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TZEDEK
ASSOCIATION

Save A Life, Save A World

February 10, 2026

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

Re: Tzedek Association Comments on the Commission's Proposed 2026 Amendments

Dear Judge Reeves and Members of the Commission,

Tzedek Association again welcomes the opportunity to comment on the Commission's Preliminary Proposed Amendments for the current cycle.

Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Tzedek is committed to championing the rights of those mistreated by the criminal justice system, empowering individuals to be productive citizens and aiding the less fortunate. Tzedek seeks a society that values compassion and fairness. To that end, Tzedek is proud of its efforts to champion the First Step Act and the home confinement provision within the CARES Act, and to provide input to the Commission via both written submissions and oral testimony over the past several years. Tzedek is also engaged in current efforts seeking myriad legislative reforms, in some cases building on the Commission's efforts, such as codifying reforms designed to limit the use of acquitted conduct, expanding safety valve provisions, and retroactive application of legislatively enacted sentence reductions.

Tzedek lauds the Commission's willingness to take steps that reflect the view that a criminal justice system worthy of our nation must temper the need for punishment with compassion and fairness and must be informed by empirical evidence rather than reflexive and arbitrary policies and mechanisms that ignore the innate human capacity for growth and change. More specifically, Tzedek greatly appreciates the

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Commission's thoughtful, principled, and impactful accomplishments over the past several years.

In response to the Commission's Proposed Amendments issued on December 12, 2025, Tzedek offers relevant context for the Commission's consideration and specifically comments on Proposed Amendments, 1, 2, 3, 4 and 7.

Summary of Comments and Recommendations

- The Commission should do more to ensure that base offense calculation and all enhancements accord due regard to *mens rea* and individual culpability.

- Amendment 1. Drug Offenses

  The Commission should not add any additional drug enhancements and specifically should not add an enhancement at §2D1.1(b)(14) relating to distribution of fentanyl or fentanyl analogue based on youth. If it does, it should include a strong *mens rea* provision and specify the maximum age differential under consideration.

- Amendment 2. Inflationary Adjustments

  The Commission should significantly deemphasize the role of loss in offense calculation, and the Commission should provide for an automatic inflationary adjustment no less than every three years for any and all loss-based enhancements.

- Amendment 3. Economic Crimes

  The Commission should significantly modify the role of loss calculation by adopting qualitative metrics with quantitative exemplars and should truncate into five categories with a specific variable enhancement range for each category. Concomitantly, the Commission should compress the voluminous aggravating enhancements and adopt a new approach focused on the defendant's intent and individual culpability keyed to the facts of the case, according courts a broad range to enhance or reduce the base offense level.

  The Commission should eschew the proposed new aggravating factor, §2B1.1(b)(3), as inviting duplicative and excessive sentences and should

also forego adoption of the proposed new mitigating factors, §2B1.1(b)(22) as too narrow and too limited in effect. Rather the Commission should adopt the proposed revision that would accord courts broad leeway to mitigate or enhance sentencing ranges based on the defendant's intent and individual culpability.

The Commission should adopt the proposed tiered reduction, §2B1.1(b)(23) with specific modifications, but only in the absence of the fundamental reforms proposed above, as those reforms would obviate the need for this new provision.

- Amendment 4. Post-Offense Rehabilitation Adjustment

  The Commission should adopt §3E1.2, Option One, rejecting Option Two, but increasing the potential reduction under Option One to 4 levels or more.

- Amendment 7. Sophisticated Means

  The Commission should eliminate the sophisticated means enhancements; failing that, the Commission should reject the proposed new definitions and cabin its application only to those offenses to which it currently applies.

Introductory Comment Regarding the Proposed 2026 Amendments

Tzedek appreciates many of the Commission's important efforts to address an array of issues that have been a concern to judges, lawyers and many in the advocacy community eager for the Guidelines to recommend more proportionate and sound punishment levels.

For the reasons explained below, Tzedek is particularly pleased to see the Commission's interest in recognizing post-arrest rehabilitation. Additionally, the willingness to address the outdated loss tables applicable to economic crime—an issue we have raised with the Commission multiple times—is most welcome.

That said, Tzedek respectfully believes that the economic crime proposals fail to take the kind of meaningful steps essential to decouple base offense level from the artificial and distorting impacts of loss-based calculations, do not adequately address undue severity and harmful complexity, and do not achieve the necessary refocus of the offense calculation on individual culpability. The proposals also carry the fearful

risk of having unintended negative consequences that could further undermine efforts to make our sentencing system fairer and more just.

Tzedek continues to urge the Commission to advance guideline amendments to effectuate a much-needed paradigm shift in the application of federal criminal law and to correct fundamental flaws that have plagued federal sentencing practices for decades. But Tzedek is concerned that mere tinkering with the loss table and adding more complex sentencing factors is no substitute for essential reform that will focus foundationally upon individual intent with a simplified and sensible guideline. The current loss table is a cancer with a deeply broken guideline; this guideline needs fundamental structural reform, and modest fiddling by making incremental tweaks will not cure the core malignancy.

The need for paradigmatic reform is also applicable to the drug guideline due to the distorting central role that quantity calculation plays in the controlled substance offense area. The need for these reforms is evident as the Commission's data continue to demonstrate a significant disconnect between the Guidelines and the sentences imposed by judges fulfilling their statutory obligation to impose sentences "sufficient, but not greater than necessary" to achieve congressional punishment purposes. 18 U.S.C. §3553(a).[1]

As has been the case in the recent amendment cycles, Tzedek urges the Commission to act boldly to implement reforms that will effectuate a significant course correction to infuse fairness and humanity, consistent with the statutory framework for sentencing. Tzedek continues to see a critical need to address the absence of adequate *mens rea* considerations in the sentencing process. *Mens rea*, or criminal intent, is the moral anchor of a criminal code.

