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Reforming Securities Fraud Sentencing: An Alternative Proposal to a Loss-Based Approach

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The sentencing regime for criminal securities fraud has undergone many adjustments over the past several decades. The U.S. Sentencing Commission's initial focus on loss as the paramount factor in sentencing, however, has weathered this regulatory storm. In recommending an appropriate sentence for securities fraud, along with other types of "theft," the U.S. Federal Sentencing Guidelines place an improper emphasis upon (and often improperly calculate) the financial "loss" associated with the violation—that is, the overall loss resulting from the offense.[1] At first glance, this arrangement—tying an individual's sentence to the losses caused by his transgressions—may appear reasonable, at least within the overall context of economic crime. Unlike other forms of theft, however, a securities fraud offender's intended or actual gain frequently diverges significantly from (and often is much smaller than) the associated victim or market losses.[2] Because the Guidelines assign high priority to the loss calculation, the current sentencing regime often imposes harsh punishments that far exceed a defendant's culpability. Given that an offender's state of mind is a paramount principle of criminal law, this is particularly troubling and undermines the Commission's goals to develop a more honest, uniform, equitable, and proportional sentencing system.[3]

In light of these concerns, the loss calculation should not determine sentences for securities fraud offenders. Instead, sentencing determinations should be based upon a securities offender's actual or intended gain, with upward departures for higher modes of culpability. Adopting such a system would treat white collar criminals more equitably than the current regime, which frequently results in disproportionate sentences for securities offenders that are even harsher than those imposed upon murderers or other violent offenders.

BACKGROUND

Throughout the evolution of the Guidelines, the Commission has embraced many changes relating to white collar crimes but remained steadfast in considering loss a critical determinant in sentencing recommendations. Although the Commission, taking its cue

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[1] *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL, §§ 2B1.1, 2B1.4 (Nov. 2018) [hereinafter 2018 SENTENCING GUIDELINES].

[2] John D. Esterhay, *Apples and Oranges: Securities Market Losses Should Be Treated Differently for Major White-Collar Criminal Sentencing Under the Federal Guidelines*, 76 MO. L. REV. 1113, 1117 (2011).

[3] 2018 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A.

from federal courts, recently has considered the suitability of several loss calculation methods, it continues to focus upon loss to determine a defendant's punishment. The U.S. Supreme Court's 2005 decision to render the Guidelines advisory, rather than mandatory,[4] did not fracture this tendency but instead exposed how frequently securities fraud sentencing recommendations under the Guidelines are draconian.

Prior to the adoption of the Guidelines, concern over disparities in sentencing for comparable federal crimes steadily rose.[5] To address the need for reform, Congress passed the Comprehensive Crime Control Act of 1984, creating a new, independent agency—the U.S. Sentencing Commission.[6] Congress delegated authority to the Commission to develop an effective and fair sentencing system—a regime that would no longer allow variations within sentencing to persist along geographical, racial, and gender lines.[7]

Shortly thereafter, in 1987, the Commission promulgated its first set of Guidelines.[8] The Commission had observed a considerable difference between sentences for defendants convicted of white collar crimes, such as embezzlement or fraud, and for those convicted of simple theft.[9] Displeased with this distinction, the Commission "made a policy decision to adopt a guideline structure under which all of these crimes [would be] treated identically,"[10] and the 1987 Guidelines created "loss tables" that increased punishment with each ascending estimated, probable, or intended loss amount range.[11] The Commission also added several "specific offense characteristics" that could increase a defendant's sentence, such as whether an offense involved "more than minimal planning."[12]

With respect to securities fraud, the Commission recognized that the amount of loss may not be precise, such that "[e]stimates based upon aggregate 'market loss' (*e.g.*, the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases."[13] The Commission deemed a defendant's gain from committing the fraud an alternative estimate but emphasized that measures based on gain will "ordinarily . . . understate the loss."[14] Conversely, under some circumstances, the total dollar loss may

