

It's All About (Re)location: Interpreting the Federal Sentencing Enhancement for Relocating a Fraudulent Scheme

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Section 2B1.1(b)(10) of the U.S. Sentencing Guidelines Manual increases the recommended sentencing ranges for defendants who make fraudulent schemes harder to uncover. In particular, subsection (A) of this Guideline—the relocation enhancement—increases a defendant’s recommended sentence if she “relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials.” This provision raises the question: Where is a fraudulent scheme located? The question might have a straightforward answer in cases that involve few defendants and few fraudulent acts. But federal circuit courts have split over how to apply this enhancement to schemes that span multiple jurisdictions at once, exacerbating a preexisting disagreement about the level of intent required by the relocation enhancement.

This Comment argues that courts can resolve these problems by limiting the applicability of the relocation enhancement. Specifically, courts should apply the relocation enhancement only to cases where the defendant committed an act of deception in one jurisdiction, grew suspicious of a specific law enforcement investigation into her actions, fled the jurisdiction because of that investigation, and then committed the same deceptive act in a new jurisdiction. This reading draws support from interpretive canons, Sentencing Commission guidance, and existing literature on the deterrent effect of sentencing enhancements. This reading also encourages courts to make greater use of another provision in § 2B1.1(b)(10)—the sophisticated-means enhancement—to address the problems posed by multijurisdictional fraud schemes.

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INTRODUCTION

Nobody likes telemarketers, least of all when they perpetrate fraud. The specter of scam calls loomed large during the nineties, when many feared that advancing technology could dramatically increase the scope and effectiveness of telemarketing fraud.¹ To address these concerns, Congress passed the Telemarketing Fraud Prevention Act of 1998² (TFPA). This law increased the penalties associated with a telemarketing fraud conviction in various ways. In particular, one provision instructed the U.S. Sentencing Commission (Commission) to provide a sentencing enhancement for crimes that “involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.”³

In response, the Commission promulgated the Guideline found at § 2B1.1(b)(10) of the U.S. Sentencing Guidelines Manual (Guidelines).⁴ Section 2B1.1(b)(10)—which applies to both

¹ See Bruce Horovitz, *Telemarketing Scams Expected to Get Slicker: Fraud: A Consumer Coalition Warns That the Use of New Technologies by Con Artists Will Cost Victims More Than \$10 Billion a Year in the 1990s*, L.A. TIMES (Jan. 25, 1990), <https://perma.cc/KFV9-DDJ8>.

² Pub L. No. 105-184, 112 Stat. 520 (1998) (codified as amended in scattered sections of 18 and 28 U.S.C.).

³ Telemarketing Fraud Prevention Act § 6(c)(2), 112 Stat. at 521.

⁴ U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT'G COMM'N 2018). Note that, while the Guideline in question has been codified under various sections in previous years, the language has remained largely the same since its enactment. This Comment refers to the current location of these enhancements throughout.

telemarketing scams and many other types of fraud schemes⁵—punishes a defendant for taking steps to keep her scheme from being detected by increasing her offense level.⁶ This increased offense level, in turn, leads to a higher recommended sentence under the Guidelines.⁷ Though the Guidelines have been advisory since 2005,⁸ they continue to play an important role in federal sentencing, and judges continue to impose many sentences within the ranges recommended by the Guidelines.⁹

More specifically, subsection (B) of the Guideline—the “international enhancement”—increases a defendant’s offense level if “a substantial part of [her] fraudulent scheme was committed from outside the United States.”¹⁰ Subsection (C)—the “sophisticated-means enhancement”—provides for the same increase if she “intentionally engaged in or caused [] conduct constituting sophisticated means” in connection with a fraudulent scheme.¹¹ But, in addition to these enhancements, the Commission provided for a third sentencing enhancement not expressly called for by the TFPA. Subsection (A) of § 2B1.1(b)(10)—the “relocation enhancement”—increases a defendant’s offense level if she “relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials.”¹²

This relocation enhancement is easy enough to apply in some simple cases. Consider, for example, a person who sells fake Rolex watches. This scheme involves a single person, and each fraudulent act involves a single transaction, so there is no question about the location of the scheme; it takes place where the person makes her sales. Now, say that this person starts her enterprise in New York, but, after hearing that the police are looking into her sales, she moves to California and takes up the scheme anew. Because she moved across jurisdictional lines to evade law enforcement, and because she took up her scheme in the new jurisdiction, the enhancement would certainly apply to her case.

⁵ See *United States v. Singh*, 291 F.3d 756, 761 (11th Cir. 2002) (citing U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003)) (noting that the section is not “reserved solely to punish telemarketing fraud”).

⁶ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT’G COMM’N 2018).

⁷ See *infra* Appendix.

⁸ *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (opinion of Breyer, J.).

⁹ See *infra* text accompanying notes 50–58.

¹⁰ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(B) (U.S. SENT’G COMM’N 2018).

¹¹ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(C) (U.S. SENT’G COMM’N 2018).

¹² U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(A) (U.S. SENT’G COMM’N 2018).

But, as one might guess, schemes are seldom this simple. Fraudsters could commit different parts of the scheme in different jurisdictions—for example, by making fake watches in one state and selling them in another state.¹³ Though these schemes involve crossjurisdictional trips, those trips might not fit the definition of relocations—they could just as easily be characterized as expansions of the scheme.¹⁴ These types of issues prompt the following question: When do these multijurisdictional schemes fall within the meaning of the relocation enhancement? That is, how can courts apply the relocation enhancement to a scheme which, by its very nature, operates in multiple jurisdictions at once?

This question has become the subject of a wide-ranging circuit split, with five circuits advancing three different proposals. The first of these is the “home-base approach,” initially articulated in an unpublished Eleventh Circuit opinion and later developed by the Seventh Circuit. This approach states that a defendant relocates a scheme only if she moves the “home base” of that scheme to a different federal district.¹⁵ The second proposal is the “key-acts approach,” advanced by the First Circuit. This approach locates the scheme where the defendants commit acts that constitute “the heart of the [fraudulent] enterprise.”¹⁶ If the defendants commit these acts in multiple jurisdictions, they relocate the scheme. Finally, the Third and Sixth Circuits have put forward the “nature-of-scheme approach.” Under this approach, courts focus less on identifying a scheme’s location and determining whether that location has changed. Instead, the nature-of-scheme approach looks to how the scheme itself is organized, allowing courts to apply the enhancement based on specified characteristics of the scheme planned.¹⁷ For example, the Third Circuit allows courts to “conside[r] the geographic scope of the conspiracy”

¹³ Note that a “jurisdiction,” as used in § 2B1.1(b)(10), refers to the geographic area covered by a federal district. Hence, a defendant will always relocate to a new jurisdiction when she crosses state lines, but she can relocate to another jurisdiction without leaving a state if it has multiple federal districts. *See, e.g.*, *United States v. Morris*, 153 F. App’x 556, 558 (2005) (per curiam) (discussing instances in which the defendant left the Northern District of Georgia and traveled to other federal districts, both inside and outside of Georgia).

¹⁴ *See, e.g.*, *Morris*, 153 F. App’x at 558.

¹⁵ *United States v. Hines-Flagg*, 789 F.3d 751, 754–56 (7th Cir. 2015); *see also Morris*, 153 F. App’x at 558–59.

¹⁶ *United States v. Savarese*, 686 F.3d 1, 15–16 (1st Cir. 2012).

¹⁷ *See United States v. Thung Van Huynh*, 884 F.3d 160, 168–69 (3d Cir. 2018); *United States v. Woodson*, 960 F.3d 852, 854–55 (6th Cir. 2020).

when deciding whether the defendant relocated the scheme, focusing on the distance between the areas of fraudulent activity.¹⁸ Similarly, the Sixth Circuit looks to the setup of the scheme itself, explaining that “‘where travel to other jurisdictions’ to avoid detection by law enforcement is ‘a key component of a fraud scheme,’ the [relocation] enhancement applies.”¹⁹

These circuits also disagree about how to interpret the phrase “to evade law enforcement,”²⁰ though they give this issue less attention. More specifically, the courts are split over whether the relocation enhancement requires general intent (a desire to keep the scheme from attracting notice) or specific intent (a desire to circumvent a particular law enforcement investigation). The Seventh Circuit has reasoned in dicta that “application of this [relocation] enhancement requires more than just the operation of a multijurisdictional scheme in order to reduce the chances of detection,” favoring a specific-intent reading.²¹ But the First Circuit disputes this idea, finding instead that courts can infer an intent to evade law enforcement from the defendant’s methods of operation or choice of targets.²² The Third and Sixth Circuits have advanced similar interpretations in unpublished opinions,²³ and—as demonstrated below—the nature-of-scheme approach they employ requires them to adopt a general-intent reading of the relocation enhancement.²⁴

This Comment sheds new light on these circuit splits by drawing on the canon of statutory surplusage—the rule of interpretation that states that “every word and every provision in a legal instrument is to be given effect.”²⁵ This canon, in connection with the Commission’s amendment notes on the enhancement and existing literature on criminal deterrence, helps the Comment develop two key insights on how courts should interpret the relocation enhancement.

¹⁸ *Thung Van Huynh*, 884 F.3d at 168.

¹⁹ *Woodson*, 960 F.3d at 855 (quoting *United States v. Thornton*, 718 F. App’x 399, 403–04 (6th Cir. 2018)).

²⁰ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(A) (U.S. SENT’G COMM’N 2018).

²¹ *Hines-Flagg*, 789 F.3d at 756.

²² *See Savarese*, 686 F.3d at 16 n.12.

²³ *See United States v. Braxton*, 374 F. App’x 248, 249–50 (3d Cir. 2010) (citing *United States v. Vega-Iturrino*, 565 F.3d 430, 433 (8th Cir. 2009)); *United States v. Hessa*, 464 F. App’x 473, 475 (6th Cir. 2012).

²⁴ *See infra* notes 143–45145 and accompanying text.

²⁵ *Surplusage Canon*, BLACK’S LAW DICTIONARY (11th ed. 2019).

First, my analysis shows that the phrase “to evade law enforcement” requires something more than a general intent to evade law enforcement; in fact, the Commission’s amendment notes suggest that the relocation enhancement should only apply in cases where the defendant “know[s] or suspect[s] that [law] enforcement authorities have discovered the scheme.”²⁶ Put another way, the enhancement requires a type of specific intent consisting of two criteria: the defendant must know or suspect that she is under a law enforcement investigation, and that knowledge or suspicion must arise from the specific scheme at issue. Second, my analysis demonstrates that courts can—and do—use the sophisticated-means enhancement to address the problem of multijurisdictional fraud schemes. Existing literature even suggests that the sophisticated-means enhancement is better suited to address this problem than the relocation enhancement. Both of these observations generally weigh in favor of giving the relocation enhancement a narrower construction than it has received thus far in the courts.

In light of these observations, I offer three concrete proposals for courts going forward. First, courts should reject the nature-of-scheme approach advanced by the Third and Sixth Circuits, as that approach contravenes the surplusage canon and the Commission’s amendment notes. Second, courts should use a modified version of the First Circuit’s key-acts approach to interpret the relocation enhancement narrowly. Finally, courts should read the sophisticated-means enhancement broadly and recognize the potential of this enhancement to deter multijurisdictional fraud schemes.

This Comment proceeds in four parts. Part I provides an overview of federal sentencing, the Guidelines, and § 2B1.1(b)(10). Part II outlines the circuit splits surrounding the relocation enhancement. Part III analyzes the circuit splits through the use of interpretive canons, supplemented by Commission commentary and existing literature on criminal deterrence. Part IV draws on this analysis to form some concrete proposals.

I. THE SENTENCING GUIDELINES AND § 2B1.1(b)(10)

The Guidelines aim to “review and rationalize the federal sentencing process” by “creat[ing] categories of offense behavior

²⁶ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 cmt. (U.S. SENT’G COMM’N 2003).

and offender characteristics” and “specify[ing] an appropriate sentence for each class of convicted persons.”²⁷ Though the Guidelines initially required judges to impose sentences within a defendant’s prescribed sentencing range,²⁸ the Supreme Court held this requirement to be unconstitutional, and the Guidelines have been merely advisory since 2005.²⁹

Nonetheless, the Guidelines continue to exert a large influence over federal sentencing. Part I.A notes two reasons why this remains the case. First, courts must correctly calculate a defendant’s Guidelines range before ruling and provide additional reasoning justifying sentences made outside the range,³⁰ giving courts an incentive to issue a sentence within the recommended range. Second, the Guidelines exert an “anchoring effect” on sentences that vary from the recommended ranges, limiting the extent of those variances.³¹

Part I.B then describes the enhancements contained in § 2B1.1(b)(10) and notes the ambiguity contained in the relocation enhancement. Because courts are required to interpret the Guidelines correctly, they have a stake in resolving that ambiguity in a clear and correct manner. And, because defendants can receive a higher sentencing range when the relocation enhancement applies, they have a stake in its correct application.