In general, the United States Sentencing Guidelines ("U.S.S.G." or, alternatively, "Guidelines") as currently constructed largely disregard and in some cases eviscerate traditional notions of *mens rea* as a fundamental feature of a sound sentencing process. Oliver Wendell Holmes famously quipped that even a dog knows the difference between being accidentally tripped over and being intentionally kicked. And yet the Guidelines fail to capture this foundational moral reality when it treats losses that may be merely reasonably foreseeable to a defendant just as severely as those losses caused intentionally by the defendant him or herself. This failing can produce sentencing ranges untethered from culpability and therefore undermine

[1] *See infra*, footnotes, 3, 4 and 5, referencing the data that show significant gulfs between the Guideline sentence and the sentence imposed in various offense categories.

respect for the Guidelines as an anchor.[2] Tzedek believes that the Guidelines should reflect the fundamental principle that punishment should be proportionate to the offender's culpability and that *mens rea* (criminal intent) should be a key factor in assessing that culpability.

A substantive commitment to a guideline based around culpability should also require the government to prove a culpable state of mind with respect to all key offense facts that impact guideline ranges, and proof of a more culpable state of mind should generally be required for greater sentencing enhancements. Review and revision of the Guidelines to reflect these principles should also ensure that courts are fully and clearly instructed to consider all potential mitigating aspects of a defendant's *mens rea*, including factors related to motive, purpose, and personal belief in determining the appropriate sentence.

Tzedek urges the Commission to treat this cycle as the start of a necessary re-centering of sentencing on culpability. In practice, the Guidelines too often become an overly-generalized mathematical exercise driven by outcome metrics (loss/quantity) rather than a principled assessment of individual intent and moral blameworthiness. The Commission should therefore (1) substantially compress and cap loss-driven enhancements and (2) begin a *mens rea*-focused revision project requiring a culpable mental state for guideline-driving facts—especially in §§2B1.1 and 2D1.1—the two areas in which there is the greatest need for *mens rea* reform, with their over-reliance upon loss amount and drug quantity. Addressing the *mens rea* deficiencies in these sections will not only address unnecessary harshness in the operation of existing enhancements but will also help provide improved guidance to courts while simplifying the sentencing process. It is from this perspective that Tzedek offers specific comments on the proposed amendments.

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[2] Tzedek has repeatedly explained that the Guidelines' heavy reliance on outcome-based metrics such as loss amount and drug quantity, without corresponding *mens rea* requirements, produces sentencing ranges that disregard individual culpability and drive excessive severity—leading courts to routinely discount guideline ranges. See Tzedek Association, Public Comment on Proposed Priorities for Amendment Cycle 2023–2024, at 220–221 (Aug. 1, 2023), https://www.ussc.gov/sites/default/files/pdf/policymaking/public-comment/202307/Public_Comment_Priorities_2023-2024.pdf; Tzedek Association, Comment on Commission's Proposed 2025–2026 Policy Priorities, at 323–329 (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/policymaking/public-comment/202507/Public_Comment_Priorities_2025-2026.pdf; Comments of Norman L. Reimer on behalf of Tzedek Association, U.S. Sentencing Comm'n Public Hearing (Mar. 12–13, 2025), at 200–202, https://www.ussc.gov/sites/default/files/pdf/policymaking/meetings-hearings/public-hearing-march-12-13-2025.pdf.

Proposed Amendment 1: Drug Offenses

Tzedek defers to those with greater expertise to address the substantive issues presented by the proposals to address the purity distinction related to methamphetamine and the modifications involving "Ice" (Part A) or the amendments to address "fentanyl-related substances" prompted by the HALT Fentanyl Act (Part B). Nonetheless, Tzedek continues to urge the Commission to move away from the quantity-driven focus that is the hallmark of §2D1.1, which is a major contributor to the continuing problem of undue severity of controlled substance guideline sentences.

Recent data support the assertion that the applicable Guidelines for fentanyl and fentanyl analogue offenses are demonstrably more severe than the imposed sentences. The Commission's most recent report on fentanyl trafficking sentences shows that there were variances in 40.6 percent of cases, with 37.9 percent downward variances and 2.7 percent upward variances—meaning that it is roughly 14 times more likely that judges determine statutory mandates require granting a downward variance compared to an upward variance from the current Guidelines.[3] And those downward variances have constituted a very substantial average reduction of 38.5 percent below the Guideline sentence.

The data also reflect a similar pattern with respect to fentanyl analogue trafficking. There were variances in 50.6 percent of cases, with 48.8 percent constituting downward variances and 1.7 percent upward variance—meaning that it is roughly 29 times more likely that a downward variance will be granted than an upward variance.[4] And those downward variances involved average reductions of 36.7 percent of the Guideline sentence.

Thus, in light of this recent data, Tzedek urges the Commission to eschew amendments that increase sentence severity for controlled substance offenses. Federal judges, by being so much more likely to sentence below than above the current ranges, are directly showcasing for the Commission that the existing guideline is failing to provide a sentencing range that is "not greater than necessary" to achieve congressional purposes. The Commission should respond to this clear feedback by looking for sound ways to lower the applicable guideline.

