

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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February 24, 2026

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**Re: Defender Reply Comment on Proposed 2025–2026
Amendments on Proposals 3 and 7**

Dear Judge Reeves:

Thank you for the opportunity to provide comment and witness testimony on this year’s proposed amendments to the Sentencing Guidelines. In this letter, we briefly supplement our comment and testimony, to respond to matters raised at last week’s hearing regarding two amendments: economic crimes (proposal 3) and sophisticated means (proposal 7).

I. Economic Crimes

Vice Chair Murray asked at the hearing whether Defenders would support widening the loss bands if the Commission kept the amendment severity-neutral.¹ In case we were not clear, we would support a severity-neutral amendment with wider loss bands; this would reduce fact-finding disputes and litigation at the margins. The Commission’s current proposal is probably as severity-neutral as possible; and although Defenders have proposed a better alternative, we would certainly prefer the Commission’s proposal over the current scheme.

The witness for the Criminal Law Committee (CLC) agreed that wider bands “might actually make things easier,” but doubted that any benefit would materialize because judges must still calculate precise actual loss

¹ See [February Hearing Video](#) at 2:57:53-2:58:30.

figures for restitution.² As discussed at the hearing, we respectfully disagree: restitution is typically stipulated, not litigated.³ And in an “intended loss” case, there is no restitution. But also, Defenders’ witness alluded to the fact that, in the future, judges may no longer need to find facts regarding restitution. To clarify, last month, the Supreme Court held that restitution is not merely a civil remedy, but “plainly criminal punishment.”⁴ This strongly suggests that, as a constitutional matter, restitution must be found by a jury (not courts)⁵ —because “once we recognize restitution as being a ‘criminal penalty’ the proverbial *Apprendi* dominoes begin to fall.”⁶

Finally, the CLC and DOJ witnesses also contended that widening the loss bands would minimize nuances in culpability—someone with a \$260,000 loss would be treated the same as someone with a \$1,499,000 loss.⁷ But that problem already exists under the current loss table—someone with a \$3.6 million loss is treated the same as someone with a \$9.5 million loss.⁸ The

² See *id.* at 27:15-29:06.

³ See *id.* at 3:03:45-3:05:24 (Defenders: explaining that contested restitution hearings are “very rare,” and recounting a recent case in which a senior district judge, appointed by President Clinton, remarked that it was his “first contested restitution hearing he’s ever had” in his decades on the bench).

⁴ *Ellinburg v. United States*, 607 U.S. --, 2026 WL 135982, at *2 (Jan. 20, 2026).

⁵ See Darren Kramer, [Supreme Court’s Ellinburg Ruling Upends Federal Restitution](#), SentencingStats (Jan. 23, 2026) (highlighting that the appointed *amicus* conceded that if the court finds restitution punitive, it would trigger *Apprendi*, such that juries would be required to “find beyond a reasonable doubt facts that determine” the amount of restitution); see also *Hester v. United States*, 586 U.S. 1104, 1105-07 (2019) (Gorsuch, J., dissenting from the denial of certiorari) (arguing the same).

⁶ See *United States v. Carruth*, 418 F.3d 900, 906 (8th Cir. 2005) (Bye, J., dissenting).

⁷ See [February Hearing Video](#) at 29:30-29:50 (CLC: “The restructured loss tables would really minimize those nuances. As an example, a \$260,000 loss would be treated the same as a \$1.4 million loss. It would be within the same band.”); *id.* at 2:47:10-2:47:29 (DOJ: similar).

⁸ See USSG §2B1.1(b)(1).

solution to this problem is not maintaining the status quo of 16 gradations; rather, the solution is creating a more rational scaling of punishment.

II. Sophisticated Means

Some stakeholders endorsed expanding the “sophisticated means” enhancement to potentially reach every Chapter 2 offense, but the reasons offered fail to overcome what CLC describes as (and Defenders agree to be) an “overly complicated” move that “would invite litigation.”⁹

A. Intrastate and interdistrict disparities in sophisticated-means application are even more pronounced than discussed at the hearing.