A. Federal Sentencing and the Guidelines

Congress formed the Commission in 1984³² to “establish sentencing policies and practices for the Federal criminal justice

²⁷ U.S. SENT’G GUIDELINES MANUAL § 1A1.2 (U.S. SENT’G COMM’N 2018).

²⁸ 18 U.S.C. § 3553(b)(1) (“[T]he court shall impose a sentence of the kind, and within the range, referred to in [the Guidelines].”). Though the statute allowed a court to depart from the Guidelines upon finding that “there exist[ed] an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission,” 18 U.S.C. § 3553(b)(1), the Guidelines still mandated a specific sentencing outcome in many cases, given that “[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account.” *United States v. Booker*, 543 U.S. 220, 234 (2005) (opinion of Stevens, J.).

²⁹ *Booker*, 543 U.S. at 245–46 (opinion of Breyer, J.).

³⁰ *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (citing *Rita v. United States*, 551 U.S. 338, 347–48, 351, 356–58 (2007)).

³¹ *See, e.g., Hawkins v. United States*, 706 F.3d 820, 824 (7th Cir. 2013) (“[T]he guideline ranges exert a gravitational pull on non-guideline sentences, making them closer to sentences within that range than they would be were there no guidelines.”).

³² *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987 (codified in scattered sections of 18 U.S.C.).

system.”³³ These policies should meet “the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)],”³⁴ which instructs courts to impose sentences that “reflect the seriousness of the offense,” “afford adequate deterrence,” “protect the public from further crimes of the defendant,” and “provide the defendant with . . . correctional treatment.”³⁵ The policies should also “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities . . . while maintaining sufficient flexibility to permit individualized sentences.”³⁶ The Commission promulgated—and continues to update—the Guidelines to meet this mandate.³⁷

The Guidelines operate by mapping individual offenses to a specific “guideline range” outlined in the Guidelines’ sentencing table.³⁸ To determine a defendant’s sentencing range, the court must first consult the Guidelines Manual to determine what guidelines are applicable to the defendant’s statutory offense.³⁹ These guidelines will provide the judge with a defendant’s “base offense level”—a number representing the severity of the offense standing alone.⁴⁰ In a wire-fraud case, for example, the Guidelines would direct courts to § 2B1.1,⁴¹ which provides a base offense level of 6.⁴² Courts should then adjust this offense level “as appropriate” based on the specific facts underlying the crime, including the victim or victims involved, any obstruction that took place, and the defendant’s role in the crime.⁴³ In the wire-fraud case mentioned above, courts would apply § 2B1.1(b) to accomplish this goal, adjusting the offense level based on the various details

³³ 28 U.S.C. § 991(b)(1).

³⁴ 28 U.S.C. § 991(b)(1)(A).

³⁵ 18 U.S.C. § 3553(a)(2).

³⁶ 28 U.S.C. § 991(b)(1)(B).

³⁷ See U.S. SENT’G GUIDELINES MANUAL § 1A2 (U.S. SENT’G COMM’N 2018) (“[T]he guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act.”).

³⁸ See U.S. SENT’G GUIDELINES MANUAL §§ 1B1.1(a)(7), 5A (U.S. SENT’G COMM’N 2018). The sentencing table in § 5A is reproduced *infra*, Appendix.

³⁹ See U.S. SENT’G GUIDELINES MANUAL §§ 1B1.1(a)(1), 1B1.2(a) (U.S. SENT’G COMM’N 2018).

⁴⁰ U.S. SENT’G GUIDELINES MANUAL § 1B1.1(a)(1)–(2) (U.S. SENT’G COMM’N 2018).

⁴¹ U.S. SENT’G GUIDELINES MANUAL app. A (U.S. SENT’G COMM’N 2018) (connecting charges under 18 U.S.C. § 1343—the criminal statute punishing wire fraud—to §§ 2B1.1 and 2C1.1, the second of which only covers public officials).

⁴² U.S. SENT’G GUIDELINES MANUAL § 2B1.1(a)(2) (U.S. SENT’G COMM’N 2018).

⁴³ U.S. SENT’G GUIDELINES MANUAL § 1B1.1(a)(3) (U.S. SENT’G COMM’N 2018).

surrounding the defendant's case.⁴⁴ Finally, courts should look to any past offenses committed by the defendant and any applicable adjustments to determine her "criminal history category."⁴⁵ These two scores—the offense level and the criminal history category—provide the defendant's guideline range in months when plugged into the Commission's sentencing table.⁴⁶

Notably, courts do not have to issue a sentence within the guideline range. The Supreme Court's decision in *United States v. Booker*⁴⁷ made the Guidelines advisory in 2005, allowing courts to vary from the guideline range to further the goals of sentencing outlined in 18 U.S.C. § 3553(a).⁴⁸ In addition, the Guidelines themselves provide a list of circumstances in which courts can depart from the sentencing range for good cause.⁴⁹ Thus, a defendant's guideline range will not necessarily control the sentence she receives.

Nonetheless, the Guidelines continue to play a significant role in federal sentencing for two reasons. First, courts still have a large incentive to issue a sentence within the guideline range after *Booker*. A court must calculate a defendant's guideline range correctly during sentencing proceedings, even if it eventually departs or varies from the range.⁵⁰ Failure to do so could result in reversal on appeal.⁵¹ Moreover, whenever a court deviates from the guideline range, it must provide an explanation justifying its choice, with larger variances calling for greater justifications.⁵² The effort involved in producing these explanations—along with the possibility of getting overturned on appeal—will often lead judges to adhere to the advisory Guidelines. Empirical observations bear this out. For example, in fiscal year 2019, a majority of

⁴⁴ See U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b) (U.S. SENT'G COMM'N 2018) (providing for increased offense levels based on the monetary loss involved, the number of victims involved, and other characteristics of the offense).

⁴⁵ U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(6) (U.S. SENT'G COMM'N 2018).

⁴⁶ U.S. SENT'G GUIDELINES MANUAL §§ 1B1.1(a)(7), 5A (U.S. SENT'G COMM'N 2018).

⁴⁷ 543 U.S. 220 (2005).

⁴⁸ *Id.* at 245–46 (opinion of Breyer, J.).

⁴⁹ See, e.g., U.S. SENT'G GUIDELINES MANUAL § 5K2.0–2.24 (U.S. SENT'G COMM'N 2018). Note that "departures" and "variances" are terms of art in federal sentencing. "Departures" are sentence range deviations based on other provisions in the Guidelines Manual, while "variances" are deviations based on external statutory considerations. See *Irizarry v. United States*, 553 U.S. 708, 714 (2007).

⁵⁰ *Gall*, 552 U.S. at 49 (citing *Rita*, 551 U.S. at 347–48).

⁵¹ *Id.* at 51.

⁵² *Id.* at 50.

sentences fell within their corresponding guideline ranges,⁵³ and only 23% of cases involved a downward variance under § 3553(a).⁵⁴

Second, even when judges choose to vary from the guideline range, the range exerts an “anchoring effect” on the sentence imposed.⁵⁵ An anchoring effect is “the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the ‘anchor.’”⁵⁶ In sentencing, the guideline range serves as this anchor, “exert[ing] a gravitational pull on non-guideline sentences, making them closer to sentences within that range than they would be were there no guidelines.”⁵⁷ Again, empirical observations bear this out: the average extent of sentence reductions has not increased substantially since the Guidelines became advisory.⁵⁸

To summarize, federal courts must begin sentencing by correctly applying the Guidelines to a defendant’s case. The Guidelines provide each defendant with an offense level—based on the statutory crime committed and the specific characteristics of the offense—and a criminal history category. Those numbers then produce a recommended sentencing range for the defendant. The judge has discretion to issue a sentence that falls outside this range based on additional considerations found in the Guidelines themselves or the factors listed in 18 U.S.C. § 3553(a). But, since courts must calculate the guideline range in every case and have an incentive to issue a sentence within that range, most sentences will adhere to the Guidelines’ recommendations.

B. Guideline § 2B1.1(b)(10)

The Commission has executed the TFPA’s directives through the Sentencing Guidelines located in § 2B1.1, which deals with

⁵³ U.S. SENT’G COMM’N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 86 (2019).

⁵⁴ *See id.* at 101 n.1.

⁵⁵ *See Hawkins*, 706 F.3d at 824.

⁵⁶ Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014).

⁵⁷ *Hawkins*, 706 F.3d at 824; *see also* Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137 (2006), <https://perma.cc/9G8Q-GAAE> (“Studies underscore the significance of [an] initial anchor; judgments tend to be strongly biased in its direction. In effect, the 300-odd page Guideline Manual provides ready-made anchors.”).

⁵⁸ Bennett, *supra* note 56, at 520 & fig. 6.

fraud, larceny, theft, forgery, and other types of economic offenses.⁵⁹ This Comment focuses on the provisions contained in § 2B1.1(b)(10). Section 2B1.1(b)(10) instructs courts to increase a defendant's offense level by 2 if any of the following conditions apply:

(A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.⁶⁰

The Guideline also states that when the enhancement applies, the defendant should receive a minimum offense level of 12.⁶¹ For the purposes of clarity and brevity, I refer to subsection (A) of this Guideline as the "relocation enhancement," subsection (B) as the "international enhancement," and subsection (C) as the "sophisticated-means enhancement."

To better contextualize these provisions, three clarifying points merit mention here. First, § 2B1.1(b)(10) can have an appreciable effect on a defendant's sentence. While a two-level increase in a defendant's offense level will have a relatively modest impact on most sentences, it can increase a defendant's sentencing range by multiple years for serious offenses.⁶² Moreover, the minimum offense level imposed by § 2B1.1(b)(10) places a defendant in Zone C of the sentencing table,⁶³ which precludes her from receiving a sentence of probation without a departure or variance.⁶⁴ Thus, the proper application of § 2B1.1(b)(10) can mean a great deal to a great many defendants.

⁵⁹ The areas covered by § 2B1.1 are laid out in detail by the Section's title. U.S. SENT'G GUIDELINES MANUAL § 2B1.1 (U.S. SENT'G COMM'N 2018).

⁶⁰ U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT'G COMM'N 2018).

⁶¹ U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT'G COMM'N 2018).

⁶² See U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2018); *infra* Appendix; see also Miriam H. Baer, *Unsophisticated Sentencing*, 61 WAYNE L. REV. 61, 73 (2015) ("For high-loss offenders, as well as recidivists, the enhancement can result in substantially greater terms of imprisonment, with increases of twenty or even thirty months.")

⁶³ See *infra* Appendix.

⁶⁴ See U.S. SENT'G GUIDELINES MANUAL § 5C1.1(d) (U.S. SENT'G COMM'N 2018).

Second, § 2B1.1(b)(10) has grown in importance since the Commission added it to the Guidelines in 1998.⁶⁵ The language of the Guideline suggests—and courts widely accept—that the Guideline is applicable to all federal fraud offenses, not just the telemarketing schemes contemplated by the TFPA.⁶⁶ In addition, courts have increasingly applied the Guideline in recent years. In fiscal year 2002, for example, the Guideline was applied in 160 cases;⁶⁷ by fiscal year 2019, that number had increased to 1,015 cases.⁶⁸ Given the ever-growing number of consumer fraud reports,⁶⁹ the number of cases could increase further in the coming years.

Finally, while courts increasingly apply the relocation enhancement, there is no definitive guidance regarding what the relocation enhancement requires. Courts widely read the relocation enhancement as requiring two separate elements before it can be applied. Specifically, the defendant must have “relocated, or participated in relocating” a fraudulent scheme to another jurisdiction, and she must have taken those actions in order to evade law enforcement.⁷⁰ But neither the Guideline nor its application notes elaborate on what these elements mean. They provide no method of determining when a defendant has relocated a scheme or if she has done so to evade law enforcement.⁷¹ These questions have largely been left for the courts to answer.

⁶⁵ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003) (noting that the amendment became effective November 1, 1998).

⁶⁶ See, e.g., *United States v. Singh*, 291 F.3d 756, 761 (11th Cir. 2002) (citing U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003)).

