WHITE COLLAR CRIME COMMITTEE NEWSLETTER

SUMMER/FALL 2015

ABA CRIMINAL JUSTICE SECTION WCC Committee

MESSAGE FROM THE EDITOR

Welcome to the Summer/Fall 2015 Edition of the *White Collar Crime Committee Newsletter*.

The ***White Collar Crime Committee Newsletter*** showcases content and opinion of leading experts, scholars, and practitioners through articles written by our Criminal Justice Section members. The White Collar Crime Committee seeks your participation in its 20 regional committees and 20 substantive committees; and encourages your attendance at its national and international conferences, CLE, and workshops.

The White Collar Crime Committee encourages you to participate year round, and also looks forward to reading your submissions for our upcoming Winter/Spring 2016 issue. If you would like to submit an article for our next edition or have ideas on a subject for a topical Newsletter, please contact the WCCC Newsletter Subcommittee Chair, **Salma S. Safiedine** at S.Safiedine@SPartnersLaw.com.

Please note these upcoming programs related to white collar crime:

- **Southeastern White Collar Crime Institute**: Sept. 10-11, Braselton, GA (near Atlanta)
- **Fourth Annual International White Collar Crime Institute**: Oct. 12-13, London, UK
- White Collar Crime Town Hall – ***The New Frontier-Surveillance Technology and the Law*: Oct. 27, Washington, DC (During CJS Fall Meeting)**
- **Inaugural Global White Collar Crime Institute**: Nov. 19-20, Shanghai, China

FEATURED ARTICLES

The U.S. Sentencing Commission Votes for Fundamental Fixes to the Sentencing Guidelines

By Alan Ellis and Mark H. Allenbaugh

On April 9, 2015, the U.S. Sentencing Commission voted to fundamentally fix some portions of the U.S. Sentencing Guidelines that have long been in need of repair. These fixes will become final on November 1, 2015, if Congress does not act to the contrary. Of the nearly 800 amendments to the guidelines, Congress has only vetoed Commission action four times, and those had to do with crack cocaine amendments. While the Department of Justice initially opposed some of the current changes, it voiced no opposition at the April 9

vote. It is highly doubtful that Congress will reject any of these amendments, as they are relatively non-controversial. READ MORE

Worthless or Merely Worth Less: The Current State of the Worthless Services and Quality of Care Theories of False Claims Act Liability

By Matthew T. Newcomer and Barbara Rowland

Late last year, Extendicare Health Services agreed to pay $38 million to resolve allegations that it violated the federal and state False Claims Acts (FCA) by seeking government reimbursement for "materially substandard and/or worthless skilled nursing services" that were provided at Extendicare's numerous skilled nursing facilities. The Department of Justice hailed the resolution as the "largest failure of care settlement with a chain-wide skilled nursing facility" in its history. The thrust of the government's theory was not that Extendicare billed the government for services that were not performed or that were medically unnecessary; rather, it alleged that Extendicare submitted claims for services that failed to meet the purported "federal standards of care" because, for example, it did not adequately staff its facilities, failed to follow certain medical protocols and failed to appropriately administer medication to some of its residents. READ MORE

An Economical Good In Disguise; The True Impact of Counterfeit Goods

By Kelsey Powderly, Salma S. Safiedine, Darcy Sharp

Counterfeit goods are a domestic and international problem that affects businesses, consumers, and workers alike. Businesses are harmed through loss profits, but counterfeiting is even more damaging to the business brand - an attractive target to counterfeiters. When counterfeit luxury goods are made more available and sold at worse quality, the business loses brand prestige and exclusivity and thereby suffers harm to their good will. In 2006, it was estimated that between $15 billion and $50billion in profits offset sales of genuine items due to their counterfeit-counterpart. READ MORE

Overcoming "Crony Communism": Is EU Membership the Key?

