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Principal Deputy Assistant Attorney General
Glenn Leon
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U.S. Department of Justice Criminal Division
950 Pennsylvania Avenue, N.W.
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Via email: Glenn.Leon@usdoj.gov

Re: Follow-Up from the Victims' Families on a Fine and Related Issues
U.S. v. Boeing, No. 4:21-cr-005 (Fort Worth Div. - N.D. Tex)

Dear Nicole and Glenn (if I may, and please continue to call me Paul),

I write on behalf of my clients (referred to here as "the families") in response to your email requesting information about the losses (and gains) from Boeing's crimes and how this information might factor into fines and related issues. As explained in more detail below, Boeing's crime produced losses in excess of $12,390,000,000, meaning the maximum possible fine is $24,780,000,000. Because Boeing's crime is the deadliest corporate crime in U.S. history, a maximum fine of more than $24 billion is legally justified and clearly appropriate, although it might be partially suspended if funds that would otherwise be paid are devoted to appropriate quality control and safety measures. This letter explains the calculations underlying this conclusion and further sets out the families' views more broadly on how Boeing and responsible corporate executives should be prosecuted.

In overview, as explained in greater detail in my letter to you of June 4, the families continue to believe the appropriate action now is an aggressive criminal prosecution of The Boeing Company. The Justice Department should promptly ask Judge O'Connor to schedule a date for a jury trial within seventy days of July 7, 2024—as required by the Speedy Trial Act. In requesting a quick jury trial, the Department should note the families' right, as embodied in the Crime Victims' Rights Act (CVRA), to proceedings free from unreasonable delay. If Boeing requests plea negotiations, the

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Department should not offer Boeing any concessions. If the Department seems likely to reach a tentative agreement with Boeing on plea concessions, the families request an opportunity to exercise their right under the CVRA to confer with the Department about any possible concessions. *See* 18 U.S.C. § 3771(a)(5) & (9).

Once Boeing is convicted at trial (or by pleading guilty "straight up" to the pending conspiracy charge), then it should receive a sentence reflecting its guilt for the deadliest corporate crime in U.S. history. It should be fined the maximum—$24,780,000,000—with perhaps $14,000,000,000 to $22,000,0000,000 of the fine suspended on the condition that Boeing devote those suspended funds to an independent corporate monitor and related improvements in compliance and safety programs as identified below. And Boeing's Board of Directors should be ordered to meet with the families.

The families also believe that the Department should launch criminal prosecutions of the responsible corporate officials at Boeing at the time of the two crashes, including in particular former Boeing CEO Dennis Muilenburg. Because time is of the essence to avoid any statute of limitations from running, the Department should begin these prosecutions promptly.

In writing this letter, I need to continue to note the families' disappointment that the May 31 conferral was, as with earlier purported "conferrals," perfunctory and non-informative. Nothing in this letter concedes that the Department has appropriately discharged its responsibility to reasonably confer with the families. The families hope that the Department will be more forthcoming in future discussions, because as of this date the Department has said so little regarding salient issues.

I also need to highlight that your email continues to refer to the families as representing "crash victims." They represent "*crime* victims"—as Judge O'Connor has specifically found by overruling your contrary position. You should follow the law of the case and refer to the families with the legally proper designation. *Cf.* 18 U.S.C. § 3771(a)(8) (prosecutors must treat crime victims "with fairness and with respect for the victim's dignity").

<u>How the Department's Prosecution of The Boeing Company Should Proceed</u>

At the May 31 meeting, the Department noted that (theoretically speaking) the Department has four options for how it could now proceed against Boeing, the corporation. At the meeting, the Department also suggested its focus would be on Option 4—criminal prosecution of Boeing. The families continue to agree with the well-

supported view that, among the four options, only criminal prosecution is an appropriate way forward.

The families' view was supported in a Senate hearing yesterday. While a full transcript is not yet available, press reports indicate that Senator Richard Blumenthal, who chairs the Senate's Permanent Subcommittee on Investigations, called the criminal proceeding a "moment of reckoning" for Boeing and concluded there was significant evidence that the U.S. Justice Department should pursue prosecution against Boeing. "As a former federal prosecutor and state attorney general, I think that the evidence is near-overwhelming to justify that prosecution," Senator Blumenthal said. *See* David Shepardson & Allison Lampert, *Boeing CEO Dave Calhoun Blasted in US Senate Hearing While Apologizing for Safety Woes,* Reuters (June 18, 2024).[1]

In their earlier June 4 letter, the families spelled out how your prosecution of Boeing should proceed:

- The Department should reject Boeing's pending "appeal" of the breach decision.

- The Department should then request a quick scheduling conference with Judge O'Connor (before July 7).

- At the scheduling conference, the Department should request that Judge O'Connor set a trial date for a jury trial within seventy days of July 7, 2024.

- The Department should also remind Judge O'Connor that the victims have a CVRA right to proceedings "free from unreasonable delay." 18 U.S.C. § 3771(a)(7). After the Department's filing supporting the families' CVRA right, the families would then quickly make a filing supporting the Department's request for a prompt trial date. Such supportive filings would mark one of the first times in this case that the Department and the families stood on the same side of an important issue.

- The Department should then prepare for the trial, including preparing to use Boeing's "confession" (i.e., Boeing's agreement with the statement of facts in the DPA that it committed the conspiracy crime, *see* DPA ¶ 2). The Department should also immunize pilot Mark Forkner and other mid-level executives to get full information from them about how the conspiracy was orchestrated by top-

[1] *See* https://www.reuters.com/business/aerospace-defense/boeing-ceo-face-harsh-senate-questions-new-whistleblower-claims-2024-06-18/.

level executives. *Cf.* Andrew Tangel & Dave Michaels, *Inside DOJ's Wrenching Decision on Whether to Prosecute Boeing*, WALL ST. J. (June 17, 2024) ("Some prosecutors wanted to probe whether the company or its executives defrauded investors by denying problems with the 737 MAX's safety, according to people familiar with the discussions, but supervisors told them to focus on Mark Forkner, a pilot in charge of dealing with certain Federal Aviation Administration officials on training matters.").

