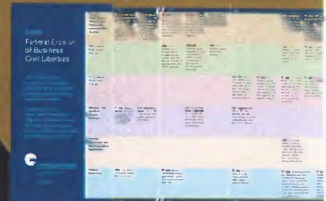


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Gaining the Upper Hand in Arguing Loss in Securities Fraud Cases

Since the Supreme Court's decision in *United States v. Booker*,¹ sentencing courts are no longer bound by the U.S. Sentencing Guidelines. Although their substantial sentencing discretion was recently reaffirmed in *Gall v. United States*,² they nonetheless remain obligated to calculate and consider the applicable sentencing range under the Guidelines. Thus the calculation of "loss" under Section 2B1.1 of the Guidelines remains a critical issue at sentencing in many white collar crime cases.³ This article examines some arguments and strategies that defense counsel might consider in preparing loss arguments for a securities fraud sentencing.

'Loss' Under Guideline Section 2B1.1

The loss adjustment in Section 2B1.1 of the Guidelines may lead to harsh sentences in fraud cases. The Guidelines include an expansive definition of loss that applies in most financial cases, including those involving securities, bank, mail and wire fraud, money laundering, and conspiracy. Typical

defendants are the principals or executives of issuers or brokerages, traders or other investment services employees, lawyers, investment advisors, or other professionals. Wrongdoing may include misleading investors or clients, backdating, cooking the books, pump-and-dump schemes, false filings with the SEC, misstatements to regulators, and an array of other misconduct.

Loss calculations can generate particularly draconian results in securities fraud cases. Consider, for example, WorldCom's Bernie Ebbers (25 years), Enron's Jeff Skilling (over 24 years) and Andrew Fastow (six years), Dynegy's Jamie Olis (24 years, reduced to six years on resentencing), Adelphia's Timothy Rigas (17 years), Qwest's Joseph Nacchio (six years), and Canadian CEO Conrad Black (over six years). These sentences are unfair and irrational.⁴ Some appellate courts disfavor an unbridled construction of loss in securities cases, and their opinions invite a fresh evaluation of the issue in preparing for sentencing proceedings.

In securities fraud cases, the loss up-tick is often the greatest single factor in determining a sentence. As the Second Circuit has noted, the Guidelines "are a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence."⁵ This may be true even for a defendant who profited little or not at all from a fraudulent scheme. In the typical case in which an "oversimplified... measure of damages [is] proffered by the government,"⁶ the defense may be able to improve its position by proposing a more sophisticated loss calculation methodology. A lower loss adjustment, of course, means a lower "starting point" or "initial bench-



BY EVAN A. JENNESS

mark⁷ from which the sentencing court will determine the applicable sentence.

The Government's Burden of Proof

The government bears the burden of proving the facts underlying any upward adjustment.⁸ Ordinarily the standard is a preponderance of the evidence, but where a potentially disproportionate adjustment is at issue, due process may require the prosecution to satisfy a heightened burden.⁹

The clear and convincing standard may apply — at least in some jurisdictions.¹⁰ Where the government proposes a loss adjustment that is greater than four levels and would have a substantial impact on the sentence, the clear and convincing standard may be appropriate.¹¹ There is no “bright line” rule, however, and the “totality of the circumstances” will determine whether the heightened standard of proof applies.¹² Relevant considerations in a securities fraud case ordinarily will support an argument that the clear and convincing standard should be applied.¹³ Given the challenges of calculating securities fraud losses, convincing a sentencing court to hold the government to this heightened standard may benefit the defense substantially.

Satisfying the clear and convincing standard may be a problem for the government when it comes to assessing securities losses in complex cases. Complex cases include those involving multiple stocks, numerous investors, multiple defendants, stocks with a long trading history or substantial residual value, a generally turbulent market at the time in question, an intricate scheme, or a lengthy period of fraudulent conduct. The presence of several of these factors may compound the government's challenge.