⁶⁷ U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2002 8, 27 (2002). Note that the three enhancements were originally codified at § 2F1.1 of the Guidelines Manual, but this section was deleted and consolidated with § 2B1.1 on November 1, 2001. *Id.* at 26 n.27. The 160-case figure includes all citations under both § 2B1.1 and § 2F1.1.

⁶⁸ U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED, FISCAL YEAR 2019 11 (2019); see also Baer, *supra* note 62, at 68–69 (showing that “the percentage of fraud defendants who have received a sophisticated means enhancement . . . more than tripled” between 2005 and 2013).

⁶⁹ See FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK 2020 6 (2021), <https://perma.cc/Q3YD-RZYW> (showing an increase from 0.33 million consumer fraud reports in 2001 to 4.72 million in 2020).

⁷⁰ See *United States v. Hines-Flagg*, 789 F.3d 751, 754 (7th Cir. 2015); *United States v. Savarese*, 686 F.3d 1, 15 (1st Cir. 2012); *United States v. Thung Van Huynh*, 884 F.3d 160, 167 (3d Cir. 2018).

⁷¹ See U.S. SENT’G GUIDELINES MANUAL § 2B1.1 cmt. n.9 (U.S. SENT’G COMM’N 2018) (providing commentary on the sophisticated-means enhancement and international enhancement but not the relocation enhancement). This remark should not be taken to mean that the Commission’s notes on the relocation enhancement cannot elucidate its meaning.

II. THE CIRCUIT SPLITS

In some cases, the application of the relocation enhancement is fairly straightforward. As an example, consider the case *United States v. Smith*.⁷² In *Smith*, the defendant opened several credit accounts under fake or stolen identities and used those accounts to make fraudulent purchases.⁷³ Smith did this for a few months in Iowa before he moved with his family to Florida.⁷⁴ Once in Florida, he took up his scheme again, using a fake name to make \$15,000 in fraudulent charges.⁷⁵ Based on these facts, the trial court applied the relocation enhancement to Smith's case, and the Eighth Circuit upheld its application.⁷⁶ Smith unquestionably relocated his scheme; he was the only person involved in its operation, and he carried it out in multiple federal jurisdictions.⁷⁷ Moreover, there was no question that Smith relocated "to evade law enforcement" since testimony at his sentencing hearing indicated that he "likely knew . . . that federal law enforcement agents had an arrest warrant for [him]."⁷⁸ Thus, *Smith* presents an easy case for both elements of the relocation enhancement. The scheme had a definite, discernable location, and the record provided clear evidence of Smith's intent to evade law enforcement.

The analysis becomes more complicated, however, when the scheme is designed to operate in multiple jurisdictions at once. Imagine that, instead of moving to Florida and continuing the scheme, Smith regularly stole IDs in Iowa and then flew to Florida to make fraudulent purchases. While the scheme in this scenario still operates across jurisdictional lines, it does not appear to have an easily discernable location—it could be "located" in Iowa, in Florida, or in both states at once. Moreover, while Smith likely makes these out-of-state trips to avoid detection, he might not intend "to evade law enforcement" in the sense of avoiding a particular investigation.

On the contrary, this Comment argues that a close reading of these materials can resolve a significant portion of the circuit split. My remark here only notes that the application notes and other explanatory materials provide no direct definitions of what it means to relocate a scheme or evade law enforcement.

⁷² 367 F.3d 737 (8th Cir. 2004), *vacated on other grounds*, 534 U.S. 1103 (2005).

⁷³ *Id.* at 739.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 739–40.

⁷⁷ In fact, Smith did not even dispute the trial court's finding that he relocated the scheme. *See Smith*, 367 F.3d at 740.

⁷⁸ *Id.*

These problems have produced two circuit splits involving the First, Third, Sixth, Seventh, and Eleventh Circuits. Principally, these circuits disagree over what a defendant must do to relocate a multijurisdictional scheme within the meaning of § 2B1.1(b)(10)(A). The circuits also disagree about whether a general intent to avoid detection will suffice under the relocation enhancement or if specific intent is required. Though the opinions do not focus on the second issue, this Comment argues that both issues have important implications for how courts should interpret the relocation enhancement going forward.

A. The Home-Base Approach

Two circuits have advanced what I call the “home-base approach” to address the problem of multijurisdictional schemes. In essence, this approach states that a multijurisdictional scheme is located at the conspirators’ base of operations (the area to which they return after executing the other, discrete parts of the scheme). Accordingly, in order for a defendant to relocate the scheme, she must move the home base across jurisdictional lines.

The Eleventh Circuit first advanced this interpretation with its opinion in *United States v. Morris*.⁷⁹ The scheme at issue in *Morris* centered on credit card fraud. Morris and his coconspirators would steal credit cards and driver’s licenses from health clubs in and around Atlanta, use the cards to fraudulently purchase goods, and then give the goods to a fence (someone who sells stolen goods) in Marietta, Georgia.⁸⁰ Though both Marietta and Atlanta are located in the Northern District of Georgia, one witness testified that Morris and others would occasionally travel to cities in the Middle District of Georgia or to other states to make fraudulent purchases.⁸¹ On this basis, the trial court applied the relocation enhancement to Morris’s sentence.⁸²

The Eleventh Circuit vacated the sentence in part. Because the Guidelines did not define the term “relocate,” the Eleventh Circuit stated that it must give the word its ordinary meaning: to “establish or lay out in a new place.”⁸³ Under this definition, the out-of-town trips made by Morris did not constitute a relocation

⁷⁹ 153 F. App’x 556 (11th Cir. 2005) (per curiam).

⁸⁰ *Id.* at 557.

⁸¹ *Id.* at 558.

⁸² *Id.* at 557–58.

⁸³ *Id.* at 558 (citing *Relocate*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976)).

of the scheme since Morris “always returned to the Northern District of Georgia” and the fence did not change his residence.⁸⁴ Rather, the temporary excursions were “an expansion, and not a relocation, of the conspiracy.”⁸⁵

Though *Morris* is an unpublished per curiam opinion, its reasoning proved to be persuasive when the Seventh Circuit considered the multijurisdictional scheme problem. In *United States v. Hines-Flagg*,⁸⁶ the Seventh Circuit analyzed the relocation enhancement against the backdrop of an identity-theft scheme. Using their home computer in Detroit, Hines-Flagg and her nephew illegally accessed individual credit reports and made fake IDs with the fraudulently obtained information.⁸⁷ They then traveled to neighboring states, opened lines of credit with the fake IDs, purchased goods, and either kept the goods for personal use or sold them once back in Detroit.⁸⁸

The Seventh Circuit held that the relocation enhancement did not apply to the scheme at issue. “We do not believe that this Guideline applies to every fraudulent scheme that just happens to operate in multiple jurisdictions,” the court remarked.⁸⁹ “Hines-Flagg’s scheme was always meant to operate in multiple locations, with Detroit as its home base. . . . Therefore, the scheme was not ‘relocated’ to Wisconsin, Ohio, and Illinois when Hines-Flagg traveled to those locations.”⁹⁰ The court went on to analogize the case to *Morris*, noting that “the fraudulently obtained merchandise was always delivered to, and eventually fenced from,” a particular city in both cases.⁹¹

Having found that the defendants did not relocate a scheme within the meaning of § 2B1.1(b)(10)(A), the *Hines-Flagg* court observed that it “[did] not need to rule on whether any hypothetical relocation was done ‘to evade law enforcement.’”⁹² However, the court went on to note that the facts of the case likely failed the intent element of the relocation enhancement as well. The court noted that “most criminal enterprises are set up to avoid

⁸⁴ *Morris*, 153 F. App’x at 558.

⁸⁵ *Id.*

⁸⁶ 789 F.3d 751 (7th Cir. 2015).

⁸⁷ *Id.* at 793.

⁸⁸ *Id.* at 753–54.

⁸⁹ *Id.* at 755.

⁹⁰ *Id.* (emphasis in original).

⁹¹ *Hines-Flagg*, 789 F.3d at 755–56.

⁹² *Id.* at 756.

getting caught.”⁹³ From this proposition, it reasoned that “application of [the relocation] enhancement requires more than just the operation of a multijurisdictional scheme in order to reduce the chances of detection.”⁹⁴

This reading of the relocation enhancement’s intent requirement is the minority view among federal circuits. In support of its reading, the *Hines-Flagg* court cites *United States v. Paredes*,⁹⁵ a Tenth Circuit case analyzing the relocation enhancement. In *Paredes*, the Tenth Circuit found that the defendant acted with the requisite intent when he “moved from Utah to Idaho because Utah became ‘hot’ after one of the [coconspirators] was arrested.”⁹⁶ But while *Paredes* established that this type of proof of specific intent is *sufficient* to apply the enhancement, it did not decide whether this type of proof would be *necessary* to apply the enhancement, as the Seventh Circuit appears to require. Moreover, many circuits directly disagree with this reading of the intent requirement.⁹⁷

B. The Key-Acts Approach

The First Circuit has advanced a different approach to the multijurisdictional scheme problem. This method—which I call the “key-acts approach”—locates a fraudulent scheme wherever its most important actions take place, as opposed to at a particular fixed base of operations. If the defendant carries out key actions in multiple jurisdictions, then she relocates a scheme within the meaning of § 2B1.1(b)(10)(A).

The First Circuit lays out this interpretation in *United States v. Savarese*.⁹⁸ In *Savarese*, the First Circuit considered a credit card fraud scheme organized by Savarese and his compatriots in Boston. Savarese would travel to different gyms across the country to steal credit cards. He would then fax the credit card information to his coconspirators, who would work with a Boston-based photography studio to create fake IDs matching the stolen

⁹³ *Id.*

⁹⁴ *Id.* (citing *United States v. Paredes*, 461 F.3d 1190, 1192 (10th Cir. 2006)).

⁹⁵ 461 F.3d 1190 (10th Cir. 2006).

⁹⁶ *Id.* at 1192.

⁹⁷ See *United States v. Savarese*, 686 F.3d 1, 16 n.12 (1st Cir. 2012); *United States v. Braxton*, 374 F. App’x 248, 249–50 (3d Cir. 2010) (citing *United States v. Vega-Iturrino*, 565 F.3d 430, 433 (8th Cir. 2009)); *United States v. Hessa*, 464 F. App’x 473, 475 (6th Cir. 2012).

⁹⁸ 686 F.3d 1 (1st Cir. 2012).

credit cards. Finally, some members of the conspiracy would go to racetracks and casinos in different states and withdraw large cash advances with the fraudulently obtained information.⁹⁹

On its face, this fact pattern appears to resemble the one in *Morris*. Both schemes involve going to gyms, stealing credit cards, and then reporting back to a fixed home base. Nonetheless, the First Circuit declined to extend *Morris*'s reasoning to the facts of *Savarese*. Whereas Atlanta served as a main hub for the scheme in *Morris*, in *Savarese* the defendant's Boston base was used to carry out more "tangential elements" of the scheme.¹⁰⁰ "The theft and fraudulent use of the credit cards seems to us at least as critical, if not more so, to the operation's success than any of its other elements," the court reasoned; "indeed, these acts comprised the heart of the enterprise."¹⁰¹ Having found that Savarese's thefts and withdrawals constituted the main part of the scheme and that Savarese conducted these thefts in multiple federal jurisdictions, the First Circuit upheld the application of the relocation enhancement.¹⁰²

The First and Seventh Circuits have taken some steps to minimize the differences between the home-base and key-acts approaches. *Savarese*, for example, specifically "reserve[d] judgment" on the reasoning of *Morris* instead of challenging the case directly, explaining that the transitory thefts in *Morris* were less central to the scheme.¹⁰³ *Hines-Flagg* showed a similar reticence toward challenging *Savarese*, instead noting that, "[w]ere we to use *Savarese*'s approach, Detroit would be 'the heart of th[is] enterprise.'"¹⁰⁴

But these attempts to reconcile the two approaches are unavailing. First, if courts assume that the central hub of a scheme has some independent significance, then the home-base approach must occasionally produce different results than the key-acts approach. Courts could define the scheme's home base in one of two ways: it could either be the place to which the defendants regularly return (as in *Morris* and *Hines-Flagg*)¹⁰⁵ or the place where

⁹⁹ *Id.* at 5–6.

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.*

¹⁰² *Id.* at 15–16.

¹⁰³ *Savarese*, 686 F.3d at 15.

¹⁰⁴ *Hines-Flagg*, 789 F.3d at 756 (second alteration in original) (quoting *Savarese*, 686 F.3d at 15).

