likely to be “an organizer, leader, manager, or supervisor of a criminal activity that involved five or more participants” and thus to be eligible for an enhancement under Model Sentencing Guidelines §1.1(a)(1). In order to avoid over-punishment for closely correlated factors, only one of these enhancements may be applied to a single defendant.

6. Limitation on sophisticated means aggravator in high-loss cases

A defendant convicted of an economic offense that caused or was intended to cause a loss of more than $1 million is highly likely to employ sophisticated means to accomplish this end. Accordingly, in order to avoid over-punishment for closely correlated factors, the sentencing judge should not rely on Model Sentencing Guidelines §2B1(c)(2) to justify a sentence above the midpoint of the applicable range in any case involving an actual or intended loss in excess of $1 million.

7. [DRAFTER’S NOTE: THE FOREGOING SECTIONS INCLUDE MOST OF THE IMPORTANT RULES ON THE APPLICATION OF THIS ECONOMIC CRIME GUIDELINE. SOME OTHER MORE PARTICULAR RULES RELATING TO SPECIAL CASES OR CIRCUMSTANCES WOULD DOUBTLESS ALSO BE INCLUDED IN A FINAL VERSION OF THIS GUIDELINE.]

Drafter’s Commentary

General Observations

I have a particular personal interest in the configuration of the federal sentencing guidelines governing economic offenses. I spent some five years working (with many others) toward the reconfiguration of the old, formerly separate, theft and fraud guidelines into the current consolidated economic crime guideline, U.S.S.G. §2B1.1. Shortly after that process was completed in 2001, I became enmeshed in the debate over the sentencing components of the Sarbanes-Oxley Act of 2002 and the ensuing round of guidelines amendments. I have taken several general lessons from this long experience.

First, the large number and differing types of economic crimes embraced by federal statutes make drafting generally applicable sentencing rules for these offenses extraordinarily challenging.

Second, the Sentencing Commission has done a commendable job of identifying factors that ought to be considered in sentencing an economic offender. It is hard to deny that the amount of loss inflicted by an economic offense, the complexity of the scheme devised by the defendant, the number of affected victims, the size of the defendant’s personal gain, damage to financial institutions or large corporations, the position of defendants within victim entities, and most of the other factors now embodied in Section 2B1.1 are relevant to offense seriousness and thus to punishment.

Third, nonetheless, the current guidelines do a poor job of quantifying the sentencing effects of all these factors. The present economic crime guideline, U.S.S.G. §2B1.1, embodies two basic errors. The first is the assignment of independent weight to a large number of factors that in practice are closely correlated. For example, the current guidelines impose offense level increases for a large number of victims, a sophisticated scheme, derivation of a large personal gain, and high corporate position. All of these factors are closely correlated in the sense that a substantial corporate fraud is very likely to involve all of them. Yet each of these factors generates a separate offense level increase. More importantly, each of these factors is also closely correlated with a high loss amount, which imposes a separate and very substantial offense level increase of its own. In effect, what the Guidelines have done over time is to tease out many of the factors for which loss was already a rough proxy and give them independent weight in the offense level calculus. This first error has been compounded by a second, the failure to remember the logarithmic structure of the Guidelines’ sentencing table. Because the sentencing table was constructed according to constraints imposed by the so-called “25 percent rule,” the size of the sentence increase associated with each one-offense-level movement up the table increases steadily the further one travels up the vertical offense level axis. Thus, a one-offense-level increase at the bottom of the table changes a defendant’s sentencing range not at all, while the same one-offense-level increase at the top of the sentencing table increases the defendant’s minimum sentence by three years and his maximum sentence from thirty years to life imprisonment.