- DOJ should not offer any concessions in plea bargaining—if Boeing desires to change its current not-guilty plea, it should plead guilty "straight up." While plea bargaining often occurs in other less serious and weaker cases, in this case, any further concessions to Boeing would be entirely gratuitous and inappropriate. As found by Judge O'Connor, this case concerns the deadliest corporate crime in U.S. history. A single conspiracy charge for fraud in a case revolving around 346 deaths is already extremely lenient treatment for such an extraordinarily serious crime. Against that backdrop, any further leniency through plea concessions would be utterly inappropriate. In addition, given Boeing's "confession" to all the relevant facts of the crime—signed by its CEO, *see* DPA at 26—the risk of an acquittal at trial is essentially nonexistent. No weakness in the case can justify any plea concessions, let alone material ones.

- If the Department nonetheless decides to discuss a tentative plea agreement with concessions to Boeing, the Department should then immediately confer with the families about those concessions before presenting them to Judge O'Connor. The families have a right under the CVRA to confer about any anticipated plea. *See* 18 U.S.C. § 3771(a)(5) & (9). To be clear, as of today, the families have no inkling about what a possible plea agreement might specifically look like. Hence, the May 31 meeting did not even begin to satisfy their promised CVRA right to confer about a possible plea.

- After Boeing is convicted, the families and the Department should confer further about the appropriate sentence for Boeing. For example, following a guilty verdict at trial (or Boeing's straight-up guilty plea), the families and the Department should confer about the size of the fine to recommend for Boeing and whether the sentence, as a condition of probation, should include an independent monitor of Boeing's safety efforts. Boeing's sentence should reflect the most recent Department guidelines on corporate prosecution (the "Monaco Memorandum"), which states that it is the Department's policy to make aggressive use of corporate monitors and otherwise to prosecute white-collar crimes aggressively. Boeing should not be given special treatment. In addition, as

noted above, the fine calculation and other related Sentencing Guidelines issues need to reflect the proven fact that Boeing lied and, as a direct and proximate consequence, people died.

- One last overarching point: any resolution of the case that fails to reflect that Boeing killed 346 people dishonors the crime victims' memory—and the families will vehemently and appropriately object to any resolution that does not acknowledge Boeing's responsibility for criminally killing their loved ones. As discussed at the May 31 meeting, Boeing's sentence on the existing fraud charge can reflect that responsibility. Accordingly, whether the Department decides to file manslaughter or criminally negligent homicide charges against Boeing does not control this important point.

The Fine Range – Loss Calculation Generally

On June 12, 2024, in a follow-up email to the families' earlier June 4 letter, you asked for information from the families about a possible fine and restitution if Boeing were to plead guilty. Of course, I have had limited time to respond to your request, which asked for that information within just four workdays. These issues are typically deferred until after a defendant is convicted. But I write to provide some initial thoughts for your consideration, which are subject to revision as the families receive more information. The families also have a right to confer with the Fraud Section's lawyers about all these issues.

The basic fine for an organization like Boeing is up to $500,000. *See* 18 U.S.C. § 3571(c)(3). But in cases like this one, the "alternative fines" provision, 18 U.S.C. § 3571(d), immediately comes into play. That provision allows a fine based on twice the gross gain or twice the gross loss from the crime:

> (d) Alternative Fine Based on Gain or Loss.—
>
> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than *the greater of twice the gross gain or twice the gross loss*, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d) (emphasis added).

During the May 31 meeting, you presented to the families a possible fine calculation resting on the DPA's calculation of the applicable U.S. Sentencing Guidelines (hereinafter "Guidelines" or "USSG"). In the DPA, the parties agreed that:

> The Fraud Section and the Company agree that application of the Sentencing Guidelines to determine the applicable fine range yields the following analysis:
>
> a. The 2018 USSG are applicable to this matter.
>
> b. Offense Level. Based upon USSG § 2B1.1, the total offense level is 34, calculated as follows:

(a)(2) Base Offense Level	6
(b)(1)(N) Gain of More Than $150,000,000	+26
(b)(10) Sophisticated Means	+2
TOTAL	34

> Base Fine. Based upon USSG § 8C2.4(a)(2), which imposes a base fine equal to the pecuniary gain to the organization from the offense if such gain is greater than the amount indicated in the Offense Level Fine Table, the base fine is $243,600,000 (representing Boeing's cost-savings, based on Boeing's assessment of the cost associated with the implementation of full-flight simulator training for the 737 MAX).
>
> Culpability Score. Based upon USSG § 8C2.5, the culpability score is 5, calculated as follows:

(a) Base Culpability Score	5
(b)(4) The organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense	+2
(g)(2) The organization cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	-2
TOTAL	5

> Calculation of Fine Range:

Base Fine $243,600,000
Multipliers 1.0 (min) / 2.0 (max)
Fine Range $243,600,000 / $487,200,000

DPA ¶ 9.

Of course, the families were not consulted by the parties about their secret DPA—a DPA that Judge O'Connor found to have been consummated in violation of the families' CVRA rights. And while the Department tentatively agreed in the DPA to a fine range based on a gain of merely a quarter of a billion dollars (*e.g.*, $243,600,000), that agreement is not controlling now. As the DPA itself provides: "[N]othing in this Agreement shall be deemed an agreement by the Fraud Section that $243,600,000 is the maximum penalty that may be imposed in any future prosecution, and the Fraud Section is not precluded from arguing in any future prosecution that the Court should impose a higher fine, although the Fraud Section agrees that under those circumstances, it will recommend to the Court that any amount paid under this Agreement should be offset against any fine the Court imposes as part of a putative future judgment." DPA ¶ 11.

Surprisingly, the DPA used "gain" rather than "loss" to determine the Guideline range—and thus the ultimate fine range.[2] Yet under the Guidelines, it is clear that "[t]he court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." USSG § 2B1.1, App. Note 3(B). Nothing in the DPA suggests that the loss from Boeing's conspiracy crime could not be reasonably determined—particularly with the resources the Department has available to investigate the loss issue. Moreover, in determining loss, "[t]he court need only make a reasonable estimate of the loss. The sentencing judge is uniquely positioned to assess the evidence and estimate the loss based upon that evidence." USSG § 2B1.1, App. Note 3(B) (citing 18 U.S.C. § 3742(e) and (f)). Thus, the sentencing court is not required to calculate the loss with specificity; rather "[t]he court need only make a reasonable estimate of the loss, given the information available." *United States v. Masek*, 588 F.3d 1283, 1287 (10th Cir. 2009).