¹⁰⁵ See *Morris*, 153 F. App'x at 558; *Hines-Flagg*, 789 F.3d at 755.

the defendants carry out the most important parts of their scheme (as in *Savarese*).¹⁰⁶ If courts adopt the former definition, then the home-base and key-acts approaches will produce different results in cases where the important parts of the scheme take place outside of a central, fixed location. And, if courts adopt the latter definition, then the home-base approach collapses into the key-acts approach; courts will simply locate a scheme where the important actions take place, regardless of whether that place is fixed.

Furthermore, even if we assume that the First, Seventh, and Eleventh Circuits are all applying their own versions of the same test, those versions nevertheless produce substantially different results in application. For example, in *Savarese*, the defendant received the enhancement in part because of his fraudulent credit card use in multiple states,¹⁰⁷ but, in *Hines-Flagg*, the defendant avoided the penalty despite taking the same action.¹⁰⁸ Put another way, even if we assume that the Seventh and Eleventh Circuits' home-base approach could collapse into the key-acts approach, the circuits would need to agree on what constitutes the key acts of each fraudulent scheme in order to fully resolve the circuit split.

Finally, even if the circuits agreed on a method to determine where a scheme is located, they would still disagree over how to interpret the relocation enhancement's intent element. In *Savarese*, the First Circuit read the phrase "to evade law enforcement" as requiring a general intent to evade law enforcement. In its view, the fact that the defendants simply "avoided returning to the same health clubs and gambling establishments" was sufficient evidence to infer the requisite intent.¹⁰⁹ This reading has been adopted by the majority of circuits to consider the issue. The Eighth Circuit has stated that the relocation enhancement does not require "that the relocation be motivated by a 'specific' threat of arrest as opposed to a more general intent to evade law enforcement,"¹¹⁰ and the Third and Sixth Circuits have reached similar

¹⁰⁶ See *Savarese*, 686 F.3d at 15 (noting that the "theft and fraudulent use of the credit cards" constitutes a second central "hub" of the scheme).

¹⁰⁷ *Id.*

¹⁰⁸ *Hines-Flagg*, 789 F.3d at 753 ("Hines-Flagg would travel to other states . . . to open store credit card accounts and shop using the fraudulent identifications.").

¹⁰⁹ *Savarese*, 686 F.3d at 16 n.12.

¹¹⁰ *Vega-Iturrino*, 565 F.3d at 433.

conclusions in unpublished opinions.¹¹¹ But, in *Hines-Flagg*, the Seventh Circuit reached the opposite conclusion, observing that the relocation enhancement requires something more than a general intent to avoid detection.¹¹² Thus, *Hines-Flagg* and *Savarese* clearly differ as written, and aspects of one or the other will need to be modified to resolve the circuit split.

C. The Nature-of-Scheme Approach

Lastly, the Third and Sixth Circuits have advanced what I call the “nature-of-scheme approach.” In contrast to the two previous approaches, the nature-of-scheme approach does not tie the location of a scheme to a fixed home base or set of actions. Rather, the enhancement applies under the nature-of-scheme approach if the crossjurisdictional trips meet certain criteria. For example, if the trips spanned a certain geographic distance or provided a core benefit to the scheme, then the relocation enhancement would apply under the nature-of-scheme approach.

The nature-of-scheme approach was first advanced by the Third Circuit in *United States v. Thung Van Huynh*.¹¹³ *Thung Van Huynh* involved the application of the relocation enhancement to an identity-theft conspiracy. The defendant paid for stolen information from a car dealership in California, used that information to create fake IDs, and gave those IDs to his coconspirators. These coconspirators would then fly to other states, fraudulently purchase Rolex watches, and return to California to fence the goods.¹¹⁴

The scheme in *Thung Van Huynh* bears a striking similarity to the one in *Hines-Flagg*. Both schemes were designed to span multiple jurisdictions, both schemes centered on a home base, and both schemes crossed jurisdictional lines only in order to facilitate fraudulent purchases. Nonetheless, the Third Circuit found that the relocation enhancement applied.¹¹⁵ Unlike *Hines-Flagg*, who

¹¹¹ See *Braxton*, 374 F. App'x at 249–50 (citing *Vega-Iturrino*, 565 F.3d at 433) (“[W]e agree with the Government that the relocation need not be motivated by a *specific threat* of arrest for [the relocation enhancement] to apply.” (emphasis in original)); *Hessa*, 464 F. App'x at 475 (upholding application of the relocation enhancement because the defendant “did not otherwise explain why he was traveling from location to location”).

¹¹² *Hines-Flagg*, 789 F.3d at 756 (“[W]e believe application of [the relocation] enhancement requires more than just the operation of a multi-jurisdictional scheme in order to reduce the chances of detection.”).

¹¹³ 884 F.3d 160 (3d Cir. 2018).

¹¹⁴ *Id.* at 163.

¹¹⁵ *Id.* at 169.

made fraudulent purchases in three contiguous states, nearly all of Thung Van Huynh's targets were "half the country apart."¹¹⁶ Though the Third Circuit noted that "mere geographic distance . . . is not dispositive," it found that the "geographic scope of the conspiracy and the dispersed nature of the locations to which the co-conspirators traveled" mattered for the application of the relocation enhancement.¹¹⁷ In particular, these factors cast doubt on the defendant's argument that the out-of-state trips merely constituted an "expansion of the conspiracy, not a relocation to avoid detection."¹¹⁸ On these grounds, the Third Circuit concluded that the relocation enhancement applied, endorsing the idea that the crossjurisdictional trips themselves—and the distance covered by those trips—can inform the interpretation of the enhancement.¹¹⁹

The Sixth Circuit implemented a much broader version of the nature-of-scheme approach in *United States v. Woodson*.¹²⁰ In *Woodson*, the Sixth Circuit considered a scheme much like the one considered in *Hines-Flagg*—it involved committing fraudulent acts in multiple states and then fencing the ill-gotten goods from a home base.¹²¹ But the Sixth Circuit placed little reliance on precedent from sister circuits, focusing its analysis on the relocation enhancement's text instead. Noting that the word "scheme" commonly refers to "intangible plans and concerted actions between co-conspirators,"¹²² the court found that "a scheme is primarily the criminal agreement between co-conspirators rather than the physical headquarters from which the enterprise operates."¹²³ Reasoning from this definition, the court "decline[d] to adopt a categorical rule that the existence of a base of operations consistently utilized by conspirators to carry out portions of their scheme . . . precludes application of the [relocation] enhancement."¹²⁴ Instead, the court reasoned, "'where travel to other jurisdictions' to

¹¹⁶ *Id.* at 168 (citing Brief for Appellant at 22, *Thung Van Huynh*, 884 F.3d 160 (No. 17-2417)).

¹¹⁷ *Id.*

¹¹⁸ *Thung Van Huynh*, 884 F.3d at 167–68 (quoting Brief for Appellant at 10, *Thung Van Huynh*, 884 F.3d 160 (No. 17-2417)).

¹¹⁹ *Id.* at 168–69.

¹²⁰ 960 F.3d 852 (6th Cir. 2020).

¹²¹ *Id.* at 853.

¹²² *Id.* at 855 (citing *Scheme*, MERRIAM-WEBSTER, <https://perma.cc/6SM5-XFFK>; *Scheme*, DICTIONARY.COM, <https://perma.cc/248B-VT8U>; *Scheme*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

¹²³ *Id.*

¹²⁴ *Id.*

avoid detection by law enforcement is ‘a key component of a fraud scheme,’ the enhancement applies.”¹²⁵ Read literally, this holding would make the relocation enhancement applicable to every scheme designed to operate in multiple jurisdictions.¹²⁶

Like previously discussed cases in the circuit split, both *Thung Van Huynh* and *Woodson* purport to be in accord with at least some of the other approaches advanced by other circuits.¹²⁷ But, as was the case with *Savarese* and *Hines-Flagg*, these claims of accord do not withstand scrutiny. For example, *Thung Van Huynh* states that *Hines-Flagg* and *Morris* are “distinguishable” from the present case because the scheme at issue involved the greater distances between locations.¹²⁸ But, while all three cases distinguish the expansion of a scheme from the relocation of a scheme, *Morris* never references the distance covered by the defendant’s interstate trips, focusing instead on the centrality of the scheme’s home base.¹²⁹ Similarly, the *Woodson* court states that its holding “is in accord with that of the First Circuit in *United States v. Savarese*.”¹³⁰ However, *Savarese* applied the enhancement because the defendant committed the same set of important acts in multiple jurisdictions.¹³¹ *Woodson*, on the other hand, treats relocation itself like the heart of the enterprise—no particular instance of relocation needs to occur because the scheme itself is built on the idea of relocating. Thus, *Thung Van Huynh* and *Woodson* subtly shift the interpretive question from *where* a scheme is located to *how* the defendants set up their multijurisdictional scheme.

¹²⁵ *Woodson*, 960 F.3d at 855 (quoting *United States v. Thornton*, 718 F. App’x 399, 403–04 (6th Cir. 2018)).

¹²⁶ Courts could cabin this interpretation by narrowing the definition of “key component.” *Thornton*, 718 F. App’x at 404. The scheme in *Woodson* involved elaborate jewelry store heists, which required *Woodson* and his coconspirators to interact with store clerks. *Woodson*, 960 F.3d at 853. Because this heist plan “seemingly would only work once in a given area,” relocation could be more central to *Woodson*’s scheme than a run-of-the-mill credit card scam. *Id.* at 856. But the language used in *Woodson* originally comes from a Sixth Circuit case that involved simple thefts and check forgeries. See *Thornton*, 718 F. App’x at 400. If travel across jurisdictions constituted a key component of this scheme, then it could constitute a key component of many multijurisdictional schemes.

¹²⁷ See *Thung Van Huynh*, 884 F.3d at 168 & n.3 (distinguishing *Hines-Flagg* and *Morris*); *Woodson*, 960 F.3d at 885–86 (distinguishing *Savarese*).

¹²⁸ *Thung Van Huynh*, 884 F.3d at 168 & n.3.

¹²⁹ Compare *id.* at 168–69, with *Morris*, 153 F. App’x at 558, and *Hines-Flagg*, 789 F.3d at 755.

¹³⁰ *Woodson*, 960 F.3d at 855.

¹³¹ *Savarese*, 686 F.3d at 15.

Thung Van Huynh and *Woodson* also deepen the circuit split regarding the intent element of the relocation enhancement. Both cases have language favoring a general reading of the intent requirement,¹³² echoing earlier unpublished opinions from the Third and Sixth Circuits favoring this approach.¹³³ But more fundamentally, the nature-of-scheme approach can only work if courts read “to evade law enforcement” as requiring a general intent to avoid detection. To illustrate this point, consider the evidence of intent discussed in *Paredes*. In that case, the court found that the defendant acted with the requisite intent because he crossed jurisdictional lines after his coconspirator’s arrest to avoid a specific law enforcement investigation.¹³⁴ This type of fact pattern could plausibly be read as a necessary condition of the relocation enhancement, which specifically mentions evading law enforcement.¹³⁵ But on the Sixth Circuit’s reading in *Woodson*, the relocation enhancement can apply to a defendant as soon as she forms a plan that centers on moving between federal districts. At this point, her actions could not relate to any specific law enforcement investigation into the planned scheme—her plan has yet to get underway. To sustain the Sixth Circuit’s reading of § 2B1.1(b)(10)(A), therefore, we must read the phrase “to evade law enforcement” as referring to a general desire to avoid detection.

III. INTERPRETING THE RELOCATION ENHANCEMENT

This Part uses interpretive tools to determine how to apply the relocation enhancement. Part III.A employs textual analysis,

¹³² See *Thung Van Huynh*, 884 F.3d at 169 (citing *Savarese*, 686 F.3d at 16 n.12) (“Further supporting the District Court’s determination that the scheme was relocated to evade the authorities was Huynh’s decision, with one exception, to target each store only once.”); *Woodson*, 960 F.3d at 856 (finding that the defendant and his coconspirators possessed the requisite intent because “their scheme seemingly would only work once in a given area. . . . Relocating to different jurisdictions to avoid detection was thus an integral part of Woodson’s criminal conduct”). Notably, the *Thung Van Huynh* court observed that the evidence on the record could satisfy *Hines-Flagg*’s heightened intent requirement, given the defendant’s elaborate travel plans and the fact that he left states after encountering law enforcement on multiple occasions. *Thung Van Huynh*, 884 F.3d at 169. But *Thung Van Huynh* also cites *Savarese*’s intent analysis with approval, suggesting that more general showings of intent could suffice in the future. *Id.* (citing *Savarese*, 686 F.3d at 16 n.12).