The result is that factors for which loss is already a proxy not only have been given independent weight but also can impose dramatic increases in prison time because they add offense levels on top of those already imposed for loss itself.
Fourth, the trend toward over-quantification of closely correlated factors was already pronounced at the time of the promulgation of the 2001 Economic Crime Package consolidating and amending the theft and fraud guidelines, but the political storm unleashed by the corporate scandals of 2001-2002 produced guideline amendments that dictate frankly absurd sentences for defendants in large fraud cases. For example, had Kenneth Lay lived to face sentencing in the Enron case, and if the current guidelines were applied to his case, his offense level could easily have been as high as 55—which translates to the mandatory life imprisonment called for by an offense level of 43, plus twelve additional levels. No other class of federal crime produces offense levels this high. An armed bank robber who discharged a firearm, caused permanent injury to a victim, kidnapped a hostage, and got away with $50 million would receive, at most, an offense level of 44.14 Even a terrorist or serial killer who committed fifty premeditated first-degree murders could score no higher than an offense level 48.15 Moreover, the average sentences actually imposed for robbery and murder in federal courts are still further removed from the sentences prescribed by the Guidelines for white-collar crime. In 2005, the average sentence actually imposed on robbers with no prior criminal record was only fifty-seven months, or less than five years.16 Even robbers who were also Criminal History Category VI career offenders only received an average of 168 months, or fourteen years.17 The average sentence for all murderers regardless of prior criminal record is less than nineteen years.18 And in 2005 the mean sentence for murderers who were also career offenders was twenty-five years,19 markedly less than the life imprisonment plus twelve levels suggested by the Guidelines for first-time fraud defendants in the circumstances of Mr. Lay.

Even assuming that any form of stealing, on no matter how grand a scale, merits life imprisonment, the fact that the guidelines contemplate life imprisonment—and then a bunch more—for such crimes reveals the degree to which emotion has overtaken logic in this area. After all, once you have sentenced a man to a federal term of life imprisonment, which really is imprisonment for one’s natural life, there is nothing left to do to him, save perhaps spitting on his grave. And the overkill of the current economic crime guidelines is not limited to the most culpable offenders in the most exceptional cases. The over-quantification of closely correlated factors is so extreme that a corporate officer, stockbroker, or commodities trader engaged in a stock fraud causing a loss as low as $2.5 million could be subject to a guidelines sentence of life imprisonment.20

I do not wish to be misunderstood here. Prior to the advent of the Federal Sentencing Guidelines, sentences for serious economic crimes were far too low. The Guidelines did a service by ensuring that far more white-collar and other economic offenders saw the inside of a prison cell. Moreover, in my own view (which is not necessarily shared by other members of the working group for this project), the general trend during the guidelines period toward increasing the severity of economic crime sentences has, until recently, been a desirable one. To mention only the most obvious points: (1) thievery and fraud are serious crimes, particularly when the financial harm is great, and deserve punishment on par with other serious offenses; and (2) economic offenders, particularly white-collar criminals, are usually seen as more apt than other defendants to be rational calculators of risk and reward, and thus the real prospect of serious prison time should act as a meaningful deterrent. That said, the combination of political pressure and some failures of foresight on the part of those involved in revising the economic crimes guidelines in recent years (including myself) has produced Guidelines sentencing ranges for moderate-to-serious white-collar offenders that simply cannot be rationally defended. It is one thing to say that those who steal tens or hundreds of thousands of dollars should do at least some prison time, or even that those who steal millions of dollars should serve long sentences. It is quite another to write rules that purport to make white-collar crime the most severely punished class of noncapital offenses known to federal law.21 Moreover, one should perhaps be cautious in absolutely requiring very long sentences for high-loss economic crime cases when, in many instances, the line between a criminal violation and high-risk, entrepreneurial, but legal, behavior can be fairly thin.

As a consequence, one objective of this reconceived economic crime guideline has been to maintain rough outcome neutrality in comparison to the current Guidelines for defendants involved in cases of low to moderate seriousness, while restoring some rationality to sentences at the higher end of the spectrum. This end is achieved largely by reemphasizing a central insight of the original fraud and theft guidelines, namely that loss is a good proxy for many, perhaps most, of the recognized indicators of offense seriousness in economic offenses. Hence, loss should be the primary determinant of sentencing range. Those factors for which loss serves as a rough proxy, many of which have been teased out and given independent significance over the years, are largely treated as factors to be considered by the court when setting a sentence within the applicable guidelines range. Where they are retained as factors relevant to setting offense level, either in this guideline or in the generally applicable factors enumerated in Chapter 3 of these model guidelines, the application notes limit their effect by precluding separate offense level enhancements for obviously correlated factors such as “more than 25 victims” and endangering the financial well-being of large organizations (Application Note 4), or for being an officer or director of a publicly traded company and role in the offense (Application Note 5).