By Sulaksh Shah, Mihnea Rotariu, Thomas Firestone

While the relationship between perceived corruption and ease of doing business in a country is fairly easy to grasp, a more interesting, and provocative, question is this: To what extent can a country *formerly* known for a relatively high level of perceived corruption change — once it joins an economically developed supranational entity such as the European Union? The question is vital for companies doing business — or contemplating doing so — in the countries of the former Soviet Bloc (defined for purposes of this article as the former Soviet republics, plus the former socialist countries of the "Eastern Bloc") and former Yugoslavia who have joined or plan on joining the EU.
READ MORE

A New Compliance Challenge for Companies Doing Any Business In UK

By T. Markus Funk, Paul O. Hirose, and Elizabeth R. Breakstone

Multi-national companies with business interests in the UK take note: the UK just ramped up its role in the global fight against human trafficking. On the heels of the UK Bribery Act of 2010 (a close copy of the US Foreign Corrupt Practices Act), the UK Government has now taken cues from another novel US enactment - this time the California Transparency in Supply Chains Act (the "California Act") - and delivered its own disclosure regime on the doorsteps of the international business world.
READ MORE (Originally published in *Law360*, reprinted with permission.)

CJS Upcoming Events

SOUTHEASTERN WHITE COLLAR CRIME INSTITUTE:
Sept. 10-11, Braselton, GA (near Atlanta)

Qui Tam Litigation: A Practitioner's Symposium:
Sept. 25, Charlotte, NC

Fourth Annual International White Collar Crime Institute:
Oct. 12-13, London, UK

CJS 8th Annual Fall Institute, Awards Luncheon, CJS Council & Committee Meetings:
Oct. 22-25, Washington, DC

Inaugural Global White Collar Crime Institute:
Nov. 19-20, Shanghai, China

Visit The Criminal Justice Section's Complete Calendar at
http://www.americanbar.org/groups/criminal_justice/events_cle.htm

NEW PUBLICATIONS

The State of Criminal Justice 2015
Edited by Mark E. Wojcik

This publication examines and reports on the major issues, trends and significant changes in the criminal justice system. The 2015 volume contains 19 chapters focusing on specific aspects of the criminal justice field, with summaries of all of the adopted official ABA policies passed in 2014-2015 that address criminal justice issues.

Money Laundering
By Miriam Weismann

This book provides an updated and comprehensive review of the subject of anti-money laundering activity. The book is designed to organize and simplify (to the extent possible) the explanation of the laws, regulations, and salient cases.

Trying Cases to Win: In One Volume
By Herbert J Stern and Stephen A Saltzburg

This book is an indispensable resource for everyone who tries cases-whether civil or criminal - and for anyone who wants to learn the art of the trial lawyer. It sets forth a strategic method for any trial, and provides the techniques to deliver that strategy throughout every phase of the trial: openings, directs and cross, experts, and summations.

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VISIT THE WHITE COLLAR CRIME COMMITTEE WEBSITE FOR UPDATES AND RECENT NEWS

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The ***WCCC Newsletter*** is published two times a year. Articles reflect the views of the individuals that prepared them and do not necessarily represent the position of the American Bar Association, the Criminal Justice Section, or the editors of the newsletter.

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The U.S. Sentencing Commission Votes for Fundamental Fixes to the Sentencing Guidelines

By Alan Ellis and Mark H. Allenbaugh[1]

On April 9, 2015, the U.S. Sentencing Commission voted to fundamentally fix some portions of the U.S. Sentencing Guidelines that have long been in need of repair. These fixes will become final on November 1, 2015, if Congress does not act to the contrary. Of the nearly 800 amendments to the guidelines, Congress has only vetoed Commission action four times, and those had to do with crack cocaine amendments. While the Department of Justice initially opposed some of the current changes, it voiced no opposition at the April 9 vote. It is highly doubtful that Congress will reject any of these amendments, as they are relatively non-controversial.

Practitioners should take note of these amendments in order to maximize the benefits of these changes for their clients. If possible, where the changes are helpful, practitioners should move sentencings to after November 1, 2015, or at least otherwise argue to the court that downward variances should be made to account for relevant amendments.

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Mark H. Allenbaugh is a nationally recognized expert on federal sentencing, law, policy and practice. He has served as co-chair of the Sentencing Committee for the National Association of Criminal Defense Lawyers; chair of the Federal Sentencing Guidelines Task Force for the D.C. Chapter of the Federal Bar Association; and as a member of the ABA's Corrections and Sentencing Committee. He currently is a member of the U.S. Sentencing Commission's Practitioner's Advisory Group. Prior to entering private practice, Mr. Allenbaugh served as a Staff Attorney for the U.S. Sentencing Commission.

