AFFIRMATIVELY AMBIGUOUS: REFORMING THE FRAUD FEDERAL SENTENCING GUIDELINE RULES IN "AFFIRMATIVE ACTION" GOVERNMENT CONTRACTS

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I. INTRODUCTION

In fiscal year 2018, the federal government will provide American small businesses with nearly billions of dollars in contract opportunities and targeted assistance.[1] Among such contracts, 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") steal hundreds of millions of dollars annually from various government programs by means of fraud, embezzlement or improper disbursement.[3] Sentencing white collar criminals creates challenging issues for the courts, including

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[1] USASPENDING.GOV, https://www.usaspending.gov/#/agency/803 (last visited Nov. 7, 2018).

[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. 343 (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); *see* Rick Moran, *SBA Inspector General Uncovers Fraud in the 8(a) Program*, ASSOCIATION OF PROCUREMENT TECHNICAL ASSISTANCE CENTERS, http://www.aptac-us.org/news/sba-ig-uncovers-8a-fraud/ (last visited Nov. 7, 2018); *see also* Michelle McVicker, *The Real Cost of DBE Fraud*, U.S. DEP'T OF TRANSP. 1, 8 (2016) (stating that the largest DBE fraud in United States history perpetrated by one recipient totaled 136 million dollars over 15 years).

how to punish behavior not immediately recognizable as criminal, since fraud crimes often implicate amorphous victims.[4] Without reforming the 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.[5]

Circuit courts use two major approaches to calculate loss when criminals steal money intended for minority or women businesses: the "general loss" rule and the "government benefits" rule.[6] As a result, a circuit split exists between circuit courts that apply the general loss rule, and those that apply the government benefits rule.[7] The decision as to whether to apply the general loss rule or the government benefits rule matters because an individual can defraud the government, but be subject to considerably different punishments based on the circuit in which the fraud is tried.[8] For example, under the general loss rule, if small business owner A defrauds the government of one million dollars and uses some of the funds for legitimate purposes, he will have the legitimate services subtracted from the one million dollars awarded. Importantly, owner A will see a reduction in prison time because he performed on the contract to some extent. In contrast, if small business owner 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 and injustice, and reinforce the need for a uniform sentencing policy in fraud cases involving "affirmative action" programs.

In this note, I will argue that the United States Sentencing Commission (the "Commission") should amend the calculation for loss under section 2B1.1(b)(1) of the Guidelines 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.[9] In

[4] Henning, *supra* note 3, 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, 681–88 (2016).

[5] Henning, *supra* note 3, at 34 (noting that white collar crime and procurement fraud implicates unseen harm).

[6] *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 government benefits rule).

[7] *See Harris*, 821 F.3d at 602; *Maxwell*, 579 F.3d at 1307.

[8] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (F)(ii) (U.S. SENTENCING COMM'N 2016) [hereinafter *U.S.S.G.*]; *see also id.* § 2B1.1 n.3(A) (2016).

[9] *See id.* § 2B1.1(b)(1).

the alternative, to avoid varying interpretations concerning whether the Small Business Administration 8(a) (the "SBA") and Disadvantaged Business Enterprise (the "DBE") programs are "government benefits," the Commission should add the following text to the enumerated list of examples included in the 3(F)(ii) special rules:

> Government benefits shall include "Small Business Administration and Disadvantaged Business Enterprise grants or any type of federal program payments enacted with the purpose of giving exclusive opportunities to women businesses, minority businesses, or businesses run by any class of disadvantaged persons."[10]

Lastly, until the Commission revises the Notes, the Supreme Court should consider SBA 8(a) contracts and DBE grants to be "government benefits" within the meaning of 3(F) for federal sentencing purposes.

First, this note will introduce the Commission, the Guideline comments language, and provide a detailed explanation of the relevant rule provisions. Part II will explore the history of the Commission, the specific comment rules at issue, and the purpose of SBA 8(a) and DBE programs. Part III will explain the various circuit court decisions regarding the Note application. Fourth, the note will evaluate both sides of the circuit split and argue that affirmative action procurement programs should be considered "government benefits." Finally, this will note 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 Commission & the Guidelines

The United States Sentencing Commission, created by the Sentencing Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984, is an independent agency within the judicial branch.[11] Congress tasked the Commission with instituting "sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines, and prescribing the appropriate sentences for offenders convicted of federal crimes."[12] The Commission includes seven

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[10] *See id.*

[11] U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, subpt. 1–2 (U.S. SENTENCING COMM'N, 2004); Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, Title II, 98 Stat. 1976 (1984); *see* 28 U.S.C. §§ 991–98 (2008); 28 U.S.C. § 994 (outlining duties of the Commission); *see generally* Sentencing Reform Act, 18 U.S.C. § 3551 (1984).

[12] *Id.*

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).[13] 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.[14] 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 owed by the convicted criminal.[15] Section 2B1.1 of the Guidelines covers economic crimes including larceny, embezzlement, fraud, forgery, and counterfeiting offenses.[16] The Guidelines provide a sentencing structure for federal courts while streamlining the mechanics of federal sentencing.[17] 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 unreasonableness.[18] The process by which federal courts apply the Guidelines varies slightly among the circuit courts of appeals; 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*.[19]

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[13] U.S.S.G. ch.1, pt. A, subpt. 1–2; *see* 28 U.S.C. § 991 (2008).

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

[15] U.S.S.G. § 2B1.1 (2018); *see* United States v. Booker, 543 U.S. 220 (2005).

[16] U.S.S.G. § 2B1.1 (2018).

[17] *Booker*, 543 U.S. at 264; *see* U.S.S.G. § 2B1.1 (2018).

[18] *Booker*, 543 U.S. at 261–63; *see* 18 U.S.C. § 3661 (2018) ("No 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").

[19] United States v. Nagle, 803 F.3d 167, 179 (3d Cir. 2015); *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, 454–58 (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

In the Third Circuit, a district court calculated 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' sentence.[20]

In the Third Circuit, the three-step sentencing process begins with the calculation of an applicable sentencing range under the Guidelines.[21] As mentioned above, the Guidelines range functions as the starting point or the "Base Offense Level" for a court to begin the sentencing calculation.[22] Relevant to the analysis, the court examines "[t]he amount of loss that . . . [a] defendant is found to have caused to determine the recommended sentencing range under the Guidelines."[23] Second, after the court establishes the base offense level, the district court considers departure motions.[24] A departure motion allows the court to consider "depart[ing] from the applicable guidelines range" where "there exists an aggravating or mitigating circumstance . . ."[25] 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.[26] In government fraud cases, a court may find upward variations for harm to unaccounted for property or crimes that cause a "significant disruption of a governmental function."[27] In the final step of the sentencing

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)); United States v. Fumo, 655 F.3d 288, 308 (3d Cir. 2011).

[20] *Id.*

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

[22] *See id.*

[23] 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).

[24] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1)(A)(U.S. SENTENCING COMM'N, 2004) (prescribing departure process).

[25] *See id.*; United States v. Fumo, 655 F.3d 288, 308 (3d Cir. 2011) (discussing step two of sentencing calculation process where departure motions must be considered).

