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Affirmatively Ambiguous: Reforming the Fraud Federal Sentencing Guideline Rules in “Affirmative Action” Government Contracts

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I. Introduction

In fiscal year 2017, the federal government contracted with nearly 3.5 million different individuals and awarded over 350 billion dollars in contracts.¹ Specifically, the government reserves and allocates substantial sums of contract dollars for small businesses run by historically disadvantaged individuals such as minorities and women.² Unfortunately, individuals (referred to as “white collar criminals”³) steal hundreds of millions of dollars annually from various government programs by means of fraud, embezzlement or improper disbursement.⁴ Sentencing white collar criminals implicates challenging issues including how to punish behavior not immediately recognizable as criminal because fraud crimes often implicate amorphous victims.⁵ Without reforming the federal United States Sentencing Guidelines’ (the “Guidelines”) Comment Application Notes (“the Notes”), the small business procurement market of individual minority and women business owners will continue to suffer harm.⁶

The circuit courts of appeals use two major approaches to calculate loss when criminals steal money intended for minority or women businesses.⁷ As a result, a circuit split exists where several circuit courts apply the general loss rule, while others apply the government benefits

¹ USASPENDING.GOV, <https://www.usaspending.gov> (LAST VISITED SEPT. 14, 2017).

² See 15 U.S.C. § 637(a)(1)(A)–(C) (2016); 49 C.F.R. § 26.1–.15 (2014).

³ Peter J. Henning, *Is Deterrence Relevant in Sentencing White Collar Criminals?*, 61 WAYNE L. REV. 34 (2015) (defining “white collar criminals” as unique because they share several distinct characteristics; they are typically white, older, and better educated with no prior criminal history).

⁴ See Rick Moran, *SBA Inspector General Uncovers Fraud in the 8(a) Program*, ASSOCIATION OF PROCUREMENT TECHNICAL ASSISTANCE CENTERS (2017), <http://www.aptac-us.org/news/sba-ig-uncovers-8a-fraud/>; see also Michelle McVicker, *The Real Cost of DBE Fraud*, U.S. DEP’T OF TRANSP. 1, 8 (2016) (stating the largest DBE fraud in United States history perpetrated by one recipient totaled 136 million dollars over 15 years).

⁵ *Id.* at 34 (defining “amorphous victims” as “the market” or a faceless organization that does not suffer in the same way one who is robbed or assaulted would); see Christopher C. Reese, Note, *A New Sentencing Blueprint: The Third Circuit Allows Disadvantaged Business Enterprise Fraud Convictions to Be Offset by Construction Contract Performance in United States v. Nagle*, 61 VILL. L. REV. 681–88 (2016).

⁶ Henning, *supra*, at 34 (noting that white collar crime and procurement fraud implicates unseen harm).

⁷ See e.g., *United States v. Harris*, 821 F.3d 589, 602 (5th Cir 2016) (applying the general loss rule); *United States v. Maxwell*, 579 F.3d 1282, 1307 (11th Cir. 2009) (applying the special government benefits rule).

special loss rule.⁸ The decision as to whether to apply the general rule or the government benefits rule matters because an individual can defraud the government in one circuit, but serve considerably more or less time in a different circuit for committing the same offense.⁹ For example, under the general loss rule, small business owner A that defrauds the government of one million dollars who uses some of the funds for legitimate purposes will have the legitimate services subtracted from the one million dollars awarded. Importantly, owner A will see a reduction in prison time because A performed on the contract to some extent. In contrast, if B defrauds the government of one million dollars deemed to be “government benefits,” B will owe the entire one million dollars in restitution and be sentenced as such regardless of any legitimate services provided. Therefore, dramatic discrepancies in federal sentencing breed unfairness, injustice, and reinforce the need for uniform sentencing policy in fraud cases involving “affirmative action” programs.

In this comment, I will argue that the United States Sentencing Commission (“The Commission”) should amend the Guidelines for calculating loss under section 2B1.1(b)(1) to clarify that an individual who steals from “affirmative action” programs will be liable for every dollar received from the government without any reduction for legitimate services rendered.¹⁰ In the alternative, to avoid varying interpretations concerning whether the Small Business Administration 8(a) (SBA) and Disadvantaged Business Enterprise (DBE) programs are “government benefits,”¹¹ the Commission should add the following text to the enumerated list of examples included in the 3(F)(ii) special rules: government benefits include “Small Business Administration and Disadvantaged Business Enterprise grants or any type of federal program

⁸ *See id.*

⁹ *See* USSG §2B1.1 cmt. n.3(F)(ii); *see also id.* n.3(A).

¹⁰ *See id.* §2B1.1(b)(1).

¹¹ *See id.*

payments with the aim of giving exclusive opportunities to women businesses, minority businesses, or businesses run by any class of disadvantaged persons.” Lastly, until the Commission revises the Notes, the Supreme Court should hold that SBA 8(a) contracts and DBE grants should be considered “government benefits” within the meaning of 3(F) for federal sentencing purposes.

First, this comment will introduce the Commission, the Guideline comments language, and provide a detailed explanation of the relevant rules provisions. Second, this comment will explore the history of the Commission, the specific comment rules at issue, and the purpose of SBA 8(a) and DBE programs. Third, this comment will explain the various circuit courts of appeals decisions regarding the Note application. Fourth, this comment will evaluate both sides of the circuit split and argue that affirmative action procurement programs should be considered “government benefits.” Finally, this comment will argue that the Commission should amend section 2B1.1(b)(1) to explicitly state that “affirmative action” government contracts programs belong under the government benefits special rule under 3(F)(ii).

II. Background

A. Congress Creates the Sentencing Commission & Guidelines

The Commission, created by the Sentencing Reform Act of 1984¹² as part of the Comprehensive Crime Control Act of 1984,¹³ is an independent agency within the judicial branch tasked with instituting “sentencing policies and practices¹⁴ for the federal criminal justice system

¹² See generally 18 U.S.C. § 3551 (1984); see 28 U.S.C. §§ 991–98 (2008).

¹³ Pub. L. No 98-473, Title II, 98 Stat. 1976 (1984).

¹⁴ See 28 U.S.C. § 994 (2006) (outlining duties of the Commission).

that will assure the ends of justice by promulgating detailed guidelines,¹⁵ and prescribing the appropriate sentences for offenders convicted of federal crimes.”¹⁶ The Commission includes seven voting members (typically a combination of federal judges, federal prosecutors, and legal scholars) and two *ex officio* non-voting members (including representatives from the parole commission and the Attorney General).¹⁷ Importantly, Congress espoused three overarching principles in creating the Commission: (1) combat crime honestly through an effective, fair system, (2) introduce reasonable uniformity in sentencing by narrowing discrepancies in sentences imposed for similar crimes committed by similar offenders, and (3) sentence proportionally in a way that accounts for severity of offenses and repeat offenders.¹⁸ The circuit split on whether to apply the general loss rule or the government benefits rule should be resolved to realign the sentencing rules with Congress’s three guiding principles.

B. Calculating the Proper Guidelines Sentence under *United States v. Booker*

After an individual is convicted of a federal crime, federal courts apply the Guidelines to determine the appropriate sentence and any potential restitution to be paid by the criminal.¹⁹ Section 2B1.1 of the Guidelines covers economic crimes including larceny, embezzlement, fraud, forgery, and counterfeiting offenses.²⁰ The Guidelines provide a sentencing structure for federal courts while streamlining the mechanics of federal sentencing.²¹ In *United States v. Booker*, the United States Supreme Court held that the Guidelines requirements are not mandatory, and appellate courts must review federal sentences calculated under the Guidelines for

¹⁵ *Id.* § 994(a).

¹⁶ USSG §2B1.1(b)(1) ch.1, pt. A, subpt. 1–2 (U.S. SENTENCING COMM’N 2016).

¹⁷ *Id.* subpt. 1 (U.S. SENTENCING COMM’N 2016); *see* 28 U.S.C. § 991 (2008).

¹⁸ USSG §2B1.1(b)(1) ch. 1, pt. A, subpt. 3, p.s.; *see* 28 U.S.C. § 991(b) (2008).

¹⁹ USSG § 2B1.1 (2018); *see* *United States v. Booker*, 543 U.S. 220 (2005).

²⁰ USSG § 2B1.1 (2018)

²¹ *United States v. Booker*, 543 U.S. at 264; *see* USSG § 2B1.1 (2018).

unreasonableness.²² The process by which federal courts apply the Guidelines varies slightly among the circuit courts of appeals;²³ however, the Third Circuit’s three-step process serves as an instructive example of how courts calculate an appropriate federal sentence in compliance with *Booker*.²⁴ In the Third Circuit, a district court calculates an appropriate sentence under *Booker* by identifying the correct sentencing range under the Guidelines, considering departure motions from the base offense level, and applying any variances that may justify an increase or decrease in an individual’s sentence.²⁵

In the Third Circuit, the three-step sentencing process begins with the District Court properly calculating the applicable sentencing range under the Guidelines.²⁶ As mentioned above, the Guidelines range functions as the starting point or the “Base Offense Level” for a court to begin the sentencing calculation.²⁷ Relevant to the analysis, “[t]he amount of loss that a defendant is found to have caused largely drives the determination of [the] recommended sentencing range under the Guidelines.”²⁸ Second, after the court establishes the base offense level, the District

²² *Booker*, 543 U.S. at 261–63; see 18 U.S.C. § 3661 (stating that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence”).

²³ See e.g., *United States v. Corsey*, 723 F.3d 366, 374–77 (2d Cir. 2013) (holding that the District Court may use a less rigid federal sentencing procedure to bypass a “minefield of tricky determinations” so long as the court arrives at the correct Guidelines sentencing range and explicitly weighs the required §3553(a) factors); *United States v. Green*, 436 F.3d 449, 454–458 (4th Cir. 2006) (stating that the appropriate standard for calculating federal sentences under the Guidelines post-*Booker* involves a four-step analysis where the District Court must (1) properly calculate the sentencing range recommended by the Guidelines; (2) determine whether a sentence within that range and within the statutory limitations serves the factors set forth in §3553(a), and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Guidelines range better serves the relevant sentencing purposes set forth in §3553(a)).