Perhaps the most remarkable thing about the DPA's fine calculation is that it failed to reflect that Boeing killed 346 innocent victims. Of course, Judge O'Connor has now specifically found that Boeing's conspiracy "directly and proximately harmed" 346

[2] The DPA calls what is, for all practical purposes, a "fine" a "criminal monetary penalty" because, technically speaking, Boeing was not being fined under the DPA. *See* DPA, ¶ 9. For simplicity here, I will just refer to the calculation as a "fine" calculation.

people—indeed, it caused their deaths. *United States v. Boeing*, No. 4:21-cr-0005-O, Dkt. 116 at 16-18 (N.D. Tex. 2022). As Judge O'Connor found (over your and Boeing's misguided oppositions), "In sum, but for Boeing's criminal conspiracy to defraud the FAA, 346 people would not have lost their lives in the crashes." *Id.* at 16. The salient fact in this case is not complicated: *Boeing lied, people died.* Indeed, as Judge O'Connor subsequently explained, "Boeing's crime may properly be considered *the deadliest corporate crime in U.S. history*." Dkt. 185 at 25 (emphasis added) (citing other corporate crime cases with fewer deaths). That staggering loss should be reflected in the sentence in this case—including in the fine. Indeed, it would be morally reprehensible if the criminal justice system was incapable of capturing the enormous human costs of Boeing's crime.

Notably, in previous court proceedings, Boeing has resisted conceding that its crime harmed the families. But yesterday, in the Senate hearing on the subject, Boeing's current CEO, Dave Calhoun, seemingly took a direct tack. As he began his remarks to the Senators, he rose and turned to face the victims' families. He then stated: "Before I begin my opening remarks, I would like to speak directly to those who lost loved ones on Lion Air Flight 610 and the Ethiopian Airlines Flight 302. I would like to apologize on behalf of all of our Boeing associates spread throughout the world, past, and present, *for your losses*. They are gut-wrenching. And I apologize for the grief that we have caused …. And so, again, I'm sorry."[3]

Candidly, the families are skeptical of Mr. Calhoun's apparent contriteness while the cameras were running. While yesterday Boeing's CEO said he was sorry, in January 2023, Boeing sent its high-powered (and highly paid) legal defense team to Texas to enter a plea of "not guilty" to the charges against Boeing. *See* Dkt. 179. It was hard to understand then how this could possibly square with Boeing's commitments in the DPA, which included a promise never to make any public statement contradicting its acceptance of responsibility for the conspiracy crime. See DPA ¶ 32. And then later last year, Boeing's legal team travelled to the Fifth Circuit in Louisiana, where it told that court that the families were "not the direct and proximate victims" of Boeing's conspiracy crime. *In re Ryan et al.*, No. 23-10168, Boeing Company Resp. to Petn. at 26 (Mar. 27, 2023). If Mr. Calhoun is doing more than just posturing for the cameras, then he should quickly travel to the district court in Texas and change Boeing's plea to the pending conspiracy charge from "not guilty" to "guilty."

[3] While no transcript is yet available, CEO Calhoun's remarks can be viewed on a video available at https://www.reuters.com/business/aerospace-defense/boeing-ceo-face-harsh-senate-questions-new-whistleblower-claims-2024-06-18/.

At the May 31 meeting, I pointed out that the Department's $243,600,000 fine calculation failed to include any estimate of what Boeing has just conceded were the "gut-wrenching" losses from the deadliest corporate crime in U.S. history. As I remember your (Glenn's) response during the meeting, it was that you would carefully consider my point and look at a loss calculation that included losses to the families. I know the families would like to see the Department's calculation for *their* losses. Surely the Department will agree that Boeing's crime produced substantial losses to the 346 victims and their families. Indeed, in the very first sentence of its very first filing on these issues, the Department conceded as much. *See* Dkt. 58 at 1 ("The United States of America … recognizes the *indescribable and irreparable losses* suffered by the representatives of eighteen crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 … and the *losses* suffered more generally by the loved ones of the 346 people who perished on those flights. Nothing will ever make up for these *losses*" (emphases added).

It is also important for the Department to be willing to invest time and resources to reasonably calculate the loss from Boeing's crime. To be sure, if calculating that loss would "unduly complicate or prolong" the sentencing process, then it might be appropriate to rely instead on a gain calculation. *See* 18 U.S.C. § 3572(d). But whether something "unduly" extends the process is a determination that must be made within the context of a particular criminal case. In calculating a reasonable loss figure for the deadliest corporate crime in U.S. history, the Department owes the families at least some modest investment of time and resources.

Against this backdrop, the families' legal team has been working on calculating a reasonable loss. Multiple approaches are possible to calculate the losses from Boeing's conspiracy crime. One conservative approach is as follows:

Boeing Criminal Monetary Penalty Calculation Data: Losses

Description	Amount	Reference
Deaths of 346 persons: pecuniary	3,633,000,000	U.S. Department of Transportation Valuation of a Statistical Life, 2018[1]
737 MAX customer loss considerations[2]	8,757,000,000	Form 10-K, Boeing, Dec. 31, 2020 at p. 35-36
Total loss estimate	***12,390,000,000***	

[1] Available at https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.

Actual losses may be significantly greater; the reinsurance industry reported $3 billion loss estimates for the crashes of Lion Air flight 610 and Ethiopian Airlines flight 302. Boeing loss surges to ~$3bn, hammering reinsurers and retro market, October 21, 2022, available at https://www.insuranceinsider.com/article/2as5uzoqyfoje80q6g934/london-market-section/boeing-loss-surges-to-3bn-hammering-reinsurers-and-retro-market.