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[3] U.S. Sentencing Comm'n, May 2025, Fentanyl Trafficking, https://www.ussc.gov/research/quick-facts/fentanyl-trafficking

[4] U. S. Sentencing Comm'n, 2025, Fentanyl Analogue Trafficking, https://www.ussc.gov/research/quick-facts/fentanyl-analogue-trafficking

For these reasons, Tzedek opposes the proposed new Part C §2D1.1(b)(14), which would add a new age-related enhancement. Tzedek believes that policies that ratchet up penalties for substance abuse offenses are ill-conceived, unnecessarily harsh and, as the history of the "war on drugs" has shown, do not eradicate substance abuse and are far less effective than treatment, education and diversion.

Should the Commission nonetheless proceed to adopt such an enhancement, for the reasons stated in the preceding discussion of the importance of *mens rea* and individual culpability, Tzedek supports the inclusion of the *mens rea* requirement of knowledge relating to the age of the individual and the substance involved in the offense as threshold requirements for the enhancement.

Additionally, Tzedek supports limiting the application of the age-related enhancement to individuals under the age of 18 (as opposed to 21) and supports the option that would require that a defendant to whom the enhancement would be applied should be at least 8 years older than the younger individual at the time of the offense, rather than the lesser alternatives presented for consideration. Given recognition in both law and social science about the maturation process and impulse control in teens and young adults, the broader gap is entirely appropriate and empirically warranted.

Still, the better course is not to adopt this new enhancement.

Proposed Amendments 2 and 3: Inflationary Adjustments and Economic Crimes

There is an obvious connection between Proposed Amendment 2 (Inflationary Adjustments) and Proposed Amendment 3 (Economic Crimes). For this reason, Tzedek addresses these two sets of proposals together.

Inflation Adjustment

Tzedek does not believe that the proposed amendments related to economic crimes address the fundamental flaws with the loss-based regime for establishing the base offense level. That said, to the extent that the loss table or other monetary tables and values in the Guidelines continue to play a central role in the determination of the

offense level, Tzedek wholeheartedly supports the concept of regularly adjusting for inflation, as we have commented in previous cycles.

It should be axiomatic that increases in the cost of living, and the corresponding decrease in the value of currency, should result in periodic adjustment to the loss table. And there is no justification for waiting more than a decade for such an adjustment. While there may be periods of relatively low inflation, there are also periods of significant and abrupt inflation, as the nation recently experienced in the immediate aftermath of the economic disruptions arising from the COVID pandemic.

While inflationary adjustments may not be necessary or practical on an annual basis, such adjustments should occur at least every other year or at least every three years. Tzedek supports regularizing this practice by adopting a mechanism to automatically adjust for inflation. Such a procedure is consistent with the Commission's statutory authority to "periodically review and revise in consideration of comments and data coming to its attention" 28 U.S.C. §994(o), and to promulgate and submit such inflation-based adjustments to Congress pursuant to 28 U.S.C. §994(p).[5]

But neither the proposed inflation adjustments nor most of the other proposals related to economic crimes are sufficient to address the fundamental inadequacies that stem from the current approach—an approach that is problematically complex, leads to sentence calculations that are generally far too severe, and perpetuate a disconnect between the Guidelines and sound sentencing practices.

Relevant Context of Actual Economic Crime Sentencing

To fully appreciate the gaping chasm between the Guidelines and practice, it is useful to consider the Commission's latest data on sentences for theft, property destruction and fraud.[6] According to the Commission's "Quick Facts" data for Fiscal Year 2024, sentences in these cases fall into three principal categories: sentences imposed within the guideline range, sentences below the guideline range (including downward departures and variances), and sentences above the guideline range (including upward departures and variances).

[5] Notably, automatic adjustments are administratively consistent with the Commission's role because regularized inflation updates promote stability, reduce ad hoc revisions, and improve predictability—core Commission objectives.

[6] U.S. Sentencing Comm'n, June 2025, Theft, Property Destruction & Fraud https://www.ussc.gov/research/quick-facts/theft-property-destruction-fraud

The Commission's data show the following:

- Below Guidelines Sentences: 56.2 percent
  (This is comprised of 37.9 percent downward variance; 3.8 percent downward departure; and 14.5 percent substantial assistance departures.)

- Above Guidelines Sentences: 2.3 percent
  (This is comprised of 2 percent upward variance; and 0.3 percent upward departure.)

- Within Guideline Range Sentences: 41.4 percent.

Thus, judges are approximately 25 times more likely to conclude that the guideline range is too severe rather than too lenient as they seek to impose a sentence "sufficient, but not greater than necessary" to serve congressional purposes. Put another way, across the range of cases sentenced under this Guideline, there will be 25 cases in which the calculated range is "greater than necessary" for every one case in which a judge finds the range insufficient.

Also of great significance, the data shows that when courts impose downward variances (37.9 percent of cases), the average sentence reduction is 57.0 percent below the bottom of the guideline range. In other words, when judges depart from §2B1.1 ranges, they do so not marginally, but by cutting guideline sentences roughly in half. This pattern reflects not case-specific anomalies, but a consistent and repeated judicial response to guideline ranges driven to be systematically greater than necessary primarily because artificial (and sometimes arbitrarily derived) loss amounts rather than culpability is prioritized in the guideline calculus.

Taken together, the Commission's own sentencing data demonstrates that courts routinely treat current §2B1.1 ranges as systematically too severe and disconnected to congressional punishment purposes, strongly suggesting that modest changes to the loss table risks further entrenching a flawed framework rather than correcting it.

These data clearly suggest that the current loss-based focus for §2B1.1 is highly problematic and fails to accurately account for the factors that judges across the nation recognize are central to effective and just sentencing, factors such as individual *mens rea* and true culpability.