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[4] *United States v. Booker*, 543 U.S. 220, 259 (2005).
[5] Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1005 (2010).
[6] 2018 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A.
[7] *Id.*; Vollrath, *supra* note 5, at 1005-06; U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 7-8 (June 1987) [hereinafter 1987 SUPPLEMENTARY REPORT].
[8] 2018 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A.
[9] 1987 SUPPLEMENTARY REPORT, *supra* note 7, at 18.
[10] *Id.*
[11] *Compare* U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 2B1.1 (Nov. 1987) [hereinafter 1987 SENTENCING GUIDELINES] *with id.* § 2F1.1 (demonstrating that calculation of the base offense level with specific offense characteristics results in substantially similar final offense levels for theft and fraud crimes). In general, the Commission created a system in which the sentencing recommendations depended on a pre-determined "base offense level" and then "specific offense characteristics." Offense-specific characteristics include facts relevant to the commission of the offense that can increase or decrease a defendant's sentence. *See* U.S. SENTENCING COMM'N, *An Overview of the Federal Sentencing Guidelines*, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.
[12] 1987 SUPPLEMENTARY REPORT, *supra* note 7, at 13-15; 1987 SENTENCING GUIDELINES, *supra* note 11, at § 2F1.1(b)(2).
[13] 1987 SENTENCING GUIDELINES, *supra* note 11, at § 2F1.1 cmt. 8.
[14] *Id.*

"overstate" the seriousness of the violation[15]—for example, "when a misrepresentation is of limited materiality or is not the sole cause of the loss."[16] But the Commission failed to address the very real possibility that although an offender's conduct may be material, the offender may have failed to anticipate the potential market loss (or the magnitude thereof) in perpetrating the fraud—particularly in instances in which the offender is one of many whose conduct collectively contributes to significant market losses, as occurred in the 2008 U.S. financial crisis, for example. Accordingly, the Commission neglected to address circumstances in which securities fraud sentencing based on loss, rather than on a defendant's actual or intended gain, may be improperly harsh, and "[t]he upward ratchet of the Guidelines for economic crimes" therefore "began at the beginning—with the initial set of Guidelines" in 1987.[17]

Over the decades that followed, the Guidelines underwent a series of iterations and revisions, pursuant to which the Commission repeatedly accentuated loss as a driving factor. *First*, from 1987 to the mid-1990s, the Commission amended the Guidelines to add more offense characteristics and modify the loss tables, subjecting white collar offenders to greater punishment.[18] *Second*, in 2001, the Commission adopted the Economic Crime Package amendments.[19] Among other changes, these amendments collapsed the Guidelines governing theft and fraud into a single instruction.[20] *Third*, after the passage of the Sarbanes-Oxley Act in 2002, the Commission increased punishment for white collar criminals whose conduct contributed to high market or victim losses.[21] During the course of these changes, the Commission strongly emphasized the centrality of loss—however calculated—to punishment for white collar crimes.

Today, the amount of loss that judges reasonably may attribute to a white collar offender's actions continues to drive sentencing.[22] Although the Supreme Court in *United States v. Booker* rendered the Guidelines "advisory" rather than "mandatory," the Court has since clarified that the Guidelines' recommendations still play a crucial role in,[23] and remain "the starting point and the initial benchmark" for, sentencing.[24] Accordingly, the

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[15] *Id.* at cmt. 11.
[16] *Id.*
[17] Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 940, 951 (2017) (quoting James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT'G REP. 138 (2010)) (internal quotation marks omitted).
[18] Lana L. Freeman, *Sentences Should Be Reasonable, Not Shocking: A De-emphasis on Loss for Federal Securities Fraud Sentencing*, 2012 U. ILL. L. REV. 969, 977 (2012).
[19] Vollrath, *supra* note 5, at 1009.
[20] *Id*. The amendments also "slightly lowered the sentences of offenders convicted of low-loss frauds and significantly raised the sentences of offenders convicted of high-loss frauds," *id.*, and further expanded the definition of loss. *Id.* at n.59.
[21] Freeman, *supra* note 18, at 977-78. Specifically, the Guidelines added a two-level increase for offenses resulting in losses exceeding $200 million and those exceeding $400 million. The Commission also raised the base offense level for theft, fraud, and other similar crimes from six to seven. *Id.*
[22] Vollrath, *supra* note 5, at 1012.
[23] *Booker*, 543 U.S. at 259 (holding the mandatory provision of the Guidelines unconstitutional); *see Gall v. United States*, 552 U.S. 38, 59 (2007) (holding that the "the Guidelines are only one of the factors to consider when imposing sentence"); *Rita v. United States*, 551 U.S. 338, 356-57 (2007) (explaining that a sentencing judge may apply the Guidelines to a case without "lengthy explanation").
[24] *Gall*, 552 U.S. at 49.

Guidelines continue to maintain a strong influence in sentencing determinations,[25] thus highlighting the importance of identifying an appropriate methodology for securities fraud sentencing.