²⁴ *United States v. Nagle*, 803 F.3d 167, 179 (3d Cir. 2015); see *United States v. Fumo*, 655 F.3d 288, 308 (3d Cir. 2011).

²⁵ *Fumo*, 655 F.3d at 308.

²⁶ See *Nagle*, 803 F.3d at 179 (citing *Fumo*, 655 F.3d at 308).

²⁷ See *id.*

²⁸ Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1003 (2010) (discussing the importance of loss calculation in determining the appropriate Guidelines range in white collar crime sentencing).

Court must consider departure motions.²⁹ A departure motion allows the court to consider “depart[ing] from the applicable guidelines range” when “there exists an aggravating or mitigating circumstance . . .”³⁰ Guideline departures, which must be carefully justified and explained by the court, should only apply in “atypical case[s]” and the Guidelines enumerate reasons for adjusting sentences upward or downward.³¹ Pertinent to fraud in the government contract context, a court may find upward variations for harm to unaccounted for property or crimes that cause a “significant disruption of a governmental function.”³² In the third and final step of the sentencing analysis, the District Court must consider applying variances pursuant to the statutory factors enumerated in 18 U.S.C. § 3553(a).³³ Section 3553(a) obliges courts to impose sentences “sufficient, but not greater than necessary.”³⁴ Federal courts may consider (among other things) the following factors in imposing a sentence: (1) “the nature and circumstances of the offense,” (2) the need to “reflect the seriousness of the offense, to promote respect of the law, and to provide

²⁹ See USSG § 5K2.0(a)(1)(A) (prescribing departure process).

³⁰ See *id.*; see also *Fumo*, 655 F.3d at 308 (discussing step two of sentencing calculation process where departure motions must be considered).

³¹ See OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, *Primer: Departures and Variances* 19 (2015) (internal quotation marks omitted) (quoting USSG n.55, ch.1, pt. A(4)(b)) (describing application of departures and noting they should “only apply in the ‘atypical’ case lying outside the ‘heartland’ of conduct covered by the guidelines”); see also *id.* at 4–40 (detailing overview of departures authorized by the Guidelines); see also *Fumo*, 655 F.3d at 308.

³² See OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, *Primer: Departures and Variances* at 19–21 (quoting *United States v. Cole*, 357 F.3d 780 (8th Cir. 2004)). Under the Guidelines, “[i]f the offense caused property damage or loss not taken into account within the [G]uidelines, the court may increase the sentence above the authorized guideline range” in an amount “depend[ent] on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.”; USSG § 5K2.7. (stating “[i]f the defendant’s conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized [G]uideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected”).

³³ See *Fumo*, 655 F.3d at 308 (explaining third step of sentencing process where “court [must] consider[] the recommended Guidelines range together with statutory factors . . . and determine[] the appropriate sentence . . .”) (internal citations omitted); see also *id.* at 317 (explaining the difference between departures and variances where departures are deviations from the Guidelines range based on “reasons contemplated by the Guidelines themselves,” while variances are deviations “based on an exercise of the court’s discretion under [18 U.S.C.] § 3553(a)”) (internal quotation marks omitted).

³⁴ 18 U.S.C. § 3553(a) (2012) (instructing courts on appropriate factors to consider for imposing a sentence).

just punishment for the offense,” and (3) the need for deterrence.³⁵ Overall, federal courts calculate an appropriate sentence for financial crimes contained in section 2B1.1 by using the range calculated in step one, adding or subtracting (via aggravating or mitigating factors) departures in step two, and increasing or decreasing the range to reflect any applicable variances.³⁶

Section 2B1.1 Loss Rules Under the Guidelines That Apply to “Affirmative Action” Contract Fraud.

As illustrated above, Guidelines section 2B1.1 prescribes offense level calculations for economic crimes including fraud and deceit.³⁷ Within section 2B1.1, subsection (A) provides the base offense level and subsection (B) provides a detailed list of modifications for offense-specific characteristics that can increase or decrease an offender’s base sentencing level based on various aggravating and mitigating factors.³⁸ In calculating loss, the Guidelines provide for baseline loss and sentencing totals that are adjusted upward for loss where the offense level increases, the loss increases in a directly proportional manner.³⁹ The two most pertinent rules within section 2B1.1 for calculating sentencing totals for fraud in the “affirmative action” contract context include the general loss rule and the special loss rules.⁴⁰

- a. The General Loss Rule in 3(A) & the Government Benefits Special Loss Rule in 3(F)(ii)

In cases involving government contract fraud, the general loss rule provides the starting point for the sentencing analysis.⁴¹ The general loss rule applies to loss under subsection (b)(1)

³⁵ *Id.* § 3553(a)(1)–(2) (detailing several relevant factors courts should consider in determining whether a variance may be applicable in the DBE/8(a) “affirmative action” contract fraud context).

³⁶ *See Fumo*, 655 F.3d at 308 (discussing a court’s responsibility at third step of the sentencing analysis).

³⁷ *United States v. Nagle*, 803 F.3d 167, 179 (3d. Cir. 2015).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See* USSG §2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM’N 2016); *see id.* cmt. n.3(F).

⁴¹ *Id.* n.3(A).

and states that “loss is the greater of actual loss or intended loss.”⁴² The Notes define “actual loss” as “reasonably foreseeable pecuniary harm that resulted from the offense.”⁴³ Pecuniary harm “means harm that is monetary or that otherwise is readily measurable in money.”⁴⁴ Intended loss is defined as the pecuniary harm that offender sought to inflict.⁴⁵ In invoking the general loss rule instead of the government benefits special rule, federal courts cite section 2B1.1 Note 3(A)(v)(II) as the appropriate provision governing procurement fraud cases for fraud related to a defense contract award.⁴⁶ To that end, some judges would apply 3(A)(v)(II) regardless of the nature, circumstances or purpose surrounding the defense contract award.⁴⁷

The government benefits rule, a special rule under Note 3(F)(ii) that supplants the general loss rule, applies in cases involving “government benefits” including fraud of grants, loans, and entitlement program payments.⁴⁸ In government benefits fraud cases, the Guidelines require that “loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted from intended uses.”⁴⁹ In short, if a court concludes that an offender’s fraud included “government benefits,” the loss for sentencing purposes will be the entire total of the grant or contract awarded without any mitigation for legitimate services rendered.⁵⁰ As shown above, the decision as to whether to apply the general rule or the government benefits rule implicates serious consequences for an individual’s aggregate sentence.⁵¹

b. Current Issues in Interpreting & Applying the Guideline Notes

⁴² *Id.* n.3(A).

⁴³ *Id.* n.3(A)(i).

⁴⁴ *Id.* n.3(A)(iii).

⁴⁵ *Id.* n.3(A)(ii).

⁴⁶ *United States v. Nagle*, 803 F.3d 183 (3d. Cir. 2015) (Hardiman, J., concurring)

⁴⁷ *Id.*

⁴⁸ USSG §2B1.1 cmt. n.3(F)(ii) (U.S. SENTENCING COMM’N 2016).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See* USSG §2B1.1 cmt. n.3(F)(ii); *see also id.* n.3(A); *see infra* Part I.

Currently, varying interpretations as to whether an “affirmative action” government contract program constitutes a “government benefit” and textual issues within the Guideline comments continue to frustrate the goals Congress sought to achieve by creating the Commission. As stated by Congress, the Commission’s goals and purpose is to “provide certainty and fairness” in sentencing, “[avoid] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,” maintain flexibility in sentencing sufficient to “permit individualized sentences when warranted by mitigating and aggravating factors not taken into account in the establishment of general sentencing practices,” and “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]”⁵² Presently, the conflict between Note 3(E)(i) and Note 3(F)(ii) and the current comment’s language providing that 3(F)(ii) applies “notwithstanding subsection (A)” creates problems with consistent statutory interpretation.⁵³ Moreover, in cases involving SBA 8(a) defense contract procurement fraud,⁵⁴ courts may properly conclude that 3(A)(v)(II) applies in cases of “procurement fraud, such as fraud affecting a defense contract award.”⁵⁵ If 3(A)(v)(II) applies, like 3(E)(ii), the general loss rule must be used for calculating sentence severity and requires that the amount lost be mitigated so that loss is the greater of actual loss or intended loss, not the full amount awarded under the contract.⁵⁶

c. The “Affirmative Action” Government Programs at Issue: Well-Intentioned Programs Exploited.

a. The Small Business Administration’s 8(a) Joint Venture Program

⁵² 28 U.S.C. § 991(2008); *see* USSG ch. 1, pt. A, subpt. 3 (U.S. SENTENCING COMM’N 2016).

⁵³ *See* *United States v. Harris*, 821 F.3d 589, 608 (5th Cir. 2016).

⁵⁴ *See id.*

⁵⁵ USSG §2B1.1 cmt. n.3(A)(v)(II) (U.S. SENTENCING COMM’N 2016).

⁵⁶ *See* USSG § 2B1.1; *Harris*, 821 F.3d at 608.