The Loss Table
The loss table proposed here reduces the number of decision points for loss from the current sixteen down to six. Practically speaking, because the number of cases invol-
loss amount justifies a particular sentence within the
lish a more precise loss figure for purposes of arguing that
one of the cutoff points. Should either party wish to estab-
proving loss at trial. All that would be necessary to meet
minations of loss amount. The marked simplification of
been the difficulty of asking juries to make precise deter-
judges and lawyers charged with litigating fraud cases has
raised the specter of putting all
guidelines factors to juries, a commonly voiced concern of
these sentencing provi-
ments that suggested complex planning activity (number of victims and use of "sophisticated means") and put them in a group.

Second, in more recent times, efforts have been made to
account for harm to victims other than their simple dollars-
and-cents losses. We have recognized that one who steals a
large amount from one who can afford it may be commit-
ting a less serious offense than stealing a smaller amount
from a victim for whom the loss is financially debilitating.
Likewise, one who commits a crime that brings down a
business organization causes harm to all those who depend
on that business for employment, retirement benefits, sales
for their own companies, and the like. The first draft of this
guideline culled factors of this sort from the current guid-
lines and put them in another group.

Third, although physical injuries rarely occur in theft
and fraud crimes, they occasionally do happen and the
current guidelines have provisions for that eventuality.
The first draft of this guideline included a separate group
of specific offense characteristics dealing with such cases.

Fourth, over time, Congress and the Commission have
identified certain types of economic crime as being more
serious than garden-variety thefts and frauds. These were
grouped together in what was section (b)(5) of the original
draft.

The present draft of the economic crime guideline
embodies several important changes to the original struc-
ture.

First, feedback from the working group suggested that
references to physical harm or the risk thereof should be
removed from the economic crime guideline to be
addressed when necessary by the general provision in
Model Sentencing Guidelines §3.3.

Second, I continue to think that both complex planning
activity and assessment of the degree of financial harm
caused beyond dollar loss amount are important considera-
tions in setting a sentence. Moreover, I lean to the view that
these considerations ought to play a mandatory role in set-
ting a sentence. However, the factual determinations
involved in assessing these factors are difficult in a jury trial setting. For example, determining whether a particular
crime involved "sophisticated means" requires a compara-
tive judgment weighing the facts of the present crime
against other "typical" crimes. This is a task which is rela-
tively simple for a judge, but for which juries are poorly

Non-loss Factors That Affect Offense Level
In the proposed guideline, all non-loss factors that affect
offense level are lumped into three groups: other financial
harms, §2B1(b)(2); victims, §2B1(b)(3); and particularly
blameworthy offenses or conduct, §2B1(b)(4). A defendant
can receive only one upward sentence range bump per
group, even if the government were to charge and prove
more than one factor listed in a particular group. There-
fore, other than loss, there could only be three additional
upward adjustments of sentencing range in any given
case. Given the stringency of the requirements of subsection (b)(2), "Other Financial Harms," the maximum
number of available upward adjustments in all but the
most extraordinary case would be two.

The foregoing point has a corollary regarding simplicity
of proof at trial. Notice that most of the specific offense
characteristics (SOCs) in section (b)(4) are either established
simply because of the identity of the offense of conviction
or would be part and parcel of the proof of the government’s
case regardless of the existence of these sentencing provi-
sions. Because factors in (b)(4) arise so rarely, as a practical
matter, the government would be taxed in any given case
with proving only loss and one other sentence-enhancing
factor in addition to the statutory elements of the crime.

Mandatory Factors in Setting Sentence within Range
The first draft of this guideline identified four groups of
non-loss factors to be determined by the jury.