[26] *See* OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, *Primer: Departures and Variances* at 5 (2018) (internal quotation marks omitted) (quoting U.S.S.G. 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.

[27] OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, *Primer: Departures and Variances* at 19-20 (2018); U.S.S.G. § 5K2.5. provides for an upward departure if "the offense caused property damage or loss not taken into account within the guidelines."; *see id.* § 5K2.7 (stating that if the defendant's conduct resulted in a "significant disruption of a governmental

analysis, the district court must consider applying variances pursuant to the statutory factors enumerated in 18 U.S.C. § 3553(a).[28] Section 3553(a) obliges courts to impose sentences that are "sufficient, but not greater than necessary."[29] 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 just punishment for the offense, and (3) the need for deterrence."[30] 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.[31]

C. The Small Business Jobs Act and Section 2B1.1 Loss Rules Under the Guidelines Applying to "Affirmative Action" Contract Fraud.

As illustrated above, Guidelines section 2B1.1 prescribes offense level calculations for economic crimes including fraud and deceit.[32] 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.[33] In calculating loss, the Guidelines provide for baseline loss and sentencing totals that may be adjusted upward proportionally in cases where an increase in loss increases the convicted criminal's aggregate restitution owed and prison term.[34] Two of the most pertinent rules within section 2B1.1 for calculating

function," the court may increase the sentence above the authorized guideline range "to reflect the nature and extent of the disruption and the importance of the governmental function affected.").

[28] *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).

[29] 18 U.S.C. § 3553(a) (2012) (instructing courts on appropriate factors to consider for imposing a sentence).

[30] 18 U.S.C. § 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).

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

[32] United States v. Nagle, 803 F.3d 167, 179 (3d Cir. 2015).

[33] *Id.*

[34] *Id.*

sentencing totals for fraud in the "affirmative action" contract context include (1) the general loss rule and (2) the government loss rules.[35]

1. The General Loss Rule in 3(A) & the Government Loss Rule in 3(F)(ii)

In cases involving government contract fraud, the general loss rule provides the starting point for the sentencing analysis.[36] The general loss rule applies to losses under subsection (b)(1) and states that "loss is the greater of actual loss or intended loss."[37] The Notes define "actual loss" as "reasonably foreseeable pecuniary harm that resulted from the offense."[38] Pecuniary harm "means harm that is monetary or that otherwise is readily measurable in money."[39] Intended loss is defined as the pecuniary harm that offender sought to inflict.[40] In invoking the general loss rule, instead of the government benefits 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.[41] To that end, some judges apply Note 3(A)(v)(II) regardless of the nature, circumstances or purpose surrounding the defense contract award.[42]

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.[43] 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."[44] 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.[45] As shown above, the decision of whether to apply the general rule or the government benefits rule plays a major role in determining an individual's aggregate

35 *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N, 2016); *see id.* cmt. n.3(F).

36 *Id.* n.3(A).

37 *Id.*

38 *Id.* n.3(A)(i).

39 *Id.* n.3(A)(iii).

40 *Id.* n.3(A)(ii).

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

42 *Id.*

43 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(ii) (U.S. SENTENCING COMM'N, 2016).

44 *Id.*

45 *Id.*

sentence.[46]

2. Current Issues in Interpreting & Applying the Guideline Notes

Currently, there are varying interpretations of whether an "affirmative action" government contract program constitutes a "government benefit." Furthermore, there are textual issues within the Guideline's comments which continue to frustrate the goals Congress sought to achieve by creating the Commission. As stated by Congress, the Commission was founded 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[.]"[47] Presently, the conflict between Note 3(E)(i), Note 3(F)(ii), and the current comment's language asserting that 3(F)(ii) applies "notwithstanding subsection (A)" creates problems with consistent statutory interpretation.[48] Moreover, in cases involving SBA 8(a) defense contract procurement fraud, courts may properly conclude that 3(A)(v)(II) applies in cases of "procurement fraud, such as fraud affecting a defense contract award."[49] 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.[50]

3. The "Affirmative Action" Government Programs at Issue: Well-Intentioned Programs Exploited.

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

The SBA, created under the Small Business Investment Act of 1958, exists to "ensure small businesses [receive] a 'fair proportion' of government contracts."[51] Many fraud cases involve the 8(a) Joint Venture Program, a

46 *See* U.S.S.G. § 2B1.1 cmt. n.3(F)(ii) (2016); *see also id.* n.3(A); *see infra* Part I.

47 28 U.S.C. § 991 (2008); *see* U.S.S.G. ch. 1, pt. A, subpt. 3 (2016).

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

49 U.S.S.G. § 2B1.1 cmt. n.3(A)(v)(II).

50 *See* U.S.S.G. § 2B1.1; *Harris*, 821 F.3d at 608.

51 Small Business Investment Act of 1958, Pub. L. No. 85–699, § 102, 72 Stat. 689 (1958); *About the SBA: The Founding of the SBA*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/about-sba/what-we-do/history (last visited Dec. 17, 2018),; *see* 15 U.S.C. § 631 (2010) (containing a declaration of SBA policy); *see also* 15 U.S.C. § 661

federal program which allows small businesses lacking the capability (due to size and money) to perform contracts on their own, to enter into a joint venture agreement with a larger, more capable, business to perform the contract.[52] Specifically, the Section 8(a) Joint Venture Program authorizes the SBA to award federal procurement contracts to qualifying small businesses.[53] Under the 8(a) Joint Venture Program, participants can receive up to four million dollars for goods and services and up to 6.5 million for manufacturing ventures.[54] To qualify for 8(a) contracts, a small business "must be owned and controlled by one or more 'socially and economically disadvantaged individuals'" including women and minority owned businesses.[55] As such, the 8(a) program provides procurement opportunities by acting as an "affirmative action" contracting program.[56] SBA attempts to curb fraudulent joint venture arrangements by warning applicants that joint venture approval may be denied where an 8(a) firm brings its 8(a) status and little else to the joint venture.[57] SBA actively monitors for fraudulent joint ventures, and requires all parties under the Joint Venture Agreement to specify how the division of labor requirements will be met, with businesses owned by disadvantaged groups performing at least 40% of the work.[58] Unfortunately, many 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.[59]

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

The Department of Transportation ("DOT"), which requires (under authority from Title VI of the Civil Rights Act of 1964) any state that receives federal transportation funds to set goals for participation by

(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").

52 *See* 13 C.F.R § 124.513 (2016).

53 15 U.S.C. § 637(a)(1)(A) – (B) (2016).

54 U.S. SMALL BUSINESS ADMINISTRATION, *supra* note 52.

55 15 U.S.C. § 637(a)(4) (2016); *id.* § 637 (a)(1)(C).

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

57 13 C.F.R § 124.513(a)(2).

58 13 C.F.R. § 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); 13 C.F.R. § 124.513(c)(7).