¹³³ See *supra* note 111.

¹³⁴ *Paredes*, 461 F.3d at 1192.

¹³⁵ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(A) (U.S. SENT’G COMM’N 2018) (applying a sentencing enhancement if “the defendant relocated . . . a fraudulent scheme to another jurisdiction to evade law enforcement”).

focusing in particular on the canon of statutory surplusage. The canon has the clearest implications for the intent requirement of the relocation enhancement. Specifically, the canon demonstrates that the relocation enhancement requires something more than a general intent to evade law enforcement. In addition, the canon shows that the sophisticated-means enhancement already contemplates punishing multijurisdictional schemes more harshly.

The remaining sections use additional materials to flesh out these points. Part III.B draws on Commission commentary to establish what level of intent the relocation enhancement requires, concluding that a defendant must “know or suspect that [law] enforcement authorities have discovered the scheme” before the enhancement can apply.¹³⁶ Part III.C then explores some existing scholarship on deterrence and detection avoidance. This literature shows that the sophisticated-means enhancement is better suited for deterring the creation of multijurisdictional schemes than the relocation enhancement is, favoring a more cabined interpretation of the relocation enhancement.

A. Textual Interpretation

1. The plain meaning of the relocation enhancement.

Two decisions in the circuit split over multijurisdictional schemes—*Morris* and *Woodson*—place a large emphasis on dictionary definitions and the ordinary meaning of the relocation enhancement.¹³⁷ Ironically, these two cases reach opposite conclusions about what the enhancement requires. This divergence results from each circuit employing a cabined method of textual analysis, focusing on only some of the text at issue. In *Morris*, the Eleventh Circuit focused on the definition of the word “relocate” when analyzing the relocation enhancement, and it found that the word ordinarily means to “establish or lay out in a new place.”¹³⁸ In order for something to have been laid out in a new place, the object must have had a concrete location in the first place. Unsurprisingly, then, the *Morris* court focused its analysis on where the scheme was located, ultimately locating the scheme

¹³⁶ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003).

¹³⁷ See *Morris*, 153 F. App’x at 558; *Woodson*, 960 F.3d at 855.

¹³⁸ *Morris*, 153 F. App’x at 558 (quoting *Relocate*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976)).

at a fixed home base.¹³⁹ In contrast, the Sixth Circuit in *Woodson* drilled down on the definition of the word “scheme” and found that the word referred to “intangible plans and concerted actions between co-conspirators.”¹⁴⁰ Because a scheme is intangible, the Sixth Circuit found that relocating a scheme did not require the defendant to move a tangible, fixed home base. Instead, the relocation enhancement applies whenever travel to other jurisdictions is a “key component” of the scheme.¹⁴¹ In short, these circuits’ constructions of the relocation enhancement largely turned on which word—“relocate” or “scheme”—they chose to emphasize.

The obvious solution to this problem would be to have courts consider the definitions of both words at once when interpreting the relocation enhancement. But this proposal comes with its own problems. A significant tension exists between the dictionary definitions of the words “relocate” and “scheme.” If “relocate” means “to lay out in a new place,” then the object being relocated must have some sort of identifiable location in the first place; but how can one localize a “scheme” if it entirely consists of intangible plans? The problem is by no means insuperable. Courts could assign a fixed location to an amorphous entity through a court-created rule, like the Supreme Court did by confining a corporation’s residence to its “nerve center” for purposes of personal jurisdiction.¹⁴² But no such rule exists for the relocation enhancement; dictionary definitions, standing alone, cannot provide one.

A plain meaning approach to relocation enhancement’s intent element creates similar problems. The meaning of the phrase “to evade law enforcement” contains some ambiguity, as it could refer to the general avoidance of law enforcement authorities or the specific choice to flee a particular group of pursuers.¹⁴³ Again,

¹³⁹ *Id.* at 558 (finding the relocation enhancement inapplicable because the “[d]efendant always returned to the Northern District of Georgia”).

¹⁴⁰ *Woodson*, 960 F.3d at 855 (citing *Scheme*, MERRIAM-WEBSTER, <https://perma.cc/6SM5-XFFK>; *Scheme*, DICTIONARY.COM, <https://perma.cc/248B-VT8U>; *Scheme*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

¹⁴¹ *Id.* (quoting *United States v. Thornton*, 718 F. App’x 399, 403–04 (6th Cir. 2018)).

¹⁴² See *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010). One can imagine a court—or the Commission—handing down a similar rule regarding the location of a fraudulent scheme. In fact, I propose such a rule below to resolve the relocation circuit split. See *infra* Part IV.B.

¹⁴³ See *Evade*, MERRIAM-WEBSTER, <https://perma.cc/RD8D-Y8J9> (noting that “evade” can be a transitive or intransitive verb); *Law Enforcement*, BLACK’S LAW DICTIONARY (11th ed. 2019) (noting that “law enforcement” can refer to “[t]he detection and punishments of violations of the law” or “[p]olice officers and other members of the executive branch . . . charged with carrying out and enforcing the criminal law”).

different courts have different intuitions about which definition of “to evade law enforcement” should prevail in this context.¹⁴⁴ Moreover, the intent provision does not have a common law history that courts can draw upon, and it does not employ terms of art to differentiate between levels of intent.¹⁴⁵ As a result, courts have to turn to more complex methods of interpretation to determine the meaning of the relocation enhancement’s intent element.

2. Canons of statutory interpretation.

When dictionary definitions fail to solve an interpretive problem, judges will often turn to canons of statutory interpretation.¹⁴⁶ These canons act as “rules of thumb . . . that help users of legal language discern meaning.”¹⁴⁷ Though some of these rules of thumb prove more divisive than others, many judges—including textualists—maintain that certain canons are valid interpretive tools,¹⁴⁸ and they continue to use them frequently when settling interpretive questions.¹⁴⁹ This includes questions surrounding the interpretation of sentencing enhancements.¹⁵⁰

¹⁴⁴ Compare *Hines-Flagg*, 789 F.3d at 756 (“[M]ost criminal enterprises are set up to avoid getting caught. Based upon the plain language of the Guideline, we believe application of this enhancement requires more than just the operation of a multi-jurisdictional scheme in order to reduce the chances of detection.”), with *Savarese*, 686 F.3d at 16 n.12 (“The evidence supports an inference that the defendants avoided returning to the same health clubs . . . because the likelihood of detection would otherwise have increased substantially.”).

¹⁴⁵ For an example of a system that links certain intent requirements to particular terms of art, see MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1985) (using the words “purposely,” “knowingly,” “recklessly,” and “negligently” to define different levels of mens rea).

¹⁴⁶ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 663 (1990) (“The new textualists . . . seek a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism.”); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 79 (2018) (“Interpretive canon use is associated with textualist approaches to statutory interpretation.”).

¹⁴⁷ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465 n.285 (2003).

¹⁴⁸ See Eskridge, *supra* note 146, at 663–64. For a list of canons endorsed by two prominent textualists, see generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

¹⁴⁹ See Mendelson, *supra* note 146, at 99 (“Majority opinions [in the first decade of the Roberts Court] considered . . . at least one canon in roughly 70% of contested statutory issues.”).

¹⁵⁰ See, e.g., *United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020) (citing *United States v. Soberanes*, 318 F.3d 959, 963 n.4 (9th Cir. 2003)) (“Canons of statutory construction can also guide the interpretation [of the Sentencing Guidelines].”).

One canon frequently employed by judges is the canon of statutory surplusage.¹⁵¹ The surplusage canon counsels that “every word and every provision in a legal instrument is to be given effect.”¹⁵² In the context of § 2B1.1(b)(10), only one enhancement can apply to a defendant’s case.¹⁵³ Therefore, the surplusage canon would advise courts to prevent the three relevant enhancements—the relocation enhancement, the international enhancement, and the sophisticated-means enhancement—from becoming redundant or subsuming one another. Note that this canon applies not only to each enhancement taken as a whole but also to each word within each enhancement. If an interpretation reads a word or clause out of a statute by making it redundant or nugatory, it violates the surplusage canon.¹⁵⁴

Applying this canon helps elucidate the intent element of the relocation enhancement. As noted in Part II, several circuits read the phrase “to evade law enforcement” to merely require a general intent to evade law enforcement.¹⁵⁵ But the relocation enhancement is the only provision in § 2B1.1(b)(10) to include the phrase “to evade law enforcement.”¹⁵⁶ Therefore, in order for the general-intent reading of the relocation enhancement to withstand scrutiny under the surplusage canon, it must give the phrase a meaning independent from the intent requirements of the international and sophisticated-means enhancements. Otherwise, there would be no need to include the phrase at all.

The general-intent reading fails this test. The sophisticated-means enhancement already requires this type of general intent to avoid detection. The application notes to § 2B1.1(b)(10) state that the conduct constituting sophisticated means must “pertai[n] to the execution or concealment of an offense.”¹⁵⁷ And while all

¹⁵¹ See SCALIA & GARNER, *supra* note 148, at 174 (noting that the surplusage canon is a valid interpretive tool for all texts); Mendelson, *supra* note 146, at 101 tbl.1 (showing that the surplusage canon was the third-most discussed canon in the first decade of the Roberts Court, appearing in 13.2% of cases involving contested statutory issues).

¹⁵² *Surplusage Canon*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Yates v. United States*, 574 U.S. 528, 543 (2015) (“We resist a reading of [a provision] that would render superfluous an entire provision passed in proximity as part of the same Act.”).

¹⁵³ See U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 cmt. (U.S. SENT’G COMM’N 2003) (noting that § 2B1.1(b)(10) includes “three alternative provisions”).

¹⁵⁴ See SCALIA & GARNER, *supra* note 148, at 176 (“Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.”).

¹⁵⁵ See *supra* notes 132–35 and accompanying text.

¹⁵⁶ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(A) (U.S. SENT’G COMM’N 2018).

¹⁵⁷ U.S. SENT’G GUIDELINES MANUAL § 2B1.1 cmt. n.9(B) (U.S. SENT’G COMM’N 2018).

aspects of a scheme's execution may not specifically aim at detection avoidance, they all generally help the schemers maintain a low profile. Many courts recognize this reality in practice, noting that concern about the concealment of crime is the driving force behind the sophisticated-means enhancement.¹⁵⁸ Thus, a general-intent reading of the phrase "to evade law enforcement" would essentially read the phrase out of § 2B1.1(b)(10), something which the surplusage canon forbids.

The surplusage canon also sheds some light on what it means to relocate a multijurisdictional scheme. Recall that the Sixth Circuit has held that the relocation enhancement can apply based on the nature of the scheme alone—if the scheme centers on travel between federal jurisdictions, the relocation enhancement applies.¹⁵⁹ But the application notes to § 2B1.1(b)(10) explain that these types of schemes could just as easily be subject to the sophisticated-means enhancement. The notes state, in pertinent part: "[I]n a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means."¹⁶⁰ Unsurprisingly, many courts have read this language to mean that any type of multijurisdictional operation can satisfy the sophisticated-means enhancement.¹⁶¹ Reading the

¹⁵⁸ See *United States v. Valdez*, 726 F.3d 684, 695 (5th Cir. 2013) (reversing application of the sophisticated-means enhancement because "there is no indication that" the defendant's conduct "could have made it more difficult for his offense . . . to be detected"); *United States v. Mendez*, 420 F. App'x 933, 938 (11th Cir. 2011) ("In each case in which we have upheld the application of a sophisticated-means enhancement, the defendant used false identities, fraudulent accounts, or fictitious entities to conceal his participation in the scheme or to execute and conceal the fraudulent transactions."); *United States v. Hulse*, 989 F. Supp. 2d 1224, 1226 (M.D. Ala. 2013) ("[I]t appears that concealment from authorities is at the core of [the] sophisticated-means enhancement.").

¹⁵⁹ *Woodson*, 960 F.3d at 855. While *Thung Van Huynh* also follows the nature-of-scheme approach, it does not demand the same type of categorical result. *Thung Van Huynh*, 884 F.3d at 169 (holding that "the District Court did not clearly err in considering the geographic scope of the conspiracy"). But an extension of its principles would arguably lead to the same result that *Woodson* reaches. Even if the travel between jurisdictions needs to meet some nebulous distance requirement before the relocation enhancement can apply, the test still allows courts to apply the enhancement based on the mere existence of a multijurisdictional scheme.

¹⁶⁰ U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.9(B) (U.S. SENT'G COMM'N 2018).