Although “some estimate must be made for Guidelines' purposes, or perpetrators of fraud would get a wind-fall,”¹⁴ the benefit of any doubt should be given the defense where the court is estimating loss.¹⁵

Factors to Consider in Evaluating Loss

A number of arguments may support a more reasonable loss adjustment than that proposed by the government. In developing a position, consider the following:

❖ Should victims' losses be market-adjusted to reflect any overall drop in the relevant market at the time in question (for example, the dot-com bust in the high tech market, or distress in the mortgage-backed securities market)?¹⁶

❖ Should a victim's losses be adjusted to reflect any drop in the value of a stock that was caused by factors unrelated to the fraud (for example, unfavorable earnings releases), or extrinsic conditions (for example, exchange rate fluctuations, increasing energy costs, or general economic conditions)?

❖ Where the facts support the use of various different time periods for assessing loss, should the client be given the benefit of the doubt by selecting the time period that minimizes the loss adjustment?

❖ Would the client's personal gain provide a suitable alternative because the government's evidence is not clear and convincing or does not enable victims' losses to be assessed with reasonable certainty?

❖ Should sophisticated victims' losses be adjusted to reflect the degree of risk that they knowingly assumed, so that a loss adjustment is based only on that portion of a loss resulting from investors' unwitting assumption of risk?

❖ Was a large portion of victims' losses caused by the “intervening, independent, and unforeseeable criminal misconduct”¹⁷ of a third party?

❖ Where a fraudulent scheme involves multiple stocks, should a victim's aggregate losses be offset by the victim's gains on all stocks (i.e., does the calculation of net loss on a stock-by-stock basis result in a loss greater than the victim's out-of-pocket loss because the victim made money on some stocks in the victim's portfolio)?

❖ Do victims' losses overstate a client's culpability based on any other factors? For example, was the client unaware of the fraudulent scheme when victims first purchased stocks? Did the client take steps to avoid or mitigate investors' losses? Did the client attempt to withdraw from a conspiracy? Were any victims on notice of irregularities when they invested in a stock, and thus partially to blame for their losses? Did a stock broker/client intend for his customers to be among those who profited from a scheme? Was a scheme simply “puffery or cheerleading or even a misguided effort to protect the company, its employees, and its cheerleaders from the capital-impairing effects of what was believed to be a temporary downturn in business”?¹⁸

Notwithstanding “the time and evidentiary constraints on the sentencing process,” some courts considering loss have been amenable to a “nuanced approach modeled upon loss causation principles.”¹⁹ This may substantially benefit the defense in a thorny securities fraud case.

Actual Loss vs. Intended Loss vs. Alternate Measures

The Guidelines commentary states that “loss” is the “greater of actual loss or intended loss.”²⁰ “Actual loss” — often referred to as “but for” loss — means “the reasonably foreseeable pecuniary harm that resulted from the offense.”²¹ It includes both losses directly attributable to acts of the defendant and acts of co-conspirators that were reasonably foreseeable to the defendant.²²

“Intended loss” means “the pecuniary harm that was intended to result from the offense.”²³ “Intended loss” is not simply the maximum potential loss from an offense, and a “court errs when it simply equates potential loss with intended loss without deeper analysis.”²⁴ However, there is no “economic reality principle” under the Guidelines, and intended losses may include losses that would have been “impossible or unlikely to occur.”²⁵

The Guidelines “do not present a single universal method” for loss calculation, and a “fact-intensive and individualized ... inquiry” may be required to make a reasonable estimate of loss.²⁶ There are “several possible approaches to this calculation: the greater of actual loss or intended loss” or, where these figures cannot be determined “with sufficient certainty ... the defendant's personal gain from the fraud as an alternate measure.”²⁷

The Guidelines suggest two loss calculation methods that may be particularly relevant to securities fraud cases: “the approximate number of victims multiplied by the average loss to each victim,” and “the reduction that resulted from the offense in the value of equity securities or other corporate assets.”²⁸ Often neither method will result in a loss adjustment that fairly reflects the economic reality of a client's wrongdoing or bears any reasonable relationship to the client's conduct.