59 *See* Moran, *supra* note 3.

disadvantaged business enterprises in transportation construction projects, remains susceptible to fraud and abuse.[60] 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.[61] 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 disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it."[62] Additionally, states must announce DBE participation goals and certify a business as a DBE prior to contract bidding.[63] To be considered a certified DBE, a business must "perform . . . a commercially useful function on [the] contract.[64] 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.[65] 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 funds.[66]

c. The Small Business Jobs Act of 2010 Statutory

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[60] 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); 49 C.F.R. § 26.21 (2014); *see generally* 49 C.F.R. § 26(A–C); 49 C.F.R. § 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)).

[61] *See* McVicker, *supra* note 3, at 4.

[62] 49 C.F.R. § 26.5 (2014); *see* Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 261 (2000) (Stevens J., dissenting) (noting that minority and women subcontractors are frequently subject to less traditional or obvious disadvantages "than direct, intentional racial prejudice").

[63] 49 C.F.R § 26.81.

[64] 49 C.F.R § 26.55(c).

[65] 49 C.F.R § 26.55(c)(2).

[66] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, RCED-89-26, HIGHWAY CONTRACTING: ASSESSING FRAUD AND ABUSE IN THE FEDERAL HIGHWAY ADMINISTRATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM (1988) (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); *see also* McVicker, *supra* note 3, 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).

Presumption: A New Complication

The Small Business Jobs Act arguably creates a presumption that "loss" in all small-business-fraud schemes must be the full value of the contract.[67] Section (w)(1) states:

> In every contract, subcontract . . . or grant which is set aside, reserved or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended . . . whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.[68]

The statutory presumption in the law may appear straightforward, but courts continue to struggle with how, or even if, the statutory language interacts with the Guidelines' command to credit loss in the sentencing rules.[69] The regulation implementing the presumption states, "it is SBA's intent that the presumption of loss shall be applied in all manner of criminal, civil, administrative, contractual, common law, or other actions, which the United States government may take to redress willful misrepresentation."[70] Congress initially intended to make the presumption "irrefutable," but ultimately did not do so because of due process concerns.[71] However, evidence suggests that Congress intended that the presumption only be rebuttable in cases of unintentional error, technical malfunction, or other similar situations.[72] Therefore, courts have held that fully performing on an illegally obtained contract cannot rebut the statutory presumption.[73] The Small Business Act presumption adds one more wrinkle in the already confusing morass of assessing loss in the "affirmative action" contract context.

III. CURRENT CIRCUIT COURT OF APPEALS INTERPRETATION & APPLICATION OF THE RULES

In the absence of Supreme Court or Commission guidance on whether

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[67] *See* Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504; 15 U.S.C. § 632(w).

[68] 15 U.S.C. § 632(w)(1).

[69] United States v. Crummy, 249 F. Supp. 3d 475, 485 (D.D.C. 2017) (noting that Congress may have created a clear statutory presumption that "it is not at all clear that Congress intended for this presumption to supplant aspects of the Guidelines calculation that the Commission has determined otherwise apply to yield to the total loss amount").

[70] Small Business Size and Status Integrity, 78 Fed. Reg. 38811–12, 38816 (June 28, 2013).

[71] United States v. Singh, 195 F. Supp. 25, 30–31 (D.D.C. 2016).

[72] *See* Small Business Size and Status Integrity, 78 Fed. Reg. 38811–12 (June 28, 2013).

[73] *See, e.g.*, *Singh*, 195 F. Supp. at 30–31.

to apply the general loss rule or the government benefits rule to "affirmative action" contract fraud cases, circuit courts continue to reach contradictory conclusions that endangering Congress's goal of crafting uniform and fair federal sentencing guidelines. In all, two circuits, the Fifth Circuit and the Ninth Circuit concluded that the general loss rule applies.[74] Conversely, the Fourth Circuit, the Seventh Circuit, and the Eleventh Circuit apply the government benefits rule, voiding any mitigation provisions in the general rule.[75] Finally, the Third Circuit in *United States v. Nagle* assumed that SBA and DBE programs should be considered "government benefits," but, declined to resolve the issue definitively because the court concluded that comment 3(E)(i) displaces 3(F)(ii) as currently written.[76] Despite the Third Circuit's refusal to decide 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.[77] In sum, the Third Circuit reached a legally sound conclusion given the Notes' current statutory construction. However, the *Nagle* court's ruling exposes the need to immediately reform the Notes given the billions of taxpayer dollars that remain vulnerable.

A. Circuits That Apply the General Loss Rule to "Affirmative Action" Program Fraud Cases

In *United States v. Harris*, the Fifth Circuit decided whether to apply the general loss rule or the government benefit rule in a fraud case involving the SBA's 8(a) Joint Venture Program.[78] 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.[79] Overall, the joint venture received three 8(a) contracts worth a total of $1,317,593.51.[80] Harris defrauded the federal government by joining with Tropical and Luster to receive 8(a) status, but failing to give either of the 8(a)-qualified companies a significant role in the planning or execution of

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[74] United States v. Harris, 821 F.3d 589, 608 (5th Cir. 2016); United States v. Martin, 796 F.3d 1101, 1112 (9th Cir. 2015).

[75] United States v. Maxwell, 579 F.3d 1282, 1307 (11th Cir. 2009); United States v. Leahy, 464 F.3d 773, 800 (7th Cir. 2006); United States v. Bros. Constr. Co., 219 F.3d 300, 321 (4th Cir. 2000).

[76] United States v. Nagle, 803 F.3d 167, 181–83 (3d Cir. 2015).

[77] *Id.*

[78] *Harris*, 821 F.3d at 592.

[79] *Id.* at 592–93.

[80] *Id.* at 594–602 (applying the government benefits rule and determining 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").

the process, as the Guidelines require.[81] In short, Harris flouted the aforementioned SBA 8(a) regulations by paying Tropical and Luster 51% of the project profits to "make everything look legitimate."[82] The District Court for the Western District of Texas found Harris guilty on all counts, and he challenged the loss calculation, which 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).[83] On appeal, Harris argued that the government did not show that his business harmed the procuring agencies, since the Joint Venture performed all contracted for services.[84] Harris also argued that the loss amount totaled zero, because neither the 8(a) companies, nor the government suffered pecuniary harm as a result of his actions.[85] Finally, Harris argued that, in the alternative, the court "can look to the gain from the scheme, which is also zero."[86] 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.[87]

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.[88] The court determined that "the general rule . . . [applies] [i]n the case of a procurement fraud, such as fraud affecting a defense contract award."[89] 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.[90] To that end, although the enumerated list in 3(F) is not necessarily exhaustive, the doctrine of *noscitur a sociss* canon asserts that an enumerated list can only be expanded to entities sharing the common features of the enumerated examples.[91] 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

81 *Id.*

82 *Id.* at 596.

83 *Id.* at 597–98.

84 *Harris*, 821 F.3d at 603.

85 *Id.*

86 *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 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.").

87 *Harris*, 821 F.3d at 602.

88 *Id.*

89 *Id.* at 603; U.S.S.G. § 2B1.1 cmt. n.3(A)(v)(II) (2016).

90 *Harris*, 821 F.3d at 603.