The victims' families can provide a sampling of Boeing's reports of economic losses to families, where such reports have been produced in litigation, upon request.

[2] In 2019 customer considerations was an estimated $8.259 billion. In 2020, this was an estimated $498 million. 737 MAX "customer considerations" reflect the estimated "concessions and other considerations to customers for disruptions related to the 737 MAX grounding and associated delivery delays." Boeing to Recognize Charge and Increased Costs in Second Quarter Due to 737 MAX Grounding, July 18, 2019, available at https://boeing.mediaroom.com/2019-07-18-Boeing-to-Recognize-Charge-and-Increased-Costs-in-Second-Quarter-Due-to-737-MAX-Grounding.

As shown in the table above, these calculations are based primarily on a U.S. Department of Transportation report and Boeing's own admissions and, in any event, cannot be seriously disputed as minimum, conservative calculations.[4] These calculations produce a reasonable loss figure of $12,390,000,000—which is justified for the reasons explained in the following sections.

[4] Boeing may attempt to argue that the loss figures for the Lion Air crash are significantly lower than for the Ethiopian Airlines crash, based on lower civil settlements in the Lion Air cases. But any such argument would simply reinforce the view that Boeing has potentially committed crimes in securing inappropriately low settlements in Indonesia. I understand that another attorney with great familiarity with the Lion Air settlements (Sanjiv Singh) has provided the Department with a dossier providing actionable information about Boeing's potential crimes in Indonesia, which the Department should aggressively pursue.

Loss Calculation – Valuing Losses to the Families

As calculated in the table above, it is possible to quantify the gross losses to the families through the use of the Value of a Statistical Life (VSL) methodology. The U.S. Department of Transportation VSL measure is a conventional approach for calculating the benefit of preventing a fatality. In 2013, the Transportation Department issued a comprehensive memorandum on the subject and thereafter has updated its VSL figures annually. *See* U.S. Dept. of Transportation, Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses (Feb. 28, 2013) (hereinafter "Transportation Dept. VSL Memo.").[5] Notably, the Federal Aviation Administration (FAA) has implemented the Transportation Department's approach. *See* FAA, Treatment of the Values of Life and Injury in Economic Analysis (n.d.) ("This section … is based on guidance furnished by the Office of the Secretary of Transportation (OST) …. This guidance provides recommendations to all modal administrators on the treatment of the values of life … in economic analyses.").[6] Because Boeing's crime caused two crashes in late 2018 and early 2019, the families conservatively use the 2018 valuation calculated by the Transportation Department. The Justice Department should give due weight to the Transportation Department's (and FAA's) adoption of VSL, because these are sister federal agencies with considerable expertise in this area.

A loss calculation based on VSL is appropriate for calculating Boeing's fine. In calculating the "gross loss" from Boeing's crime (18 U.S.C. § 3571(d)), it is important to understand that § 3571(d)'s plain language does not limit the applicable loss to a "pecuniary" loss. The alternative fine provision has two parts—what can be described as a "trigger mechanism" and a "penalty calculator." Broken into those two parts, the statute reads:

[5] The memorandum is available at https://www.transportation.gov/sites/dot.gov/files/docs/VSL%20Guidance_2013.pdf.

[6] The FAA guidance is available at https://www.faa.gov/sites/faa.gov/files/regulations_policies/policy_guidance/benefit_cost/econ-value-section-2-tx-values.pdf.

Trigger Mechanism

If any person derives pecuniary gain from the offense, or if the offense results in *pecuniary loss* to a person other than the defendant, …

Penalty Calculator

… the defendant may be fined not more than the greater of twice the gross gain or twice the *gross loss*, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. §3571(d) (emphasis added) (provision broken into two sections).

Boeing may try to argue that the second half of the provision—the penalty calculator--should be read as though it were written as follows: "the defendant may be fined not more than the greater of twice . . . the gross *pecuniary* loss …." Congress did not write the statute that way; the word "pecuniary" simply does not appear in the penalty calculator. Any effort to restrict the "gross loss" provision to "gross pecuniary losses" should be rejected as flatly inconsistent with the statute's plain language.

In drafting this brief letter, I do not have time to review all of the court decisions on this issue. While at least one district court has disagreed with the interpretation advanced above, the families' interpretation is consistent with the "cardinal principle" of statutory interpretation announced by the Supreme Court that courts "must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citing Williams *v. Taylor,* 529 U.S. 362, 404 (2000)). Indeed, the Supreme Court has "often noted that when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—[the] Court presumes that Congress intended a difference in meaning. *Loughrin*, 464 U.S. at 23 (citing *Russello v. United States,* 464 U.S. 16, 23 (1983) (cleaned up)). Here, of course, Congress omitted the word "pecuniary" in the very next part of the same provision—which means Congress presumably intended not to include the restriction to pecuniary losses in the second part.

The families' reading of the statute makes considerable sense. The word "loss" can have a broad meaning, and so Congress specifically added the qualifier "pecuniary" to restrict the types of losses that trigger the alternative fines provision. Presumably, Congress intended to limit the cases triggering substantial alternative fines to those involving a clear *pecuniary* loss, excluding more speculative situations involving crimes that only caused emotional distress and the like. But once a defendant has been shown to have committed a crime inflicting a clear pecuniary loss, Congress then substituted the more expansive term "gross" for the narrower qualifier "pecuniary" in the penalty

calculator. This expansion gives district judges the power to impose appropriate fines that fully reflect all losses caused to victims by a defendant's crime.

In any event, a VSL calculation of loss is, effectively, a calculation of pecuniary loss within the meaning of the alternative fines provision, § 3571. As the Transportation Department has explained, a VSL calculation arises from expected earnings:

> When first applied to benefit-cost analysis in the 1960s and 1970s, the value of saving a life was measured by the potential victim's expected earnings, measuring the additional product society might have lost. These lost earnings were widely believed to understate the real costs of loss of life, because the value that we place on the continued life of our family and friends is not based entirely, or even principally, on their earning capacity. In recent decades, studies based on estimates of individuals' willingness to pay for improved safety have become widespread, and offer a way of measuring the value of reduced risk in a more comprehensive way. These estimates of the individual's value of safety are then treated as the ratio of the individual marginal utility of safety to the marginal utility of wealth. These estimates of the individual values of changes in safety can then be aggregated to produce estimates of social benefits of changes in safety, which can then be compared with the costs of these changes.