The Challenge of Calculating Loss With Reasonable Certainty

The Guidelines require only that a sentencing court “make a reasonable estimate of ... loss.”²⁹ In cases involving multiple victims, determining loss “is not easily quantifiable.”³⁰ Where a stock is a complete sham, determining loss may be relatively straightforward.³¹ However, the analysis is “considerably more complex”

where a scheme involved an “otherwise legitimate company,” or a company that is not an “entirely sham” operation.³² This is because the government may be unable to prove loss causation — that the stock would be worthless but for the scheme, or that the drop in stock price resulted entirely from the fraudulent scheme.³³

Substantial challenges face the government where: (1) a stock has some value apart from the effect of a fraudulent scheme; (2) a stock had a long trading history or substantial residual market value following the conclusion of a scheme; (3) market forces or other factors unrelated to the fraud contributed to the drop in a stock’s price; or (4) the price of the stock rebounded significantly at some point after disclosure of the fraud. One or more of these factors will often be present where a scheme causes investor losses regarding an otherwise legitimate stock.

An example of the potential complexity of assessing loss is a “pump-and-dump” scheme, which involves “the tout-ing of a company’s stock ... through false and misleading statements to the marketplace. After pumping the stock, fraudsters make huge profits by selling their cheap stock to the market.”³⁴ As the Ninth Circuit held in *Zolp*, unless the government can prove by clear and convincing evidence that the stock is a complete sham, a loss assessment requires it to “disentangle the underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation ... due to unrelated causes.”³⁵ The way to calculate loss in such circumstances is not set forth in the Guidelines. In this type of situation, the defense may benefit greatly from a sophisticated loss analysis.

Market Capitalization Theory of Loss

A market capitalization theory of loss is a crude but easy-to-apply method of calculating loss. It measures the decline in a stock’s value between the time when a fraudulent scheme was going on and the time when investors first learned about the scheme. This measure bases “loss on a gross correlation between stock price decline and the revelation of a fraudulent action.”³⁶

A market capitalization measure of loss is often a poor proxy for victims’ actual injury because the dates selected for valuation of the stock may have “no particular relevance to the offense conduct,” and the method will attribute the total amount of a decline in the price of a stock to the offense conduct even though other factors may have contributed to the loss.³⁷ This is particularly true in the case of a

long-running scheme because “[o]ther things being equal, the longer the time between purchase and sale ... the more likely that other factors caused the loss.”³⁸

Moreover, a market capitalization measure of loss overstates a victim’s losses where the victim bought the stock at a price that was lower than the inflated price that resulted from the fraudulent scheme. The over-inflation of loss using this methodology may be very substantial where a stock has a lengthy trading history and its price has increased continually over time. In such cases, early purchasers may have lost little or nothing, yet a high loss could be attributed to them.³⁹

A market capitalization calculation also overstates victims’ losses where the stock price plummeted immediately after investors learned of the fraud, but then rebounded at a later point in time.⁴⁰

An example of the defects in loss calculations proposed by the government is described in *Zolp*. The sentencing court had adopted the government’s position that the loss for Guidelines purposes was the “intended loss.”⁴¹ The district court calculated loss as the difference between the purchase price of the stock and what it assumed to be its true value (nothing). The Ninth Circuit reversed, ruling that the government had not met its “burden to establish, by clear and convincing evidence, that there was ‘no market’ for ... [the] shares after the fraud came to light.”⁴²

Analogizing to Civil Securities Fraud

Analogizing to civil law may be helpful because civil securities law encompasses a loss causation standard that is similar to the common law theory of proximate cause — a concept largely lost in Section 2B1.1 of the Guidelines.⁴³ In *Rutkoske*, a stock manipulation case against a brokerage firm owner, the Second Circuit remanded for resentencing, noting “no reason why considerations relevant to loss causation in a civil fraud case should not apply” to loss calculations under the Guidelines.⁴⁴

When considering the bounty of civil securities fraud cases examining loss causation and calculating damages, defense counsel should be cognizant of the significant impact of the Supreme Court’s 2005 decision in *Dura Pharmaceuticals*.⁴⁵ In *Dura*, a case cited in many securities fraud cases, the Court held that a civil securities fraud plaintiff must plead and prove loss causation, i.e., that there was a “causal connection between the material misrepresentation and the loss,” in order to satisfy the element of “loss causation.”⁴⁶ Cases predating *Dura* may adopt a broader con-

cept of loss than that which applies following *Dura*, as reflected in its progeny.