At the hearing, the Chair asked several questions in an attempt to probe the substantial disparities between neighboring districts in the same state. The DOJ’s witness contended that different districts impose sophisticated-means enhancements at different rates because they each have their own U.S. Attorney and corresponding priorities.¹⁰ The witness then argued that sophistication exists in different ranges, comparing the average case in the very-complex Southern District of New York to a case in Arkansas that might consist of a person “lying to their neighbor to get them to invest in your [MLM soap-selling scheme].”¹¹

First, the data do not support DOJ’s theory in several ways:

- The witness’s example—Arkansas versus the Southern District of New York—undermines the DOJ’s theory. Arkansas’s Western District applied the sophisticated-means enhancement in 18.3% of cases over the past five fiscal years, as compared to the Southern District of New

⁹ [CLC Comment on the USSC’s 2025-2026 Proposed Amendments](#) at 9-10 (Feb. 10, 2026).

¹⁰ *See, e.g.*, [February Hearing Video](#) at 4:24:05-4:24:44.

¹¹ *Id.* at 4:31:42-4:32:04.

York's 16.9%.¹² Those rates place the districts 16th and 20th, respectively. In contrast, Arkansas's eastern district, which includes Little Rock, the state's biggest city and capital, ranks 83rd in application rate at only 4.1%.¹³

- Nor do data bolster the witness's comparison of her own district (Middle District of Florida) with the Defenders' witness's district (Southern District of Florida).¹⁴ While the application rate is higher in the Southern District than the Middle District, the gap is 5.8%.¹⁵ This hardly compares with the enormous swings between Mississippi's two districts and two of Tennessee's districts, as discussed in Defenders' Comment.
- The top ten districts for the sophisticated-means enhancement represent a mix of geography and population density.¹⁶ While the five highest are in the geographic central-south, other districts in the top 10 were: the Northern District of Illinois, which includes Chicago (6th in frequency at 22.7%), the Western District of Washington, which includes Seattle (7th in frequency at 21.4%), and Maryland, which includes both Baltimore and the Washington D.C. suburbs (8th in frequency at 20.6%).¹⁷
- Although the top five districts are close to one another geographically,¹⁸ other districts in each of those same states

¹² The data used for these analyses were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2020 to 2024. The Commission's Individual Datafiles are publicly available for download on its [website](#).

¹³ *Id.*

¹⁴ [February Hearing Video](#) at 4:31:20-4:31:43.

¹⁵ FY 2020 to 2024 USSG Individual Datafiles.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The top five, in order, are: the Middle District of Tennessee (36.9%), the Southern District of Mississippi (30.4%), the Middle District of Louisiana (28.4%),

exhibit notable intrastate disparity akin to those Defenders identified for Mississippi and Tennessee.¹⁹

Second, DOJ's big-versus-small theory is not consistent with the text of the enhancement, which does not instruct courts to compare the instant case to other cases in a given district; but then, it also does not direct courts to compare among cases nationally. It leaves courts to decide what the comparator is, welcoming disparity. DOJ's explanation, described as based on a single attorney's career, was thus not describing the enhancement as it *must* presently work textually but rather how it may, depending on the judge or district.²⁰ Moreover, it is not clear why conduct involving equal sophistication should be punished more harshly in a smaller-resource district than a larger one. If anything, the observation that 94 different U.S. Attorneys result in very different applications of the sophisticated-means enhancement amply supports Defenders' proposal for the Commission to better guide courts by putting up clearer guiderails and narrowing the scope of the analysis.

the Southern District of Alabama (24.9%), and the Western District of Louisiana (24.3%). *Id.*

¹⁹ *Id.* The Eastern District of Louisiana ranks 58th in frequency at 8.3% despite being in the same state as the third- and fifth-highest-rate districts. *Id.* The Northern District of Alabama ranks 78th at 5.1 percent while the Middle District of Alabama ranks 35th at 12.8% despite being in the same state as the fourth-ranked district. *Id.*

²⁰ Defenders' Comment actually included a case confirming that at least one circuit does not think the enhancement calls on judges to compare sophistication among those in the venue district. See [Defenders' Comment on the USSC's 2025-2026 Proposed Sophisticated Means Amendment](#) at 3 n.9 (Feb. 10, 2026) (citing *United States v. Kontny*, 238 F.3d 815, 821 (7th Cir. 2001) (rejecting argument comparing offense complexity to present-day federal fraud cases and instead considering "what the Sentencing Commission took to be the average criminal tax fraud when it promulgated the 'sophisticated concealment' guideline back in 1987.")). *Kontny* did not involve a question of whether the person being sentenced was directly involved in the sophisticated conduct and thus was not impacted by the 2015 amendment.