The SBA, created under the Small Business Investment Act of 1958,⁵⁷ exists to “ensure small businesses [receive] a ‘fair proportion’ of government contracts.”⁵⁸ Many fraud cases involve the 8(a) Joint Venture Program, a federal program which allows an 8(a) firm that lacks the capability to perform a contract on its own to enter into a joint venture agreement to perform the contract.⁵⁹ Specifically, the Section 8(a) Joint Venture Program authorizes the SBA to coordinate fulfillment of federal procurement contracts through qualifying small businesses.⁶⁰ Under the 8(a) Joint Venture Program, participants can receive up to 4 million dollars for goods and services and up to 6.5 million for manufacturing ventures.⁶¹ To qualify for 8(a) contracts, a small business “must be owned and controlled by one or more ‘socially and economically disadvantaged individuals.’”⁶² As such, the 8(a) program provides procurement opportunities by acting as an “affirmative action” contracting program.⁶³ SBA attempts to limit fraudulent joint venture arrangements by warning that joint venture approval may be denied where an 8(a) firm brings its 8(a) status and substantively little else to the joint venture.⁶⁴ SBA actively monitors for fraudulent joint ventures and requires that 8(a) businesses perform at least 40% of the work,⁶⁵ and the Joint Venture Agreement must specify how the division of labor requirements will be met.⁶⁶

⁵⁷ Pub.L. No 85-699, Title I, § 102, 72 Stat. 689 (1958).

⁵⁸ *About the SBA: The Founding of the SBA*, (2017), <https://www.sba.gov/about-sba/what-we-do/history>; see 15 U.S.C. § 631 (2010) (declaration of SBA policy); see also 15 U.S.C. § 661 (stating that the overall purpose and policy of Small Business Investment Act of 1958 is to “improve and stimulate the national economy in general and the small-business segment thereof in particular by establishing a program to stimulate and supplement the flow of private equity capital and long-term loan funds which small-business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not available in adequate supply”).

⁵⁹ See 13 C.F.R §124.513 (2016).

⁶⁰ 15 U.S.C. § 637(a)(1)(A–B) (2016).

⁶¹ *About the SBA: Benefits of the Program*, (2017), <https://www.sba.gov/about-sba/what-we-do/history>.

⁶² 15 U.S.C. § 637(a)(4) (2016); *id.* § 637 (a)(1)(C).

⁶³ See *United States v. Harris*, 821 F.3d 589, 591 (5th Cir. 2016).

⁶⁴ 13 C.F.R § 124.513(a)(2).

⁶⁵ *Id.* § 124.513(d) (stating that the 40% labor division requirement became effective in March 2011 where prior to that date, SBA regulations required that an 8(a) firm complete a “significant portion” of the contract work, but no percentage was explicitly specified).

⁶⁶ *Id.* § 124.513(c)(7).

Unfortunately, many “8(a) businesses” have stolen millions of dollars by misrepresenting its 8(a) status, or by joining with a non-8(a) business as a matter of pretense only to have the non-8(a) business complete most of the contract work and reap most of the award dollars.⁶⁷

b. The Department of Transportation’s Disadvantaged Business Enterprise Program

The DOT, which requires (under authority from Title VI of the Civil Rights Act of 1964) that any state that receives federal transportation funds must set goals for participation in transportation construction projects by disadvantaged⁶⁸ business enterprises, remains susceptible to fraud and abuse.⁶⁹ Congress created the DBE program for recipients of federal transportation funds.⁷⁰ The DOT spends approximately fifty billion dollars annually on construction projects and the government requires that roughly ten percent of its construction budget or five billion dollars be allocated to qualifying DBEs.⁷¹ A DBE is a for-profit small business that “is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged⁷² and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it.”⁷³ Additionally, states must announce DBE participation goals and certify a business as a DBE prior to contract bidding.⁷⁴ To be considered a certified DBE, the DBE must “perform

⁶⁷ See Rick Moran, *SBA Inspector General Uncovers Fraud in the 8(a) Program*, ASSOCIATION OF PROCUREMENT TECHNICAL ASSISTANCE CENTERS (2017), <http://www.aptac-us.org/news/sba-ig-uncovers-8a-fraud/>.

⁶⁸ 49 C.F.R. § 26.5 (2014) (defining “socially and economically disadvantaged individuals” to include African-Americans, Native Americans, Asian-Pacific Americans, Hispanic Americans, and women among other classifications).

⁶⁹ *Id.* § 26.21 (2014); see generally *id.* § 26(A–C).

⁷⁰ *Id.* § 26.1–26.109 (2016); see also 23 U.S.C. § 324 (2012) (stating that no individual receiving federal assistance may be discriminated against on the basis of gender under agency authority of Title VI of the Civil Rights Act of 1964); see also George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U. C.R. L.J. 423, 423 (2007) (citing 49 C.F.R. § 26.3); see also George R. La Noue, *Western States’ Light: Restructuring the Federal Transportation Disadvantaged Business Enterprise Program*, 22 GEO. MASON U. C.R. L.J. 1, 3 (2011) (citing 49 § U.S.C. 31105(f) (2012)).

⁷¹ See McVicker, *supra*, at 4.

⁷² See *Adarand*, 528 U.S. at 261 (Stevens J., dissenting) (noting that minority and women subcontractors are frequently subject to less traditional or obvious disadvantages “than direct, intentional racial prejudice”).

⁷³ 49 C.F.R. § 26.5 (2014).

⁷⁴ *Id.* § 26.81.

[] a commercially useful function on [the] contract.⁷⁵ Therefore, like SBA 8(a) requirements, a DBE whose “role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation” does not qualify for DBE participation.⁷⁶ Regrettably, as with the SBA 8(a) program, the DOT’s DBE program remains susceptible to fraud and abuse because individuals seeking lucrative government contracts can creatively set up businesses and joint ventures that use one party’s DBE status as a cover to receive federal dollars.⁷⁷

III. Current Circuit Court of Appeals Interpretation & Application of the Rules

In the absence of Supreme Court or Commission guidance on whether the general loss rule or the government benefits rule applies to “affirmative action” contract fraud, the circuit courts of appeals continue to reach contradictory conclusions endangering Congress’s goals of crafting the Guidelines to create uniformity and fairness in federal sentencing nationwide. Indeed, two circuits concluded that the general loss rule applies.⁷⁸ Conversely, three circuits held that the government benefits rule applies and voids any mitigation provisions in the general rule.⁷⁹ Finally, the Third Circuit in *United States v. Nagle* assumed that SBA and DBE programs should be considered “government benefits”; however, the Third Circuit declined to resolve the issue definitively

⁷⁵ *Id.* § 26.55(c)

⁷⁶ *Id.* § (c)(2).

⁷⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-89-26, HIGHWAY CONTRACTING: ASSESSING FRAUD AND ABUSE IN THE FEDERAL HIGHWAY ADMINISTRATION’S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM, <https://www.gao.gov/products/RCED-89-26> (finding that contractors paid over 1 million dollars to settle fraud claims as a result of hundreds of DBEs being audited and investigated for fraud, abuse, and waste) (1989); see also *McVicker*, *supra*, at 8–9 (stating the largest DBE fraud in United States history perpetrated by one recipient totaled 136 million dollars over 15 years and 18.7 million dollar fraud perpetrated by steel company using phone invoices).

⁷⁸ *Harris*, 821 F.3d 589, 608 (5th Cir. 2016); *Martin*, 796 F.3d 1101, 1112 (9th Cir. 2015).

⁷⁹ *Maxwell*, 579 F.3d 1282, 1307 (11th Cir. 2009); *Leahy*, 464 F.3d 773, 800 (7th Cir. 2006); *Bros. Constr. Co.*, 219 F.3d 300, 321 (4th Cir. 2000).

because the court concluded that comment 3(E)(i) displaces 3(F)(ii) as currently written.⁸⁰ Despite the Third Circuit's court's refusal to conclude whether comment rule 3(A) or 3(F)(ii) applies to DBE programs, the Court applied 3(E)(ii) to mitigate the defendant's sentence.⁸¹ In sum, the Third Circuit reached a legally sound conclusion given the Notes' current statutory construction. However, the case serves as a model for why the Notes require urgent reform given the billions of taxpayer dollars that remain vulnerable.

Circuits That Apply the General Loss Rule to “Affirmative Action” Program Fraud Cases

In *United States v. Harris*, the Fifth Circuit decided the issue of whether the general loss rule or the government benefit rule applies in a fraud case involving the SBA's 8(a) Joint Venture Program.⁸² Harris, a retired Army Colonel who worked for a non-8(a) firm that performed large-scale defense projects, created a joint venture with an 8(a) SBA approved business (Tropical and Luster).⁸³ Overall, the joint venture received three 8(a) contracts: first for \$69,994, second for \$947,722 and third for \$492,169 totaling \$1,317,593.51.⁸⁴ Harris defrauded the federal government by joining with Tropical and Luster (approved 8(a) firms) to receive 8(a) status, but Harris did not give either 8(a) qualified company a significant role in the planning or executing process.⁸⁵ In short, Harris flouted SBA 8(a) regulations (mentioned above) by paying Tropical and Luster 51% of the project profits to “make everything look legitimate.”⁸⁶ The District Court

⁸⁰ 803 F.3d 181–183 (3d. Cir. 2015).

⁸¹ *Id.*

⁸² 821 F.3d at 592.

⁸³ *Id.* at 592–93.

⁸⁴ *Id.* at 594–602. (The District Court applied the government benefits rule and determined that an offense-level increase of sixteen levels was appropriate after having calculated the loss amount as approximately \$1.3 million. That loss amount encompassed “the total amount awarded under both contracts,” “[n]ot including the payment corresponding to the count of wire fraud for which [Harris] was acquitted”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 596.

found Harris guilty on all counts and he challenged the loss calculation that led to a two-level adjustment for his role in the crime, a two-level adjustment for abusing a position of trust, and a sixteen-level increase under section 2B1.1(a)(1).⁸⁷ On appeal, Harris argued that the government did not show harm to the procuring agencies because the Joint Venture performed all contracted for services.⁸⁸ Harris also argued that the loss amount totaled zero because neither the 8(a) companies, nor the government suffered pecuniary harm.⁸⁹ Finally, Harris argued that in the alternative, the court “can look to the gain from the scheme, which is also zero.”⁹⁰ In reply, the government argued on appeal that contracts awarded under the 8(a) program are “government benefits” and subject to the 3(F) special rule where the court should determine loss by adding the face value of the contracts with no loss mitigation.⁹¹

The Fifth Circuit held that the 8(a) program did not constitute “government benefits” under section 2B1.1 Note 3(F)(ii); therefore, defense contract loss should be calculated under the general rule.⁹² The court determined that “the general rule . . . [applies] [i]n the case of a procurement fraud, such as fraud affecting a defense contract award.”⁹³ The court further stated that 8(a) procurement contracts do not constitute “government benefits” because 3(F) only applies to grants, loans, and entitlement program payments.⁹⁴ To that end, although the enumerated list in 3(F) is not necessarily exhaustive, the doctrine of *noscitur a sociis* canon⁹⁵ requires that an enumerated

⁸⁷ *Id.* at 597–98.