In *Olis*,⁴⁷ the Fifth Circuit cited *Dura* in stating that “there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines and the portion of a price decline caused by other factors must be excluded from the loss calculation.” If a fraudulent scheme corresponded with general turbulence in the stock market, or with depression in a particular segment of the market, loss causation may prove a substantial challenge for the government. If extrinsic factors impacted a stock’s price, or players other than the client (or even co-conspirators acting outside of the conspiracy) contributed to victims’ losses, the requisite causal link may be weak. Similar problems may face the government where victims knowingly assumed a high degree of risk by investing in speculative or volatile securities.

Another illustration of the more reasonable approach to investors’ losses under civil securities law is the Private Securities Litigation Reform Act of 1995.⁴⁸ That statute provides for damages to be computed based on the difference between the purchase price paid by an investor and the mean trading price of the stock during the 90-day period following public disclosure of a fraudulent scheme.⁴⁹ This methodology will result in a more accurate assessment of damages — or, by analogy, loss — where the market has an extreme but temporary reaction to disclosure of a fraudulent scheme.

The government may object to considering civil law in calculating loss under the Guidelines because most criminal cases reflect a broader concept of loss. However, the argument that civil securities law does not apply to loss calculations under the Guidelines was explicitly rejected by the Second Circuit in *Rutkoske*.⁵⁰ The common sense reasons for considering civil law in *Rutkoske* and *Olis* may appeal to sentencing courts, in light of the similarity between civil damages and loss to investors in a criminal securities fraud case.⁵¹

Market-Adjusted Loss

A market-adjusted analysis of loss reduces investors’ losses by any decrease in the value of a security that resulted from market factors that were unrelated to a fraudulent scheme. Market adjustment makes economic sense and is consistent with the Guidelines since a loss caused by extrinsic factors is “not a ‘loss’ attributable to the fraud.”⁵² A loss computation that is not market-adjusted will often overstate the loss under the Guidelines.⁵³ Thus, the government must

prove — perhaps by clear and convincing evidence — the amount of investors' losses that resulted exclusively from the fraudulent activities of the defendants.

Where a security is not a complete sham, a large portion of the diminution in its value may have been caused by factors other than a fraudulent scheme. Accordingly, it may behoove defense counsel to establish that the security was not a total sham. Consider questions such as: How long had the security been trading before the claimed fraud? Did it continue trading after the fraud was exposed? Was it traded on the NYSE, AMEX, NASDAQ, or another NASD-regulated exchange? Was it widely traded?⁵⁴ Was it rated by Morningstar, Lipper, or another popular rating system? Was it included in the Russell 20000, NASDAQ-100® or another market index? Did the issuer have business premises? Did it have substantial tangible or others assets? Did it have numerous employees or extensive business operations? Did it submit timely and complete SEC filings?

While the factors establishing legitimacy will differ depending on the circumstances, the more indicia of *bona fide* business operations that can be established, the more likely it is that a court will consider the impact of extraneous factors on the drop in stock price following revelation of a fraud.