The Proposed Amendments to the Loss Table Do Not Adequately Address the Fundamental Flaw and Accordingly the Commission Should Consider Alternative Approaches

Although Tzedek appreciates the Commission's effort to simplify application of the economic crimes guideline and to reduce the fact-finding burden on the courts by revising the loss tables, respectfully, the proposed modest adjustments fail to address the fundamental flaws in the loss-based approach and risk forestalling the necessary change by creating the veneer of reform. The Guidelines should place much less emphasis on loss while also making loss determinations much simpler, particularly when the full scope of the purported loss was neither anticipated nor intended by the defendant. And the Guidelines should place far greater emphasis on *mens rea* and actual individual culpability. Loss is a relevant metric for assessing the impact of the offense, but crude loss calculation will never serve as a proper proxy for culpability.[7] In view of the demonstrable disconnect between the Guidelines sentences and actual practice, as discussed above, the Commission should now propose the kinds of fundamental changes necessary to ensure the efficacy of the Guidelines.

There are several potential avenues to effectuate this reform. Tzedek suggests two alternatives, the first of which is more modest and the second of which is more in keeping with the view that the economic crime guideline would benefit from significant revision.

First, given that §2B1.1(b) provides more than 20 other aggravating enhancements in addition to those associated with loss—enhancements that can contribute to offense level increases extending literally "off the chart"—the Commission could and should cut the loss enhancement levels in half, capping the loss enhancement at 15 or one-half of the current maximum of 30, and also divide into fewer levels.

Such an approach would more aptly calibrate the relative importance of various aggravating factors and eliminate the false precision of a loss table divided into 16(!) artificial levels. Even cut in half, a loss table providing for as much as a 15-level enhancement would increase applicable guideline ranges by many years, sometimes decades, even for individuals with no criminal history, <u>because of the application</u> of

[7] Tzedek has consistently urged the Commission to move away from rigid, outcome-driven quantitative proxies—such as loss amount and drug quantity—that function as substitutes for culpability and *mens rea*, and instead to adopt sentencing frameworks that prioritize intent, foreseeability, and individual moral blameworthiness. *See*, *supra*, Fn 2, citing the numerous occasions on which Tzedek has advocated for these reforms.

the many other aggravating enhancements that regularly apply in the sentencing of economic crimes.

Second, and preferably, the Commission should be more ambitious and, at long last, consider a major restructuring of §2B1.1 to reduce the complexity and severity of offense level calculation for economic crimes, while simultaneously ensuring proper attention to *mens rea* and individual culpability. To achieve this goal of a more sound, more fair and simpler economic crime guideline, Tzedek proposes an approach that may be characterized as a "dual-axis reform."

Tzedek proposes that the Commission adopt a greatly simplified loss matrix and a concomitant enhancement/mitigation range. To achieve this, the Commission should consider replacing the current multitude of enhancements with a broad enhancement/mitigation offense characteristic that would encourage courts to accord appropriate weight to the defendant's intent and individual culpability keyed to the facts of the specific case.

As we envision the focus on culpability, the Commission should add a guideline provision that would provide up to a fourteen-level difference based on the possibility of enhancing or reducing the offense calculation by up to seven levels in either direction based on whether the defendant's *mens rea* was aggravating or mitigating. Under such an approach, Tzedek suggests that loss be factored into the offense calculation using qualitative metrics with quantitative exemplars. For example, the following five tiers could account for loss:

- Minimal/No Loss (Under $15K): no enhancement
- Small Loss ($15K - $100K): enhancement by 1–5 points (lowest enhancement for most mitigated culpability; higher for most aggravated)
- Moderate Loss (≥$100K - $1M): enhancement by 2–8-points (again range based on culpability assessment)
- Major Loss (≥$1M - $100M): enhancement by 4–14 points (again range based on culpability assessment)
- Extreme Loss (≥$100M) enhancement by 6–20 points (again range based on culpability assessment)

This foundational calculation should then be supplemented with a revision to §2B1.1(b) to replace the current complicated mix of aggravating enhancements (which to some extent address individual intent and culpability, but do so in an

inexact and falsely precise manner), with a direction that courts consider various factors related to the defendant's intent by providing for the largest enhancement in cases where the defendant's malevolent intent is extreme and the loss outcome highly foreseeable and correspondingly providing for the largest reduction where the malevolent intent was minimal and the loss outcome minimally foreseeable.

Together these changes will provide judges with the flexibility in guideline calculations to provide a sounder starting point and initial benchmark for then applying the statutory sentencing factors to fashion an appropriate sentence. This approach would help to avoid the current problems with loss amounts serving as an artificial and excessive guideline benchmark that creates an applicable guideline range that is often untethered to *mens rea* and individual culpability.

In addition, this proposed approach would enable the Commission to address the long-standing concerns with the definition of "loss" as "the greater of actual loss or intended loss" as provided under the notes to §2B1.1(b)(1). This formulation regularly enables artificial constructions of loss amounts to be the higher of two dimensions and thus results in unduly elevated sentencing ranges, especially for those whose transgression causes unintended "actual loss" through the application of the amorphous "reasonably foreseeable" standard.

Conversely, there are instances in which the government will invoke the "intended" standard rather than the actual loss standard to seek to increase dramatically the guideline range and advocate for extremely harsh sentences where there was little or no actual loss, and even where larger losses were functionally impossible. These results are fostered by a guideline excessively focused on loss coupled with a "heads we win, tails you lose" approach to loss calculations that largely forego appropriate assessment of individual culpability and the usual requirement that the government prove serious aggravating offense facts beyond a reasonable doubt.

Under the formulation proposed by Tzedek, the compressed loss table and the expanded enhancement/mitigation option will afford courts the appropriate discretion to ensure that the guideline range and the punishment process is better tailored to fit the actual *mens rea* and individual culpability of the defendant—either increasing or decreasing the offense level as the facts warrant. This approach likely would also have the advantage of ensuring that the Guidelines more appropriately align with current judicial practices, as evidenced by the Commission's data showing downward variances in 37.9 percent of cases.[8]

[8] *See*, *supra*. Fn 6.