¹⁶¹ See *United States v. Johnson*, 732 F. App'x 638, 663 (10th Cir. 2018) ("[S]omething as simple as [a] multi-state location may constitute 'sophisticated means.'" (second alteration in original) (quoting No. 11-501, 2016 WL 4120778, at *6 (D. Utah July 28, 2016))); see also *United States v. Evano*, 553 F.3d 109, 112–13 (1st Cir. 2009) (holding that a multi-state fraud operation involved sophisticated means); *United States v. Jenkins*, 578 F.3d

relocation enhancement to apply in the same way—as the Third and Sixth Circuits do—renders the provision largely superfluous.

Of course, the surplusage canon is not the only available interpretive canon. The Third and Sixth Circuit could parry this analysis with a countercanon. For example, these circuits could observe that § 2B1.1(b)(10) provides for an increased sentencing level if the relocation enhancement applies “or [] the offense otherwise involved sophisticated means.”¹⁶² Invoking the canon of *noscitur a sociis*, they could then argue that relocating a scheme is just one of many sophisticated means, allowing the provisions to overlap.¹⁶³ I could parry, in turn, with a counter-countercanon of *eiusdem generis*, noting that courts generally disfavor using general terms to govern the construction of specific provisions,¹⁶⁴ and so on. This sort of back-and-forth illustrates Professor Karl Llewellyn’s well-known criticism that “there are two opposing canons on almost every point.”¹⁶⁵ I maintain that the surplusage canon predominates in this exercise, but reasonable minds could disagree.

At the very least, the surplusage canon highlights two things that courts should keep in mind when interpreting the relocation enhancement within § 2B1.1(b)(10). First, courts cannot read the relocation enhancement to merely require a general intent to avoid detection; the government must make a greater showing of intent in order for the enhancement to apply. This insight affirms the Seventh Circuit’s reading of the intent element¹⁶⁶ while disputing the contrary reading advanced by the First, Third, and Sixth Circuits.¹⁶⁷ Second, courts can still address the dangers posed by multijurisdictional schemes through the sophisticated-means enhancement. In fact, a court might have stronger textual

745, 751–52 (8th Cir. 2009) (same); *United States v. Gadsden*, 628 F. App’x 639, 642 (11th Cir. 2015) (same).

¹⁶² U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10)(C) (U.S. SENT’G COMM’N 2018).

¹⁶³ See *Noscitur a sociis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[T]he meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it.”).

¹⁶⁴ See *Yates*, 574 U.S. at 545 (“[W]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (first alteration in original) (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003))).

¹⁶⁵ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

¹⁶⁶ See *supra* notes 93–94 and accompanying text.

¹⁶⁷ See *supra* notes 110–12 and accompanying text.

grounds to apply this enhancement to multijurisdictional schemes, since the commentary on the sophisticated-means enhancement appears to specifically contemplate multijurisdictional coordination.¹⁶⁸ Thus, prosecutors in the Third and Sixth Circuits could maintain the practical effects of *Thung Van Huynh* and *Woodson* by seeking alternative enhancements.

B. Amendment Notes to the Relocation Enhancement

The foregoing textual analysis demonstrates that the relocation enhancement requires something more than a general intent to avoid detection, but it does not clarify what that something more should be. This textual analysis thus leaves courts and prosecutors with an important question: What showing of intent needs to be made before the relocation enhancement can apply?

The Commission's explanation for adding the relocation enhancement to the Guidelines provides an answer. As mentioned in Part I.B, the advisory notes to § 2B1.1(b)(10) do not provide any concrete definitions for the terms "relocate a scheme" or "to evade law enforcement."¹⁶⁹ But application notes do not represent the entirety of the Commission's statements on any particular guideline. The Commission also provides amendment notes when it proposes an amendment to the Guidelines, explaining the need for and the rationale behind the new amendment. While these amendment notes do not appear as part of the commentary following each individual guideline, they are submitted to Congress during the amendment process.¹⁷⁰ Therefore, amendment notes reflect the official position of the Commission and can lend some insight into the interpretive problems surrounding the Guidelines.

Viewed in this light, the notes to Amendment 577—the amendment implementing § 2B1.1(b)(10)—help resolve the circuit split surrounding the intent element of the relocation enhancement. The notes state that "testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that [law] enforcement authorities have discovered the scheme. [This] type[] of conduct [is] specifically covered by the

¹⁶⁸ See U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.9(B) (U.S. SENT'G COMM'N 2018).

¹⁶⁹ See *supra* note 71 and accompanying text.

¹⁷⁰ 28 U.S.C. § 994(p) (allowing the Commission to amend the Guidelines and requiring that "an amendment or modification [] be accompanied by a statement of the reasons therefor").

new enhancement.”¹⁷¹ These comments confirm what the surplusage canon suggested: the relocation enhancement requires more than a general desire to avoid detection. In fact, they call for something close to specific intent. On the Commission’s reading, the defendant must flee across jurisdictional lines while knowing or suspecting that she is under a law enforcement investigation. Moreover, this intent to avoid detection must arise from the specific scheme at issue; the enhancement would not apply to defendants who make an elaborate scheme because they know or suspect that they are already under investigation for something else.

If amendment notes were simply a piece of legislative history, then they would not be given much weight by courts. But the Commission is a federal agency, and agency interpretations of their own rules receive considerable deference from courts. More specifically, under *Auer v. Robbins*,¹⁷² agency interpretations of their own rules are given controlling weight unless they are “plainly erroneous or inconsistent with the regulation.”¹⁷³ This standard is extremely deferential to federal agencies, matching the deference accorded to agency interpretations of statutes under the *Chevron* standard.¹⁷⁴ And, in *Stinson v. United States*,¹⁷⁵ the Supreme Court held that courts should show similar deference to Commission commentary regarding the Guidelines.¹⁷⁶ Thus, courts have firm ground to read the relocation enhancement as

¹⁷¹ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003).

¹⁷² 519 U.S. 452 (1997).

¹⁷³ *Id.* at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (Brennan, J., concurring)). The Supreme Court recently clarified that agency interpretations will only receive *Auer* deference if the interpretation at issue remains “genuinely ambiguous” after courts “exhaust all the ‘traditional tools’ of construction.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). “To make that effort, a court must ‘carefully consider[]’ the text, structure, history, and purpose of a regulation.” *Id.*, 139 S. Ct. at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). The relocation enhancement remains genuinely ambiguous after using these tools. *See supra* Introduction (examining history); *supra* Part III.A.1 (examining text); *supra* Part III.A.2 (examining structure through canons); *infra* Part III.C (examining purpose). Even if this were not the case, the Commission’s amendment note would still have the “power to persuade,” given its thorough consideration by the Commission and its consistency over time. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

¹⁷⁴ *See Kisor*, 139 S. Ct. at 2416 (“Under *Auer*, as under *Chevron*, the agency’s reading must fall ‘within the bounds of reasonable interpretation.’” (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013))).

¹⁷⁵ 508 U.S. 36 (1993).

¹⁷⁶ *See id.* at 45 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

applying only to cases where the defendant relocates a scheme to avoid a known or suspected law enforcement investigation.¹⁷⁷

Admittedly, *Stinson* involved a different form of Commission guidance than the amendment notes examined here. In *Stinson*, the Court evaluated a formal application note that the Sentencing Commission intended to clarify a particular guideline.¹⁷⁸ The amendment notes evaluated in this Comment, by contrast, is an appendix entry merely explaining why the Commission chose to amend the Guidelines.

The Guideline Manual itself belies this distinction, however. “Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines,” the manual states.¹⁷⁹ “These are to be construed as commentary and thus have the force of policy statements.”¹⁸⁰ In light of these statements, it is unsurprising that federal courts show deference to explanatory amendment notes when interpreting their corresponding guidelines.¹⁸¹

Thus, both the surplusage canon and relevant Commission statements suggest that the relocation enhancement requires specific intent. To the extent that the First, Third, and Sixth Circuits suggest otherwise, they are mistaken. This observation proves especially problematic for the nature-of-scheme approach advanced by the Third and Sixth Circuits, as I will discuss in further detail below.¹⁸²

C. Deterrence, Linkage, and Recursivity

The textual analysis in Part III.A also demonstrates that courts may not need to use the relocation enhancement to punish multijurisdictional schemes. Instead, courts can—and, to a

¹⁷⁷ Granted, *Stinson* predated the sweeping changes made to the federal sentencing landscape by *Booker* and its progeny. But the decision remains good law; federal circuit courts continue to cite the decision with approval. *See, e.g.*, *United States v. Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020); *United States v. Henry*, 968 F.3d 1276, 1282 (11th Cir. 2020).

¹⁷⁸ *Stinson*, 508 U.S. at 39.

¹⁷⁹ U.S. SENT’G GUIDELINES MANUAL § 1B1.7 cmt. (U.S. SENT’G COMM’N 2018).

¹⁸⁰ U.S. SENT’G GUIDELINES MANUAL § 1B1.7 cmt. (U.S. SENT’G COMM’N 2018).

¹⁸¹ *See United States v. Diaz-Diaz*, 135 F.3d 572, 581 (8th Cir. 1998) (holding that a court must adhere to an amendment’s explanatory notes unless they are “plainly at odds with the Guidelines”). For examples of circuit courts using amendment notes to interpret the Guidelines, *see United States v. Ladeau*, 688 F. App’x 342, 349–50 (6th Cir. 2017); *United States v. Clayton*, 172 F.3d 347, 355 (5th Cir. 1999).

¹⁸² *See infra* Part IV.A.

certain extent, already do—punish multijurisdictional schemes through the sophisticated-means enhancement. I argue here that this is a positive aspect of § 2B1.1(b)(10). Not only does the sophisticated-means enhancement have a better textual justification for addressing multijurisdictional schemes than the relocation enhancement,¹⁸³ but it can also better effectuate the purposes of § 2B1.1(b)(10). Therefore, to the extent that the overlap between the relocation enhancement and the sophisticated-means enhancement poses a problem for courts, they should resolve it by limiting the application of the former and expanding the application of the latter.

The clearest purpose underlying the § 2B1.1(b)(10) enhancements appears to be deterrence of concealment efforts, also known as “detection avoidance.”¹⁸⁴ The statute that led to the creation of the relocation enhancement—the Telemarketing Fraud Prevention Act of 1998 (TFPA)—instructed the Commission to “provide an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts.”¹⁸⁵ The Commission then added the language found at § 2B1.1(b)(10) to the Guidelines, noting that it did so to increase sentences “for fraud offenses that involve conduct . . . that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender.”¹⁸⁶ While the TFPA also put forward some retributivist reasons for increasing fraud crime sentences,¹⁸⁷ these purposes can be accounted for by different sentencing enhancements,¹⁸⁸ and there is little reason to think that the § 2B1.1(b)(10) enhancements effectuate a separate retributivist purpose. As such, the practical value of

¹⁸³ See *supra* text accompanying notes 160–61.

¹⁸⁴ See generally Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006).

¹⁸⁵ Telemarketing Fraud Prevention Act § 6(c)(2), 112 Stat. at 521.

¹⁸⁶ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT’G COMM’N 2003).

¹⁸⁷ See Telemarketing Fraud Prevention Act § 6(c)(3), 112 Stat. at 521 (instructing the Commission to “provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims . . . are affected by a fraudulent scheme”); see also H.R. REP. NO. 105-158, at 2–3 (1997), as reprinted in 1997 U.S.C.C.A.N. 227, 228 (citing a need to protect “elderly victims” and “strike[] back at crooked telemarketers” to justify the passage of the TFPA).

¹⁸⁸ See, e.g., U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(9)(A) (U.S. SENT’G COMM’N 2018) (providing for increased penalties if a fraud offense involved “a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency”).

the enhancements should be judged by how well they deter detection avoidance.

This purpose fits squarely within the law-and-economics view of criminal justice, which focuses on deterrence.¹⁸⁹ Generally speaking, economic models of crime view criminality as the result of a cost-benefit analysis, where expected costs are a function of the probability of getting caught and the penalty that will result.¹⁹⁰ Efforts to avoid detection—like scheme relocations or the use of sophisticated means—affect this model by reducing the probability of getting caught, thereby decreasing the expected costs of crime and increasing the expected return for criminal acts. Accordingly, to deter would-be fraudsters, the government should increase the penalties for defendants who have engaged in detection avoidance in order to bring the expected return on crime back down to zero.¹⁹¹

At first glance, each enhancement in § 2B1.1(b)(10) adheres closely to this framework. Each enhancement deals with an action that reduces a defendant's chances of getting caught and increases her expected return from fraudulent activity. The enhancements, in turn, subject defendants to longer sentences when they take these actions by increasing their recommended sentencing ranges. In theory, then, all three enhancements would drive down the expected return of fraudulent schemes, deterring rational actors from taking part in these schemes in the first place.