Rather than evaluating whether loss is an appropriate measure for sentencing in the first place, the Commission has focused upon the suitability of various loss calculation methodologies.[26] The Guidelines currently define loss as "the greater of actual loss or intended loss."[27] "Actual loss" constitutes "the reasonably foreseeable pecuniary harm that resulted from the offense," while "intended loss" represents the "pecuniary harm that the defendant purposely sought to inflict," including harm that would have been "impossible or unlikely to occur."[28] The Guidelines make clear that a court need only make a "reasonable estimate" of the loss.[29] The Guidelines accept the gain resulting from the offense as an alternative measure of loss, but "only if there is a loss but it reasonably cannot be determined."[30] Over the past few years, appellate courts have debated, and the Commission has addressed, which loss calculation methodology should be used in sentencing securities fraud[31] but have not expressly considered setting aside this measure altogether in favor of a more fair and equitable indicator of a defendant's culpability.

DEFICIENCIES IN SECURITIES FRAUD SENTENCING

The Commission's ongoing focus upon loss calculation methodology overlooks one crucial query: is loss itself an appropriate measure when sentencing offenders for criminal securities fraud? Given the great weight assigned to loss calculation, the ultimate sentencing recommendations often are untethered to a securities fraud defendant's culpability, and as such, using loss to determine sentences may be improper in the securities fraud context.[32] Judges also have acknowledged problems with relying primarily upon loss, often choosing to adopt downward variances when sentencing offenders for securities fraud[33]—an acknowledgement of the draconian sentences the Guidelines impose

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[25] Freeman, *supra* note 18, at 979; Vollrath, *supra* note 5, at 1014.

[26] U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 1-2 (Apr. 30, 2012) [hereinafter AMENDMENTS TO THE SENTENCING GUIDELINES].

[27] 2018 SENTENCING GUIDELINES, *supra* note 1, at § 2B1.1 cmt. 3(A).

[28] *Id*.

[29] *Id*. at cmt. 3(C).

[30] *Id*. at cmt. 3(B).

[31] *See* Freeman, *supra* note 18, at 980-88 (documenting circuit split among courts as to whether loss causation principles in the civil sphere should extend to criminal securities fraud sentencing); AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 26, at 5-6 (adopting the "modified rescissory method" of calculating loss as a "rebuttable presumption").

[32] Bennett, *supra* note 17, at 982 (acknowledging that most individuals and entities submitting comments to the Commission regarding the 2015 Amendments were "troubled" by overreliance upon the loss amount).

[33] U.S. SENTENCING COMM'N, *Quick Facts: Securities and Investment Fraud Offenses*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY18.pdf (illustrating that in Fiscal Year 2018, of the 62.4% of securities and investment fraud offenders sentenced pursuant to the Guidelines, 37.6% received a variance); *see also* Bennett, *supra* note 17, at 968 (showing that in one empirical study in which researchers presented district court judges with a securities fraud sentencing hypothetical, 75% of judges "sentenced at the precise bottom of the designated guideline range . . . and that sentence lengths were predicted by judges' mercy, but not retribution, philosophies").

upon white collar criminals, particularly in securities fraud cases.[34] In fact, "the recommended sentences for high-loss white-collar crimes eclipse the sentences typically imposed for murder and serial child molestation."[35] This incongruity underscores that use of a different, more equitable indicator is warranted when determining sentences for securities fraud.

The Guidelines' reliance upon loss calculations fails to take into account the varying levels of culpability for securities fraud, and that the market or victim losses incurred may have little or no relation to an individual's culpability. Culpability is the linchpin of criminal law, which renders the established methodology particularly puzzling.

The consolidation of the theft and fraud loss tables in the Guidelines has contributed to this problem.[36] For example, the Guidelines treat an individual who embezzles $100 directly from a company significantly less severely than one who commits securities fraud in anticipation of receiving a $100 bonus but consequently (and perhaps even unforeseeably) generates millions of dollars in market losses as a result of the fraud. Embezzlement often yields a one-to-one loss ratio to the victim—the perpetrator steals $100, and the victim consequently loses $100; but that is not often the case for securities fraud, where victim and market losses can reach multi-millions of dollars, while the offender gains only a small fraction of that amount. For this reason, direct theft and securities fraud should not be viewed through an identical lens; the loss amounts associated with these crimes often differ dramatically and afford little or no reflection of an offender's culpability for his or her conduct (or expected benefit therefrom).