Transportation Dept. VSL Memo, *supra*, at 2. As this history makes clear, VSL is simply an improved and expanded measure of a victim's "expected earnings"—clearly a pecuniary loss. Since VSL more fully captures all of the "value of reduced risk," in a case (like this one) where the risk has actually materialized, it is best viewed as comparable to a calculation of lost expected earnings.

Indeed, even applying a definition of "pecuniary" loss produces the same conclusion. *Black's Law Dictionary* defines "pecuniary loss" as "[a] loss of money or *something having monetary value*." BLACK'S LAW DICTIONARY 1088 (deluxe 10th ed. 2014). VSL quantifies increases in risk as having "monetary value," thereby fitting within the plain meaning of the definition above.

For all these reasons, a standard calculation using VSL—value of a statistical life—produces a reasonable estimate of the loss to the victims and their families caused by Boeing's crime.[7]

Loss Calculations – Losses to Boeing's Aircraft Customers

As indicated in the table above, it is also possible to quantify the gross losses to Boeing's customers from the crime through a straightforward calculation resting on Boeing's own statements. The starting point for this loss calculation is Boeing's admissions in the DPA that it caused "direct pecuniary harm" to its "airline customers." In the DPA, Boeing agreed "to pay a total Airline Compensation Amount of $1,770,000,000 to its airline customers for the direct pecuniary harm that its airline customers incurred as a result of the grounding of the Company's 737 MAX." DPA ¶ 12. But the DPA is silent about how the $1.770 billion figure was calculated—and, consequently, the DPA offers no reason for thinking that this stipulated figure encompasses the total "direct pecuniary harm" to Boeing's customers.[8] The figures the families cite in the table above provide quantification of the *total* loss to all of Boeing's customers,[9] which are indisputably part of the "gross loss" from Boeing's crime. The loss to Boeing's customers is, accordingly, reasonably calculated to be $8,757,000,000.

Loss Calculations – Alternative Approaches Exist

In providing these straightforward loss calculations, the families want to emphasize that they could also provide substantial additional evidence in support of their loss calculations. The families would also like to confer with the Department about these issues. No doubt, the Department has information in its possession that would help fortify the families' calculations, as discussed below.

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[7] For purposes of the fine calculation, it makes no difference whether Boeing's crime inflicted a loss on the crime victims killed in the two crashes, their families, or their families' estates. In any event, a "loss" cognizable under the Alternative Fines Provision, 18 U.S.C. § 3571(d), exists.

[8] Curiously, the figure also reflects money that Boeing was already contractually obligated to pay its corporate customers. *See* Ankush Khardoi, *The Trump Administration Let Boeing Settle a Killer Case for Almost Nothing*, INTELLIGENCER (Jan. 23, 2021).

[9] Boeing may attempt to argue that its crime only affected domestic airlines, but Judge O'Connor has already soundly rejected any artificial limitation that attempts to cabin the foreseeable harm from Boeing's crime to U.S. customers. *See* Dkt. 116 at 12 ("As a result, Boeing's airline customers and every pilot-operator of a 737 MAX, worldwide, received both inadequate training and materially inaccurate operational manuals based on guidance taken from the FSB Report.").

If the Department is concerned about any part of the methodologies above, alternative methodologies exist for calculating the families' losses in this case. The Sentencing Guidelines neither proscribe, nor prohibit, a methodology for a court to use when calculating the "reasonable estimate" of the loss a defendant's conduct caused. *See United States v. Erpenbeck*, 532 F.3d 423, 433 (6th Cir. 2008). The Department should explore all reasonable alternatives and then deploy "the greater" of the available options. *See* 18 U.S.C. § 3571(d).

As one example of an alternative methodology, considerable literature exists on calculating the costs that a defendant who commits a homicide inflicts on the victim. *See generally* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 973 (2020) (collecting research). The Department of Justice has played an important role in producing reliable estimates of this type of cost of crime. One of the first important studies quantifying such costs was commissioned by the Department's National Institute of Justice. The resulting study—"Victim Costs and Consequences: A New Look"—has been widely cited as documenting significant costs from crime. *See* TED R. MILLER ET AL., U.S. DEPT OF JUSTICE, NAT'L INSTITUTE OF JUSTICE: VICTIMS COSTS AND CONSEQUENCES: A NEW LOOK (1996).[10]

Building on the Department's research, a second generation of studies has more comprehensively quantified the costs of crimes. As one example, in a prominent 2010 article, Professor Matt DeLisi and his colleagues calculated "cost estimates" for the crime of murder (the most intentional form of homicide).[11] *See* Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 501, 506 (2010). They concluded that the cost, in 2008 U.S. dollars, was $4,712,769. *Id.* at 506 tbl. 1. Translated into 2018 dollars, the cost of a homicide would be $5,496,483.[12] Multiplied across 346 crime victims, the total loss to victims by Boeing's crime in 2018 dollars is $1,901,783,000.

The approaches listed above are not exhaustive. And, no doubt, other families are able to provide documentation and estimates of their significant losses in other

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[10] The report is available on the Department's website, https://www.ojp.gov/pdffiles/victcost.pdf.

[11] To be clear, I am not arguing that Boeing committed intentional murder. But the same "cost estimate" for a death caused by an intentional murder would, by definition, equal the cost estimate for a death directly and proximately caused by intentional conspiracy to defraud the FAA.

[12] Conversion based on inflation calculator found at https://www.usinflationcalculator.com/.

ways. The Department should give all of that information full consideration. But the overarching point here is that the Department needs to endorse some reasonable method of calculating the losses caused in cases of far-reaching corporate crimes such as this one. Otherwise, the Department will be in the perverse position of being able to argue for alternative fines in corporate crimes cases that caused no deaths or just a few deaths—but be unable to do so in cases such as this one, involving hundreds of deaths.