Assessing the appropriate amount of market adjustment "inevitably cannot be an exact science," and ordinarily expert analysis and consideration of the general and particular segment of the securities market is necessary for a court "to approximate the extent of loss caused by a defendant's fraud."⁵⁵ Because market-adjusted figures will often be more accurate than those mechanically generated from raw trading data, it may benefit the defense to have an expert prepare a market-adjusted analysis of loss. At a minimum, raising the possibility of market influences on investors' losses may discredit crude and inflated government loss estimates, and support the position that the government has failed to meet its burden of establishing loss with reasonable certainty.⁵⁶

Alternate Loss Measures — A Defendant's Gain

If neither "intended" nor "actual" loss can be reasonably ascertained, a defendant's "personal gain from the fraudulent scheme" is an appropriate alternative method of calculating Guidelines loss.⁵⁷ A client's gain could be diverted funds, inflated trading profits, or the bonuses, kickbacks or other remuneration received because of participation in a scheme.⁵⁸

Using the gains to a client rather than victims' losses may benefit the defense substantially where a client profited little from a fraud, or ended up being among the losers when the scheme belly-flopped or the leading perpetrators scooped all of the gains. Regardless of the circumstances, it also is the alternate method prescribed by the Guidelines when no reasonably accurate assessment of intended or actual loss can be made. In *Zolp*, for example, the defendant was a "major participant in a 'pump-and-dump' scheme," who, *inter alia*, convinced an issuer to hire a bogus investment advisory firm, which generated false press releases, thereby driving up the price of the stock. When the price was elevated, he told his broker to sell his trove of stock.⁵⁹ The presentence report "found that actual loss to the investors could not be determined, and, accordingly, recommended a calculation based on [the defendant's] personal gain from the fraudulent scheme."⁶⁰

Of course, a client's gain may be disproportionately large relative to actual or intended loss. For example, in a sting operation law enforcement may be responsible for the amount paid in bribes or kickbacks.⁶¹ In such cases, the government holds the keys to a defendant's gain, and it could be unfair to use such figures as the "loss" amount for sentencing purposes.

Novel Government Theories of Loss


Government efforts to calculate loss based on novel theories (for example, a victim's expectations of profit, or the opportunity cost of funds invested by victims) have been unpopular in some courts.⁶² As the Fifth Circuit stated in *Olis*, the "government does not further the goals of sentencing uniformity or fairness when, as seems to be happening in these cases, the government persistently adopts aggressive, inconsistent, and unsupported theories of loss."⁶³

Exclusions From, and Credits Against, Loss

Exclusions from, and credits against, loss may provide good opportunities for a lower loss adjustment. For example, amounts based upon an agreed-upon return, the costs of prosecution, and a victim's expenses in aiding prosecutors are not included in loss calculations.⁶⁴ Loss will also be reduced by money or property returned to victims before an offense is exposed, or a defendant knows, or reasonably should have known, that the scheme was about to be detected.⁶⁵ An exception to this exclusion, however, is a Ponzi or other scheme in which payments to victims are routinely made to some or all victims.⁶⁶

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A victim's losses also should be reduced by the victim's gains, and courts could consider a victim's net losses on the entire portfolio of stocks that were impacted by a fraudulent scheme. As explained by the Seventh Circuit in *United States v. Mount*:⁶⁷

[The Guidelines], and this court's cases ... call for the court to determine the net detriment to the victim rather than the gross amount of money that changes hands. So a fraud that consists in promising 20 ounces of gold but delivering only 10 produces as loss of the value of 10 ounces of gold, not 20.

This may be helpful where a victim withdrew some trading profits on a fraudulent stock before the scheme came to light and its value plummeted. Likewise, this may be helpful where a scheme involved multiple stocks and an investor lost money on some, but profited on others.

To make a reasonably accurate assessment of loss that takes into account investors' gains, a court must evaluate an individual investor's trading history and the residual value of a stock at some point in time following the exposure of a fraudulent scheme. Where an investor had extensive in-and-out trading over a lengthy period of time, or where the nature of the stock invited extensive trading (for example, penny stocks or commodities), it may be very challenging to offset victims' losses with their gains. If feasible, however, it may result in a lower loss adjustment where a victim enjoyed profits on stocks at various times during the course of a scheme, or enjoyed profits on some, but not all, stocks that were affected by a fraud.

Conclusion

Computing loss with reasonable certainty in securities fraud cases presents substantial legal and practical challenges. Identifying a methodology that is feasible under the circumstances, consistent with the Guidelines, and generates a fair sentence may be particularly problematic. However, a number of cases create opportunities to avoid some of the distortion created by the broad concept of loss under the Guidelines. In light of the severe sentences often generated by rote loss calculations, exploring these issues may help to obtain more just sentences for clients convicted of securities fraud.