B. DOJ and POAG did not grapple with the Commission's long-stated reason for only including sophistication enhancements in economic crimes.

Both DOJ and POAG in their comments appear to place much of their support for expanding the sophisticated-means enhancement (to Chapter Three) on the reasoning that sophistication itself requires punishment—period. Conspicuously absent from the hearing, however, was any discussion of why the Commission determined that sophistication matters in the first place.²¹

In crafting the original Guidelines Manual, the Commission assessed several thousand sentencings to determine what factors pre-SRA courts regularly relied upon to decide sentences, and how significant those factors were.²² The inaugural Commission offered two reasons for enhancing certain fraud offenses for sophistication: 1) adding an “additional sanction for deterrence purposes,” and 2) because “[a]nalyzes of data for other frauds and property crimes show that careful planning or sophistication generally results in an average increase of at least 2 levels.”²³ It does not appear that the Commission found a similar pre-SRA practice of sentences being elevated based on sophistication in other offense types.

As it turns out, the Commission's first reason has been thoroughly debunked: DOJ long ago explained that longer prison sentences do not deter crime.²⁴ As for the second basis, the Commission's review of pre-SRA practice

²¹ *But see* [DOJ Comment on Defenders' Comment on the USSC's 2025-2026 Amendments](#) at 57 (Feb. 10, 2026) (describing provision's original basis).

²² For reasons not relevant here, Defenders and commentators have routinely noted that this evaluation had crucial flaws including relying only on cases that went to trial and resulted in prison and intentionally increasing sentences beyond what the data demanded in economic offenses.

²³ USSG §2T1.1 (Background) (1987).

²⁴ *See* Nat'l Inst. of Justice, DOJ, [Five Things About Deterrence](#) at 1-2 (May 2016) (indicating that prison is not an effective deterrent and “[p]risons may exacerbate recidivism”). At the hearing, Vice Chair Mate highlighted this when she asked whether panelists were aware of any study showing that incremental sentencing adjustments deter crime; none were aware of any. And even if prison

explains why economic offenses would be uniquely impacted by sophistication. Past practice—that is, the circumstances that judges have found meaningful to sentencing—justify the enhancement. So, before expanding this enhancement to the entire Guidelines Manual, the Commission would need to conduct a deep inspection of sentencing practices and related enhancements.

And even with a review, it is impossible to forecast how new sophisticated-means litigation will interact with other Guidelines provisions. Courts have only ever interpreted the sophisticated-means enhancement in the context of discrete categories of fraud offenses. The caselaw has never had to grapple with sophistication in other offense types. New questions are inevitable and easy to envision: Does a 3-D-printed firearm constitute “sophisticated means” notwithstanding the ubiquity of both the designs and printers? And, if they are, what are courts to do with the overlapping enhancement for knowingly possessing firearms without serial numbers, which the Commission amended recently to address those guns?²⁵ Is a person couriering drugs in a car with a hidden compartment engaging in sophisticated drug-trafficking? Does the complexity of the compartment matter? What if the courier had no knowledge of how the compartment worked (as he was just told to drive the car)? And should the Commission be creating a new enhancement that could impact couriers a year after expanding their access to mitigating-role reductions?²⁶

somehow could deter crime generally, SIAG’s witnesses were abundantly clear that adjustments in an obscure and technical Guidelines manual are not impactful.

²⁵ See USSG §2K2.1(b)(4); *see also* USSG App. C., Amend. 819, Reason for Amendment (Nov. 1, 2023) (amending §2K2.1(b)(4) “to account for privately made firearms not marked with a serial number . . .”).