First, traditionally, the two primary means of determin-
ing offense seriousness in economic crime cases have
been the size of the crime in economic terms (the loss)
and indicators of special, complex planning activity.
Because, unlike many crimes against persons, economic
crimes are not distinguished by different culpable mental
states written into the elements of the offense, evidence of
complex planning activity has been deemed to show a
more blameworthy culpable mental state. In addition,
complex planning activity suggests a higher degree of
social dangerousness on the part of the offender. Accord-
ingly, the first draft of this guideline culled from the
current guidelines those factors that suggested complex
planning (number of victims and use of "sophisticated
means") and put them in a group.
equipped. Likewise, determining the effect of a crime on the solvency and financial prospects of a number of victims would be a lengthy, resource-intensive process before a jury but could be addressed more expeditiously before a judge. Accordingly, sophisticated means and individual victim solvency were removed from among the factors that would be decided by a jury and would determine sentencing range, and are instead to be facts a judge must find. If found, these facts would not change the defendant’s sentencing range. Rather, a finding of one or the other (or both) of these facts would create either a requirement or a form of presumption that the judge impose a sentence above the midpoint of the otherwise applicable range. Whether the finding would impose a requirement or presumption would depend on the form of words chosen from the bracketed language in Section 2B1i(c). If the word “shall” was selected, a sentence above the midpoint would be required, or to put it more precisely, the midpoint of the range would become, in effect, the new bottom of the applicable range. If the phrase “should ordinarily” was selected, the effect would be to create a presumption of a sentence above the midpoint of the range.

The members of the defense bar affiliated with the working group are unanimous in disapproving of the midpoint mechanism, in either its mandatory or presumptive form. The pros and cons of the idea are discussed in the Editor's Observations at the beginning of this Issue. If it were decided that the victim solvency and sophisticated means provisions of Section 2B1i(c) were undesirable, these factors could readily be added to the list in Section 2B1i(d)(1) of aggravating factors relevant to determination of sentence within range.

Advisory Factors in Setting Sentence within Range

The list of aggravating factors relevant to determination of sentence within range, Model Sentencing Guidelines §2B1i(d)(1), is composed of factors for which loss is already a rough proxy (such as the existence of multiple victims and endangerment of the financial security of fewer than ten victims), nonmonetary harms (such as the existence of a noneconomic criminal objective), and particular kinds of economic crime that Congress has in the past suggested should be sentenced more stringently (such as bankruptcy fraud and access device fraud). These factors were categorized as advisory factors to be considered in sentencing within range rather than as factors setting offense level either because, though relevant, they are already partially accounted for through loss amount or some generally applicable factor such as role in the offense, or because they lack sufficient independent significance to merit a full offense level adjustment.

Comparison of Outcomes under Current and Model Guidelines

Critical to assessing any proposed revision of the current federal sentencing guidelines is a comparison of the outcomes that would be produced under the revised system as compared to the system now in place. Several years ago, in the course of analyzing the evolution of the federal economic crimes guidelines, I prepared a set of hypothetical cases demonstrating the persistent (and in recent years dramatic) increases in the sentencing range prescribed by successive versions of the Guidelines from 1987 through the adoption of the 2003 post-Sarbanes-Oxley guidelines amendments. A slightly modified version of that comparison is contained in Figures A and B below. Figure C applies this model economic crimes guideline to the same hypothetical cases. Figures A, B, and C are largely self-explanatory; however, a few points should be highlighted.

First, as noted above, the model guideline proposed here is roughly outcome-neutral for cases of low-to-moderate seriousness. Among Defendants A through G, the old and new ranges for Defendants A, B, D, E, and F overlap either completely or predominantly. The sentencing range for Defendant C, the postal worker who steals credit cards from the mail, would be reduced from 30–37 months under the current guidelines to 12–24 months under the model, largely due to the omission in the model of the current large offense level increase for theft of undelivered mail. Defendant G, the computer expert who steals personal data online to obtain $450,000 in merchandise and phony car loans, would have a sentencing range of 87–108 months under the current guidelines and a range of 60–96 months under the model guidelines. This result is readily justifiable on the ground that the offense level of 29 under the current guidelines results from application of several enhancements so closely correlated as to verge on double counting of the same factor—an increase of 14 levels for loss greater than $400,000, a 2-level sophisticated means enhancement, a 2-level enhancement for use of a special skill, and a 2-level enhancement for more than ten victims. In the aggregate, these separate factors do little more than describe aspects of a moderately large complex fraud.