Notes

1. 543 U.S. 220 (2005).

2. 128 S.Ct. 586, 596 (2007).

3. For offenses before November 1, 2001, see USSG § 2F1.1 (providing lower loss adjustments).

4. See Stuart Taylor, Jr., *Irrational Sentencing, Top to Bottom*, NAT'L LAW J. (February 12, 2007) (comparing sentencing proceedings in such cases to "Roman emperors throwing criminals to the lions and bears to gratify circus crowds").

5. *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007).

6. *United States v. Olis*, 429 F.3d 540, 547 (5th Cir. 2005).

7. *Gall*, 128 S.Ct. at 596.

8. *United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007).

9. See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (higher standard of proof than a preponderance of the evidence may apply where sentencing enhancement is the "tail which wags the dog of the substantive offense").

10. See *United States v. Gonzalez*, 492 F.3d 1031, 1039 (9th Cir. 2007) (clear and convincing standard applies to 9-level increase to the offense level, which increased Guideline range from 0-6 months to 21-27 months, since adjustment had "extremely disproportionate effect on the sentence relative to the offense of conviction"), *cert. denied*, 128 S.Ct. 1093 (2008); *Zolp*, 479 F.3d at 718; *United States v. Okai*, 454 F.3d 848, 852 (8th Cir.) (recognizing in *dicta* that due process may require sentencing courts to apply a higher standard of proof where the sentencing enhancement becomes the "tail which wags the dog of the substantive offense"), *cert. denied*, 127 S.Ct. 697 (2006). *Cf. United States v. Grier*, 475 F.3d 556, 566 (3d Cir.) (*en banc*) (declining to consider status of prior holding that sentencing enhancements that "can fairly be characterized as a 'tail which wags the dog of the substantive offense' must be proved by clear and convincing evidence") (citations omitted), *cert. denied*, 128 S.Ct. 106 (2007); *but see United States v. Scroggins*, 485 F.3d 824 (5th Cir.) (rejecting argument that any standard of proof greater than a preponderance applies where relevant conduct is the "tail that wags the dog" of the substantive offense), *cert. denied*, 128 S.Ct. 324 (2007).

11. See *United States v. Jordan*, 256 F.3d 922, 929 (9th Cir. 2001) (clear and convincing standard applies where 9-level adjustment would approximately double Guideline range); *id.* at 934 ("[W]e appear to have consistently held that when the enhancement is greater than four levels and more than doubles the applicable sentencing range, then the enhancements must be proved under 'clear and convincing' standard of proof.") (O'Scannlain, J., concurring); *Zolp*, 479 F.3d at 718 (government concedes clear and convincing stan-

dard applies to 20-level loss adjustment).

12. *United States v. Pike*, 473 F.3d 1053, 1057-58 (9th Cir.) (error to apply heightened standard to 5-level adjustment without first considering "totality of circumstances"), *cert. denied*, 128 S.Ct. 256 (2007).

13. See *id.* (enumerating relevant factors); USSG § 2B1.1(b)(1) (prescribing 4- to 30-level adjustments for losses exceeding \$5,000).

14. *United States v. Ebbers*, 458 F.3d 110, 127 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 1483 (2007).

15. See *United States v. Kilby*, 443 F.3d 1135, 1141 (9th Cir. 2006) (where "sentence depend[ed] in large part upon the amount of drugs," court "must err on the side of caution" in approximating quantity).

16. See, e.g., *Rutkoske*, 506 F.3d at 180 ("a fraud disclosed just as the dot-com bubble burst might cause most, but not necessarily all, of the decline in previously high-flying technology stocks"); *Emergent Capital Inv. Mgmt., LLC v. Stronopa:h Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (where "loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not have been established").

17. *United States v. Hooker*, 217 F.3d 1038, 1049 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000).

18. *Ebbers*, 458 F.3d at 129-30.