Loss Calculations — Justice Department Duty to Disclose

While the families have been able to calculate losses based on public record information, the Department no doubt possesses substantial information in its files that would corroborate—and perhaps even increase—the losses calculated above. The Department should share that information with the families and, ultimately, with Judge O'Connor.

At sentencing, the Justice Department is (of course) obligated to disclose to the sentencing judge all information relevant to sentencing. *See* Justice Manual 9-27.710(1) (prosecutors should assist the sentencing judge by "[a]ttempting to ensure that the relevant facts and sentencing factors, as applied to the facts, are brought to the court's attention fully and accurately."). In more colorful words, prosecutors should not "swallow the gun"—i.e., withhold incriminating evidence at sentencing. *See, e.g., United States v. Mercer*, 472 F. Supp. 2d 1319, 1323 (D. Utah 2007) (noting that Department policy at sentencing is designed to avoid "the spectacle of government attorneys arguing to the court things that are contrary to fact—it avoids prosecutors 'swallowing the gun.'"); *see also* Robert H. Edmunds, Jr., *Analyzing the Tension Between Prosecutors and Probation Officers over Fact Bargaining*, 8 FED. SENT. R. 318 (1996) ("It has been the policy of the Department of Justice from the day the guidelines were implemented not to 'swallow the gun.'").

The loss figures recounted above are based on public record information, including Boeing's own statements. The Department's own files, no doubt, contain far more information that would support these calculations. For example, the Department presumably has information about payments Boeing has made to aircraft customers as part of its DPA obligations. *See* DPA ¶ 12. Otherwise, there would be no way for the Department to decide whether Boeing has complied with its DPA obligations to make those payments. The Department must present this information to Judge O'Connor when he considers what sentence to impose on Boeing.

In sum, simply and conservatively calculated, the loss from Boeing's conspiracy crime is $12,390,000,000. And, under the alternative fines provision, 18 U.S.C. § 3571(d),

the loss must be doubled to calculate the fine range, producing a maximum possible fine of $24,780,000,000. The Department should support the families' calculation and provide all evidence it possesses supporting this calculation to the court.

The Fine Range – An Alternative Gain Calculation

For the reasons explained above, in the first instance, the fine range for Boeing should be determined by a loss calculation. And under the families' analysis, a loss calculation results in a higher permissible fine than a gain calculation. *Cf.* 18 U.S.C. § 3571(c) (fine range determined by "the greater of" twice the gross loss or gain). But for the sake of completeness, it is important to understand that Boeing had a very sizeable gain from its deadly crime—a gain that provides a partial estimate of losses to victims. *Cf. United States v. Haddock*, 12 F.3d 950, 964 (10th Cir. 1993) (suggesting that gain can be used to estimate loss only where they are the same and loss is not quantified). Indeed, maximizing profits appears to have been the whole point of Boeing concealing the expanded capabilities of the MCAS system from the FAA. *See generally* FINAL COMM. REPORT: THE HOUSE COMM. ON TRANSPORTATION AND INFRASTRUCTURE, THE DESIGN, DEVELOPMENT & CERTIFICATION OF THE BOEING 737 MAX (Sept. 2020) at pp. 37-55 & 168-69.[13]

The DPA itself recognized that Boeing had a gain of at least $243,600,000, "representing Boeing's cost-savings, based on Boeing's assessment of the cost associated with the implementation of full-flight simulator training for the 737 MAX." DPA ¶ 9. But this number is artificially low. The table below presents a more fulsome and accurate calculation:

[13] The report is available at https://democrats-transportation.house.gov/download/20200915-final-737-max-report-for-public-release.

Boeing Criminal Monetary Penalty Calculation Data: Gains

Description	Amount	Reference
Value of 737 MAX aircraft orders placed through 2018, with a profit margin of $9.5-12 million per aircraft[3]	3,003,000,000-3,960,000,000	Boeing Commercial Airplanes Orders & Deliveries; Boeing 1/30/19 press release

[3] From the inception of the 737 MAX program, in 2011, through 2018, Boeing won 5,211 orders for the 737 MAX. By the end of 2018, 330 deliveries had been made. Boeing Orders & Deliveries Report, available at https://www.boeing.com/commercial#orders-deliveries.

Boeing Commercial Airplanes reported 262 net orders during the Q4 2018, valued at $16 billion. Boeing Reports Record 2018 Results and Provides 2019 Guidance, January 30, 2019, available at https://boeing.mediaroom.com/2019-01-30-Boeing-Reports-Record-2018-Results-and-Provides-2019-Guidance. In Q4, Boeing received 287 total gross orders, with 248 gross 737 MAX orders. Boeing Orders & Deliveries Report. To be conservative, assume all 25 canceled orders were MAX aircraft, resulting in 223 net MAX orders. The approximate value is $13.6 billion, or $61 million per aircraft. With the reported 15.6% Q4 profit margin (Boeing Reports Record 2018 Results..., supra), Boeing gained approximately $2.1 billion in MAX sales ($9.5 million per aircraft) during that time.

In Q1 2019, 95 additional MAX aircraft were ordered, with another 57 deliveries made before the grounding in March 2019. Boeing Orders & Deliveries Report.

The flight ET 302 aircraft purchase agreement was produced to the plaintiffs in the flight ET 302 civil litigation. DOJ may already be in possession of the purchase contracts for the flight JT 610 and flight ET 302 aircrafts, or other information about Boeing's profit margins for the 737 MAX from 2018 to March 10, 2019.

The actual profit margin may be higher. Citing Moody's, Business Insider reported profit margins for the 737 MAX of $12-15 million per aircraft prior to the crash of Ethiopian Airlines flight 302. Here's how much Boeing is estimated to make on each 737 Max 8 plane, Business Insider, March 13, 2019, available at https://www.businessinsider.com/boeing-737-max-profit-moodys-2019-3.

Boeing stock price reached a record high on March 1, 2019.

The Commercial Airplane operating margins increased in Q4 2018 to 15.6%, in large part as a result of the 737 program. By January 2019 the 737 program was projected to be at 90% MAX aircraft. Q4 2018 The Boeing Company Earnings Conference Call transcript at p. 25, January 30, 2019, available at https://investors.boeing.com/investors/events-presentations/event-details/2019/Q4-2018-The-Boeing-Company-Earnings-Conference-Call/default.aspx.