The effectiveness of a sentencing enhancement, however, can turn on how and when it takes effect. Professor Miriam Baer's account of the "linkage" factor provides a clear example of this

¹⁸⁹ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) ("[A]n increase in a person's probability of conviction or punishment if convicted would generally decrease . . . the number of offenses he commits."); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1243–46 (1985) (explaining that "the optimal sanction" is higher when the probability of apprehending a criminal is lower or the benefits from crime are greater).

¹⁹⁰ See Becker, *supra* note 189, at 176–77.

¹⁹¹ Notably, this model assumes that fraudsters are aware of the sentencing enhancements and make rational decisions in light of how those enhancements could apply. This is a strong assumption, and even some law-and-economics scholars have begun to question whether potential offenders can accurately weigh the costs and benefits of crime. See Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1538–41 (1998). But the assumption is thought to be more palatable in the context of fraud crimes, where would-be perpetrators generally plan their schemes with an eye toward maximizing their expected return. See Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1309–10 (2008).

principle. Linkage, as Baer defines it, is “the extent to which the cessation of new criminal conduct increases the perceived likelihood of detection and punishment for previous instances of criminal conduct.”¹⁹² This linkage effect will be especially pronounced for “mid-fraud perpetrators,” since fraudsters in the midst of a scheme often must rely on continuing criminal acts to prevent the discovery of past criminal acts.¹⁹³ In these cases, increased sanctions will have a very low deterrent effect on the defendant. At this point, she will no longer weigh the expected penalty against the expected reward. She will instead weigh the expected costs of giving up (which have just been increased by the enhancement) against the expected costs of continuing with the scheme (which will be heavily discounted).¹⁹⁴ This skewed balancing calculation will likely come out in favor of continued criminality.

In addition, sentencing enhancements that target detection avoidance can foster more detection avoidance once incurred. Professor Chris William Sanchirico notes that when defendants face additional penalties for concealing wrongdoing, a small amount of concealment will beget more concealment.¹⁹⁵ Sanchirico elaborates:

This is what people do. They do not simply lie. They lie about lying. And if you accuse them of that, they lie about lying about lying. . . . Cover-up is covered up in a chain of effectively infinite length: a chain, that is, always one link longer than the pursuer is willing to follow it.¹⁹⁶

Thus, sentencing enhancements that punish midscheme cover-ups foster future criminality in two ways. They encourage

¹⁹² Baer, *supra* note 191, at 1321.

¹⁹³ *See id.* at 1329. Baer bases this observation in part on the continuing presence of the defendant at the corporation she is defrauding and on repeat interactions between the defendant and her victims. *Id.* at 1326–29. These characteristics may not be present in credit card schemes, like the ones at issue in several of the circuit-split cases. *See id.* at 1328–29 (“[T]here are numerous crimes (including many variations of online or credit card frauds) for which the perpetrator’s absence decreases the likelihood of detection.”). But other aspects of those schemes can create a linkage problem, such as the ease of committing federal fraud crimes and the difficulty of terminating a multijurisdictional scheme. *See id.* at 1322–26. Moreover, § 2B1.1(b)(10) would apply equally to the types of workplace fraud that Baer contemplates in her article. *See* U.S. SENT’G GUIDELINES MANUAL app. A (U.S. SENT’G COMM’N 2018) (connecting wire fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and securities fraud (18 U.S.C. § 1348) to the provisions of § 2B1.1).

¹⁹⁴ *See* Baer, *supra* note 191, at 1330–32.

¹⁹⁵ *See* Sanchirico, *supra* note 184, at 1368–69.

¹⁹⁶ *Id.* at 1367–68.

defendants to carry on with their schemes and to engage in higher-order cover-ups.

In light of these observations, the relocation enhancement provides the least deterrent benefit out of the enhancements in § 2B1.1(b)(10), since it can only take effect during the course of the scheme. The typical defendant presumably chooses to operate out of another country or use sophisticated means at the outset of her scheme. But, under the Commission's reading of the relocation enhancement, a defendant can only relocate her scheme to avoid a known or suspected investigation once that scheme has gotten underway.¹⁹⁷ Accordingly, the relocation enhancement's deterrent effects will be mitigated by the strong linkage effects and the recursive nature of detection avoidance. If courts want to effectuate the deterrent purposes of § 2B1.1(b)(10), they should instead focus on the international and sophisticated-means enhancements, which defendants can consider before they begin committing fraudulent acts. Readings that make more liberal use of these provisions, therefore, should generally be favored over readings that make liberal use of the relocation enhancement.

IV. PROPOSED SOLUTIONS TO THE CIRCUIT SPLITS

This final Part walks through three specific recommendations that follow from the analysis in Part III. First, Part IV.A argues that courts should reject the nature-of-scheme approach advanced by the Third and Sixth Circuits. Put simply, their approach conflicts with the construction of the relocation enhancement suggested by the use of the surplusage canon and the Commission's amendment note, which calls for specific intent to evade law enforcement.

This observation, however, does not completely settle the circuit split. The two remaining approaches—the home-base approach and the key-acts approach—can both coexist with a specific-intent requirement. To address this lingering conflict, Part IV.B proposes a new standard for applying the relocation enhancement to multijurisdictional schemes. Specifically, the relocation

¹⁹⁷ Granted, this understanding assumes that the statutory canons and Commission amendment note discussed above control the meaning of the relocation enhancement. On a contrary view—like the nature-of-scheme approach—a defendant could make choices at the outset of her scheme that would trigger the relocation enhancement. *See infra* text accompanying note 200. Even so, most cases involving the relocation enhancement should involve decisions made during the course of the scheme, and the aforementioned deterrence issues will continue to pose a problem in these cases.

enhancement should only apply when a defendant (1) commits an act of deception, (2) flees across jurisdictional lines to avoid a specific law enforcement investigation, and (3) begins deceiving new victims in another district. This rule adds consistency and clarity to this area of criminal sentencing while limiting the applicability of the relocation enhancement to obvious cases.

Finally, Part IV.C shows that courts can engage in something like the nature-of-scheme analysis while applying the sophisticated-means enhancement. This approach allows courts to adequately deter sophisticated fraud schemes through legal arguments that stand on much firmer ground. But courts should take care to not read the sophisticated-means enhancement too broadly, as doing so could reintroduce surplusage problems or render the enhancement meaningless. This Part concludes with an example of a multijurisdictional scheme that should receive neither the relocation nor the sophisticated-means enhancement.

A. Courts Should Reject the Nature-of-Scheme Approach

As made clear by the preceding Part, courts should avoid applying the relocation enhancement based on a showing of general intent. The home-base and key-acts approaches advanced in the circuit split can accommodate this instruction.¹⁹⁸ The nature-of-scheme approach, however, cannot coexist with a specific-intent requirement. Recall that the nature-of-scheme approach structurally depends on a general-intent reading of the relocation enhancement.¹⁹⁹ If the relocation enhancement applies whenever “travel to other jurisdictions . . . is a key component of [the] fraud scheme,”²⁰⁰ then the enhancement can apply to schemes that have been planned but not yet executed. But law enforcement cannot investigate a scheme that has yet to get underway, nor could any defendant know or suspect that law enforcement is onto her fraudulent scheme before the scheme begins. It follows that any future plans to establish a multijurisdictional scheme could not be motivated by a specific intent to hide that very scheme from a specific investigation. Thus, the specific-intent requirement stands in tension with the notion that the relocation enhancement can apply to any scheme that centers on multijurisdictional

¹⁹⁸ See *infra* Part IV.B.

¹⁹⁹ See *supra* text accompanying notes 132–35.

²⁰⁰ *Woodson*, 960 F.3d at 855 (quoting *United States v. Thornton*, 718 F. App'x 399, 403–04 (6th Cir. 2018)).

travel. To the extent that the Third and Sixth Circuits advance that notion, they are mistaken.

A few caveats bear mentioning here. In some unique circumstances, a defendant might have a specific intent to evade law enforcement at the outset of her scheme. For example, a defendant could reasonably know or suspect that law enforcement is investigating her for a different reason, and she could set up a multi-jurisdictional scheme in response to that fear. But, on the Commission's reading, the relocation enhancement applies "once [the defendant] know[s] or suspect[s] that [law] enforcement authorities have discovered *the scheme*" at issue,²⁰¹ not when the defendant suspects that she is being investigated for something else. This scenario, therefore, does not dispute the foregoing analysis.²⁰²

Of course, the planning of the scheme is, in some sense, a part of the scheme. Law enforcement could, therefore, investigate the scheme during its planning phase, and the relocation enhancement could arguably apply to the defendant if she crossed jurisdictional lines specifically to avoid that investigation. But this observation does not license the conclusion that the Third and Sixth Circuits reach. These circuits would apply the enhancement so long as the scheme involved relocation between jurisdictions in the future, regardless of whether the defendant actively sought to avoid law enforcement during its planning stages. That outcome remains unaddressed by this observation, and it remains fundamentally at odds with the relocation enhancement's structure and the Commission's amendment note. As such, future courts should reject this reading.

B. Courts Should Apply the Relocation Enhancement to a Narrow Set of Multijurisdictional Schemes

Rejecting the nature-of-scheme approach does not completely resolve the circuit split; future decisions could still be torn between the home-base approach and the key-acts approach. This Section will attempt to settle this additional dispute by adopting a modified version of the key-acts approach that ensures

²⁰¹ U.S. SENT'G GUIDELINES MANUAL app. C, amend. 577 (U.S. SENT'G COMM'N 2003) (emphasis added).

²⁰² Granted, courts will have to determine whether this second, multijurisdictional scheme is truly a new scheme in its own right or merely a continuation of a previous scheme. If it is a continuation of a previous scheme, then the relocation enhancement could apply. But again, this does not challenge the foregoing analysis, since, by hypothesis, the relocation takes place during the middle of the scheme.

consistency in sentencing and avoids the problems involved with broader constructions.

I begin by noting that the First and Seventh Circuits—the main proponents of the key-acts and home-base approaches, respectively—maintain different ideas about what the intent element of the relocation enhancement requires. The First Circuit’s decision in *Savarese* held that a general intent to avoid detection can suffice, while the Seventh Circuit’s decision in *Hines-Flagg* called for something more.²⁰³ For reasons I have discussed at length, I believe that the Seventh Circuit has the better side of the argument, and the First Circuit should revise its doctrine accordingly.

But this observation does not imply that courts should reject *Savarese* in its entirety. Nothing in the First Circuit’s reasoning intrinsically links the defendant’s intent to the location of the fraudulent scheme in the way that the nature-of-scheme approach links the two. To put it another way, a court can argue that a scheme is located where its key acts take place under either theory of intent without creating a contradiction. If the relocation enhancement calls for specific intent, the First Circuit can save most of *Savarese* by simply analyzing intent more carefully going forward. The same holds true of the home-base approach: courts can reason that a scheme is located at its base of operations regardless of whether the relocation enhancement calls for a showing of general or specific intent. Thus, the relocation enhancement’s specific-intent requirement can rule out only the nature-of-scheme approach; it cannot decide between the two remaining approaches without invoking some other consideration.

When considered on their own merits, both the home-base approach and the key-acts approach leave something to be desired. The key-acts approach has a strong intuitive appeal. If a scheme is a set of “intangible plans and concerted actions between co-conspirators,”²⁰⁴ then one might imagine that a scheme is located where those plans and actions are carried out. But *Savarese* does not provide a good theory for what qualifies as a “key act” under its standard, and that ambiguity invites different courts to interpret the standard in different ways. We can already see this happening within the circuit split itself: *Savarese* suggests that the “theft and fraudulent use of [] credit cards” constituted “the

²⁰³ Compare *Savarese*, 686 F.3d at 16 n.12, with *Hines-Flagg*, 789 F.3d at 756–57.

²⁰⁴ *Woodson*, 960 F.3d at 855.

heart of [Savarese's] enterprise,"²⁰⁵ while *Hines-Flagg*—which also involved identity theft and credit card fraud—found that “the heart of [Hines-Flagg's] enterprise” was her home base in Detroit.²⁰⁶

These divergent results prove especially troubling because the Guidelines were designed to avoid this sort of result. The Commission's enabling statute states that the Guidelines should “provide certainty and fairness in meeting the purposes of sentencing” and “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”²⁰⁷ But if courts continue to interpret the key acts of a fraud scheme in divergent ways, then disparities will arise. Defendants will face different sentences based solely on where they happen to stand trial. This result directly contravenes the purpose of the Guidelines, and it should be avoided through the use of clearer standards.