19. *Olis*, 429 F.3d at 547 (citations omitted). An example of this is the analysis of the district court considering the sentencing of Brocade Communications' CEO Gregory Reyes. See *United States v. Reyes, et al.*, CR 06-556-CRB (N.D. Cal.) (CR 737, Order Re: Sentencing dated November 27, 2007 ("Reyes Order")).

20. USSG § 2B1.1, cmt. n.3(A).

21. *Id.* at § 2B1.1, cmt. n.3(A)(i); see also U.S. Sentencing Commission, Office of General Counsel, *An Overview of Loss in USSG § 2B1.1* (March 2007), available at <http://www.uscc.gov/training/loss-March%202007.pdf> ("Loss Overview").

22. See *Loss Overview*, at 1.

23. USSG § 2B1.1, cmt. n.3(A)(ii).

24. *United States v. Geevers*, 226 F.3d 186, 192 (3d Cir. 2000).

25. *Loss Overview*, at 4.

26. *Zolp*, 479 F.3d at 718.

27. *Id.* at 719; see USSG § 2B1.1, cmt. n.3(B).

28. USSG § 2B1.1, cmt. n.3(C)(iii), (iv).

29. USSG § 2B1.1, cmt. n.3(C).

30. *Ebbers*, 458 F.3d at 127.

31. *Olis*, 429 F.3d at 546-47.

32. See *Zolp*, 479 F.3d at 719.

33. See *id.*; *Ebbers*, 458 F.3d at 128 ("Many factors causing a decline in a company's performance may become publicly known around the time of [a] fraud and be one cause in the [drop] in price. ...").

34. *Zolp*, 479 F.3d at 717, n.1 (citation

FROM THE PRESIDENT

Continued from page 6

tal torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”)

13. The Department of Justice Office of Legal Counsel has issued the “torture memorandum” that justifies what would otherwise be a crime. Is this a legal defense? Who knows now? See 2 Paul Robinson, *CRIMINAL LAW DEFENSES* § 183(c)(3):

Potential for abuse is also often cited as a rationale for limiting the reasonable reliance excuse to official misstatements. A client might seek, or a counsel might intentionally give, erroneous advice that would then permit the client to undertake criminal activity with impunity. The objection is not without basis, but the requirement of the defense that there be actual and reasonable reliance seems sufficient to effectively exclude such fraudulent excuses. ...

It should be noted as well that where fabricated reliance upon a calculated misstatement is a concern, officials themselves have no special immunity from the temptations of bribery and corruption. Thus, if abuse is a sufficient concern to bar the defense, the defense might properly be barred for reliance upon official misstatement as well.

14. Starting, of course, with the Geneva Convention and all its amendments.

15. *United States v. Lee*, 106 U.S. 196, 220 (1882):

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it. ■

NACDL Sentencing Committee — Call to Action

Mark Rankin and Mark Allenbaugh are the new co-chairs of the NACDL Sentencing Committee and seek your involvement. The Committee will focus on state, federal, and international sentencing policy and procedure. The first meeting of the newly constituted committee will be on Sunday morning at the Fall Meeting in Tampa. Please e-mail the co-chairs at mrankin@carltonfields.com and mallenbaugh@alsalaw.com to express your interest in being involved and attending the meeting in person or by phone.

omitted).

35. *Id.* at 719; see also *Ebbers*, 458 F.3d at 128 (“The loss must be the result of the fraud.”).

36. *Olis*, 429 F.3d at 546-47 (citing cases rejecting market capitalization calculations of loss).

37. See *Rutkoske*, 506 F.3d at 178.

38. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343 (2005); cf. *Ebbers*, 458 F.3d at 127 (“The loss to investors who hold during the period of an ongoing fraud is not easily quantifiable because we cannot accurately assess what their conduct would have been had they known the truth.”).

39. See *In re Cedant Corp. Litig.*, 264 F.3d 201, 242 (3d Cir. 2001) (illustrating inflated loss generated by market capitalization analysis where an investor purchased stock at a lower price than that immediately preceding disclosure of a fraud), discussed in *Reyes Order*, at 5-6.