As shown in the table, these calculations largely rely on Boeing's own admissions and, in any event, cannot be seriously disputed. Moreover, these calculations are extremely conservative. Some courts have interpreted the "gross gain" provision in § 3571(d) as meaning the gross revenues that the corporation obtained from the crime—not the net profits. *See, e.g., United States v. Baderi,* 2010 WL 2681707 at *2 (D. Colo. 2010). The calculation above uses the more restricted, net-profits approach.

The families could also provide substantial additional evidence in support of these calculations. And, no doubt, the Department has already collected significant evidence regarding Boeing's gains from its crimes. After all, the DPA itself has a limited gain calculation. *See* DPA ¶ 9(b). The Department should share with the families—and with Judge O'Connor—all its information on Boeing's gain from the crime.

In sum, simply (and extremely conservatively) calculated, Boeing's gain from its conspiracy crime is $3,003,000,000.[14] And again, under the alternative fines provision, the gain can be doubled, producing a maximum possible fine under this approach of $6,006,000,000.

Calculating the Appropriate Base Fine Under the Guidelines

For the reasons explained above, the maximum possible fine against Boeing in this case is $24,780,000,000, which represents only about 65% of what Boeing spent between March 2014 and September 2018 repurchasing common stock. But the question of what fine Judge O'Connor should impose within that fine range remains—and likewise remaining is the question of what fine the Justice Department should recommend.

Judge O'Connor is required to consider the (2018) Guidelines. The Guidelines largely track the statutory calculation of a fine range. Of particular relevance here, the Guidelines provide that the recommended "base fine" under the Guidelines is the greatest of either "the pecuniary gain to the organization from the offense … or … the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly." USSG § 8C2.4(a)(2) & (3).

Under these provisions, the "base fine" is $12,390,000,000, per the loss calculations above. Boeing criminally caused the loss at least recklessly. The crime that Boeing committed—conspiracy—is a specific intent crime. *See* Criminal Information, Dkt. 1 (alleging that the Boeing Company *"knowingly and willfully, and with intent to defraud*, conspired and agreed together with others to defraud the United States by

[14] To demonstrate how conservative this calculation is, it does not take into account the benefits accrued to Boeing, as well as its insiders, from the 737 MAX project *before* the fraud was discovered. By way of example, Muilenburg, Boeing's former CEO, made $23 million in 2018, according to Boeing's proxy statement—the year the first 737 MAX crashed—on top of the $49 million he earned during the previous two years. That is a total of $72 million dollars, or roughly $2 million a month. Similarly, Kevin McAllister, former head of Boeing's commercial division that produced the 737 MAX, was paid more than $57 million during his nearly three years at the company, or roughly $1.6 million a month. In a more elaborate calculation, these kinds of gains should also be considered.

As another demonstration of how conservative this figure is, for comparison between March 2014 and September 2018, Boeing "bought back" approximately $38,000,000,000 worth of common stock.

impairing, obstructing, defeating, and interfering with, by dishonest means, the lawful function of a United States government agency, to wit, … [the FAA AEG] … in connection with the FAA AEG's evaluation of the Boeing 737 MAX Airplane's Maneuvering Characteristics Augmentation System ….").

Boeing's intentional criminal conspiracy knowingly and recklessly risked death. Among the many facts supporting this conclusion is Judge O'Connor's finding (based on Boeing's sworn admissions in the DPA) that Boeing's "chief technical pilots intentionally hid MCAS's low-speed expansion from the AEG so that they could secure the less rigorous—and less expensive—Level B training." Dkt. 116 at 3. And even "reasonable laypeople could easily predict that inadequate pilot training might result in catastrophic airplane crashes, as it did here." *Id.* at 16. And after the first crash, Boeing continued to "gamble[] with the public's safety … resulting in the deaths of 157 more individuals on Ethiopian Airlines flight 302, less than five months later." *See* HOUSE COMM. ON TRANSPORTATION 737 MAX REPORT, *supra*, at 28. For all these reasons, Boeing acted (at least) recklessly with respect to the losses it caused. Therefore, the base Guideline fine is $12,390,000,000.

An alternative route to a similar destination is to use a gain calculation. The Guidelines provide for a fine calculation based on "the pecuniary gain to the organization from the offense." No mens rea determination is associated with a gain calculation. And, as explained above, Boeing's gain from its crime was (at least) $3,003,000,000. If, for any reason, the court were to reject the loss calculation above, then it would immediately fall back to this base fine based on gain. But because the loss calculation produces a fine larger than the gain calculation, the loss calculation is given preference by operation of the alternative fines provision. *See* 18 U.S.C. § 3571(d).

The Guidelines thereafter use a culpability score to determine minimum and maximum multipliers. USSG § 8C2.6. In the DPA, the parties agreed to a culpability score of 5. *See* DPA ¶ 9(c). Applying that agreed score produces a multiplier of 1.0 (minimum) to 2.0 (maximum). Accordingly, the recommended fine range under the Guidelines is somewhere between $12,390,000,000 and $24,780,000,000.

The families, however, strenuously disagree with the calculation of a culpability score for Boeing of only 5. To begin with, remarkably that score gives Boeing a two-level credit for "acceptance of responsibility for its criminal conduct." DPA ¶ 9(c). But after claiming that credit, Boeing's lawyers later entered a plea of "not guilty" to the pending charge. *See* Dkt. 179. Of course, under the Guidelines, credit for accepting responsibility is typically reserved for defendants who … well … accept responsibility. Boeing chose to plead not guilty in January 2023, more than two years after the

Department filed its conspiracy charge. And it has now maintained that not-guilty plea for almost another year and a half. Boeing's not-guilty plea is currently forcing the families to wonder whether they will need to attend a trial—and the Department to wonder whether it will need to devote prosecution resources to convicting Boeing. Nothing could be further away from "timely notifying authorities of [Boeing's] intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently …." USSG § 3E1.1. At least as of today, Boeing is not entitled to credit for acceptance of responsibility.