Culpability Factors:

The Proposed New Aggravator, §2B1.1(b)(3), Will Result in Undue and Duplicative Severity and the Proposed New Mitigators, §2B1.1(b)(22), are Too Narrow in Application and Too Limited in Effect

Evaluating the proposed culpability factors in reverse order, the new mitigating factors are inadequate and underscore the rationale for the kinds of reform Tzedek proposes in the preceding section. While it is laudable that the Commission proposes to recognize such factors as employer direction or negative employment consequences, along with familiar factors such as threats and fear and vulnerability due to physical or mental condition, this proposal is essentially a non-exhaustive and incomplete list of factors that reflect diminished *mens rea* and/or limited culpability.

Efforts to define precise mitigating (or aggravating) factors are no substitute for empowering judges to consider all aspects of a defendant's *mens rea* and individual culpability, entrusting them to exercise sound discretion assessing the many unique circumstances that prompt individuals to violate the law. The Tzedek proposal to provide an adjustment for up to seven points—in either direction—is a more flexible and viable way to ensure that the punishment is not overly driven by the loss calculation.

Additionally, especially at higher loss levels, the proposed 2-level decrease for the specific circumstances enumerated in the Commission's proposal does not come close to alleviating the impact of extreme loss level enhancements when the intent is weak and individual culpability is limited. Consider cases in which an employee was threatened with firing, or a spouse was threatened with physical abuse if she did not help her boss or husband engage in a business fraud that resulted in $300,000 of loss. Though the mitigating realities of the threatened firing or abuse should obviously matter most to sound punishment in such cases, even with the proposed new Guidelines the loss would increase the guideline range many times more than a two-level reduction. Again, a far more effective and appropriately ameliorative approach would be one that does not cabin the basis for a mitigating adjustment for diminished intent and also provides a greater range of decrease.

Next, Tzedek strongly opposes the proposed new §2B1.1(b)(3), which would provide a 2, 3, or 4-level enhancement for offenses that result in substantial non-economic harm to one or more victims. There are several reasons for this opposition.

1. This proposal is duplicative of the punishment inherent in the loss calculation and the numerous enhancements that already may apply. It is self-evident that fraud and theft by their very nature will often impose non-economic harms. It is not simply the loss of money or property that justifies punishment for a theft offense, it is all the intangible factors that accompany that loss that comprise the crime. It is the loss of resources that inherently inflict trauma, psychological harm or other deprivations. Whether it is the loss of a family heirloom, the money to pay for family expenses or provide for future economic security, the sense of invasion when there is a theft from the person or the home—all these factors are the rationale for punishing theft in the first place. It is the loss of opportunity, the psychic trauma of loss, the well-established recognition that such losses can cause mental health and physical issues that form the essence of a theft crime. To the extent any large enhancement is justified at all for broadly defined "loss," it is because of all the associated non-economic harms expected to be associated with the loss. Consequently, this proposed provision risks just providing another opportunity for the government to pile another enhancement on to the already disproportionately harsh sentences that arise from the loss-based calculation of the offense level, creating an unintended consequence of making sentencing *less* proportionate, the very opposite of what the Commission is striving to do.

   Additionally, this kind of enhancement, like the sophisticated means enhancement, also provides the government with another tool to try to coerce pleas, where the government can offer to drop the enhancement with a plea but fight for the enhancement post-trial, which increases inappropriately the risk of going to trial for defendants. As Tzedek and others have noted on numerous occasions, the Guidelines should not facilitate the imposition of a "trial penalty" upon those who exercise their constitutional right to a trial.

2. In addition to the loss table already functioning as the principal driver of offense seriousness, the severity of guideline ranges is further compounded by numerous existing aggravating enhancements, including the number of victims, substantial financial hardship, vulnerable victims, abuse of trust, role adjustments, and other offense characteristics. Adding yet another enhancement for "non-economic harm" would still further repackage the predictable human consequences of financial loss into an additional upward adjustment, ratcheting sentences upward without a clear limiting principle and further exacerbating the already documented problem of excessive severity

arising from loss-based calculations combined with a long list of enhancements.

3. Additionally, because it is virtually impossible to fathom many fraud or theft offenses that do not in some way impose "non-economic harm" on the victim(s), this proposed enhancement could be invoked in most every case in which the offense level is calculated under §2B1.1—another unintended negative consequence. And because the potential enhancement could be as much as 4 levels, it would more than negate the proposed new mitigating factors if they were to be limited to two-level reductions.

4. The proposed enhancement is inherently amorphous and subjective, and will invite extensive litigation and inconsistent application. Determining whether "non-economic harm" is "substantial," and distinguishing ordinary emotional or psychological impacts that commonly accompany financial victimization from supposedly qualifying harms, will require resource-intensive factfinding and highly individualized assessments of victim impact. This challenge will predictably increase sentencing litigation, burden courts and probation offices, and widen inter-judge disparity, as outcomes will turn on contested, non-quantifiable evidence rather than on administrable and more objective criteria. These unintended consequences will only further undermine the fairness and predictability of sentencing under §2B1.1. A guideline enhancement should be administrable, predictable, and capable of consistent application across districts; respectfully, this proposal fails as to each of those criteria.