The Guidelines do not currently differentiate among varying degrees of culpability for financial crimes.[37] Not only does this undermine the Commission's goals of achieving a "more honest, uniform, equitable, proportional, and therefore effective sentencing system," it also violates an underlying principle of criminal law.[38] For most other crimes, a punishment's severity is tethered to the offender's culpable behavior. With respect to homicide, for instance, the Guidelines recommend varying levels of punishment that correlate with the offender's culpable state—that is, *mens rea*.[39] Not so for economic crimes. "Although substantive law does call for the requisite mental state for conviction, neither it nor the sentencing regime considers the possible varying degrees of culpability in allocating punishment."[40] In fact, when an offender contemplates the level of harm beyond his own personal gain, the Guidelines simply provide consideration for upward departures.[41] In light of established criminal law principles and the Commission's treatment of other offenses, disregarding culpability in securities fraud sentencing seems improper and inconsistent.

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[34] Bennett, *supra* note 17, at 973.
[35] Vollrath, *supra* note 5, at 1021.
[36] *See supra* text accompanying note 19-20.
[37] Freeman, *supra* note 18, at 991; *see also* Charles E. Torcia, 1 WHARTON'S CRIMINAL LAW § 27 THE ACT AND MENTAL STATE (15th ed. 2019) ("a crime consists in the concurrence of prohibited conduct and a culpable mental state").
[38] 2018 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A.
[39] *Id.* at §§ 2A1.1-2A1.4.
[40] Freeman, *supra* note 18, at 991.
[41] 2018 SENTENCING GUIDELINES, *supra* note 1, at § 2B1.1 cmt. 21.

Relying upon overall loss for securities fraud sentencing also departs from criminal law philosophies. The Commission has declined to adopt a single theory of criminal law in producing the Guidelines, and instead has considered both the deterrence and retributivist theories.[42] The loss calculation method for sentencing, however, conforms to neither.

The theory of deterrence seeks to prevent violations by prospective offenders and repeat violations by prior offenders.[43] Sentencing those who commit securities fraud to life imprisonment solely because of large market or victim losses deviates from the theory of deterrence when (1) a much lower sentence would achieve the stated goal; and (2) in many instances, the losses associated with a particular individual's conduct are unpredictable and unforeseeable (or unforeseen), and often indistinguishable from losses associated with the misconduct of other individuals. As a district court judge observed, there is "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."[44] In fact, most compelling for white collar defendants is not the length of the sentence, but whether they will be banished to prison in the first place.[45] Further, under the deterrence theory, individuals who are less culpable require less punishment.[46] Given that a potential securities fraud offender may fail to appreciate that his misconduct, which he may view as trivial or insignificant, could contribute to millions of dollars in market losses, a severe punishment premised upon market losses would not deter him regardless. Moreover, an offender may not be aware of other market participants engaging in similar parallel conduct, which may collectively contribute to larger market disruptions far beyond what the individual possibly could have contemplated. Again, severe sentences based on total market losses may have no deterrent effect in these circumstances, because such offenders simply have no way of knowing or predicting the magnitude of market losses caused by a larger collective—particularly when the individual offender's participation in the misconduct is minimal. Thus, recommending such large sentences based upon larger victim or market losses, particularly when only tangentially tied to an individual's misconduct, does not comport with the deterrence theory of criminal law.

Likewise, the Guidelines' prioritization of loss in securities fraud sentencing also contravenes the retributivist theory of criminal law. Retribution seeks a level of punishment proportional to the seriousness of the offense,[47] but the amount of losses caused by securities fraud offenses often affords only a poor indicator of the crime's severity.[48] With sentencing tethered to loss calculation, "the Guidelines effectively

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[42] 1987 SUPPLEMENTARY REPORT, *supra* note 7, at 17.
[43] *See* Torcia, 1 WHARTON'S CRIMINAL LAW § 3 DETERRENCE ("under the theory of special deterrence, punishment is aimed only at the individual offender," and "under the theory of general deterrence, an example is made of the offender").
[44] *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008).
[45] *United States v. Thurston*, 456 F.3d 211, 218 (1st Cir. 2006), *cert. granted, judgment vacated*, 552 U.S. 1092 (2008).
[46] Freeman, *supra* note 18, at 992.
[47] *See* Torcia, 1 WHARTON'S CRIMINAL LAW § 2 RETRIBUTION ("retribution may have a bearing on the justice of a particular sanction in the sense that the measure of punishment should never exceed that which the gravity of the offense deserves").
[48] Bennett, *supra* note 17, at 979 (quoting the former Chairman of the ABA Criminal Justice Section's statement that "[t]he Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant

recommend life imprisonment when an officer or director of virtually any public corporation is found guilty of securities fraud," bypassing the average sentences for other crimes like murder and child molestation.[49] These excessive recommendations far exceed any punishment that possibly could be considered proportionally acceptable in relation to the offense.