Second, again as noted above, the model guidelines prescribe sentences for the most serious white-collar offenders that are very high by historical standards but somewhat less severe than those called for under current guidelines. While some may note that adoption of this model guideline would effectively return guidelines sentences for high-loss white-collar fraud offenders to pre-Sarbanes-Oxley levels, any fair-minded observer would have to agree both that current high-end white-collar guidelines sentences are irrational and that the sentences called for by the model are quite tough. Moreover, the sentencing ranges in the model are consistent with the sentences actually being imposed in cases of this sort. For example, Defendant J is patterned on the lead defendants in the round of corporate fraud cases that began with the Enron bankruptcy. The model guideline prescribes a sentence of 20–25 years for such a defendant, a prescription consistent with the 25-year sentence imposed after trial on Bernie Ebbers, president and CEO of WorldCom, and the 15-year sentence imposed on John Rigas, chairman and CEO of Adelphia Communications.
Def. A  Teller in federally insured bank. Steals $3,000 from teller drawer.


Def. C  Defendant is a postal worker who steals credit cards from the mail and uses them to purchase goods worth $35,000, which he then sells to support a drug habit.

Def. D  Defendant commits online auction fraud from his home computer. Causes loss of $35,000 to more than fifty victims.

Def. E  Doctor submits false billings to Medicare using complex system of double books. Loss = $250,000.

Def. F  Telemarketer runs boiler room with eight employees. Defrauds more than 250 elderly victims of $250,000.

Def. G  Computer expert constructs scheme for stealing credit card and other personal information online. Using this information, he obtains merchandise and phony car loans online totaling $450,000 from twenty-five individual and institutional victims.

Def. H  President of small, publicly traded bank commits bank fraud causing loss of $410 million.

Def. I  CEO of publicly traded corporation operating chain of hospitals and nursing homes, in collusion with four other members of his management team, defrauds Medicaid and Medicare of $10.1 million and causes false statements to be made in required SEC filings. Thirty employees lose their jobs.

Def. J  CEO of large conglomerate, in collusion with CFO and other members of management, engage in accounting fraud and stock manipulation causing bankruptcy of company and losses to shareholders and employee pension fund of $410 million.

---

**Figure A: Description of Representative Defendants**

**Figure B: Guideline Range of Representative Defendants under Existing Guidelines**

(shaded boxes indicate sentence increase due to guidelines change)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Def. A</td>
<td>0-6 mos.</td>
<td>0-6 mos.</td>
<td>0-6 mos.</td>
<td>0-6 mos.</td>
<td>0-6 mos.</td>
<td>0-6 mos.</td>
</tr>
<tr>
<td>Def. B</td>
<td>2-8 mos.</td>
<td>4-10 mos.</td>
<td>4-10 mos.</td>
<td>4-10 mos.</td>
<td>6-12 mos.</td>
<td>8-14 mos.</td>
</tr>
<tr>
<td>Def. C</td>
<td>12-18 mos.</td>
<td>15-21 mos.</td>
<td>15-21 mos.</td>
<td>15-21 mos.</td>
<td>27-33 mos.</td>
<td>30-37 mos.</td>
</tr>
<tr>
<td>Def. D</td>
<td>10-16 mos.</td>
<td>12-18 mos.</td>
<td>12-18 mos.</td>
<td>12-18 mos.</td>
<td>27-33 mos.</td>
<td>30-37 mos.</td>
</tr>
<tr>
<td>Def. G</td>
<td>24-30 mos.</td>
<td>30-37 mos.</td>
<td>30-37 mos.</td>
<td>57-71 mos.</td>
<td>78-97 mos.</td>
<td>87-108 mos.</td>
</tr>
<tr>
<td>Def. H</td>
<td>27-33 mos.</td>
<td>37-46 mos.</td>
<td>57-71 mos.</td>
<td>57-71 mos.</td>
<td>121-151 mos.</td>
<td>210-262 mos.</td>
</tr>
<tr>
<td>Def. I</td>
<td>57-71 mos.</td>
<td>87-108 mos.</td>
<td>87-108 mos.</td>
<td>151-188 mos.</td>
<td>262-327 mos.</td>
<td>LIFE</td>
</tr>
<tr>
<td>Def. J</td>
<td>57-71 mos.</td>
<td>121-151 mos.</td>
<td>121-151 mos.</td>
<td>151-188 mos.</td>
<td>LIFE</td>
<td>LIFE</td>
</tr>
</tbody>
</table>