⁸⁸ *Harris*, 821 F.3d 589, 603 (5th Cir. 2016).

⁸⁹ *Id.*

⁹⁰ *Id.* (citing USSG §2B1.1 cmt. n.3(B) (U.S. SENTENCING COMM’N 2016) (“The court shall use the gain that resulted from the offense as an alternate measure of loss only if there is a loss but it reasonably cannot be determined.”)).

⁹¹ *Harris*, 821 F.3d at 602.

⁹² *Id.*

⁹³ *Id.* at 603; USSG §2B1.1 cmt. n.3(A)(v)(II) (U.S. SENTENCING COMM’N 2016).

⁹⁴ *Harris*, 821 F.3d at 603.

⁹⁵ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195–98 (2012) (describing the *noscitur a sociis* canon).

list can only be expanded to entities sharing the common features of the enumerated examples.⁹⁶ Moreover, the court reasoned that “while a government contract awarded under an affirmative action program may be, in some sense, a ‘benefit,’ it does share any common features [of the enumerated list]” and it is a bargained for exchange, not a unilateral transfer.⁹⁷ Likewise, the court was not persuaded by its sister circuits that concluded that the government benefits rule applies because “the mere fact that a government contract furthers some public policy objective apart from the government’s procurement needs is not enough to transform the contract into a ‘government benefit’ akin to a grant or an entitlement payment program.”⁹⁸ The Fifth Circuit concluded that the loss amount should not be the total contract price (as under 3(F)), but rather the “contract price less the fair market value of services rendered by the Joint Venture to the procuring agencies.”⁹⁹ The court reasoned that calculating total loss under section 2B1.1(b)(1), 3(E)(i) requires that “[l]oss shall be reduced by . . . the fair market value of the . . . services rendered.”¹⁰⁰ Note 3(E)(i) applies broadly to all sections of section 2B1.1(b) including loss under the general rule.¹⁰¹ The Fifth Circuit joined the Third and Ninth Circuits in concluding that if the Commission wanted 3(F)(ii) to apply to the general rule in 3(A), it would not have included rule 3(F)(v) requiring “loss to be reduced by the fair market value of services rendered to the defendant.”¹⁰²

In *United States. v. Martin*, the Ninth Circuit held that “the sentencing court [should] not use the entire amount of government contract dollars awarded to defendant in calculating loss for fraud cases involving the SBA 8(a) program or the state-administered DBE contracts.”¹⁰³ *Martin*

⁹⁶ *Harris*, 821 F.3d at 603.

⁹⁷ *Id.*

⁹⁸ *Id.* at 604.

⁹⁹ *Id.* at 605.

¹⁰⁰ *Id.* at 605; *see* USSG § 2B1.1 cmt. n.3(E)(i) (U.S. SENTENCING COMM’N 2016).

¹⁰¹ *Harris*, 821 F.3d at 605.

¹⁰² *Id.*

¹⁰³ 796 F.3d 1101, 1102 (9th Cir. 2015).

owned a construction company (“MarCon”) that focused on installing steel guardrails and concrete barriers for public highways.¹⁰⁴ Over a seven-year period (1999-2006), MarCon “received nearly \$20 million from 85 contracts awarded through the DBE program, and successfully performed each contract.”¹⁰⁵ MarCon also received three contracts worth nearly 3 million dollars from SBA programs.¹⁰⁶ The federal government caught Martin diverting profits made from the SBA and DBE programs to accounts hidden from the IRS.¹⁰⁷ By not reporting these profits, Martin avoided paying over \$100,000 in income taxes.¹⁰⁸ At sentencing, Martin asserted that proper loss to the government was zero given that MarCon fully performed on all contracts awarded to it.¹⁰⁹ Yet, the District Court found pecuniary harm and applied the “procurement fraud rule” (the same rule as the Fifth Circuit applied) found in Note 3(A)(v)(II) of section 2B1.1.¹¹⁰ In reply, the government argued that the court should apply 3(F)(ii) and conclude that the total loss amount equaled the total value of the contracts totaling \$22 million.¹¹¹ The District Court held that “the government benefits rule” applied; however, the court concluded that loss under the rule should be \$3 million, the total profits earned by Martin.¹¹²

First, the Ninth Circuit adopted Martin’s argument on appeal and held that the general rule applies to affirmative action contracts under the 3(A)(v)(II) “procurement fraud rule.”¹¹³ As such, the court stated that 3(E)(i) applied so that “[l]oss shall be reduced” by “the fair market value of . . . the services rendered . . . by the defendant . . . to the victim before the offense was detected.”¹¹⁴

¹⁰⁴ *Id.* at 1103.

¹⁰⁵ *Id.* at 1104.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1103

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Martin*, 796 F.3d 1101, 1104 (9th Cir. 2015).

¹¹⁰ *Id.* at 1108.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Like the Fifth Circuit, the Ninth Circuit first concluded that the “procurement fraud rule” in 3(A)(v)(II) is the closest fit for this case because the rule’s “placement within application note 3(A), rather than in note 3(F) with the special rules, indicates that procurement fraud cases fall under the general rule for calculating actual and intended loss.”¹¹⁵ Second, the Ninth Circuit held that the “government benefits rule” did not apply because the 3(F) special rules apply “[n]otwithstanding the general rules of application note 3(A).”¹¹⁶

The Ninth Circuit concluded that the general loss rule applied because although “an ‘exclusive opportunity’ might be a benefit in some sense, . . . the Guidelines’ focus on pecuniary harm” suggest that comment 3(F)(ii) deals exclusively with unilateral government assistance such as food stamps, not fee-for-service business deals.¹¹⁷ Specifically, the Ninth Circuit held that the general rule applied because statutory interpretation requires that when interpreting examples in an enumerated list, all terms must include similar characteristics to the enumerated list.¹¹⁸ The court further reasoned that if applying basic rules of statutory interpretation fails to illuminate the correct result, the rule of lenity compels an interpretation in favor of the defendant.¹¹⁹ The rule of lenity in statutory interpretation dictates that where Congress’s intent remains ambiguous and reasonable minds may defer as to its intent, courts should adopt the less harsh interpretation of the Guidelines punishment.¹²⁰ Despite concluding that the 3(A) general loss rules applied, the court noted that “DBE and SBA programs are designed to benefit disadvantaged businesses.”¹²¹ The court stated “[i]t is conceivable that the government paid a premium contract price”; however, any

¹¹⁵ *United States v. Martin*, 796 F.3d 1101, 1110 (9th Cir. 2015).

¹¹⁶ *Martin*, 796 F.3d at 1108 (citing USSG § 2B1.1 cmt. n.3(F)(ii)(v)).

¹¹⁷ *Id.* at 1109.

¹¹⁸ *Id.* (citing *Hamilton v. Madigan*, 961 F.2d 838, 840 (9th Cir. 1992)).

¹¹⁹ *See United States v. Leal-Felix*, 665 F.3d 1037, 1040 (9th Cir. 2011).

¹²⁰ *Rule of Lenity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹²¹ *Martin*, 796 F.3d at 1111.

difference between what the government paid versus the normal contract price is the actual loss.¹²² Finally, the court conceded that there may be non-pecuniary losses to the government in that Martin’s fraud may have harmed the integrity of the programs and cheated law abiding DBEs out of potential contracts.¹²³ Nevertheless, the court concluded that non-pecuniary loss may be properly assessed by the District Court in applying the Guidelines under the correct rule.¹²⁴

In conclusion, the Fifth and Ninth Circuits applied the general loss rule to “affirmative action” contract procurement fraud finding that either Note 3(E)(i) supersedes 3(F) in the defense contract fraud context or the “[n]otwithstanding the general rules of application note 3(A)” language precluded the application of the government benefits special rule in 3(F)(ii).¹²⁵ Both circuits concluded that 3(F)(ii) did not apply by relying on general principals of statutory interpretation,¹²⁶ despite conceding that the government “likely” paid a premium for the “affirmative action” contracts and tacitly acknowledging that such contracts remain unique in the federal contracting scheme.¹²⁷

Circuits That Apply the Government Benefits Special Loss Rule to “Affirmative Action” Program Fraud Cases

In *United States v. Brothers Construction Co.*, the Fourth Circuit held that the government benefits special rule applies in fraud case involving a state-administered DBE program.¹²⁸ In 1994, the West Virginia Department of Transportation, Division of Highways (“WVDOH”) solicited bids for a \$5 million DBE project.¹²⁹ Two business partners (Tri-State) contracted with Brothers

¹²² *United States v. Martin*, 796 F.3d 1101, 1111 (9th Cir. 2015).

¹²³ *Id.*

¹²⁴ *Id.* at 1112.

¹²⁵ *Harris*, 821 F.3d at 605–06; *Martin*, 796 F.3d at 1110.

¹²⁶ *Harris*, 821 F.3d at 603.

¹²⁷ *Martin*, 796 F.3d at 1111.

¹²⁸ 219 F.3d 300, 321 (4th Cir. 2000).

¹²⁹ *Id.* at 304.