Jointly Undertaken Criminal Activity

Conspiracy cases often involve complex questions of fact regarding the liability of one conspirator for another. For purposes of trial, conspirator A can be held liable for the overt acts of conspirator B even if A had no actual knowledge of B's acts, as long as B's acts were in furtherance of the conspiracy. But the same does not necessarily hold for purposes of sentencing, and this has led to considerable confusion in the courts.

At the trial level, courts are concerned with liability, while at sentencing the issue turns to culpability. Or as the Commission long has noted, "[t]he principles and limits of sentencing accountability . . . are not always the same as the principles and limits of criminal liability." USSG §1B1.3, comment. n.1 (emphasis added). This has nevertheless led to confusion inasmuch as courts often equate trial liability with sentencing accountability. For example, in a fraud conspiracy involving A and B that resulted in $15 million in investor losses, while A and B may be criminally liable for the conspiracy, the guidelines recognize that A may not be as accountable—in other words, less culpable—as B especially where A's role was comparatively small. The same of course holds true for drug conspiracies and other offenses that are quantity-driven, e.g., antitrust, bribery, tax fraud, and racketeering.

The Commission now has clarified conspirator A can only be held accountable for the acts of conspirator B where (1) B's acts were within the scope of criminal activity that A agreed to jointly undertake, (2) B's acts were in furtherance of that criminal activity, and (3) B's acts were reasonably foreseeable in connection with that criminal activity. The first criterion, which now has been added to the guidelines, clarifies that within conspiracies, each co-conspirator should only be held accountable for conduct that he actually agreed to jointly undertake with the other conspirators.

This clarification hopefully will reverse the trend of automatically holding one conspirator accountable for the conduct of all other conspirators. After all, holding a conspirator accountable only for the foreseeable conduct they agreed to undertake, which was in furtherance of the conspiracy, is a far better measure of culpability than has often been the case.

Mitigating Role

With respect to measuring culpability, section 3B1.2 of the guidelines provides for a downward adjust of between two and four levels where an offender is found to be a minor or minimal participant in a conspiracy. The question has been whether that determination turns only on the conduct of co-conspirators in the case at hand, or whether a court is also to look at other cases involving those who have committed similar crimes.

The Commission has now voted that courts are only to look at the relative culpability of co-conspirators in the case before them, rather than engage in a review of similarly situated defendants in other cases. This move likely will reduce unnecessary litigation on the issue and hopefully increase application of this downward adjustment, which currently is only awarded an abysmal 6.9% of the time.