91 *Id.*; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 113 COLUM. L. REV. 531, 559–60 (2012) (describing the *noscitur a sociis* canon).

enumerated list]," and it is a bargained for exchange, not a unilateral transfer.[92]

Likewise, the court was not persuaded by its sister circuits who concluded that the government benefits rule applied 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."[93] 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."[94] The court reasoned that, when calculating total loss under Section 2B1.1(b)(1), 3(E)(i), the "[l]oss shall be reduced by . . . the fair market value of the . . . services rendered."[95] The court held that note 3(E)(i) applies broadly to all sections of Section 2B1.1(b) including loss under the general rule.[96] 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), the Commission would not have included rule 3(F)(v), which requires that "loss to be reduced by the fair market value of services rendered to the defendant."[97]

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."[98] In this case, defendant Martin owned a construction company ("MarCon") that focused on installing steel guardrails and concrete barriers on public highways.[99] 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."[100] MarCon also received three contracts worth nearly three million dollars from SBA programs.[101] The federal government caught Martin diverting profits made from the SBA and DBE programs to accounts hidden from the IRS.[102] By not reporting these profits, Martin

92 *Harris*, 821 F.3d at 603.

93 *Id.* at 604.

94 *Id.* at 605.

95 *Id.* at 605; *see* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(E)(i) (U.S. SENTENCING COMM'N 2016).

96 *Harris*, 821 F.3d at 605.

97 *Id.*

98 United States v. Martin, 796 F.3d 1101, 1102 (9th Cir. 2015).

99 *Id.* at 1103.

100 *Id.* at 1104.

101 *Id.*

102 *Id.* at 1103.

avoided paying over $100,000 in income taxes.[103] At sentencing, Martin asserted that proper loss to the government was zero given that MarCon fully performed on all contracts awarded to it.[104] However, 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.[105] In reply, the government argued that the court should apply 3(F)(ii), and concluded that the total loss amount equaled the total value of the contracts totaling $22 million.[106] The district court held that "the government benefits rule" applied, but the court concluded that loss under the rule should be three million dollars, the total profits earned by Martin.[107]

On appeal, the Ninth Circuit adopted Martin's argument, holding that the general rule applies to affirmative action contracts under the 3(A)(v)(II) "procurement fraud rule."[108] 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."[109] 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."[110] The Ninth Circuit further 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)."[111]

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, and not fee-for-service business deals.[112] 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.[113] The court further reasoned

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103 *Id.*

104 *Martin*, 796 F.3d at 1104.

105 *Id.* at 1108.

106 *Id.*

107 *Id.*

108 *Id*.

109 *Id.*

110 *Martin*, 796 F.3d at 1110.

111 *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(ii)(v)) (U.S. SENTENCING COMM'N 2016).

112 *Martin*, 796 F.3d at 1109.

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

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.[114] 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.[115] Despite concluding that the 3(A) general loss rules applied, the court noted that "DBE and SBA programs are designed to benefit disadvantaged businesses."[116] The court further stated, "[i]t is conceivable that the government paid a premium contract price"; however, any difference between what the government paid versus the normal contract price is the actual loss.[117] 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.[118] Nevertheless, the court concluded that non-pecuniary loss may be properly assessed by the district court in applying the Guidelines under the correct rule.[119]

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).[120] Both circuits concluded that 3(F)(ii) did not apply by relying on general principles of statutory interpretation,[121] 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.[122]

B. 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.[123] In 1994, the West Virginia Department

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

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

116 *Martin*, 796 F.3d at 1111.

117 *Id.*

118 *Id.*

119 *Id.* at 1112.

120 United States v. Harris, 821 F.3d 589, 605–06 (5th Cir. 2016); *Martin*, 796 F.3d at 1110.

121 *Harris*, 821 F.3d at 603.

122 *Martin*, 796 F.3d at 1111.

123 United States v. Bros. Constr. Co., 219 F.3d 300, 321 (4th Cir. 2000).

of Transportation, Division of Highways ("WVDOH") solicited bids for a $5.2 million DBE project.[124] Two business partners (Tri-State) contracted with Brothers Construction (a certified DBE) to work on a local highway project. After winning the DBE contract, no Brothers employees appeared on the job site at any point during the construction.[125]

The district court convicted Tri-State and Brothers of defrauding the government by scheming to divert DBE funds to a non-DBE business.[126] 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."[127] Brothers and Tri-State further argued that loss to the government was zero because all contracts were performed by other certified DBEs.[128] Thus, defendants argued that the project received required DBE performance, and the WVDOH received what it bargained for.[129] Ultimately, the Fourth Circuit applied the now-nonexistent Section 2F1.1. Note 7(d) government benefits rule to the DBE fraud without explanation.[130]

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)), and thus required sentencing to be based on the total contract dollars awarded, with no mitigation for services rendered.[131] The ordinance, like the DBE requirements, mandated 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.[132] After Chicago passed the ordinance, James Duff set up a business with his mother (Green Duff) to qualify for WBE status.[133] An investigation revealed that, although Green Duff technically owned all the company stock, she had no real involvement with the business's management.[134] Over the course of the company's fraud scheme, Duff received over $100 million dollars in state and federal grants.[135] Defendants argued on appeal that "the only loss

124 *Id.* at 304.
125 *Id.* at 306.
126 *Id.* at 318.
127 *Id.* at 317.
128 *Id.* at 308 (imposing no fine on Brothers Construction Co. because the company was insolvent).
129 *Bros. Constr. Co.*, 219 F.3d at 318.
130 *Id.* at 317.
131 United States v. Leahy, 464 F.3d 773, 800 (7th Cir. 2006).
132 *Id.* at 779.
133 *Id.*
134 *Id.*
135 *Id.* at 780–81.

Chicago suffered was to its regulatory interests—an intangible right unprotected by these statutes."[136] In the alternative, the defendants argued that the Note governing contract procurement applied, rather than the government benefits rule.[137] Both parties agreed that Guidelines 2F1.1 applied to this case.[138] Yet, the district court determined that the appropriate loss number should total the amount of profits gained, not the entire contract dollars awarded.[139] The Seventh Circuit, citing a former city official's testimony, concluded that the Chicago city ordinance at issue was "an affirmative action program whose fruits were reserved for fledgling minority and women businesses."[140]

Specifically, the Seventh Circuit affirmed that the government benefit rules applied because:

> [T]he 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."[141]

The court held that the government benefits rule applies, instead of the general loss rule because the ordinance states, "[a]n effect to direct contracts to [MBEs] and [WBEs] is required to eradicate the effects of discrimination."[142] 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."[143]

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]."[144] A Florida grand jury indicted Maxwell on twenty-four counts of mail fraud, wire fraud, money laundering, and other conspiracy charges.[145] At issue were six contracts funded by Miami Dade County (the "County") that required compliance with

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136 *Id.* at 786.

137 *Leahy*, 464 F.3d at 790.

138 *Id.* at 789.

139 *Id.* at 789 n.3 ("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.").

140 *Id.* at 779 ("[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.").

141 *Id.* at 789 n.3.

142 *Id.* at 790.