Construction (a certified DBE) to work on a local highway project. After winning the DBE contract, no Brothers employees appeared on the jobsite at any point during the construction.¹³⁰ The District Court convicted Tri-State and Brothers of defrauding the government by scheming to divert DBE funds to a non-DBE business.¹³¹ Brothers and Tri-State argued that the sentencing court erred in concluding that under section 2F1.1. Note 7(d), “[i]n a case involving diversion of government program benefits, loss is the value of benefits diverted from intended recipients or uses.”¹³² Brothers and Tri-State further argued that loss to the government was zero¹³³ because all contracts were performed by other certified DBEs.¹³⁴ Thus, defendants argued that the project received required DBE performance and the WVDOH received what it bargained for.¹³⁵ In conclusion, the Fourth Circuit applied the now nonexistent section 2F1.1. Note 7(d) government benefits rule to the DBE fraud without explanation.¹³⁶

In *United States v. Leahy*, the Seventh Circuit held that a city ordinance meant to direct contracts to minority (MBEs) and women-owned businesses (WBEs) constituted an “affirmative action” program under Note 8(d) (the current 3(F)), which required sentencing to be based on the total contract dollars awarded with no mitigation for services rendered.¹³⁷ The ordinance, like the DBE requirements, required that an MBE or minority group must own 51% of the company and one or more minority members must be involved in day-to-day management.¹³⁸ After Chicago passed the ordinance, James Duff set up a business with his mother (Green Duff) to qualify for

¹³⁰ *Id.* at 306.

¹³¹ *Id.* at 318.

¹³² *Id.* at 317.

¹³³ *Bros. Constr. Co.*, 219 F.3d at 308 (The District Court did not impose a fine on Brothers Construction Co. because the company was insolvent).

¹³⁴ *Id.*

¹³⁵ *Id.* at 318.

¹³⁶ *Id.* at 317.

¹³⁷ 464 F.3d 773, 800 (7th Cir. 2006).

¹³⁸ *Id.* at 779.

WBE status.¹³⁹ An investigation revealed that Green Duff technically owned all the company stock, but had no real involvement with the business's management.¹⁴⁰ During the fraud scheme, defendants received over \$100 million dollars in state and federal grants.¹⁴¹ Defendants argued on appeal that "the only loss Chicago suffered was to its regulatory interests—and intangible right unprotected by these statutes" at issue.¹⁴² In the alternative, the defendants argued that the Note governing contract procurement applied, not the government benefits rule.¹⁴³ Both parties agreed that Guidelines 2F1.1 applied to this case.¹⁴⁴ Yet, the District Court determined that the appropriate loss number should total the amount of profits¹⁴⁵ gained, not the entire contract dollars awarded.¹⁴⁶ The Seventh Circuit, citing a former city official's testimony,¹⁴⁷ concluded that the Chicago city ordinance at issue was "an affirmative action program whose fruits were reserved for fledgling minority and women businesses."¹⁴⁸

Specifically, the Seventh Circuit affirmed that the government benefit rules applied because "the goal of Chicago's program was fundamentally frustrated, . . . 'it [was] a double loss, the loss that we computed and the real loss to all people that [did not] get this business, that [did not] get a chance to become [a] successful [MBE] or [WBE], because this huge amount was diverted.'"¹⁴⁹ The court held that the government benefits rule applies, not the general loss rule because the ordinance states, "[a]n effect to direct contracts to [MBEs] and [WBEs] is required to

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 780–81.

¹⁴² *Leahy*, 464 F.3d at 786.

¹⁴³ *Id.* at 790.

¹⁴⁴ *Id.* at 789.

¹⁴⁵ *Leahy*, 464 F.3d at n.3 (stating "Duff was a highly-experienced businessman who easily made substantial profits off the MBE/WBE contracts and paid the surplus to family members and associates who performed little or no work for the various entities under contract.")

¹⁴⁶ *Id.* at 789.

¹⁴⁷ *Id.* at 779 (stating "[the city ordinance] was a program to assist those companies to win contracts with the City in a competitive situation and become economically viable so that they . . . could compete with prime contractors.")

¹⁴⁸ *Id.*

¹⁴⁹ *Leahy*, 464 F.3d at 789.

eradicate the effects of discrimination.”¹⁵⁰ Thus, the Seventh Circuit held that “the correct amount under application note 8(d) is the value of the benefits diverted, which was over \$100 million.”¹⁵¹

In *United States v. Maxwell*, the Eleventh Circuit held that special rule 3(F)(ii) applies because “CSBE and DBE programs are government benefits programs under § 2B1.1 of the [Guidelines].”¹⁵² A Florida grand jury indicted Maxwell on twenty-four counts of mail fraud, wire fraud, money laundering, and other conspiracy charges.¹⁵³ At issue were six contracts funded by Miami Dade County (the “County”) that required compliance with the County’s Community Small Businesses Enterprise (“CSBE”).¹⁵⁴ To receive a CSBE contract, the CSBE must “perform a commercially useful function in the completion of the contract.”¹⁵⁵ A CSBE performs a “commercially useful function” when it “actually performs, manages, and supervises the work involved.”¹⁵⁶ Overall, the CSBE contracts at issue involved the same requirements as the federal DBE contracts previously discussed.¹⁵⁷ Once the local government approves CSBE status, the contractor must submit a Schedule of Participation and Monthly Utilization Reports to certify compliance with CSBE and DBE work requirements.¹⁵⁸ At sentencing, Maxwell objected to the court’s total calculated loss at \$7 million because “he was not personally awarded the contracts, he did not benefit from the contracts, and Fisk (his non- CSBE business partner who did all the work and remitted payment to the certified CSBE) made only a small profit on the contracts.”¹⁵⁹ On appeal, Maxwell challenged the District Court’s loss amount calculation under section 2B1.1

¹⁵⁰ *Id.* at 790.

¹⁵¹ *Id.*

¹⁵² 579 F.3d 1282, 1306 (11th Cir. 2009).

¹⁵³ *Id.* at 1288.

¹⁵⁴ *Id.*

¹⁵⁵ Cty. Ordinance 97-52; 49 C.F.R. § 26.55(c)(1) (2014).

¹⁵⁶ *Maxwell*, 579 F.3d at 1288 (citing Cty. Ordinance 97-52; 49 C.F.R. § 26.55(c)(1)).

¹⁵⁷ *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009).

¹⁵⁸ *Maxwell*, 579 F.3d at 1289 n.4 (citing Admin. Order 3-22 as amended).

¹⁵⁹ *Id.* at 1294–94.

of the Guidelines.¹⁶⁰ The government requested a total loss amount of \$7,974,674 or the total amount of all CSBE and DBE contracts awarded.¹⁶¹ The District Court concluded that total loss was six percent of the total contracts awarded because six percent was the average profit margin on government electrical subcontracts.¹⁶²

The Eleventh Circuit held that the DBE and similar programs are “government benefits” that fall under the special rules.¹⁶³ The court reasoned that “DBE and similar program[s] aimed at giving exclusive opportunities to women and minority businesses” makes them entitlement payments (one of the enumerated examples in 3(F)(ii)).¹⁶⁴ Unlike standard construction contracts, “these contracts focus mainly on who is doing the work.”¹⁶⁵ Therefore, applying 3(F)(ii), the “appropriate amount of loss here should have been the entire value of the CSBE and SBE contracts that were diverted to the unintended recipient.”¹⁶⁶

In *United States v. Nagle*, the Third Circuit held that under the standard Guideline’s definition of loss, defendants were liable for the total value of DBE contracts minus services and performance on the contracts.¹⁶⁷ Nagle and Fink owned a non-DBE manufacturing and contracting business.¹⁶⁸ Later, the business created a joint venture with a company owned by a Filipino man who worked on various DBE transportation projects.¹⁶⁹ If the minority business won a DBE contract,¹⁷⁰ Nagle and Fink’s business would perform all the work on the contract.¹⁷¹ The District

¹⁶⁰ *Id.* at 1305.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Maxwell*, 579 F.3d at 1306.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 803 F.3d 167, 168 (3d. Cir. 2015).

¹⁶⁸ *Id.* at 171.

¹⁶⁹ *Id.*

¹⁷⁰ 49 C.F.R. § 26.21–81 (2014); see *Definition of a Disadvantaged Business Enterprise*, (2017), <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise>.

¹⁷¹ *Nagle*, 803 F.3d at 171.

Court concluded that under section 2B1.1., the defendants owed the face value of the contracts without mitigation for work performed.¹⁷² Defendants argued that the District Court should have used Note 3(A) to calculate loss instead of 3(F)(ii) because “the DBE program is not a ‘government benefit’ and, therefore, whether not they should receive a credit for completing the subcontracts.”¹⁷³ In the alternative, defendants claimed that “they are nonetheless entitled to credit under Note 3(F)(ii).¹⁷⁴ In reply, the government asserted that the 3(F) “government benefits rule” applied making loss the total face value of the contracts.¹⁷⁵ Importantly, the Third Circuit declined to conclude whether a DBE contract is a “government benefit” because regardless as to whether 3(A) or 3(F)(ii) applies, the court held that defendants owed the full value of the contracts with credit for fair market value of services provided.¹⁷⁶

The Third Circuit concluded that the general loss rule applies under 3(A) and 3(F) as currently drafted.¹⁷⁷ If the 3(A) standard analysis applies, loss defendants must pay back includes the total contract value minus the fair market value of performance and raw materials provided.¹⁷⁸ Regarding whether the 3(F)(ii) applied, the court concluded that “the Government’s position [was] persuasive particularly in light of the goals of the DBE program,” who the program focuses on, and the emphasis on benefitting those who perform the work.¹⁷⁹ Furthermore, the court hinted that the special rule could apply because “[the DBE program] assumes that performance of a contract allows a DBE to not only earn a profit on the deal but also to form connections with suppliers, labor, and others in the industry.”¹⁸⁰ Importantly, therefore, the profit earned, is “not the only

¹⁷² *Id.* at 179.

¹⁷³ *Id.* at 180–81.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 181.

¹⁷⁶ *Id.* at 180.