Inflationary Adjustments

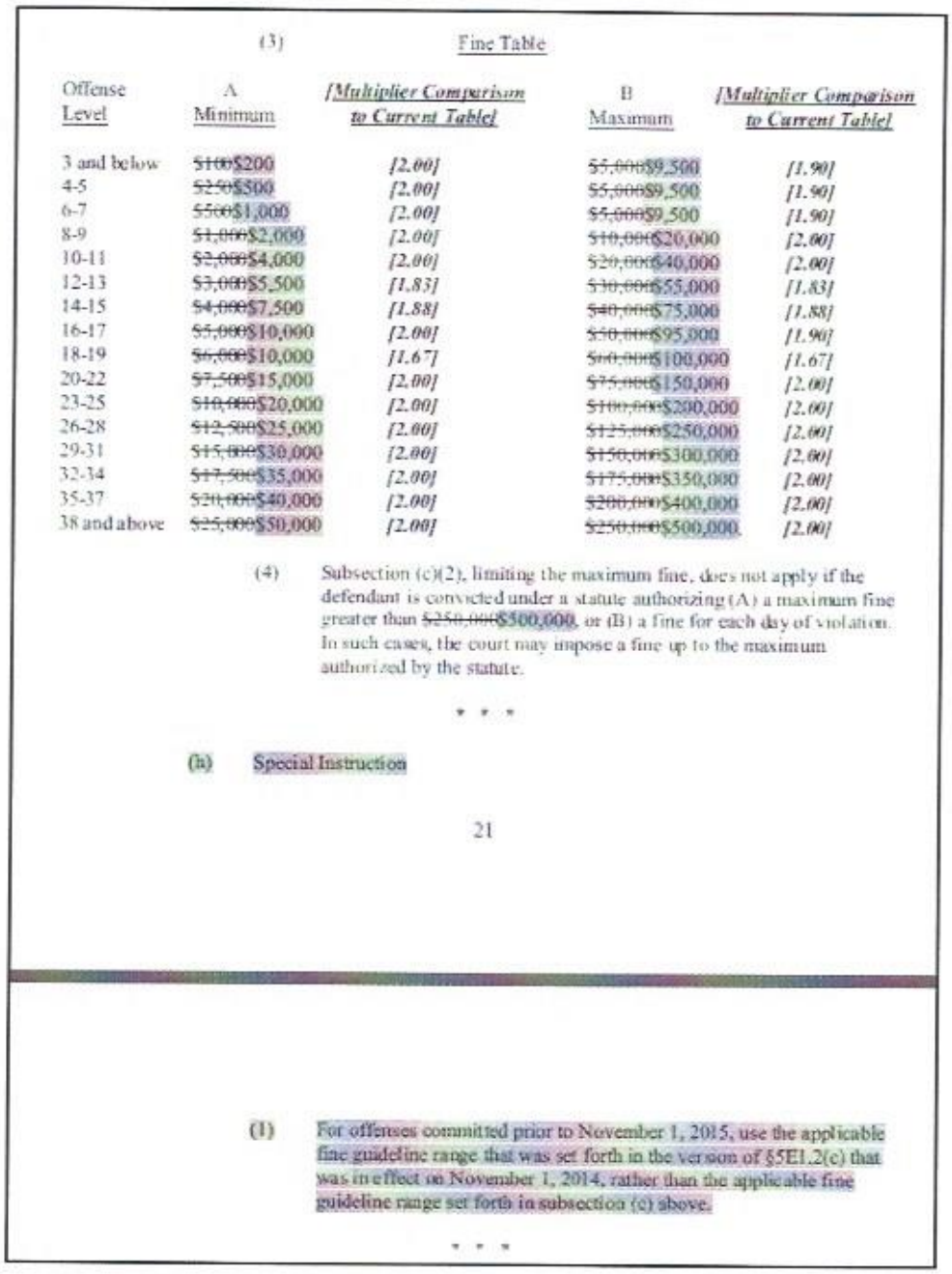
This proposed amendment adjusts monetary tables in the Guidelines to account for inflation. Specifically, the proposed amendment sets forth an approach for amending the monetary tables in the Guidelines to adjust for inflation, i.e., the tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing, or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine). The fraud-loss table at USSG §2B1.1(b)(1) and tax loss table at USSG §2T4.1 now have had their respective limits increased, which can serve to mitigate punishment.

For example, under the current iteration of the guidelines, a fraud loss amount of $500,000 will result in an offense level increase of +14. However, come November 1, 2015, the same loss amount will only result in an increase of +12. This is the final table for USSG §2B1.1(b)(1).

(1) If the loss exceeded ~~$5,000~~$6,500, increase the offense level as follows:

[Multiplier Comparison to Current Table]		Loss (Apply the Greatest)	Increase in Level
[1.30]	(A)	~~$5,000~~$6,500 or less	no increase
[1.30]	(B)	More than ~~$5,000~~$6,500	add 2
[1.50]	(C)	More than ~~$10,000~~$15,000	add 4
[1.33]	(D)	More than ~~$30,000~~$40,000	add 6
[1.36]	(E)	More than ~~$70,000~~$95,000	add 8
[1.25]	(F)	More than ~~$120,000~~$150,000	add 10
[1.25]	(G)	More than ~~$200,000~~$250,000	add 12
[1.38]	(H)	More than ~~$400,000~~$550,000	add 14
[1.50]	(I)	More than ~~$1,000,000~~$1,500,000	add 16
[1.40]	(J)	More than ~~$2,500,000~~$3,500,000	add 18
[1.36]	(K)	More than ~~$7,000,000~~$9,500,000	add 20
[1.50]	(L)	More than ~~$20,000,000~~$25,000,000	add 22
[1.40]	(M)	More than ~~$50,000,000~~$65,000,000	add 24
[1.50]	(N)	More than ~~$100,000,000~~$150,000,000	add 26
[1.50]	(O)	More than ~~$200,000,000~~$250,000,000	add 28
[1.38]	(P)	More than ~~$400,000,000~~$550,000,000	add 30