Again, the formulation offered by Tzedek—which would establish an enhancement where the intent and culpability are the most serious—would provide more than ample space for courts to soundly enhance sentences when an offender knowingly harms victims. If the defendant's fraud or theft specifically evinced a culpable mental intent regarding consequential harms to victims, such as fraudulently inducing payment for a non-existent cure for a disease or fraudulently incurring debt on a victim's home, causing them to lose their home, a judge would have sufficient latitude to apply an appropriate enhancement. But fairness and balance in a guideline regime in which excessive severity has already been documented requires that any proposed (and amorphous) new enhancement should at a minimum be accompanied by a similar mitigating adjustment as proposed above, and preferably avoided altogether in favor of a *mens rea*-based culpability framework, including the thorough overhaul of loss calculation.

In the Absence of More Fundamental Reform the Proposed New Tiered Reduction (§2B1.1(b)(23)) Should be Adopted

The same rationale and the same alternative approach apply as well to the separate proposed mitigating factor where prior to the defendant's acquiring knowledge of the criminal investigation, the defendant ceases criminal activity, makes efforts to return the money or property, or report the offense to governmental authorities. Here again, a vast simplification of the loss calculation and the adoption of a general provision that would empower a court to provide a mitigating adjustment when there is evidence of diminished intent or limited culpability is preferable. It is notable that this proposal, like so many in this amendment cycle, is ultimately seeking in an indirect manner to capture fundamental factors related to *mens rea* and culpability. This is why Tzedek believes a sounder and simpler approach is to bring these factors to bear directly in the guideline as proposed above.

Failing that, however, assuming the status quo or the status quo with the other proposed amendments, Tzedek supports the proposed reductions for those who returned money or property, inclusive of the bracketed language that includes good faith efforts to do so. Tzedek suggests that the reduction level either be set at 6 or establish a range of 4–6 levels, depending on the individual circumstances related to the amelioration of the loss. Tzedek does not support reserving the highest-level reduction for only those who also report the offense to government as there are many extraneous and justifiable reasons why reporting the offense may be problematic, especially where the money or property has been fully repaid. Additionally, Tzedek notes that to the extent that the proposed amendment depends upon the return of money, property, or services, as opposed to merely good faith efforts to do so, the Commission should make clear that in the event of adoption, this provision should be in addition to the "Credits Against Loss" provided for in Application Note 3 (E)(1) under §2B1.1.[9]

Proposed Amendment 4:
Post-Offense Rehabilitation Adjustment

Tzedek wholeheartedly endorses the adoption of the provisions in proposed §3E1.2 that would provide a reduction in the offense level for rehabilitative efforts undertaken prior to sentence. This is a long-overdue recognition that many individuals confront their mistakes and take corrective measures long before the day

[9] In the next section, Tzedek comments extensively on proposed amendments related to post-offense conduct.

of sentence. Such a provision is acknowledgement that, for many individuals, the fact of being arrested and charged, with the ensuing public, personal, and familial humiliation, is the start of the formal punishment for the wrongdoing that can and will begin the process of personal reform. Thus, it is both logical and understandable that some charged individuals can, and often do, begin a process of rehabilitation from the moment that their conduct is exposed (or even sooner). For that reason, it is wholly appropriate to recognize and reward—and even incentivize—that behavior in the sentence and guideline calculation. After all, rehabilitation that evinces remorse, addresses underlying pathologies, and gives back to victims and the community are essential objectives of criminal sentencing. It makes little sense that a person should be denied credit for those efforts merely because they occurred while the case was pending and before sentencing, which is often many months or years after commencement of the investigation or prosecution. In fact, it makes even less sense to deny credit for pre-sentencing efforts at rehabilitation when post-sentencing rehabilitation programs, such as the Bureau of Prisons' Residential Drug Abuse Treatment Program (RDAP), substantially reduce the effective prison terms individuals serve. Similar reductions should be available for presentence efforts at rehabilitation.

Furthermore, this approach would also meaningfully benefit economic victims, who most often want restitution above all else, and other victims who often are concerned that an offender shows remorse and no longer poses a risk to others. A post-offense adjustment would encourage defendants to do everything possible to repay their victims in economic cases and to reduce risk to the community more generally.

Recognizing and rewarding meaningful post-offense rehabilitation advances core sentencing objectives by reducing recidivism, encouraging prompt restitution to victims, and incentivizing early reform that promotes public safety and long-term reintegration.

Tzedek specifically responds to the two options and the issues for comment as follows:

First and foremost, Tzedek urges the Commission to adopt Option 1.

Before explaining why Option 1 is the preferable approach to meaningfully effectuate the Commission's intent to sufficiently incentivize or reward post-offense conduct and rehabilitative efforts, it is useful to highlight the fundamental flaw inherent in Option 2. That option would make eligibility contingent upon "efforts that go beyond the typical actions undertaken by defendants prior to sentencing," a

standard which is vague and invites a cynical disregard for any positive steps taken post-offense. More precisely, how is it remotely possible for judges to consistently assess what constitutes a "typical action" and by extension what is necessary to "go beyond" the typical? Is "typical" to be assessed based on classes of offenders (e.g., typically for drug offenders vs. firearm offenders) or by the demographics of offenders (e.g., typical for younger female offenders vs. older male offenders)? How would and should "typical actions undertaken by defendants" be assessed if and when a defendant was incarcerated prior to sentencing?

It is not too difficult to see prosecutors, as well as judges, regularly characterizing virtually any positive post-offense behavior or rehabilitative efforts as "typical" and indicative of a desire to curry favor with the court rather than to address and assess the underlying mitigating realities that prompted positive actions by the defendant. Also, somewhat perversely, application of this threshold requirement would mean that the greater number of individuals who engage in positive post-offense behavior and rehabilitative efforts, the more likely such behavior will be dismissed as typical and hence non-qualifying for the adjustment. Accordingly, Option 2 should be rejected.