¹⁷⁷ *United States v. Nagle*, 803 F.3d at 180–81 (3d. Cir. 2015).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 181.

¹⁸⁰ *Id.*

benefit the DBE obtains when it receives the contract. Accordingly, when [the parties] fraudulently received the [DBE contracts], the DBE program assumed that all of the contract price was going towards benefiting a true DBE.”¹⁸¹ The court concluded that if Note 3(F)(ii) applies, the proper loss amount is the total face value of the contracts.¹⁸²

Overall, even if 3(F)(ii) applies, 3(E)(i) overrides 3(F)(ii) based on the current comment text.¹⁸³ Despite assuming that DBE contracts constitute “government benefits,” the Third Circuit held that “Note 3(E)(i) requires a credit against the full face value of the contracts [regardless as whether 3(A) or 3(F)] applies.”¹⁸⁴ Here, Note 3(E)(i) requires that “the fair market value of the property returned and services rendered, by . . . the defendant [] shall be credited against the loss.”¹⁸⁵ In reply to 3(E)(i), the government argued that defendants are not entitled to credit because “as non-DBEs they did not ‘render any valuable services’” and 3(E)(i) does not apply to 3(F)(ii).¹⁸⁶ The court decided that 3(E)(i) applied to 3(F)(ii) for two reasons: the 3(F) special rules apply “[n]otwithstanding subdivision (A),” and 3(F)(v)(II) states that “loss shall include the amount paid for the property, services or goods transferred, rendered or misrepresented, *with no credit for provided for the value of those items or services.*”¹⁸⁷ Notably, the court stated that “[h]ad the [Commission] intended to preclude crediting services rendered against loss for Note 3(F)(ii), it would have used similar language as it used in Note 3(F)(v)(II).”¹⁸⁸ In conclusion, the Third Circuit held that 3(E)(i) and 3(F)(ii) function together and require mitigation of the total central regardless of which rule applies.¹⁸⁹

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*; see USSG § 2B1.1. cmt. n. 3(E)(i) (2016).

¹⁸⁵ *United States v. Nagle*, 803 F.3d at 181–82 (3d. Cir. 2015).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 182 (emphasis in the original).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 183.

Judge Hardiman, concurring in *United States v. Nagle*, concluded that DBE fraud loss calculation should invoke Note 3(A), not as a government benefit under the special rule.¹⁹⁰ Judge Hardiman reasoned that defendants “committed classic procurement fraud” by lying about “compliance with federal regulations in order to receive contracts that would have otherwise gone to others.”¹⁹¹ Furthermore, the Guidelines clearly state that the 3(A) general rule applies to fraud procurement and 3(A)(v)(II) dictates how 3(A) should be applied in such cases.¹⁹² Therefore, 3(F)(ii) should apply only in fraudulent receipt of welfare payments and has “no place in a procurement fraud case.”¹⁹³ The current circuit split involving whether rule 3(A) or 3(F)(ii) applies to fraud in the SBA and DBE programs continues to divide courts and frustrate Congress’s goals in creating the Guidelines Notes; therefore, Note 2B1.1. should be amended to provide fairness, continuity and notice to all defendants that defrauding the government will be met with a severe, predictable punishment formula.

IV. Implications & Analysis

Billions of dollars remain at risk. Consequently, the current circuit split implicates tremendous urgency in the need for federal sentencing reform in “affirmative action” government contracts. To address the current circuit split, the Commission should revise the Notes to ensure that criminals who illegally exploit government programs can be held accountable for the full amount of money awarded by the government regardless of the benefits or services provided.

The Origin of the Problem: A Significant Change to the Guidelines Within the Last Decade Creates the Need for Urgent Reform to Clarify Federal Sentencing Rules and to Return to Congress’s Original Goals of Maintaining Uniformity and Fairness in Federal Sentencing.

¹⁹⁰ *Id.* at 183–84 (Hardiman, J., concurring).

¹⁹¹ *Nagle*, 803 F.3d at 184.

¹⁹² *Id.*

¹⁹³ *Id.*

The Supreme Court held “[t]he Guidelines Manual's commentary which interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”¹⁹⁴ Moreover, the “[G]uidelines commentary, interpreting or explaining the application of a guideline, is binding on [the Court] when we are applying that [G]uidelines because we are obligated to adhere to the Commission’s definition.”¹⁹⁵ Significantly, in 2001, the Commission merged the government benefits special rule under section 2F1.1 into section 2B1.1.¹⁹⁶ Based on the now nonexistent section 2F1.1, the Fourth, Seventh, and Eleventh Circuits held that SBA and DBE programs should be considered government benefit programs.¹⁹⁷ Specifically, the Fourth and Seventh Circuits based their decisions on the 1997 and 1998 Guidelines under the former section 2F1.1, which did not require that loss be reduced by fair market value of services rendered akin to current rule 3(E)(i).¹⁹⁸ The Commission later consolidated section 2F1.1 with section 2B1.1 in the 2001 Guidelines.¹⁹⁹ The Guidelines rule change was noteworthy because the old rule 2F1.1 contained a provision similar to current rule 3(F)(ii) (which both courts relied on), but no rule allowing loss mitigation resembling 3(E)(i).²⁰⁰ If the Comments cannot be amended, the Supreme Court should hold that “affirmative action” contract programs are “government benefit” programs to reconcile decisions made under the old rules with the new rules.

¹⁹⁴ *Stinson v. United States*, 508 U.S. 36 (1993).

¹⁹⁵ *Stinson*, 508 U.S. at 43.

¹⁹⁶ *United States v. Harris*, 821 F.3d 589, 605 n.12 (5th Cir. 2016).

¹⁹⁷ *Id.* (“The Fourth, Seventh, and Eleventh Circuits, confronted with similar facts, have declined to reduce loss by the value of services provided, but each court’s analysis was embedded in the language of the government benefits rule that we hold does not apply. *See Brothers*, 218 F.3d at 317–18 (applying 1997 Guidelines); *Leahy*, 464 F.3d at 789–90 (applying 1998 Guidelines); *Maxwell*, 579 F.3d at 1305–07. Furthermore, [these cases] were decided under the former U.S. SENTENCING GUIDELINES MANUAL (herein “USSG”) § 2F1.1 (U.S. SENTENCING COMM’N 1998), which did not contain an application note requiring that loss be reduced by the fair market value of services rendered akin to current USSG § 2B1.1 cmt. n. 3(E)(i).”

¹⁹⁸ *Id.*

¹⁹⁹ *See* USSG § 2F1.1 cmt. n.8(d) (U.S. SENTENCING COMM’N 2000).

²⁰⁰ *Id.*

Re-Evaluating *United States v. Harris*: The “Government Benefits” Special Rule and Congressional Intent Weakened

If the Fifth Circuit properly interpreted the Guidelines under the *noscitur a sociis* doctrine, the court should have applied the government benefits special rule to calculate loss instead of the general loss rule. The *noscitur a sociis* doctrine, Latin for “it is known by the company that it keeps,” is a concept frequently employed in interpreting statutory construction.²⁰¹ The Fifth Circuit held that the general loss rule applied and that the *noscitur a sociis* doctrine precluded 8(a) programs from being read into the enumerated examples listed in 3(F)(ii).²⁰² Nevertheless, the Fifth Circuit erred in applying the general loss rule for three reasons.

First, the Fifth Circuit’s previous application of the government benefits rule in *United States v. Dowl* on similar facts undermines its decision in *United States v. Harris*. In *United States v. Harris*, the Fifth Circuit cited four types of programs that it previously applied the government benefits rule for sentencing.²⁰³ Specifically, the court previously applied the 3(F)(ii) government benefits special rule in cases involving: EPA grants,²⁰⁴ SBA loans,²⁰⁵ FEMA disaster relief reimbursements,²⁰⁶ and Medicare reimbursements.²⁰⁷ In *United States v. Dowl*,²⁰⁸ the Fifth Circuit held that the government benefits rule applied when the “[Defendant] submitted fraudulent applications [with the SBA’s disaster assistance loan program] to obtain government funds later spent inappropriately.”²⁰⁹ The court applied the government benefits special rule in 3(F)(ii) because

²⁰¹ See Scalia & Garner, *supra*, at 195–98 (describing the *noscitur a sociis* canon as a principle of statutory interpretation).

²⁰² *United States v. Harris*, 821 F.3d 589, 602–04 (5th Cir. 2016).

²⁰³ *Id.*

²⁰⁴ *United States v. Nelson*, 732 F.3d 504, 521–23 (5th Cir. 2013).

²⁰⁵ *United States v. Dowl*, 619 F.3d 494, 502–04 (5th Cir. 2010).

²⁰⁶ *United States v. Hebron*, 684 F.3d 554, 560–61 (5th Cir. 2012).

²⁰⁷ *United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007).

²⁰⁸ 619 F.3d at 502.

²⁰⁹ *Id.*

the defendant's scheme deprived the government of the funds' economic value for aiding homeowner[s]'s rebuilding efforts after Hurricane Katrina."²¹⁰ While the disaster assistance loan in *Dowl* did not reserve funds for a racial minority or women, the court noted (similar to 8(a) fraud) that the scheme diverted government money from the *intended recipients* to the defendant.²¹¹ Therefore, the Fifth Circuit in *Harris*, like *Dowd*, should have applied the government benefits special rule because in each case, the defendant diverted funds *reserved for a government specified recipient to an unintended recipient* causing the government a double-loss.²¹²

Second, in *United States v. Harris*, the Fifth Circuit erred in relying on the *noscitur a sociis* doctrine when it concluded that the SBA 8(a) Joint Venture program did not share common features with the 3(F)(ii) enumerated list because defense contracts require a "bargained for exchange" and a mutual transfer of benefits.²¹³ Indeed, the court acknowledged that an "affirmative action" contract program may benefit the recipient; however, the court stated that the three examples in 3(F)(ii) involve "a unilateral transfer," not a "bargained for exchange."²¹⁴ The court, invoking the *noscitur a sociis* doctrine, ultimately held that the government benefits rule did not apply because "unlike the enumerated examples, . . . contracts awarded under the 8(a) program do not exist primarily to benefit the awardee, . . . such contracts first and foremost serve the government's own procurement needs."²¹⁵ The reality remains just the opposite. 8(a)'s purpose indirectly allows the government to fulfill its procurement needs; yet, Congress expressly instituted 8(a) and DBE programs to benefit the awardee directly by providing minorities and women a fair

²¹⁰ *Id.*

²¹¹ *Id.* (emphasis added).