But what the Commission giveth, it also taketh away. In addition to adjusting the loss tables for inflation, which has a mitigating effect, the fine tables also have been adjusted, which has a significant punitive effect. Indeed, the fine ranges now are approximately doubled. Practitioners, therefore, should be aware of this new, onerous modification, and note the built-in ex post facto limitation stated within the table itself. The revised fine table for individuals, with the "special instruction," is below:



(3) Fine Table

Offense Level	A Minimum	[Multiplier Comparison to Current Table]	B Maximum	[Multiplier Comparison to Current Table]
3 and below	~~$100~~$200	[2.00]	~~$5,000~~$9,500	[1.90]
4-5	~~$250~~$500	[2.00]	~~$5,000~~$9,500	[1.90]
6-7	~~$500~~$1,000	[2.00]	~~$5,000~~$9,500	[1.90]
8-9	~~$1,000~~$2,000	[2.00]	~~$10,000~~$20,000	[2.00]
10-11	~~$2,000~~$4,000	[2.00]	~~$20,000~~$40,000	[2.00]
12-13	~~$3,000~~$5,500	[1.83]	~~$30,000~~$55,000	[1.83]
14-15	~~$4,000~~$7,500	[1.88]	~~$40,000~~$75,000	[1.88]
16-17	~~$5,000~~$10,000	[2.00]	~~$50,000~~$95,000	[1.90]
18-19	~~$6,000~~$10,000	[1.67]	~~$60,000~~$100,000	[1.67]
20-22	~~$7,500~~$15,000	[2.00]	~~$75,000~~$150,000	[2.00]
23-25	~~$10,000~~$20,000	[2.00]	~~$100,000~~$200,000	[2.00]
26-28	~~$12,500~~$25,000	[2.00]	~~$125,000~~$250,000	[2.00]
29-31	~~$15,000~~$30,000	[2.00]	~~$150,000~~$300,000	[2.00]
32-34	~~$17,500~~$35,000	[2.00]	~~$175,000~~$350,000	[2.00]
35-37	~~$20,000~~$40,000	[2.00]	~~$200,000~~$400,000	[2.00]
38 and above	~~$25,000~~$50,000	[2.00]	~~$250,000~~$500,000	[2.00]

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than ~~$250,000~~$500,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

* * *

(h) Special Instruction

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(I) For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.

* * *

Sophisticated Means

Section 2B1.1(b)(10)(C) provides for a two-level enhancement if "the offense . . . involved sophisticated means." Per the commentary to that guideline, "'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." USSG §2B1.1, comment (n.9(B)). According to the latest available

Commission statistics, in fiscal year 2013, this enhancement was applied in 11.7% of cases sentenced under 2B1.1. See U.S. Sentencing Comm'n, Use of Guidelines and Specific Offense Characteristics—Guideline Calculation Based 11 (2013).

The existing enhancement applies if "the offense otherwise involved sophisticated means." Using this language, courts have applied this enhancement without a determination of whether the defendant's own conduct was "sophisticated."

The Commission amended USSG §2B1.1(b)(10)(C) to now read that a two-level adjustment is to be applied where "the defendant intentionally engaged in or caused the conduct constituting the sophisticated means." (Emphasis added). According to the Commission, this "amendment narrows the scope of the specific offense characteristics at subsection (b)(10)(C) to cases in which the defendant intentionally engaged in or caused (rather than the offense involved) sophisticated means."

Practitioners should be sure to review PSRs carefully when this enhancement is applied, to be sure it is not applied under the old, broader standard. It is the conduct that the defendant actually engaged in, and not relevant conduct itself, that now serves as a basis for the application of this not-infrequent enhancement.

Intended Loss

For economic crimes, the guidelines look primarily to the amount of "loss" to determine offense seriousness. For example, in a typical Ponzi scheme, loss generally is equivalent to the total amount of money all investors lost, i.e., "actual loss." However, loss also can include so-called "intended loss." Returning to the Ponzi scheme example, intended loss thus would be equivalent to the money the offender intended investors to lose, e.g., where the offender was arrested before he could cash an investor's check. If the intended loss is greater than the actual loss, then the guidelines direct a sentencing judge to use the amount of intended loss.