**Figure C: Guideline Range of Representative Defendants under Model Sentencing Guidelines**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Offense Level</th>
<th>Factors</th>
<th>Sentencing Range (mos.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Def. A</td>
<td>1</td>
<td>Base Offense Level (BOL) = 1</td>
<td>0-6</td>
</tr>
<tr>
<td>Def. B</td>
<td>2</td>
<td>BOL = 1; loss = 1</td>
<td>6-12</td>
</tr>
<tr>
<td>Def. C</td>
<td>3</td>
<td>BOL = 1; loss = 1; abuse of trust = 1</td>
<td>12-24</td>
</tr>
<tr>
<td>Def. D</td>
<td>4</td>
<td>BOL = 1; loss = 2; more than 25 victims = 1</td>
<td>24-60</td>
</tr>
<tr>
<td>Def. E</td>
<td>4</td>
<td>BOL = 1; loss = 2; abuse of trust = 1</td>
<td>24-60</td>
</tr>
<tr>
<td>Def. F</td>
<td>6</td>
<td>BOL = 1; loss = 3; more than 25 victims = 1; aggravating role = 170</td>
<td>96-132</td>
</tr>
<tr>
<td>Def. G</td>
<td>5</td>
<td>BOL = 1; loss = 3; more than 25 victims = 1</td>
<td>60-96</td>
</tr>
<tr>
<td>Def. H</td>
<td>7</td>
<td>BOL = 1; loss = 4; solv = 1; president publicly traded corporation = 1</td>
<td>132-180</td>
</tr>
<tr>
<td>Def. I</td>
<td>6</td>
<td>BOL = 1; loss = 4; CEO publicly traded corporation = 1</td>
<td>96-132</td>
</tr>
<tr>
<td>Def. J</td>
<td>9</td>
<td>BOL = 1; loss = 7; CEO publicly traded corporation = 1; endanger solvency large organization = 1</td>
<td>240-300</td>
</tr>
</tbody>
</table>
Notes


3 See Bowman, Coping with “Loss,” supra note 1, at 475-83 (describing the history of economic crime sentencing generally and the particular challenges of designing a sentencing scheme for the particular federal economic offenses).


10 For a discussion of the “25 percent rule” and its effects on guidelines architecture, see Frank O. Bowman, III, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after Booker, 2005 UWF. CER. L. FORUM 149, 195, 199-201.

11 An increase in offense level from 6 to 7 has no effect on a first-time offender’s sentencing range, which remains at 0-6 months. U.S.S.G. §5A (Sentencing Table) (2005).

12 An increase in offense level from 41 to 42 changes the sentencing range for a first-time offender from 324-405 months to 360-months-life imprisonment. U.S.S.G. §5A (Sentencing Table) (2005).

13 This result assumes a fraud conviction with a Base Offense Level of 7, U.S.S.G. §2B1.1(a) (2005); an increase of 30 levels for a loss exceeding $400 million, §2B1.1(b)(1)(N); an increase of 4 levels for more than 250 victims, §2B1.1(b)(2)(B); an increase of 2 levels for sophisticated means, §2B1.1(b)(8); an increase of 2 levels for in excess of $1 million in gross receipts, §2B1.1(b)(12)(A); an increase of 4 levels for the offense involving a securities law violation and being the CEO of the company, §2B1.1(b)(15)(A); an increase of 4 levels for aggravating role, §3B1.1(a); and a possible increase of 2 levels for obstruction of justice based on testimony during the trial, §3C1.1.