²¹² See *Leahy*, 464 F.3d at 789 (noting that the 3(F)(ii) applies because stealing from the DBE program implicates a "double loss" to the government including "the loss that we computed and the real loss to all people that [did not] get [affirmative action contract] business, that [did not] get a chance to become [a] successful [MBE] or [WBE], because this huge amount was diverted).

²¹³ *Harris*, 821 F.3d at 603.

²¹⁴ *Id.*

²¹⁵ *Id.* at 603.

chance in the marketplace where minorities historically retained no opportunities or in some cases where minorities and women continue to realize stifled business opportunity.²¹⁶

Third, the Fifth Circuit’s conclusion that the 3(A) general rule applies to “affirmative action contracts” because they neither involve traditional consideration, nor the bargaining context of private contracts overlooks the nature of how individuals receive such contracts.²¹⁷ Unlike traditional contracts that require consideration to be valid, a business can receive 8(a) contracts by simply filling out a form with basic information, the job to be completed, and certification that the business complied with the statute’s SBA minority work requirements.²¹⁸ Indeed, the Fifth Circuit conceded and Congress explicitly provided that 8(a) Joint Venture contracts may “won through competition”²¹⁹ or non-competitively on a “sole source”²²⁰ basis.²²¹ As a result, contrary to the Fifth Circuit’s analysis, 8(a) and DBE contracts frequently involve a unilateral transfer of public taxpayer money to an applicant without traditional contract negotiations or legal consideration similar to EPA grants, SBA loans, FEMA disaster relief reimbursements, and Medicare reimbursement. Moreover, in contrast with *United States v. Harris*, the Fifth Circuit in *United*

²¹⁶ See *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 217 (2000) (per curiam) (“Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged”); see 49 C.F.R. § 26.1-15 (stating objectives of DBE Program are among other things “to ensure nondiscrimination in the award and administration of DOT-assisted contracts,” to create a level playing field for DBEs, and to “assist the development of firms that can competes successfully in the marketplace outside the DBE program”); see also 15 U.S.C. § 631 (2010) (stating among other things that it is the policy of Congress to aid, counsel, and assist small businesses in their competitive enterprises and assist such businesses to compete in international markets); 13 C.F.R. 124.1 (2018) (stating the “purpose of the SBA 8(a) [Business Development] program is to assist eligible small disadvantaged business concerns compete in the in the American economy through business development”); see also *McVickers*, *supra* note 43, at 7 (noting that taxpayers are impacted when public funds are allocated contrary to congressional intent).

²¹⁷ *Harris*, 821 F.3d at 591–92.

²¹⁸ *Id.*; see generally 13 C.F.R. § 124.201-07 (2018).

²¹⁹ 13 C.F.R. § 124.501 (2016).

²²⁰ National Association of State Procurement Officials, *Non-Competitive / Sole Source Procurement: Seven Questions*, BRIEFING PAPER 1, 3 (Jan. 2015), http://www.naspo.org/solesourceprocurement/7-Question_Sole_Source_Procurement_briefing_paper-1-13-15.pdf (defining sole source contract procurement as “any contract entered into without a competitive process, based on the justification that only one known source exists or that only one single supplier can fulfill the requirements”).

²²¹ *Harris*, 821 F.3d at 591–92.

States v. Lopez previously held that defrauding a federal contract program [the Javits-Wagner-O'Day Act or "JWOD"] designed to employ blind and disabled individuals constituted a loss under the government benefits rule.²²² In *Lopez*, the Fifth Circuit concluded that the government benefits rule applied when Lopez directed only nine percent of the contract award to the intended disabled or blind recipients.²²³ Although, *Lopez* did not involve racial based affirmative action goals, the court held that the government benefits rule nevertheless applied because "[t]he focus in the JWOD program is on providing employment opportunities for the severely disabled, not on the specific product or service provided."²²⁴ The government benefits special rule in the 3(F)(ii) list states that the rule applies to "(e.g., grants, loans, entitlement program payments)."²²⁵ As stated above and contrary to the Fifth Circuit's reasoning, 8(a) and DBE programs could be reconciled with the *noscitur a sociis* doctrine and be identified as unilateral grants or "program payments" due to the unilateral nature of procurement procedures, the lack of consideration exchanged between parties, and the bargaining dynamics involved. Therefore, if a federal contract program to specifically benefit the disabled constitutes a "government benefit," the 8(a) program should have been deemed such as well. In conclusion, given the holdings in *Lopez* and *Dowl*, and Congress's explicit intent in creating the SBA and DBE programs, the government benefits special rule enumerated example list should be construed broadly to include SBA 8(a) and DBE programs.

Applying the Government Benefits Special Loss Rules for Defrauding "Affirmative Action" Government Contracts Will Promote Fairness, Re-Invigorate Congress's Public Policy Goals, Deter Potential White Collar Criminals, and Send a Strong Message to the Public That Stealing from the Government and Disadvantaged Businesses Will Not Be Condoned.

²²² United States v. Lopez, 486 F.App'x 461, 463 (5th Cir. 2012) (nonprecedential).

²²³ *Id.*

²²⁴ *Id.* at 467.

²²⁵ USSG §2B1.1 cmt. n.3(F)(ii) (U.S. SENTENCING COMM'N 2016); *Harris*, 821 F.3d at 602.

In the interests of public policy and fairness, the Commission should amend the Notes to ensure that defrauding an “affirmative action” government programs results in a loss equal to the entire contract award without mitigation. Specifically, the public policy purposes for 3(F)(ii), to ensure maximum punishment for stealing from the government and taxpayers, should not be circumvented or frustrated by Note 3(E)(i) or Note 3(F)(v)(II) as currently written. To remedy the situation, the Commission should revise the sentencing rules to ensure that criminals who illegally exploit government programs can be held accountable for the full amount of money awarded by the government regardless of any benefits or services provided. Moreover, “affirmative action” contract programs should be considered “government benefits” because Congress created such programs to espouse a government policy favoring socially disadvantaged individuals in the marketplace.²²⁶ Finally, Congress explicitly created the Commission to “combat crime honestly through an effective, fair system.”²²⁷ To realize Congress’s goals, fairness demands that anyone who defrauds a government “affirmative action” program should be sentenced under 3(F)(ii) to guarantee that loss will be the entire contract total awarded just as if the criminal defrauded Medicare, the EPA, or welfare benefits.

“Affirmative action” contract programs should also be considered “government benefits” to strengthen and reassert deterrence interests in federal sentencing. The theory of deterrence in criminal law relies on the assumption that fear of punishment will influence potential criminals to

²²⁶ See *Adarand*, 528 U.S. at 217 (“Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged”); see 49 C.F.R. § 26.1–15 (stating objectives of DBE Program are among other things “to ensure nondiscrimination in the award and administration of DOT-assisted contracts,” to create a level playing field for DBEs, and to “assist the development of firms that can compete successfully in the marketplace outside the DBE program”); see also 15 U.S.C. § 631 (2010) (stating among other things that it is the policy of Congress to aid, counsel, and assist small businesses in their competitive enterprises and assist such businesses to compete in international markets); 13 C.F.R. 124.1 (2018) (stating the “purpose of the SBA 8(a) [Business Development] program is to assist eligible small disadvantaged business concerns compete in the in the American economy through business development”); see also *McVickers*, *supra* note 43, at 7 (noting that taxpayers are impacted when public funds are allocated contrary to congressional intent).

²²⁷ USSG ch. 1, pt. A, subpt. 3 (U.S. SENTENCING COMM’N 2016).

not break the law.²²⁸ To increase deterrence, the Commission should amend the Guidelines' text for calculating loss under section 2B1.1(b)(1) to clarify that the government benefits special rule under 3(F)(ii) applies “notwithstanding subdivisions (A–E)” instead of the current language stating that special rules apply “notwithstanding subdivision (A).”²²⁹ Amending the Notes in this manner will standardize and deter individuals that defraud government “affirmative action” programs regardless as to whether a business fully performs a contract. The Notes should be reformed because a federal court’s ability to mitigate loss under 3(F)(v)(II) or 3(E)(i) undermines the deterrence role and the recognition of non-pecuniary loss envisioned by the drafters of 3(F)(ii). To that end, Congress created the Commission to “introduce reasonable uniformity in sentencing by narrowing discrepancies in sentences imposed for similar crimes committed by similar offenders.”²³⁰ Uniformity, where courts treat all individuals similarly and fair notice, where all individuals know that they will receive a harsher penalty for a given offense, increases deterrence.²³¹ Consequently, the existing circuit split on the issue of “affirmative action” government programs undermines the benefits of deterrence provided by uniform sentencing and the goals set forth by Congress in creating the Commission and the Guidelines.²³² In the context of economic crimes, the symbolism of higher prison terms “is important [in deterring white collar crime or contract procurement fraud] because the strongest possible message should be sent to those who would engage in similar conduct that they will be caught and punished to the full extent of the law.”²³³

²²⁸ *Deterrence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²²⁹ *See* USSG §2B1.1(b)(1) (2016).

²³⁰ *Id.*

²³¹ Henning, *supra*, at 27.

²³² *See id.*; USSG ch. 1, pt. A, subpt. 3 (U.S. SENTENCING COMM'N 2016).

²³³ Henning, *supra*, at 27.