143 *Leahy*, 464 F.3d at 790.

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

145 *Id.* at 1288.

the County's Community Small Businesses Enterprise ("CSBE").[146] To receive a CSBE contract, the CSBE must "perform a commercially useful function in the completion of the contract."[147] A CSBE performs a "commercially useful function" when it "actually performs, manages, and supervises the work involved."[148] Overall, the CSBE contracts at issue demanded the same requirements as the federal DBE contracts previously discussed.[149] 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.[150] At sentencing, Maxwell objected to the court's total calculated loss at seven million dollars, 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."[151] On appeal, Maxwell challenged the district court's loss amount calculation under section 2B1.1 of the Guidelines.[152] The government requested a loss amount of $7,974,674, the total amount of all CSBE and DBE contracts awarded.[153] The district court, without adopting either parties' argument, concluded that total loss was six percent of the total contracts awarded because six percent was the average profit margin on government electrical subcontracts.[154]

The Eleventh Circuit held that the DBE and similar programs are "government benefits" that fall under the special rules.[155] 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).[156] "Unlike standard construction contracts, these contracts focus mainly on who is doing the work."[157] Therefore, by 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."[158]

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146 *Id.*

147 Miami-Dade Cty., Fla., Cty. Ordinance § 1033.02 (1997); 49 C.F.R. § 26.55(c)(1) (2014).

148 *Maxwell*, 579 F.3d at 1288 (citing Miami-Dade Cty., Fla., Cty. Ordinance § 1033.02; 49 C.F.R. § 26.55(c)(1)).

149 *Maxwell*, 579 F.3d at 1306.

150 *Id.* at 1289 n.2 (citing Miami-Dade Cty., Fla., Admin. Order 3-22 as amended).

151 *Id.* at 1294–95.

152 *Id.* at 1305.

153 *Id.*

154 *Id.*

155 *Maxwell*, 579 F.3d at 1306.

156 *Id.*

157 *Id.*

158 *Id.*

In *United States v. Nagle*, the Third Circuit held that under the Guidelines' standard definition of loss, defendants were liable for the total value of DBE contracts, minus services and performance pursuant to the contracts.[159] Nagle and Fink owned a non-DBE manufacturing and contracting business called Schuylkill Products, Inc. ("SPI").[160] Later, SPI entered into a joint venture with Marikina, a company owned by Cruz, a Filipino man who worked on various DBE transportation projects.[161] When Marikina won the DBE contract, SPI would perform all the work on the contract and distribute the profits among the three partners.[162] The district court concluded that, under section 2B1.1., the defendants owed the face value of the contracts without mitigation for work performed.[163] 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."[164] In the alternative, defendants claimed that "they are nonetheless entitled to credit under Note 3(F)(ii).[165] In reply, the government asserted that the 3(F) "government benefits rule" applied making loss the total face value of the contracts.[166] Importantly, the Third Circuit did not rule on whether a DBE contract is a "government benefit," since, irrespective of 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.[167]

The Third Circuit concluded that the general loss rule applies under 3(A) and 3(F) as currently drafted.[168] If the 3(A) standard analysis applies, the loss defendants must pay back includes the total contract value minus the fair market value of performance and raw materials provided.[169] 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," namely who the program focuses on, and the emphasis on

159 United States v. Nagle, 803 F.3d 167, 168 (3d Cir. 2015).

160 *Id.* at 171.

161 *Id.*at 171–72.

162 *Id.* at 171; 49 C.F.R. § 26.21–81 (2014); *see Definition of a Disadvantaged Business Enterprise*, U.S. DEPARTMENT OF TRANSPORTATION, https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise (last visited Dec. 18, 2018).

163 *Nagle*, 803 F.3d at 179.

164 *Id.* at 180.

165 *Id.*

166 *Id.* at 181.

167 *Id.* at 180–81.

168 *Id.* at 180–81.

169 *Nagle*, 803 F.3d at 181.

benefitting those who perform the work.[170] Furthermore, the court hinted that the special rule could apply, stating that 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. The profit earned, therefore, is not the only benefit the DBE obtains when it receives the contract."[171] 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."[172] The court concluded that if Note 3(F)(ii) applies, the proper loss amount is the total face value of the contracts.[173]

Overall, even if 3(F)(ii) applies in this case, the subsection is overridden by 3(E)(i), based on the Comment's current text.[174] 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.]"[175] Here, Note 3(E)(i) establishes that "the fair market value of the property returned and services rendered, by . . . the defendant [] shall be credited against the loss."[176] In reply to 3(E)(i), the government argued in *Nagle* 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).[177] The court disagreed, ruling 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*."[178] Notably, the court stated that "[h]ad the [Commission] intended to preclude crediting services render against loss for Note 3(F)(ii), it would have used similar language as it used in Note 3(F)(v)(II)."[179] In conclusion, the Third Circuit held that 3(E)(i) and 3(F)(ii) function together and require mitigation of the total loss to the government regardless of which rule applies.[180]

Judge Hardiman, concurring in *Nagle*, concluded that courts should

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170 *Id.* at 181.
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.* at 181.
175 *Nagle*, 803 F.3d at 181.; *see* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n. 3(E)(i) (U.S. SENTENCING COMM'N 2016).
176 *Nagle*, 803 F.3d at 182.
177 *Id.*
178 *Id.* at 182 (emphasis added).
179 *Id.*
180 *Id.* at 183.

calculate DBE fraud using the procurement fraud rule in Note 3(A), not the government benefits special rule.[181] 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."[182] Furthermore, the Guidelines clearly state that the 3(A) general rule applies to fraud procurement, with 3(A)(v)(II) dictating how 3(A) should be applied in such cases.[183] Therefore, 3(F)(ii) should apply only in fraudulent receipt of welfare payments and has "no place in a procurement fraud case."[184] 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.

C. The D.C. Circuit: A Circuit at Odds with Itself

In *United States v. Singh*, Judge Walton, writing for the United States District Court for the District of Columbia, held that the loss to the government under fraudulently procured 8(a) contracts should be calculated based on the full value of the contracts awarded.[185] From 2000 to 2009, Singh served as the Vice President of "Company A", a construction firm that specialized in renovating and altering buildings.[186] After Company A graduated from the SBA 8(a) program on January 12, 2009, a second company, "Company B", submitted an 8(a) application for certification.[187] In June 2009, Company B named Singh as a Vice President of Company B and "entered into a Mentor/Protégé Agreement" with Company A.[188] Over a two and a half year period, the government awarded Company B twenty-six 8(a) contracts totaling $8,533,562.86.[189] During that period, Company B maintained only one employee who actually performed work on the 8(a) contracts.[190] However, during that period, Singh engaged in activities and directed others to: replace Company A property with Company B logos, use Company B email accounts when corresponding with the government regarding Company B contracts, represent to the GSA that Company A