The home-base approach, at first glance, appears to provide these clearer standards. If a scheme revolves around a central, permanent base of operations, courts should be able to identify that hub—and any relocations of that hub—fairly easily. But this approach could create some absurd results if taken to its logical extreme. Consider a version of the scheme in *Hines-Flagg* in which the defendants both stole identities and made fraudulent purchases in other states before returning to Detroit. Detroit would still be the only fixed location in the scheme, but virtually no part of the fraudulent scheme would occur there—at most, the defendants would sell some fraudulently purchased goods while back home. Moreover, if courts attempted to solve the problem by only calling a location the home base of the scheme if certain fraudulent activities occur there, then the home-base approach would collapse into the key-acts approach, reintroducing all the aforementioned consistency problems. What actions would qualify? How would courts ensure consistency across different schemes and different circuits? The current cases provide no answer.

Ultimately, courts will need to turn to an external definition or rule in order to solve these problems. I propose the following

²⁰⁵ *Savarese*, 686 F.3d at 15.

²⁰⁶ *Hines-Flagg*, 789 F.3d at 753, 756.

²⁰⁷ 28 U.S.C. § 991(b)(1)(B); *see also* 28 U.S.C. § 994(f) (requiring the Commission to pay “particular attention to the requirements of [28 U.S.C. § 991(b)(1)(B)] for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities”).

rule: a fraudulent scheme is located wherever a member of that scheme deliberately deceives another for personal gain. Therefore, if a defendant deceives someone in one federal district, flees that district because of a known or suspected law enforcement investigation, and then takes up her deception in a new district, the relocation enhancement applies.

This rule has three prominent strengths. First, the rule would ensure a high degree of consistency and fairness in this area of criminal sentencing. Because the rule draws upon carefully and narrowly defined factors, judges should find it easy to apply in an efficient and impartial manner. Moreover, while the statutory elements of various fraud crimes can differ in important ways,²⁰⁸ each one should, by definition, involve an element of deception,²⁰⁹ making my rule generally applicable to all types of fraud offenses.

Second, this rule would lessen the application of the relocation enhancement to multijurisdictional schemes, which should prove beneficial for both the clarity of legal doctrine and overall criminal deterrence. For the reasons discussed in Part III.A, the relocation enhancement proves particularly difficult to parse when applied to schemes that span multiple jurisdictions by design. In addition, the relocation enhancement has a number of shortcomings when it comes to deterring future criminal activity, as explained in Part III.C. Taken together, these realities counsel in favor of limiting the relocation enhancement's applicability to

²⁰⁸ Compare 18 U.S.C. § 1343 (allowing a conviction for wire fraud if the defendant “transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any [communications] for the purpose of executing [a] scheme”), with 18 U.S.C. § 1028(a) (allowing a conviction for identity theft if the defendant “knowingly transfers, possesses, or uses, without lawful authority” another person’s identification or a false identification document).

²⁰⁹ Cf. *Fraud*, MERRIAM-WEBSTER, <https://perma.cc/6GUH-ANZJ> (defining the word as “an act of deceiving or misrepresenting”). In mail- and wire-fraud cases, the defendant’s act—communication via the mail or wires—only needs to be “in furtherance” of the fraudulent scheme. Skye Lynn Perryman, *Mail and Wire Fraud*, 43 AM. CRIM. L. REV. 715, 726–27, 726 nn.75–78 (2006) (collecting cases). That is, the communication “need not be an essential element of the scheme. . . . It is sufficient for the [communication] to be ‘incident to an essential part of the scheme,’ or ‘a step in [the] plot.’” *Schmuck v. United States*, 489 U.S. 705, 710–11 (1989) (third alteration in original) (citation omitted) (first quoting *Pereira v. United States*, 347 U.S. 1, 8 (1954); and then quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Most of these communications should still involve some element of deception, whether that relates to obtaining valuable goods or concealing the scheme. Perryman, *supra*, at 723. But, in any case, a communication sufficient to give rise to a mail- or wire-fraud conviction would suffice to meet the “act of deception” requirement in my proposed test.

the situations it was originally meant to cover, and my proposed rule accomplishes that task.

Finally, this rule can draw on the other provisions of § 2B1.1(b)(10) to shore up its inherent limitations. For example, one drawback of the proposed rule, which it shares with all clear-cut legal rules, is that it will sometimes prove underinclusive. Many illegal components of a scheme—such as the creation of fake IDs—could be relocated across jurisdictional lines without triggering the relocation enhancement under my proposed construction. But these actions would be subject to enhanced penalties under the sophisticated-means enhancement, which provides the same increase in offense level and (presumably) the same deterrent effect, a point on which I elaborate in the next Section.

C. Courts Should Apply the Sophisticated-Means Enhancement to Multijurisdictional Schemes

Up to this point, my proposals have largely been grounded in doctrine. But criminal sentencing should also attend to practical concerns. After all, multijurisdictional schemes will almost certainly persist and continue to harm the public, and the solution advanced in this Comment seems to prevent the relocation enhancement from addressing that problem. My solution, therefore, arguably trades deterrent potential for doctrinal cleanliness.

Courts do not have to choose between a clear doctrine and effective deterrent measures, however. They can achieve both by addressing multijurisdictional schemes through the sophisticated-means enhancement. This enhancement allows courts to increase a defendant's sentence if she intentionally engaged in conduct constituting "especially complex or especially intricate"²¹⁰ ways of committing fraud. Courts have already applied this enhancement to certain multijurisdictional schemes,²¹¹ and they can continue to do so without muddying the analytical waters surrounding the relocation enhancement.

The facts of *Thung Van Huynh* illustrate this point. Recall that the case involved a scheme in which coconspirators would fly to far-off states, steal luxury watches using fraudulent information, and return to California to sell them.²¹² The Third Circuit held that the relocation enhancement applied, reasoning that the

²¹⁰ U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.9(B) (U.S. SENT'G COMM'N 2018).

²¹¹ See *supra* note 161.

²¹² *Thung Van Huynh*, 884 F.3d at 163.

“geographic scope” between jurisdictions provided some proof that the crossjurisdictional trips constituted a relocation of the scheme, as opposed to a mere “expansion of [] operations.”²¹³ But this reading does violence to the common meaning of the word “relocate.” The distance between states should not influence whether Thung Van Huynh relocated the scheme across jurisdictional lines; either he moved the scheme or he didn’t. Moreover, if we extend the reasoning employed by the Third Circuit in this case, we could reach a decision very much like *Woodson*, which would create serious surplusage problems for the relocation enhancement. Finally, even if the case sidestepped these issues, it would still face linkage and recursivity problems, which encourage “mid-fraud perpetrators” to avoid detection by committing additional criminal acts.²¹⁴

Instead, the sentencing court could have simply relied on the sophisticated-means enhancement. The key question under this framework would have been whether the airline trips made the scheme more intricate or complex than similar schemes. This question is much more tractable than the question of where a multijurisdictional scheme is really located. Furthermore, the enhancement could have applied based on the initial decision to use interstate travel in the scheme, allowing the enhancement to avoid the linkage problem. Thus, using the sophisticated-means enhancement in this case would have provided a cleaner doctrinal answer and also increased the deterrent effect of the sentencing enhancement.

In fact, a court could almost rehabilitate *Woodson*’s nature-of-scheme approach through use of the sophisticated-means enhancement. All that a court would need to do is hold that setting up a multijurisdictional scheme categorically constitutes the use of sophisticated means. The court would have a colorable legal argument for doing so: the commentary to § 2B1.1(b)(10) appears to provide some justification for this stance,²¹⁵ and some courts have already suggested such a rule.²¹⁶

²¹³ *Id.* at 168.

²¹⁴ See *supra* notes 192–97 and accompanying text.

²¹⁵ See U.S. SENT’G GUIDELINES MANUAL § 2B1.1 cmt. n.9(B) (U.S. SENT’G COMM’N 2018) (“[I]n a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means.”).

²¹⁶ See *supra* note 161.

I would caution against applying the enhancement quite so broadly, however, since broad application of a guideline can have adverse consequences. For example, if courts read the sophisticated-means enhancement to apply to every case involving multijurisdictional travel, then they will reintroduce a surplusage problem into § 2B1.1(b)(10). On this view, every case that would fall under the relocation enhancement would necessarily fall under the sophisticated-means enhancement as well. Since both enhancements carry the same increase in offense levels,²¹⁷ this reading would leave the relocation enhancement with no legal effect.

Furthermore, reading the sophisticated-means enhancement too broadly could render the enhancement itself meaningless. Baer has already voiced concerns about the overuse of the sophisticated-means enhancement. She notes that actions which “appeared particularly complicated back in 1998 [when § 2B1.1(b)(10) was issued]” could be carried out by “amateurs” today.²¹⁸ But she also observes that the use of the sophisticated-means enhancement has grown precipitously in recent years,²¹⁹ perhaps because courts continue to rely on outdated notions of what constitutes an “especially complex or [] intricate” means of committing fraud.²²⁰ The similar overuse of the “more than minimal planning” enhancement—the predecessor to the sophisticated-means enhancement—led the Commission to repeal the enhancement since it “no longer divided the ‘really sophisticated schemers from the mass of ordinary thieves.’”²²¹ If current trends continue, the sophisticated-means enhancement could meet the same fate.

Thus, a narrow range of multijurisdictional schemes should receive neither the relocation enhancement nor the sophisticated-means enhancement. The Third Circuit case of *United States v. Braxton*²²² provides an example of this type of scheme. In *Braxton*, the defendant made fraudulent purchases at Home Depot stores in six different states.²²³ She accomplished this by buying a \$30 prepaid card and destroying its magnetic strip, allowing her to

²¹⁷ U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT’G COMM’N 2018).

²¹⁸ Baer, *supra* note 62, at 66.

²¹⁹ *Id.* at 69 & tbl.1.

²²⁰ *Id.* at 66–67 (quoting U.S. SENT’G GUIDELINES MANUAL § 2B1.1 cmt. n.9 (U.S. SENT’G COMM’N 2018)).

²²¹ *Id.* at 64 (quoting Frank O. Bowman III, *Coping with “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 499 (1998)).

²²² 374 F. App’x 248 (3d Cir. 2010).

²²³ *Id.* at 248–49.

make purchases beyond the card limit.²²⁴ The Third Circuit found that the relocation enhancement applied to the defendant's sentence, but it relied on a general-intent reading to reach this result²²⁵—something that my reading would not allow. The sophisticated-means would also not apply to this case on my view. Though the scheme involves multijurisdictional travel, there is nothing especially elaborate about altering a single prepaid card and presenting it for fraudulent purchases. Accordingly, courts should avoid imposing enhanced sentences on defendants like Braxton, regardless of which provision of § 2B1.1(b)(10) they choose to invoke.

CONCLUSION

To summarize, courts should change their approach to interpreting § 2B1.1(b)(10) in three ways. First, courts should reject the nature-of-scheme approach advanced by the Third and Sixth Circuits. This approach, which holds that the relocation enhancement applies “where travel to other jurisdictions’ to avoid detection by law enforcement is ‘a key component of a fraud scheme,’”²²⁶ requires courts to give the relocation enhancement a general-intent reading. This result would contravene the text, structure, and history of the relocation enhancement.

Second, courts should formulate a clear legal rule regarding where a fraudulent scheme is located for purposes of § 2B1.1(b)(10). My proposed rule—a fraudulent scheme is located wherever a member of that scheme deliberately deceives another for personal gain—would provide some much-needed clarity and consistency in this area of federal sentencing. On this view, courts would only apply the relocation enhancement when a defendant deliberately deceived a victim in one jurisdiction, grew to suspect an investigation into her scheme, moved to a new jurisdiction in light of that suspected investigation, and committed an act of deception again in the new jurisdiction.

Finally, courts should use the sophisticated-means enhancement to address the dangers posed by multijurisdictional schemes. The sophisticated-means enhancement provides a more tractable legal standard for courts to apply, and it will generally

²²⁴ *Id.*

²²⁵ *Id.* at 249–50.

²²⁶ *Woodson*, 960 F.3d at 855 (quoting *United States v. Thornton*, 718 F. App'x 399, 403–04 (6th Cir. 2018)).

produce a greater deterrent effect on crime going forward. But courts should temper this enthusiasm with a keen eye for what really counts as “especially complex” conduct in the modern day.

APPENDIX: U.S. SENTENCING TABLE

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life