The Notes should also be amended to address specific deterrence and general deterrence to maximize the deterrent effect on individuals that may consider stealing from the SBA and DBE programs.²³⁴ Critically, amending the Notes will deter federal courts from “succumbing to the impulse to see [white collar defendants] in the warm light of a contrite individual who engaged in aberrational conduct but is unlikely to offend again.”²³⁵ In the alternative, even if higher sentences do not reduce fraud crime directly, greater prison time may “deter judges from going to one extreme or the other” . . . because higher sentencing “requires consideration of the impact on society and not solely the particular offender.”²³⁶ Furthermore, higher standardized punishments will promote deterrence in sentencing of “affirmative action” contracts because fraud in such cases involves substantial non-pecuniary loss to amorphous victims.²³⁷ Therefore, to achieve maximum deterrence, the Commission should amend the Guidelines to vindicate non-pecuniary loss to the government, taxpayers and “amorphous victims” including the small business contract procurement market.²³⁸ In government fraud cases, many defendants plead that there is no loss to the government or society because the defendants performed all contractual obligations.²³⁹ To eliminate such defenses, defendants should be liable for the full price of a contract award because “[i]t is conceivable that the government paid a premium contract price above what it would pay for other contracts under normal competitive bidding procedures.”²⁴⁰ Therefore, the amended

²³⁴ *See id.* at 31 (stating that specific deterrence concerns deterring a specific defendant, while general deterrence seeks to deter those criminals similarly situated from engaging in future crimes because the cost of potentially committing the crime exceeds the benefit of attempting or succeeding in committing the crime).

²³⁵ Stanton Wheeler, Kenneth Mann & Austin Sarat, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* 10 (Yale Univ. Press, 1988).

²³⁶ Henning, *supra*, at 59.

²³⁷ *Id.* at 34.

²³⁸ *See* McVickers, *supra* note 43, at 7 (discussing consequences of DBE fraud where DBE fraud is unique because it prevents real DBEs from “grow[ing] and build[ing] their businesses” and from “gain[ing] crucial experience.”)

²³⁹ *See e.g., Martin*, 796 F.3d at 1111 (on appeal, defendant Martin claimed that there was no net “loss” and no “non-pecuniary loss” because MarCon performed the contract completely and adequately.).

²⁴⁰ *Id.*

Guidelines should recognize that loss to the government includes a double loss: the loss to taxpayers and the excess funds the government paid to a DBE or 8(a) business to realize Congress's policy goals of aiding minority and women owned businesses.²⁴¹

Public policy further demands that defendants be responsible for the entire contract award because “[defendant’s] fraud harmed the integrity of the [8(a) and DBE] programs, which were designed to help legitimately disadvantaged businesses. There may also be harm . . . to legitimate program participants whose businesses might have received the contracts that were awarded to [defendant].”²⁴² The government should be reimbursed fully for the traditional loss as well as the latent loss to allow the recouped funds to flow back into government coffers with the goal of aiding legitimate, law abiding minority applicants. Principally, reform will aid the market writ large and other “amorphous victims” affected by white collar contract fraud.²⁴³ As the Guidelines recognize that “there may be cases in which the offense level determined under [section 2B1.1] substantially understates the seriousness of the offense,” the Notes should be reformed to account for the invisible, non-pecuniary loss involved in fraud of SBA and DBE programs.²⁴⁴ Further examples of non-pecuniary loss caused by DBE program fraud include discouraging potential legitimate disadvantaged businesses from entering the DBE program and preventing actual recognized DBEs from graduating from the program.²⁴⁵ In sum, the Commission should amend the Guidelines for calculating loss under section 2B1.1(b)(1) to clarify that the government benefits special rule under 3(F)(ii) applies “notwithstanding subdivisions (A–E)” instead of the current language stating that special rules apply “notwithstanding subdivision (A)”²⁴⁶ to standardize and deter individuals that

²⁴¹ *Leahy*, 464 F.3d at 789.

²⁴² *Martin*, 796 F.3d at 1111.

²⁴³ Henning, *supra*, at 34 (explaining that “the market” or a faceless organization may be affected by “affirmative action” contract fraud without society, traditional stakeholders or citizens noticing the impact).

²⁴⁴ *Id.*

²⁴⁵ *McVickers*, *supra*, at 7; *Leahy*, 464 F.3d at 789.

²⁴⁶ *See* USSG §2B1.1(b)(1) (2016).

defraud government “affirmative action” programs regardless as to whether a business fully performs a contract.

The Way Forward: Preventing the *Nagle* Outcome Through Reasonable Reform

United States v. Nagle embodies the model case study to examine how the Guidelines remain fundamentally flawed without reform. Based on the current text, the Third Circuit reasonably interpreted the Notes in applying 3(A)(v)(II) and 3(E)(i) instead of 3(F)(ii) to “affirmative action” contract fraud.²⁴⁷ Regrettably, the Third Circuit’s decision “weakened prosecutor’s chances of successfully seeking [longer] prison sentences when the court allowed offsetting for contractual performance . . . in calculating . . . ‘loss.’”²⁴⁸ An examination of *United States v. Nagle* reveals three current textual issues that undermine the purpose of 3(F)(ii). First, 3(F) currently states “Special Rules- “Notwithstanding subdivision (A).”²⁴⁹ This provision undercuts special rule 3(F)(ii) by providing that the government benefits special rule only supersedes the subsection (A) general loss rule. Second, several circuit courts mitigated loss using 3(F)(v) (covering misrepresentation schemes) or using 3(A)(v)(II) (involving fraud of defense contracts).²⁵⁰ Because many SBA 8(a) and DBE fraud cases involve Defense Department contracts, the general rule in 3(A) robs 3(F)(ii) of its purpose. Given that “affirmative action” contracts remain dissimilar to traditional contracts, there is no rational reason why defense contracts under 8(a) or the DBE should be treated differently than all other 8(a)/DBE construction and transportation contracts. Third, several circuits²⁵¹ reasonably concluded that mitigating rule

²⁴⁷ *United States v. Nagle*, 803 F.3d 168, 183 (3d. Cir. 2015).

²⁴⁸ Reese, *supra*, at 681.

²⁴⁹ USSG §2B1.1 cmt. n.3(F)(ii) (2016); *see Nagle*, 803 F.3d at 181–83.

²⁵⁰ *Nagle*, 803 F.3d at 183 (Hardiman, J., concurring); *Harris*, 821 F.3d 589, 608; *Martin*, 796 F.3d 1110–11.

²⁵¹ *United States v. Harris*, 803 F.3d 181–183 (3d. Cir. 2015); *United States v. Martin*, 796 F.3d 1101, 1104 (9th Cir. 2015).

3(E)(i) “Credits Against Loss” note applies to reduce a criminal’s total “loss.”²⁵² Despite the Third Circuit assuming that DBE contracts constituted government benefits regardless as to whether 3(A) or 3(F) applies, the court held that defendants owed the full value of the contracts with credit for fair market value of services provided under section 3(E)(i).²⁵³ As a result, section 3(E)(i) and the current “[n]otwithstanding Subsection A” language frustrates the goals of 3(F)(ii) even if, as in *Nagle*, the court assumes that the DBE program constitutes a “government benefit.”²⁵⁴ Thus, to resolve the textual issues in the Notes, the Commission should amend the Guidelines for calculating loss under section 2B1.1(b)(1) to clarify that the government benefits special rule under 3(F)(ii) applies “notwithstanding subdivisions (A–E)” instead of the current language stating that special rules apply “notwithstanding subdivision (A).”²⁵⁵ Amending the Notes in this manner will clearly indicate that the 3(E)(i) “Credits Against Loss” provision does not supersede the 3F special rules. As a result, any federal court that concludes that SBA 8(a) and DBE programs constitute government benefits programs will be bound to apply the 3(F)(ii) special loss rules in lieu of the general loss rule in sub-section (A). Requiring the application of 3(F)(ii) will ensure that a criminal who steals from any “affirmative action” program will be responsible for the full contract price awarded without mitigation for any legitimate services rendered.²⁵⁶

V. Conclusion

The Commission should amend the Guidelines for calculating loss under section 2B1.1(b)(1) to clarify that the government benefits special rule under 3(F)(ii) applies “notwithstanding subdivisions (A–E)” instead of the current language stating that special rules

²⁵² USSG. §2B1.1 cmt. n.3(E)(i) (2016).

²⁵³ *United States v. Nagle*, 803 F.3d 168, 181–82 (3d. Cir. 2015).

²⁵⁴ *Id.* at 181.

²⁵⁵ *See* U.S. SENTENCING GUIDELINES MANUAL §2B1.1(B)(1) (U.S. SENTENCING COMM’N 2016).

²⁵⁶ *See id.*

apply “notwithstanding subdivision (A).”²⁵⁷ With differing circuit interpretations on how to apply the Notes, it is imperative for the Commission to amend the Notes to ensure that the government benefits rule applies to all SBA and DBE affirmative action programs. The lack of clarity regarding which rules apply to “affirmative action” contracts continues to exacerbate the discrepancies in sentencing, while eroding the benefits of such programs to the individuals who rightfully deserve financial help in their businesses. Until the Commission amends the Notes, the Supreme Court should hold that SBA 8(a) and DBE programs comprise government benefits to provide guidance and certainty in federal sentencing for white collar crimes.

This comment scrutinizes the background of the Commission, the relevant rules at issue and the various circuit court cases that resolved the issue. Likewise, this comment offers a feasible solution to revive the principle that defrauding government benefits consistently comes with a steep price. Although opponents may suggest that Congress intended to create flexible guidelines for federal courts, a district court imbued with too much sentencing discretion will ultimately lead to injustice, diluted deterrence, and disparate outcomes across the nation. In conclusion, this comment proposes reasonable solutions to re-calibrate federal sentencing with Congress’s original goals and give fair notice to offenders that they will be liable for *everything* they steal from the people.

²⁵⁷ *See id.*