181 *Id.* at 183–84 (Hardiman, J., concurring).
182 *Nagle*, 803 F.3d at 184.
183 *Id.*
184 *Id.*
185 United States v.Singh,195 F. Supp. 3d 25, 26 (D.D.C. 2016).
186 *Id.* at 27.
187 *Id.*
188 *Id.*
189 *Id.* at 28.
190 *Id.*

employees represented Company B on certain jobs, and provide to GSA representatives employee lists for Company B that actually included individuals employed by Company A.[191] Overall, Company A's profits totaled at least $90,397.15 and Singh received personal compensation of at least $28,768.28.[192]

After discussing the section 2B 1.1(b) loss calculation guidelines and surveying the government benefits rule contained in Note 3(F)(ii), the court held that the correct loss total should be considered as the full value of the contracts fraudulently awarded to Singh.[193] The court in *Singh* agreed with the reasoning of the Fourth, Seventh, and Eleventh Circuits, based on the presumption in favor of loss as the total contract value codified in the Small Business Jobs Act of 2010.[194] In the Small Business Jobs Act, Congress codified the presumption in part as, "[i]n every contract . . . which is set aside . . . there shall be a presumption of loss to the United States based on the total amount expended on the contract" whenever a small business contract received an award by fraud.[195] The court found the presumption to clearly indicate Congressional intent on how loss should be calculated and determined that Congress reaffirmed the presumption in the federal register as one that will be utilized in all criminal federal court proceedings.[196] Although the court recognized that presumptions may generally be rebutted, the court noted that no statute or regulation permits such a rebuttal in these circumstances.[197]

The *Singh* Court also rejected the Ninth Circuit's holding in *United States v. Martin*, which asserted that total loss should be mitigated based on services rendered because the rule of lenity that remains a rule of last resort in statutory interpretation, does not apply to unambiguous statutes with clear presumptions.[198] Moreover, the court disagreed with the Ninth Circuit and

191 *Singh*, 195 F. Supp. 3d at 28.

192 *Id.*

193 *Id.* at 30.

194 *Id.*

195 *Singh*, 195 F. Supp. 3d at 30 (citing Pub. L. No. 111–240, 124 Stat. 2504 (2010)); United States v. Maxwell, 579 F.3d 1282, 1306 (11th Cir. 2009); United States v. Leahy, 464 F.3d 773, 790 (7th Cir. 2006); United States v. Bros. Constr. Co., 219 F.3d 300, 317–18 (4th Cir. 2000); 15 U.S.C. § 632(w)(1) (2012); 13 C.F.R. § 121.108(a) (2016).

196 *See* Small Business Size and Status Integrity, 78 Fed. Reg. 38811, 38812–16 (June 28, 2013) ("[I]t is SBA's intent that the presumption of loss shall be applied in all manner of *criminal* . . . actions, which the United States government may take to redress willful misrepresentation.") (emphasis added).

197 *See* 13 C.F.R. § 121.108(d) (2016) (stating that the presumption may only be rebutted "in the case of unintentional errors, technical malfunctions, or other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional . . . or willful . . . under the False Claims Act.").

198 United States v. Martin, 796 F.3d 1101, 1103–04 (9th Cir. 2015); *Singh*, 195 F. Supp. 3d at 31.

the Fifth Circuit's similar conclusion in *United States v. Harris* because both Circuits failed to consider the statutory presumption contained in section 632(w)(1).[199] Finally, the court concluded that the Third Circuit's holding in *Nagle* (agreeing with the *Martin* and *Harris* courts) does not affect its reasoning because the *Nagle* decision concerned the DOT's DBE program, not the SBA's 8(a) program.[200] In conclusion, the court, consistent with the presumption codified in the Small Business Jobs Act, calculated loss to the government under the Guidelines' to be $8,533,562.86, the total amount of the contracts awarded to Singh.[201]

Just ten months later, in *United States v. Crummy*, Judge Jackson, also writing for the United States District Court for the District of Columbia, arrived at the opposite conclusion of *Singh*.[202] The court in *Crummy* held that in an 8(a) fraud case, loss to the government should be calculated by subtracting the total contract price from the fair market value of services rendered, irrespective of the statutory loss presumption contained in the Small Business Jobs Act.[203] MCC Construction Company, a general contractor ineligible for 8(a) certification, retained Company 1 ("C1"), an 8(a) certified subcontractor specializing in renewable energy contraction programs.[204] MCC and C1 defrauded the government by entering into "teaming agreements" that allowed C1 to nominally serve as the prime contractor on projects.[205] Although MCC and C1 complied with 8(a) regulations on paper, the teaming agreements allowed Crummy and MCC to use C1 to filter 8(a) reserved projects to MCC in violation of 8(a) certification parameters.[206] Through this process, the government awarded Crummy and MCC/CI two Coast Guard contracts valued at over one million dollars.[207]

In *Crummy*, the court found the Fifth Circuit's reasoning in *United States v. Harris* to be persuasive. To that end, the court held that the total loss amount for purposes of section 2B1.1(b)(1) was zero after the mandatory application of the credits against loss provision contained in Application Note 3(E).[208] Furthermore, the court held that even if the statutory presumption in the Small Business Act applies, it may be overcome by the

199 United States v. Harris, 821 F.3d 589 (5th Cir. 2016); *Singh*, 195 F. Supp. 3d at 31–32.

200 *Singh*, 195 F. Supp. 3d. at 32–33.

201 *Id.* at 33.

202 United States v. Crummy, 249 F. Supp. 3d 475 (D.D.C. 2017).

203 *Id.* at 476.

204 *Id.* at 478.

205 *Id.*

206 *Id.*

207 *Id.* at 478–79.

208 *Crummy*, 249 F. Supp. 3d at 481.

credits against loss provision within the application notes.[209] The court embraced Harris' reasoning that the SBA 8(a) program does not constitute a "government benefit" because the "mere fact that a government contract furthers some public policy objective" is insufficient to transform the contract into a government benefit.[210] If the 8(a) program does not constitute a "government benefit," the court concluded that Application Note 3(E) applies because "to conclude otherwise would be to ignore the fact that the [Sentencing] Commission defines 'actual loss' for section 2B1.1(b)(1) purposes as the "reasonably foreseeable *pecuniary* harm that resulted from the offense."[211] Mitigating loss under 3(E) "properly focuses the loss inquiry on the pecuniary impact of the victims[.]"[212] The court noted that the government's loss will not always be zero because it may be appropriate to apply the procurement fraud rule in note 3(A)(v)(II) that allows for loss to include "reasonably foreseeable administrative costs" to remedy the fraud.[213]

Finally, the court held that the Small Business Jobs Act presumption contained in section 632(w) did not indicate that Congress intended to displace the Guidelines calculation for total loss.[214] The presumption does not mandate that sentencing judges disregard Note 3(E) that states "loss shall be reduced by . . . the fair market value . . . of services rendered."[215] The court noted that the presumption fits within the Commission's statutory framework by establishing a presumptive loss total as the entire contract awarded, but that the loss total may be reduced by Note 3(E) in cases such as this where "it is difficult to conceive of the government's true pecuniary loss as the *entire* amount of the Section 8(a) contract."[216]

The *Crummy* court used a nuanced analysis to distinguish this holding from its previous precedential holding in *Singh* less than a year prior. Judge Jackson noted that to the extent her decision conflicts with *Singh*, "the undersigned respectfully disagrees" with Singh's analysis and conclusion.[217] Judge Jackson, after acknowledging the circuit split on the loss calculation issue, wrote that 8(a) program contracts should not be considered "government benefits" for the purposes of loss calculation. Judge Jackson

209 *Id.* at 482.