14 This calculation assumes a base offense level of 20, U.S.S.G. §2B3.1(a); an increase of 2 levels for robbery of a financial institution, §2B3.1(b)(1); the maximum permissible increase of 11 levels for use of a weapon and injury to a victim, §2B3.1(b)(2)(3); an increase of 4 levels for abducting a person to facilitate commission of the offense or escape therefrom, §2B3.1(b)(4); and an increase of 7 levels for loss exceeding $5 million, §2B3.1(b)(7)(H).


17 Id. at 257.

18 Id. at 256 (reporting that the mean sentence for defendants convicted of murder in the portion of FY 2005 after the decision in United States v. Booker was 220 months).

19 Id. at 257 (reporting that the average sentence for a convicted murderer who was also a Criminal History Category VI career offender was 297.5 months).

20 This result assumes a fraud conviction with a Base Offense Level of 7, U.S.S.G. §2B1.1(a) (2005); an increase of 18 levels for a loss exceeding $2.5 million, §2B1.1(b)(1)(N); an increase of 4 levels for more than 250 victims, §2B1.1(b)(2)(B); an increase of 2 levels for sophisticated means, §2B1.1(b)(8); an increase of 2 levels for in excess of $1 million in gross receipts, §2B1.1(b)(12)(A); an increase of 4 levels for the offense involving a securities law violation and being an officer of the company, §2B1.1(b)(15)(A); an increase of 4 levels for aggravating role, §3B1.1(a); and a possible increase of 2 levels for obstruction of justice based on testimony during the trial, §3C1.1. for a total offense level of 43, or life imprisonment.

21 I use the word “purport” advisedly, because there is good reason to doubt that even federal prosecutors are very often prepared to enforce the white-collar sentencing rules as writ-
enote, for example, that none of the defendants in the high-profile post-Enron cases has so far received a life sentence and that many, perhaps most, of the non-CEO defendants in these cases have been the beneficiaries of plea agreements that employ charge bargaining to cap their sentences and thus avoid the full force of the sentencing guidelines.

For example, in FY 2003, only eight defendants were sentenced in cases involving an adjustment for a loss exceeding $20 million. U.S. Sentencing Comm’n, Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2003, 6-7 (available at https://www.ussc.gov/GAF/03_gluse.pdf). This number will, of course, fluctuate from year to year, but it seems highly improbable that the total number of cases with losses this large would ever be more than a few dozen annually.


See Bowman, Pour Encourager les Autres, supra note 2, at 427-31.

U.S.S.G. §2B1.1 app. note 4(C) (2005) (equating theft of undelivered mail from an authorized mail receptacle to victimization of at least fifty victims, with a concomitant offense level increase of four or more offense levels pursuant to §2B1.1(b)(2)).


Figure 8 assumes first-time offenders (Criminal History Category I) convicted after trial. Sentences for defendants pleading guilty would be slightly lower. Sentences for defendants with criminal records would be slightly (in some cases considerably) higher.

Offense Level 6. Assumes no “more than minimal planning” (MMP).

Offense Level 6. Assumes no MMP.

Offense Level 7. Assumes no MMP.

Offense Level 10. Assumes no MMP.

Offense Level 11. Assumes fraud conviction (Base Offense Level 7), increase of four levels for loss greater than $10,000.

Offense Level 13. Assumes fraud conviction, MMP, two-level abuse of trust.


Offense Level 18. Assumes Base Offense Level of 6, increase of six levels for loss greater than $30,000, four-level increase for undelivered U.S. mail (U.S.S.G. §2B1.1 app. note 3(B) (2001)), two-level increase for abuse of trust.

Offense Level 19. Assumes fraud conviction (Base Offense Level 7), increase of six levels for loss greater than $30,000, four-level increase for undelivered U.S. mail (U.S.S.G. §2B1.1 app. note 4(C)(x) (2003)), two-level increase for abuse of trust.