Further, because the Guidelines do not take into account culpability in securities fraud, they likewise cannot be said to reflect any retributive end. Each offender is treated the same, regardless of whether he or she perpetrated the fraud recklessly or with a willful, intentional state of mind. Because loss calculation does not correspond to the seriousness of the offense, this sentencing methodology does not cohere with the retributivist theory. Because sentencing securities fraud offenders based upon market or victim losses diverges from both the deterrence and retribution theories, the Commission should seek to amend the Guidelines to encompass a fairer, more reasonable alternative.

A PROPOSED ALTERNATIVE

Given that market or victim losses afford an improper method for sentencing, the Commission should adopt an alternative measure that will result in rational and just punishments for white collar offenders. Adopting a measure that centers on an offender's actual or intended gain, rather than the overall market loss, with upward departures for more culpable behavior, would achieve this aim. An offender's gain affords a more reliable measure of culpability than total market losses. The Guidelines currently permit courts to consider a defendant's "gain" as an alternative sentencing measure, but only if loss cannot be reasonably ascertained.[50] The Commission should adopt this approach as its primary, rather than alternative, rubric for several reasons. As an initial matter, the offender's gain is a more appropriate gauge of his or her culpability than the levels of market losses the offender may have unintentionally, unknowingly, or tangentially caused. Prospective securities fraud offenders generally do not contemplate market impact; instead, in most instances, they are fixated on their anticipated profits, which often differ markedly from the resulting market or victim losses.

This methodology also will appropriately address egregious instances in which the defendant's gain bears similarity to the victims' losses. In the case of Bernie Madoff, for example, while "the multi-billion dollar loss amount was staggering . . . [the] individual victims of Madoff's scheme suffered this loss. Direct investment in Madoff's fraudulent organization was the cause of their financial loss."[51] In other words, Madoff's scheme was similar to simple theft: his gain was largely proportional to his victims' losses. By extension, sentencing based on his gain still would result in a proportionate punishment.

Circumstances of course may exist in which determining sentencing based solely on an offender's actual or intended gain may be improper, but it is those instances where upward departures for increasing levels of culpability would come into play. In one case

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sentencing factor . . . In many cases . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.") (citation omitted)).

[49] Vollrath, *supra* note 5, at 1022 (citing *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008)).

[50] 2018 SENTENCING GUIDELINES, *supra* note 1, at § 2B1.1 cmt. 3(B).

[51] Esterhay, *supra* note 2, at 1139-40.

involving securities fraud, an appellate court judge observed the vast difference between expected gain and market loss: "[t]he great difference . . . describes and defines the callousness of defendants who, in order to obtain relatively little, acted in utter disregard of the vast financial loss consequence they inflicted on so many. It is not appropriate therefore to limit sentencing consequences to defendants' gain, thereby ignoring victims' loss."[52] At times, that may be the case, but rather than establishing loss as a starting point, upward departures should be employed to address an offender's culpability. Correlating punishments to culpability is an established mechanism in both criminal substantive law and sentencing,[53] and the Commission should extend this settled principle to securities fraud sentencing. Further, defendants should not need to rely on the court to exercise prudence, particularly where judges must explain departures from the Guidelines.

Some may contend that while recognition of disproportionate recommended sentences for securities fraud is important, reform is unnecessary in light of *Booker* discretion. However, while judges can use downward departures to shorten sentences—and they have—the Guidelines still remain influential.[54] Rather than relying upon judges to avoid the path of least resistance and depart from the Guidelines' recommendations, given that the Guidelines already serve as an important "anchor" in sentencing,[55] the Commission should adopt a different sentencing regime. This alternative proposal would satisfy the Commission's goals in advocating for just and effective sentencing.

CONCLUSION

In attempting to solve one problem, the Commission has created another. No longer do individuals committing securities fraud escape punishment; instead, they face punishments severer and harsher than those imposed upon violent offenders. Without justification in criminal law, the Commission improperly emphasizes loss calculation for criminal securities fraud sentencing. By doing so, the Commission submits individuals committing securities fraud to disproportionate and unjust punishments, while dispensing with basic criminal law theories and principles. Rather than relying upon loss calculation methods, the Commission should adopt alternative measures. Sentencing according to a defendant's actual or intended gain, with upward departures for increasing levels of culpability, would yield fairer sentencing and achieve the Commission's objectives of a "more honest, uniform, equitable, proportional, and therefore effective sentencing system."[56]

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[52] *United States v. Snyder*, 291 F.3d 1291, 1296-97 (11th Cir. 2002) (Hill, J., concurring).
[53] *See supra* text accompanying notes 37-38.
[54] *See supra* text accompanying notes 22-24.
[55] Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1022 (2016).
[56] 2018 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A.