210 *Id.* (citing United States v. Harris, 821 F.3d 589, 603–04 (5th Cir. 2016).

211 *Id.* at 482 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1. cmt. n.3(a)(i) (U.S. SENTENCING COMM'N 2016)) (emphasis added).

212 *Id.* at 483 (citing *Harris*, 821 F.3d at 606).

213 *Id.* at 484 (citing U.S.S.G. § 2B1.1. cmt. n.3(A)(v)(II) (2016)); see United States v. Nagle, 803 F.3d 167, 183–84 (3d Cir. 2015) (Hardiman, J., concurring) (applying procurement fraud note 3(A)(v)(II) instead of 3(E) to mitigate loss and reach the same result).

214 *Crummy*, 249 F. Supp. 3d at 485.

215 *Id.*

216 *Id.* at 486.

217 *Id.* at 486–87.

found *Singh*'s analysis unpersuasive because the *Singh* opinion failed to mention Note 3(E) entirely, and *Singh* "was primarily concerned about the manner in which the presumptive loss amount may be rebutted" versus the issue in *Crummy* of whether Note 3(E) may be applied in an 8(a) fraud case.[218]

IV. IMPLICATIONS & ANALYSIS

Billions of dollars remain at risk due to an individual's ability to defraud the government contracting process due to lax sentencing rules.[219] This risk makes the need to resolve the current circuit split and begin federal sentencing reform in "affirmative action" government contracts of the utmost importance. 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.

A. 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.

In *Stinson v. United States*, the Supreme Court held that "[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."[220] Moreover, the court asserted that the "[G]uidelines commentary, interpreting or explaining the application of a guideline, is binding on [the Court] when we are applying that [G]uideline because we are obligated to adhere to the Commission's definition."[221] Significantly, in 2001, the Commission merged the government benefits special rule under section 2F1.1 into section 2B1.1.[222] The Fourth, Seventh, and Eleventh Circuits based their decisions on the now non-existent section 2F1.1 in holding that SBA and DBE

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218 *Id.* at 487.

219 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, RCED-89-26, HIGHWAY CONTRACTING: ASSESSING FRAUD AND ABUSE IN THE FEDERAL HIGHWAY ADMINISTRATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM (1988) (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); *see also* McVicker, *supra* note 3, at 8–9 (stating that the largest DBE fraud in United States history perpetrated by one recipient totaled 136 million dollars over 15 years).

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

221 *Stinson*, 508 U.S. at 43.

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

programs should be considered government benefit programs.[223] 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).[224] The Commission later consolidated section 2F1.1 with section 2B1.1 in the 2001 Guidelines.[225] 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).[226] 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.

B. Re-Evaluating United States v. Harris: The "Government Benefits" Special Rule and Congressional Intent Weakened

If the Fifth Circuit had properly interpreted the Guidelines under the *noscitur a sociss* doctrine, the court should have applied the government benefits special rule to calculate loss instead of the general loss rule. The *noscitur a sociss* doctrine, Latin for "it is known by the company that it keeps," is a concept frequently employed in interpreting statutory construction.[227] The Fifth Circuit held that the general loss rule applied and that the *noscitur a sociss* doctrine precluded 8(a) programs from being read into the enumerated examples listed in 3(F)(ii).[228] 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 *Harris*, the Fifth Circuit cited the four types of programs to which it had previously applied the government benefits rule for

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[223] *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* United States v. Bros. Constr. Co., 219 F.3d 300, 317–18 (4th Cir. 2000) (applying 1997 Guidelines); United States v. Leahy, 464 F.3d 773, 789–90 (7th Cir. 2006) (applying 1998 Guidelines); United States v. Maxwell, 579 F.3d 1282, 1305–07 (11th Cir. 2009). Furthermore, [these cases] were decided under the former U.S. SENTENCING GUIDELINES MANUAL § 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 U.S.S.G. § 2B1.1 cmt. n.3(E)(i) (2016)").

[224] *Harris*, 821 F.3d at 605.

[225] *See* U.S.S.G. § 2F1.1 cmt. n.8(d) (1998).

[226] *Id.*

[227] *See* Scalia & Garner, *supra* note 91, at 195–98 (describing the *noscitur a sociis* canon as a principle of statutory interpretation).

[228] *Harris*, 821 F.3d at 602–04.

sentencing.[229] Specifically, the court previously applied the 3(F)(ii) government benefits special rule in cases involving: EPA grants, SBA loans, FEMA disaster relief reimbursements, and Medicare reimbursements.[230] In *Dowl*, 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" and later spent them inappropriately.[231] The court applied the government benefits special rule in 3(F)(ii) because the defendant's scheme "deprived the Government of the funds' economic value for aiding homeowners' rebuilding efforts after Hurricane Katrina."[232] 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.[233] 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.[234]

Second, in *United States v. Harris*, the Fifth Circuit erred in relying on the *noscitur a sociss* 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.[235] 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."[236] The court, invoking the *noscitur a sociss* 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; rather, such contracts first and foremost serve the government's

229 *Id.*

230 United States v. Nelson, 732 F.3d 504, 521–23 (5th Cir. 2013) (contemplating EPA grants); United States v. Hebron, 684 F.3d 554, 560–61 (5th Cir. 2012) (discussing FEMA disaster relief reimbursement payments); United States v. Dowl, 619 F.3d 494, 502–04 (5th Cir. 2010) (considering SBA loans); United States v. Jones, 475 F.3d 701, 705 (5th Cir. 2007) (analyzing Medicare reimbursements).

231 *Dowl*, 619 F.3d at 502.

232 *Id.*

233 *Id.* (emphasis added).

234 *See* United States v. Leahy, 464 F.3d 773, 789 (7th Cir. 2006) (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").

235 United States v. Harris, 821 F.3d 589, 603 (5th Cir. 2016).

236 *Id.*

own procurement needs."[237] 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 chance in the marketplace where minorities historically retained no opportunities or in some cases where minorities and women continue to realize stifled business opportunity.[238]

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.[239] 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.[240] Indeed, the Fifth Circuit conceded, and Congress explicitly provided, that 8(a) Joint Venture contracts may be "won through competition," as in through a competitive bidding process, or non-competitively on a "sole source" basis, where the government awards a contract because only one business meets the government's bidding criteria.[241] As a result, contrary to the Fifth Circuit's analysis, 8(a) and DBE

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[237] *Id.* (citing 15 U.S.C. § 644(g)(2)(B) ("[R]equiring that each federal agency's annual goals for the participation of disadvantaged small businesses in the agency's procurement contracts 'shall realistically reflect the potential of . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . to perform such contracts'")).