The concern has been how to measure intended loss. Is it a subjective or objective measure? Consistent with its focus on the actual culpability of the offender reviewed in the sections above,

the Commission now has clarified that intended loss is to be measured by the defendant's subjective intent. In short, the proposed amendment would provide that intended loss means the pecuniary harm "that the defendants purposefully sought to inflict." (Emphasis added). This reflects certain principles discussed in the Tenth Circuit's decision in *United States v. Manatau*, 647 F.3d 1047 (10th Cir., 2011). In *Manatau* the defendant was convicted of bank fraud and aggravated identity theft. The District Court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks because a loss up to those credit limits was "both possible and potentially contemplated by the defendant's scheme." On appeal the Tenth Circuit reversed holding that "intended loss" contemplates "a loss the defendant purposefully sought to inflict," and that the appropriate standard was one of "subjective intent to cause the loss." Such an intent, the Court held, may be based on making "reasonable inferences about the defendant's mental state from the available facts." 647 F.3d at 1056. This standard has now been embodied by the proposed amendment.

Number of Victims

The Commission has expanded the enhancement by adding an either/or element of "substantial financial hardship." While the government must now prove in certain cases that victims of the offense suffered substantial financial hardship, this alone can lead to an enhancement in some cases, even if the number of victims is below the threshold, for example, if the offense involved less than ten victims. Currently, there is no such enhancement. Under the proposed amendment, if the offense involved less than ten victims but resulted in substantial financial hardship to one or more, there is a two level increase.

A four-level enhancement is mandated where the offense resulted in substantial hardship to five or more victims. If the offense resulted in substantial hardship to 25 or more victims, the increase is six levels. The revised victim table is below:

(2) (Apply the greatest) If the offense —

(A) (i) involved 10 or more victims; ~~or~~ (ii) was committed through mass-marketing; ~~or~~ (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) ~~involved 50 or more victims~~resulted in substantial financial hardship to five or more victims, increase by 4 levels; ~~or~~

(C) ~~involved 250 or more victims~~resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

Calculating Loss in Securities Fraud Cases

On November 1, 2012, in response to a Congressional directive set forth in Section 1079A(a)(1)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, the Commission adopted a novel method for estimating actual loss in cases "involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity." According to the Commission, "Case law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities." The Commission therefore adopted a then-new rule for estimating loss in securities fraud cases, specifically, the "modified rescissory method" (MRM).

Under this method "there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—

I. calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

II. multiplying the difference in average price by the number of shares outstanding.

Determining whether and to what extent a defendant's conduct may have caused a publicly traded security to increase or decrease in value, is, to be sure, no easy task especially given the vagaries and unpredictability of market dynamics. Thus, the Commission was careful to also note that when using this loss methodology, "the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic

circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events)."

Nevertheless, as it turned out, no one ever actually used this methodology. This is so because MRM necessarily glosses over the very extrinsic factors the Commission otherwise believes a court should consider when applying that method for calculating loss. Taking the average stock price over two arbitrary time periods, subtracting the two, and then multiplying by the number of outstanding shares simply cannot take into account other causal factors; indeed, the entire method merely assumes a causal connection between the defendant's conduct and changes to the security's value.

Not surprisingly, therefore, when the Commission published MRM for comment, there was near-uniform opposition to it. Both the Practitioners Advisory Group to the U.S. Sentencing Commission as well as the National Association of Criminal Defense Lawyers urged the Commission to decline adopting this method for estimating loss. In fact, anecdotal evidence suggests that even the Government, the only champion of the MRM to the Commission, does not utilize MRM, but instead has been advancing a crude "buyers only method" that not only suffers from the same problems as MRM, but has the added fundamental flaw of relying on arbitrary data (as opposed to objective, independently verifiable data such as share price and volume as reported by the major exchanges). The "buyers only method" determines which investors were net losers within an arbitrary time period, and then adds up all the net losses for a total loss amount.

The Commission now has recognized that, at least in the case of securities fraud, MRM just doesn't fit. While the Commission was considering a wholesale deletion of MRM (or any other measure of loss) and using "gain" instead, the Commission ultimately decided to leave in MRM but emphasize that "the court may use any method that is appropriate and practicable under the circumstances." While the Commission declined to expressly adopt the empirical based method as set forth by the U.S. Supreme Court in civil securities fraud cases, the Dura method likely will evolve into the primary method for determining loss in such cases. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

So, at least for now, the rebuttable presumption in favor of the (overly-simplistic) MRM method has been removed from the Guidelines thereby allowing counsel to litigate loss under the far more appropriate methodology of Dura Pharmaceutical.