Offense Level 12. Assumes MMP.

Offense Level 13. Assumes MMP.

Offense Level 18. Assumes fraud conviction, four-level > 50 victims, and two-level sophisticated means.

Offense Level 19. Assumes fraud conviction (Base Offense Level 7), four-level > 50 victims, and two-level sophisticated means.

Offense Level 16. Assumes MMP, two-level abuse of trust.

Offense Level 17. Assumes MMP, two-level abuse of trust.

Offense Level 20. Assumes fraud conviction, two-level sophisticated means, two-level abuse of trust.

Offense Level 21. Assumes fraud conviction (Base Offense Level 7), two-level sophisticated means, two-level abuse of trust.

Offense Level 21. Assumes MMP, four-level aggravating role, two-level vulnerable victim.

Offense Level 22. Assumes MMP, four-level aggravating role, two-level vulnerable victim.

Offense Level 24. Assumes MMP, four-level aggravating role, two-level sophisticated means, four-level jeopardize financial institution.

Offense Level 28. Assumes four-level > 50 victims, two-level sophisticated means, four-level jeopardize financial institution.

Offense Level 31. Assumes fraud conviction (Base Offense Level 7), six-level increase for more than 250 victims, four-level aggravating role, two-level vulnerable victim.

Offense Level 17. Assumes MMP, two-level use of special skill.

Offense Level 19. Assumes MMP, two-level use of special skill.

Offense Level 26. Assumes two-level sophisticated means, two-level access device/means of identification, two-level increase for more than ten victims, two-level use of special skill.

Offense Level 29. Assumes fraud conviction (Base Offense Level 7), increase of fourteen levels for loss greater than $400,000, two-level sophisticated means, two-level access device/means of identification, two-level > 10 victims, two-level use of special skill.

Offense Level 18. Assumes MMP, two-level abuse of trust.

Offense Level 21. Assumes MMP, two-level abuse of trust.

Offense Level 21. Assumes MMP, two-level abuse of trust, four-level endanger financial institution.

Offense Level 32. Assumes two-level >10 victims, two-level sophisticated means, four-level jeopardize financial institution, two-level abuse of trust.

Offense Level 37. Assumes fraud conviction (Base Offense Level 7), increase of sixteen levels for loss, two-level increase for more than ten victims, two-level sophisticated means, four-level jeopardize financial institution, four-level officer of publicly traded corporation, two-level abuse of trust.

Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.

Offense Level 29. Assumes MMP, four-level aggravating role, two-level abuse of trust.

Offense Level 34. Assumes two-level sophisticated means, four-level aggravating role, two-level abuse of trust.

Offense Level 39. Assumes fraud conviction (Base Offense Level 7), increase of twenty levels for loss, two-level sophisticated means, four-level violation of securities law by officer of publicly traded corporation, four-level aggravating role, two-level abuse of trust.

Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.

Offense Level 32. Assumes MMP, four-level aggravating role, two-level abuse of trust.

Offense Level 34. Assumes two-level sophisticated means, four-level aggravating role, two-level abuse of trust.

Offense Level 48. Assumes four-level > 50 victims, two-level sophisticated means, four-level jeopardize soundness of financial institution (pension fund), four-level aggravating role, two-level abuse of trust.

Offense Level 59. Assumes fraud conviction (Base Offense Level 7), increase of thirty levels for loss, six-level > 250 victims, two-level sophisticated means, four-level jeopardize soundness of financial institution (pension fund), four-level violation of securities law by officer of publicly traded corporation, four-level aggravating role, two-level abuse of trust.
Figure C assumes first-time offenders (Criminal History Category I) convicted after trial. Sentences for defendants pleading guilty would be lower. Sentences for defendants with criminal records would be higher.

Note that the offense level for Defendant F does not include an increase for the fact that the victims were arguably vulnerable senior citizens. This omission does not necessarily reflect a considered policy choice. Rather, the model guidelines proposed in this Issue contain no victim adjustments. If an offense level enhancement for vulnerable victims were to be adopted, it might apply to this case.