By recognizing and rewarding demonstrably positive post-offense behavior and rehabilitative efforts, Option 1 will finally and formally recognize and reward evidence of individual atonement and reform in the Guidelines. Supreme Court opinions long ago detailed that such behaviors are fundamental to congressional sentencing purposes. *See Pepper v. United States*, 562 U.S. 476 (2011); *Gall v. United States*, 552 U.S. 38 (2007). To make this reform fully effective, however, the decrease in offense level should be at least 4 levels. It is unclear why the more limited Option 2 provides for a decrease of up to 4 levels, while the bracketed options under Option 1 limit the maximum reduction to 3 levels. A 4-level decrease is more appropriate, and judges could be expected to apply this reduction to those most deserving if the Commission were concerned about this extent of reduction. In addition, to the extent that the bracketed options are mutually exclusive, Tzedek urges the Commission adopt the maximum decrease, and as an acceptable but less desirable alternative, provide a range of 2–4 levels, with the expectation that such an approach will afford courts the ability to calibrate the adjustment to the extent of the efforts. (Notably, many of the upward adjustments in Chapter 3 provide for offense level increases of four or more levels. *See, e.g.*, §3A1.1(b)(1) & (b)(2); §3A1.2(b) & (c); §3A1.4(a); §3A1.5(b); §3B1.1(a); §3B1.5(2)(B).)

Additionally, with respect to the bracketed alternatives in Option 1 ¶ (b), Tzedek urges the Commission to select "undertaken" as opposed to "voluntarily

undertaken." Most positive steps and rehabilitative efforts will be voluntary, but even if placement in some form of rehabilitative program, such as substance abuse treatment or other ameliorative action, is undertaken to fulfill a condition of pretrial release or other court order, that does not diminish the importance of an individual successfully completing such a program and does not alter the beneficial impact of that action on the community. Nor does it diminish the likely reduction in recidivism arising from those efforts. In fact, excluding actions that are undertaken pursuant to judicial direction and then not rewarding success perversely disincentivizes compliance.

These observations apply equally to all bracketed references to "voluntary" throughout subparagraph (b), which should not be included in the new provision. Moreover, there are no obvious benefits, and significant potential costs, arising from disputes at sentencing concerning whether a defendant's actions were truly "voluntary," especially when we should want both associates of defendants and government agents actively encouraging positive behaviors without concern for whether such efforts could undermine future claims of voluntariness.

Next, Tzedek agrees that if a defendant qualifies for a decrease under ¶ (a), there should be an additional decrease as proposed in ¶ (c) for those who undertake the qualifying post-offense behaviors prior to the criminal investigation or prosecution. Obviously, those who recognize and seek to address underlying pathologies or rectify harms caused by criminal behavior before they are "caught" evince an extra and important form of personal growth warranting additional recognition. In this regard, Tzedek urges that the adjustment for such early reform efforts should be a 2-level decrease and should be cumulative to what Tzedek proposes should be a 4-level decrease under ¶ (a).

In response to several specific questions posed in the "Issues for Comment" identified by the Commission, Issues for Comment 2, 3, and 4 are addressed above. With respect to other issues, Tzedek offers the following suggestions to improve Option 1:

(1) (Responding to Issue for Comment 1)

The court should include within the illustrative enumerated considerations successful compliance with pre-trial conditions of release or institutional rules, whichever is applicable. While mere compliance may not support the same consideration as other efforts (and hence perhaps a lesser level decrease), such compliance is still evidence of post-offense positive

behavior and should be incentivized. Additionally, if institutional compliance, which is often extremely difficult given the deplorable conditions in many facilities where defendants are detained pre-trial, is disallowed, it will indiscriminately disqualify those who are denied pre-trial release from the opportunity to achieve any post-offense benefit for positive behavior. In this regard, the Commission should provide commentary providing for consideration of any positive steps taken by defendants held in pretrial custody, including compliance with rules, maintenance of family contacts, participation in any available programming, and steps toward self-improvement.

(2) (Responding to Issue for Comment 5)

To the extent that the proposed new adjustment overlaps with acceptance of responsibility reduction referenced by §3E1.1, commentary, Application Note 1(G), Tzedek proposes that the Commission add to Note (G) a statement to the effect that "while 'post-offense rehabilitative efforts' remain relevant to the determination of whether the defendant qualifies for an adjustment pursuant to §3E1.1 for acceptance of responsibility, such behavior should independently be assessed for an adjustment under the newly adopted §3E1.2." For all practical purposes, cases are rare if non-existent where an acceptance of responsibility adjustment will turn solely on this noted factor, and thus it is appropriate that an individual independently be eligible for the new adjustment. Almost uniformly the acceptance adjustment is applied in cases in which a defendant pleads guilty, irrespective of other post-offense conduct. (Notably, many of the upward adjustments in Chapter 3 provide for cumulative offense level increases even when they contain potentially overlapping elements.)

Conversely, in those cases where a defendant does not qualify for an acceptance adjustment, most likely a result of having asserted the right to trial, it is still entirely appropriate that a defendant who has engaged in post-offense positive behavior or rehabilitative efforts should receive the benefit of the new adjustment.

Finally, because acceptance of responsibility rarely turns upon the commentary reference to post-offense rehabilitative efforts in §3E1.1, Note 1(G), under no circumstances should the proposed new adjustment be foreclosed by an adjustment under §3E1.1. Such a limitation would

essentially foreclose the application of the new reduction in the 97+ percent cases in which a defendant pleads guilty.