²⁶ See *generally* USSG App. C., Amend. 833, Reason for Amendment (Nov. 1, 2025) (providing that 4-level role reduction and offense level caps are generally appropriate for people whose primary function was courier).

C. The fact that caselaw often gets carried forward, even when an amendment undoes the foundation of the caselaw, is a crucial reason to include Defenders' proposed interpretive statement in the sophisticated means definition.

In Defenders' comment, we suggested an alternate definition of "sophisticated means," including an interpretive statement that "[t]he sophisticated means enhancement is reserved for exceptional cases and should be thus narrowly construed."²⁷ In addition to noting numerous instances where the Guidelines provide comparable language, Defenders explained that the statement is crucial to help overcome the inertia that exists from prior provisions even after amendment.

Conversation at the hearing demonstrated broad awareness of this inertia as a potential problem. First, Commissioner Meisler questioned the Defenders' witness about the age of some of the caselaw that Defenders relied upon to demonstrate how exceedingly broadly several circuits interpret sophisticated means. Commissioner Meisler noted that two of those cited decisions preceded the Commission's 2015 sophisticated means enhancement (the third sample was from 2023, well after), and asked whether that might be due to courts carrying forward their interpretations of prior language rather than flaws in the language itself.²⁸ While those still-binding cases were not cited for reasons addressed by the 2015 amendment,²⁹ Defenders

²⁷ [Defenders Sophisticated Means Comment](#) at 7, 10.

²⁸ [February Hearing Video](#) at 4:34:49-4:35:23 (asking if FPD witness thinks "that circuits have carried forward older, pre-2015 standards in a way that's not commensurate with the changes the Commission meant to effectuate and that was one way to get at the breadth concerns you mentioned.").

²⁹ Compare USSG App. C. Amend. 793 (Nov. 1, 2015) (noting that the amendment addressed prior court interpretations that looked at overall scheme sophistication instead of actions of the person being sentenced), with [Defenders' Sophisticated Means Comment](#) at 4 (discussing caselaw that "interpreted 'sophisticated means' so broadly that [courts have] all but read out the 'sophistication' requirement."). Moreover, the pre-2015 cases that Defenders' comment cited have also been cited—post-2015—by federal courts. See *United States v. Mitchell*, 914 F.3d 581, 586 (8th Cir. 2019) (citing *United States v. Norwood*, 774 F.3d 476, 480 (8th Cir. 2014) for the proposition that "sophisticated means need not be highly sophisticated" (cleaned up)); see also, e.g., *United States v. Lundberg*, 990 F.3d 1087, 1097 (7th Cir. 2021) (citing *United States v. Kontny*, 238 F.3d 815, 820

appreciate Commissioner Meisler’s premise—that amendments often must contend with prior caselaw, even if the amendment abrogated that caselaw.

TIAG’s witness, Jami Johnson, provided further support for inertia holding back Guideline amendments.³⁰ Ms. Johnson spoke of a recent fraud case where a client’s offense level was impacted by the amount of money put at risk despite a 2001 amendment having very clearly undone that line of cases.³¹ Nonetheless, Ms. Johnson’s client’s guideline was calculated as though there had been no amendment and Ms. Johnson found numerous post-amendment cases simply ignoring that change.

Adding clear narrowing language combined with Defenders’ proposed interpretive statement is the best hope for defeating carry-forward/inertial effect so that an improved, clarified definition can have real impact.

(7th Cir. 2001) for the proposition that the sophisticated-means enhancement “does not require a brilliant scheme, just one that displays a greater level of planning or concealment than the usual fraud case” (cleaned up)).

³⁰ [February Hearing Video](#) at 4:58:00-5:00:00.

³¹ See USSG App. C, Amend. 617, Reason for Amendment (Nov. 1, 2001) (“Accordingly, concepts such as . . . ‘amounts put at risk’ will no longer be considerations in the determination of intended loss.”).

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The Federal Public and Community Defenders appreciate the Commission's consideration of our views and look forward to continuing our work together to improve federal sentencing policy.

Very truly yours,



Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
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cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
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