[238] *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 also* 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 that the "purpose of the SBA 8(a) [Business Development] program is to assist eligible small disadvantaged business concerns compete in the American economy through business development."); *see also* McVicker, *supra* note 3, at 7 (noting that taxpayers are impacted when public funds are allocated contrary to congressional intent).

[239] *Harris*, 821 F.3d at 591–92.

[240] *Id.*; *see generally* 13 C.F.R. § 124.201– 07 (2018).

[241] *Harris*, 821 F.3d at 591–92; 13 C.F.R. § 124.501 (2016); 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").

contracts frequently involve a unilateral transfer of public taxpayer money – on a "sole source" basis –to an applicant without traditional contract negotiations or legal consideration similar to EPA grants, SBA loans, FEMA disaster relief reimbursements, and Medicare reimbursements.[242] Moreover, in contrast with *United States v. Harris*, the Fifth Circuit in *United 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.[243] 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.[244] 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."[245] For example, the government benefits special rule in the 3(F)(ii) list states that the rule applies to "(e.g., grants, loans, entitlement program payments)."[246] As stated above, and contrary to the Fifth Circuit's reasoning, 8(a) and DBE programs could be reconciled with the *noscitur a sociss* 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," so too should 8(a). 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.

C. 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

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242 *See* United States v. Nelson, 732 F.3d 504, 521–23 (5th Cir. 2013) (analyzing EPA grants); United States v. Hebron, 684 F.3d 554, 560–61 (5th Cir. 2012) (noting FEMA disaster relief reimbursement payments); United States v. Dowl, 619 F.3d 494, 502–04 (5th Cir. 2010) (discussing SBA loans); United States v. Jones, 475 F.3d 701, 705 (5th Cir. 2007) (considering Medicare reimbursements).

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

244 *Id.*

245 *Id.* at 467.

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

and Disadvantaged Businesses Will Not Be Condoned.

In the interests of public policy and fairness, the Commission should amend the Notes to ensure that defrauding an "affirmative action" government program 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 are 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 enforce a government policy favoring socially disadvantaged individuals in the marketplace.[247] Finally, Congress explicitly created the Commission to "combat crime honestly through an effective, fair system."[248] 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 the 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," in order 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 not to break the law.[249] To increase deterrence, the Commission should amend the Guidelines' text for calculating loss under section 2B1.1(b)(1) in order 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

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[247] *See* Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 217 (2000) ("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, "[t]o ensure nondiscrimination in the award and administration of DOT-assisted contracts," "[t]o 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 (2018) (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 American economy through business development"); *see also* McVicker, *supra* note 3, at 7 (noting that taxpayers are impacted when public funds are allocated contrary to congressional intent).

[248] U.S.S.G. ch. 1, pt. A, subpt. 3, introductory cmt. (2016).

[249] *Deterrence Theory*, BLACK'S LAW DICTIONARY (10th ed. 2014).

(A)."[250] Amending the Notes in this manner will standardize punishments and deter individuals that defraud government "affirmative action" programs regardless of 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). Congress created the Commission to "introduce reasonable uniformity in sentencing by narrowing discrepancies in sentences imposed for similar crimes committed by similar offenders."[251] Uniformity—where courts treat all individuals similarly and with fair notice—increases deterrence, since all individuals know that they will receive a harsher penalty for a given offense.[252] 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.[253] 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."[254]

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.[255] 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."[256] 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."[257] Furthermore, higher standardized punishments will promote deterrence in sentencing of individuals who steal from "affirmative action" contracts because fraud in

250 *See* U.S.S.G. § 2B1.1(b)(1) (2016).

251 U.S.S.G. ch. 1, pt. A, subpt. 3, introductory cmt. (2016).

252 *See* Henning, *supra* note 3, at 27–28.

253 *See id.* at 56–58; U.S.S.G. ch. 1, pt. A, subpt. 3, introductory cmt. (2016).

254 Henning, *supra* note 3, at 28.

255 *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).

256 *Id.* at 32 (citing Stanton Wheeler, Kenneth Mann & Austin Sarat, SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 10 (Yale Univ. Press 1988).

257 *Id.* at 58.

such cases involves substantial non-pecuniary loss to amorphous victims.[258] 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.[259] In government fraud cases, many defendants plead that there is no loss to the government or society because the defendants performed all contractual obligations.[260] 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."[261] Therefore, the amended 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.[262]

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]."[263] 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.[264] 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.[265] Further examples of non-pecuniary loss caused by DBE program fraud include discouraging potential legitimate disadvantaged

258 *Id.* at 33–34.

259 *See* McVicker, *supra* note 3, 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").

260 *See, e.g.*, United States v. Martin, 796 F.3d 1101, 1111 (9th Cir. 2015). (noting that, on appeal, defendant Martin claimed that there was no net "loss" and no "non-pecuniary loss" because MarCon performed the contract completely and adequately).

261 *Id.*

262 United States v. Leahy, 464 F.3d 773, 789 (7th Cir. 2006).

263 *Martin*, 796 F.3d at 1111.

264 Henning, *supra* note 3, 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).

265 *Id.*

businesses from entering the DBE program and preventing actual recognized DBEs from graduating from the program.[266] 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)" to standardize and deter individuals that defraud government "affirmative action" programs regardless as to whether a business fully performs a contract. [267]

D. 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.[268] 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.'"[269] 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)."[270] 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).[271] 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 circuits reasonably concluded that mitigating rule 3(E)(i) "Credits Against Loss" note applies to reduce a criminal's total "loss."[272]

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266 McVicker, *supra* note 3, at 7; *Leahy*, 464 F.3d at 789.

267 *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM'N 2016).

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

269 Reese, *supra* note 4, at 681.

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

271 *Nagle*, 803 F.3d at 183 (Hardiman, J., concurring); United States v. Harris, 821 F.3d 589, 608 (5th Cir. 2016); United States v. Martin, 796 F.3d 1101, 1110–11 (9th Cir. 2015).

272 *Harris*, 821 F.3d 589; *Martin*, 796 F.3d at 1104 ; U.S.S.G. § 2B1.1 cmt. n.3(E)(i) (2016).

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).[273] 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."[274] 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)."[275] 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. Adding this clarifying language will harmonize the Notes with the statutory presumption codified in the Small Business Act in 2010. Although none of the circuit courts to address the issue discussed the presumption and its potential interaction with the Notes, the fact that two federal district courts in the D.C. Circuit Court recently came to two opposite conclusions on whether the presumption applies emphasizes the need for immediate clarification. After the sentencing rules are clarified, 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.[276]

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 apply "notwithstanding subdivision (A)."[277] With differing circuit interpretations on how to apply the Notes and the uncertainty surrounding the Small Business Jobs Act statutory presumption, it is imperative that the Commission 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

273 United States v. Nagle, 803 F.3d 168, 181–82 (3d Cir. 2015).
274 *Id.* at 181.
275 *See* U.S.S.G. § 2B1.1(B)(1) (2016).
276 *See id.*
277 *See id.*

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 note scrutinizes the background of the Commission, the relevant rules at issue and the various circuit court cases that resolved the issue. Likewise, this note 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 note 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.