Tzedek does not see a need for any refinement to account for overlap with a departure based upon substantial assistance pursuant to §5K1.1. Such a departure would be applied after the calculation of the total offense level, which should reflect the new adjustment for positive post-offense behavior. That adjustment should be included, irrespective of whether the individual provided substantial assistance to the government when other positive post-offense conduct, and/or rehabilitative efforts have taken place. This is entirely consistent with the Commentary to §5K1.1, Application Note 2, which provides that "[t]he sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility." It follows that the substantial assistance departure should be considered independent of any new provision related to post-offense conduct, which is a discrete manifestation of acceptance of responsibility.

(3) (Responding to Issue for Comment 6)

The Commission seeks input on the potential interaction between the proposed amendment creating a new §2B1.1(b)(23) providing a reduction for return of money or property (or good faith efforts to do so) prior to knowledge of the investigation or prosecution with the proposed new §3E1.2 for post-offense rehabilitation. First, there does not appear to be any tension or ambiguity where the post-offense conduct occurs after the defendant acquires knowledge of the investigation or prosecution. Thus, ameliorative steps to return money or property, including good faith efforts in that regard that take place after that point and prior to sentence, can only be recognized and rewarded under the new post-offense rehabilitation section.

In the event that steps to reverse or mitigate the loss are taken prior to knowledge of the investigation or prosecution, in Tzedek's view the defendant should still qualify for the post-offense conduct adjustment to the extent that the positive post-offense behavior or rehabilitative efforts extend in any way beyond the return of the money or property or good faith efforts to do so. In other words, a defendant who engages in other qualifying post-conduct activities should not be barred from the adjustment solely because they repaid the loss or tried to do so. If that were to be the

sole manifestation of post-offense rehabilitation, the adjustment under new §2B1.1(b)(23) would obviate any basis for a further adjustment, which is clearly not the Commission's intent. The Commission should make that clear in an application note under the respective sections.

Proposed Amendment 7: Sophisticated Means

These comments address the proposed definition of Sophisticated Means, both under Proposed Amendment 3 (Economic Crimes) and Amendment 7 (Sophisticated Means).

Tzedek appreciates that in addressing the definition of Sophisticated Means, the Commission is endeavoring to respond to concerns that this offense characteristic is applied based on commonplace technologies. Respectfully, however, Tzedek does not believe that either creating a new Chapter Three adjustment at §3C1.5 or amending the guidance provided in the existing sections relating to sophisticated conduct (§§2B1.1, 2S1.1, 2T1.1, 2T1.4 and 2T3.1) will resolve these concerns. The notion that "sophisticated conduct" somehow warrants enhanced punishment is vague and unsupported by an empirical evidentiary justification that any such enhancement fulfills an identifiable sentencing objective.

In practice, the sophisticated means enhancement will often function as a stand-in for education, professional status, or white-collar experiences rather than as a true marker of heightened culpability, raising significant concerns about unwarranted disparities. As stressed throughout this submission, the Commission should work toward having the Guidelines focus expressly and directly on *mens rea* and related culpability issues rather than investing effort into modification of enhancements that serve as, at best, a poor proxy for appropriate sentencing considerations.

It is difficult to determine the sound rationale for sentencing someone who uses "advanced or emerging technologies" more harshly than someone who commits the same crime through other more traditional or established means. People develop a capacity to use new technologies at various rates, and technology itself continues to advance.

Importantly, what is sophisticated today is antiquated tomorrow. Attempts by the Commission to focus on the means by which a crime is committed, rather than the crime and its consequences, the intent, and the individual culpability that underlies

the crime, is an exercise that will inherently result in complex litigation disconnected from key sentencing considerations and seems likely to produce conflicting case law. All the proposed new definitions, (i.e., "greater level of complexity than the typical offense," "using technologies in ways not used by everyday users," "using emerging technology in a more specialized, elaborate or unusual way") are all exceedingly vague and subjective formulations, and their application by definition will be continually rendered obsolete by ever-advancing technology, and by users' ever-increasing facility with emerging technologies.

Additionally, in a system in which the means of committing an offense drives the sentence, there is no rational basis to limit its applicability, as the current Guidelines do, to economic crimes. One could use "sophisticated means" to commit all manner of crimes, including murder, assault, racketeering, drug smuggling, and so on without limitation. For example, if one were to use a sophisticated drone to import drugs, rather that hauling the contraband into the country in a hidden compartment in a van, does that not also constitute a "sophisticated means" warranting an enhancement? And when the use of sophisticated drones is widespread, when does their use stop being considered "sophisticated?" Option 1 would establish a new §3C1.5 presumably without limitation to the current economic offenses that provide for the sophisticated means enhancement. Is the Commission prepared for the overwhelming application of this new provision to all types of crimes? Tzedek is immensely concerned that this will be the likely result, and rather than cabin the application of the enhancement as appears to be the Commission's intent, it would have precisely the opposite effect, with prosecutors seeking the enhancement in all manner of offenses.

Rather than trying to devise some vague and inevitably transient definition for "sophisticated means," even if limited to the existing offenses under Option Two, the fundamental problem that flows from the vague and transient nature of what constitutes "sophistication" when it comes to the use of technology, can never be satisfactorily resolved.

Additionally, as noted above, amorphous enhancements like sophisticated means are often weaponized by the government to pressure defendants to surrender their constitutional right to a trial by threatening to seek such enhancements post-trial.

Accordingly, the Commission should wholly eliminate these amorphous enhancements and, failing that, should in no way expand their application.

Conclusion

Tzedek enormously appreciates the opportunity to share its perspective on the proposed amendments for the 2026 cycle, and looks forward to continuing to provide input and support for the Commission's critical work.

Sincerely,

Rabbi Moshe Margaretten[10]
President

[10] **Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this letter.**