Clarifying vs. Substantive Amendments

When imposing a sentence, unless it would violate the ex post facto clause of the U.S. Constitution, a district court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced." USSG §1B1.11(a), (b)(1). Furthermore, "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual." USSG §1B.11(b)(2). This is the so-called "One Book Rule."

"However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive." Id. Thus, while the One Book rule requires a sentencing court to utilize no more than one edition of the Guidelines Manual at sentencing, it still may look to subsequent amendments of the Guidelines so long as those only function to clarify the Guidelines as opposed to make substantive changes to the Guidelines.

In addition to this prospective use of clarifying amendments, the U.S. Courts of Appeal have uniformly held that clarifying amendments also may, and in fact should, be applied retroactively. *See, e.g.*, *United States v. DeCarlo*, 434 F.3d 447, 458-459 (6th Cir. 2006); United States v. Crudup, 375 F.3d 5, 8 (1st Cir. 2004); *United States v. Kim*, 193 F.3d 567, 578 (2d Cir. 1999); *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998); *United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995); *United States v. Smaw*, 22 F.3d 330, 333 (D.C. Cir. 1994).

An amendment is clarifying if it "changes nothing concerning the legal effect of the guidelines, but merely clarifies what the Commission deems the guidelines to have already meant." *United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995) (internal quotation marks and citation

omitted). As it sometimes is difficult to distinguish between a clarifying and a substantive amendment, courts have identified three factors to be considered when determining whether an amendment clarifies or substantively alters a Guidelines provision: "(1) how the Sentencing Commission characterized the amendment; (2) whether the amendment changes the language of the guideline itself or changes only the commentary for the guideline; and (3) whether the amendment resolves an ambiguity in the original wording of the guideline." *United States v. Monus*, 356 F.3d 714, 718 (6th Cir. 2004) (internal quotation marks and citation omitted).

Using these criteria, the amendments regarding Jointly Undertaken Criminal Activity, Intended Loss, and Sophisticated Means likely will be considered by courts as merely clarifying in nature inasmuch as these amendments largely addressed circuit conflicts regarding the application of these portions of the Guidelines, which grew out of some inherent ambiguities in the Guidelines text itself. Furthermore, while some of these amendments made changes to the Guidelines themselves, the bulk of the changes were made to the commentary to the Guidelines.

In contrast, the following amendments likely will be considered substantive: the inflationary adjustment to the loss table and other monetary tables in the Guidelines; the amendment to the Victims Table in USSG §2B1.1; and the excision of the rebuttal presumption in favor of the modified rescissory method for calculating loss in securities fraud cases. These amendments did not resolve circuit conflicts and more importantly, substantively changed the text of the Guidelines.

Attorneys can take advantage of clarifying amendments after November 1, 2015, certainly at sentencings and on direct appeals (ideally if raised in the district court below) inasmuch as the amendments merely clarify pre-existing Guidelines language. New counsel may even arguably raise them in the context of an ineffective assistance of counsel claim pursuant to 28 U.S.C. §2255 in the event predecessor counsel neglected to raise the fact of the clarifying amendment at sentencing or on appeal.

The question is whether counsel can raise clarifying amendments now, prior to their effective date of November 1, 2015.

As USSG §. 6A1.3(a) provides that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial," there would appear to be no barrier to raising clarifying amendments now at sentencing. In fact, counsel should raise these issues given that such amendments, by their very nature, merely clarify how and in what circumstances the Guidelines apply, and in some cases, serve to resolve circuit disputes. Accordingly, the amendments could serve to counter otherwise negative authority.

For the same reasons, counsel also should be sure to include a discussion of any relevant clarifying amendments in appellate briefs, especially where a circuit conflict has been resolved. For example, with respect to the Commission's clarification that intended loss requires an inquiry into the defendant's subjective intent consistent with the Second, Third, Fifth and Tenth Circuits, authority to the contrary in the First and Seventh Circuits stating that an objective inquiry is required now has been superseded by this clarification.