40. See *United States v. Bakhit*, 218 F.Supp. 2d 1232, 1241-42 (C.D. Cal. 2002) (calculating loss based on depressed stock price on date trading resumed following disclosure of fraud would result in an inflated loss adjustment because initial price drop was temporary and “appear[ed] to be an anomaly, an extreme reaction to the announcement of the fraud”).

41. 479 F.3d at 720.

42. *Id.* at 720; cf. *Ebbers*, 458 F.3d at 127-28 (discussing defects in “simplistic analysis” of market capitalization model).

43. See *Rutkoske*, 506 F.3d at 179, citing *Olis*, 429 F.3d at 546 (looking to civil securities fraud damages law for guidance in calculating Guidelines loss).

44. *Rutkoske*, 506 F.3d at 179.

45. 544 U.S. 336.

46. *Id.* at 341.

47. 429 F.3d at 546.

48. Pub.L.No. 104-67, 109 Stat. 737 (1995) (codified in various sections of Title 15 U.S.C.).

49. See 15 U.S.C. § 78u-4(e); *United States v. Grabske*, 260 F.Supp. 2d 866, 873-75 (N.D. Cal. 2002); *Reyes Order*, at 6.

50. 506 F.3d at 179.

51. See, e.g., *Reyes Order*, at 5-6.

52. *Olis*, 429 F.3d at 546.

53. See *Rutkoske*, 506 F.3d at 180 (“basic failure” for sentencing court to not even consider factors relevant to stock price decline other than fraud).

54. Cf. *Rutkoske*, 506 F.3d at 180 (rejecting government’s argument that a “thin market” for a stock means that market forces could not have contributed to investors’ losses).

55. *Rutkoske*, 506 F.3d at 179-80.

56. See *Reyes Order*, at 8-10 (rejecting government calculations based on “rescissory loss model” because effects of defendant’s wrongdoing cannot be untangled from market influences on stock price).

57. See USSG § 2B1.1, cmt. n.3(B); *Zolp*,

479 F.3d at 719.

58. See, e.g., *United States v. West*, 2 F.3d 66, 71 (4th Cir. 1993) (brokerage fees paid by government is appropriate loss where brokers fraudulently obtained under-secured bonds for government).

59. *Id.* 479 F.3d at 717.

60. *Id.* at 720; cf., e.g., *United States v. Munoz*, 430 F.3d 1357, 1371 (11th Cir. 2005) (sentencing court would be justified in using defendant’s gain to assess loss given that it was arguably difficult to determine customers’ loss in misbranding case), *cert. denied*, 126 U.S. 2305 (2006); *United States v. Yeager*, 331 F.3d 1216, 1225-26 (11th Cir. 2003) (affirming trial court finding that defendant’s profit was reasonable estimate of loss where court was unable to reasonably estimate actual or intended losses due to conflicting and confusing trial testimony).

61. See, e.g., 6 *Arrested Over Plots to Pump Up Share Prices*, N.Y. TIMES, Dec. 8, 2007, at B1 (detailing operation in which undercover FBI agent “got word out in the penny stock community that he was willing to buy stocks in struggling companies in return for bribes”).

62. See, e.g., *Reyes Order*, at 7 (rejecting government’s alternate proposal of measuring loss by SEC fines paid by issuer, or tax liabilities of victim employees that issuer voluntarily assumed).

63. *Olis*, 429 F.3d at 547, n.11, cited in *Reyes Order*, at 7 (citation omitted).

64. USSG § 2B1.1, cmt. n.3(D); *United States v. Schuster*, 467 F.3d 614, 618-20 (7th Cir. 2006) (reversing loss calculation that included victims’ expenses in connection with trial testimony).

65. USSG § 2B1.1, cmt. n.3(E)(i).

66. *Id.* cmt. n.3(F)(iv); *Loss Overview*, at 13.

67. 966 F.2d 262, 265 (7th Cir. 1992). ■

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