In addition, the culpability score of 5 in the DPA figure rests on only a two-level enhancement under USSG § 8C2.5(b)(4), which hinges on describing Boeing conspiracy as involving only "an individual within substantial authority personnel." In fact, at least one much more senior executive was involved in the crime. Specifically, as discussed at the May 31 meeting, Boeing's then-CEO Dennis Muilenburg was directly involved in Boeing's multi-year conspiracy. As one of many examples of Muilenburg's involvement, the Securities and Exchange Commission found in a September 2022 consent decree that Muilenburg (among many other things) released information to the public after the Lion Air crash that the "737 MAX is as safe as any airplane that has ever flown the skies." *See In the Matter of Dennis A. Muilenburg,* SEC Administrative Proceeding File No. 3-21141 at 9 (Sept. 22, 2022). Indeed, the SEC found that this statement *was provided to the FAA! See id.* ("Prior to issuance of the November 2018 Press Release, Boeing provided drafts to the FAA and NTSB for informational purposes, and those drafts contained the 'as safe as any airplane that has ever flown the skies' language."). Of course, this language was intentionally deceptive because Muilenburg knew that MCAS was not operating properly—creating a deadly safety risk. *See id.* ("The November 2018 Press Release – in particular, the statement that 'the 737 MAX is as safe as any airplane that has ever flown the skies'—was misleading under the circumstances absent any discussion of an 'airplane safety issue' that required remediation by fixing the MCAS software."). These undisputed actions by the Company's CEO[15] show that he "participated in, condoned, or was willfully ignorant of the offense." USSG § 8C2.5(b).

As a result, making adjustments for the fact that Boeing has not timely accepted responsibility and had at least one high-level executive involved in the crime, the proper culpability score is 10—the highest possible culpability score. *See* USSG 8C2.6. And the correct multipliers are, thus, 2.00 to 4.00. *See* USSG § 8C2.6 (table). Accordingly,

[15] Of course, given the "paper trail" involved, the Department could easily prove all the foregoing facts by proof beyond a reasonable doubt.

the recommended fine range under the Guidelines is somewhere between $24,780,000,000 and $49,560,000,000 (capped by the statutory maximum of $24,780,000,000).

Determining the Specific Fine Within the Guidelines Range

Once Judge O'Connor calculates the proper Guidelines range, he must select a point within the range for a fine. In making this selection, the Guidelines provide various factors to consider. For present purposes, it is worth highlighting that one of the factors to be considered is "any nonpecuniary loss caused or threatened by the offense." USSC § 8C2.8(a)(4).

In this case, the victims and their families suffered enormous nonpecuniary losses—namely the pain and anguish associated with the 346 deaths that Boeing directly and proximately caused. The families' can provide more information on this point if it would be useful, but it is hard to imagine anyone disputing this point. That factor alone points to a fine at the upper end of the Guidelines range.

Upward Adjustment for 346 Deaths

The Guideline calculations above assume a standard corporate crime—that is, one within the heartland of sentencing guidelines. But in fact, Boeing's conspiracy crime is an obvious outlier. As Judge O'Connor has found, "Boeing's crime may properly be considered the deadliest corporate crime in U.S. history." Dkt. 185 at 25. This stark fact means that, in imposing a fine, Judge O'Connor should depart upward from the Guidelines.

The Guidelines provide that "[i]f the offense resulted in death … or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range." USSG § 8C4.2 (risk of death) (policy statement).

Here, considering the relevant factors, the hundreds of deaths suggest a maximum fine. First and foremost is the staggering number of deaths—346 innocent passengers and crew. Second, as explained above, in lying to federal regulators about aircraft safety issues, Boeing knowingly risked a catastrophe. *See* Dkt 116 at 14 ("criminally conspiring to defraud United States safety regulators of relevant information is proscribed in order to prevent precisely this sort of catastrophic

outcome."). Third, Boeing is going to be sentenced under the Guideline applicable to defrauding the FAA—a guideline which does not build into it a risk of death. The general Guidelines indicate that "a substantial increase may be appropriate … if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of [death or] personal injury, such as fraud." USSG 5K2.1 (policy statement). A substantial increase is thus appropriate here.

The Families' Recommended Fine

In light of the foregoing—including the fact that this case involves the deadliest corporate crime in U.S. history—the families believe that the appropriate fine for Boeing is the statutory maximum of $24,780,000,000. The families further recommend, however, that a portion of that fine should be suspended on the condition that the money at issue is devoted to appropriate safety and related measures, as discussed below.

No Offset to Recommended Fine

Boeing is entitled to argue that it should receive an offset against any payment of a fine imposed at sentencing of its earlier payment of a monetary penalty of $243,600,000. *See* DPA ¶ 11. The offset issue is, of course, up to Judge O'Connor. But given that Boeing breached its obligations under the DPA, the families believe that no offset is appropriate.

Restitution

Of course, it is generally accepted that a sentencing court "must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused." USSG, Ch. 8, Intro. Cmt. (2018). Boeing's crime clearly inflicted economic harm on the victims and their families, which creates the potential for legal responsibility for a remedy, such as restitution. *See* 18 U.S.C. § 3663. Among the losses for which restitution can be awarded is lost income. 18 U.S.C. § 3663(b)(2)(C). *See U.S. v. Bedonie*, 317 F.Supp.2d 1285, 1294-1333 (D. Utah 2004) (awarding lost income to a victim's family in a case involving a crime resulting in death), *rev'd on other grounds*, 410 F.3d 656 (10th Cir. 2005); *see also* 150 CONG. REC. S10910-01, 2004 WL 2271135 (remarks of Sen. Kyl) (in passing the CVRA, "[w]e specifically intend to endorse the expansive definition of restitution given by Judge Cassell in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004.").

But it is premature to discuss restitution in detail, particularly with just one week to prepare this response. The above information shows the general types of losses that Boeing has caused. After Boeing is found guilty (or pleads guilty), then the issue of restitution should be simply referred to the Probation Office for collection of relevant information on the amount of restitution and a report to the judge—as is standard procedure. *See* Fed. R. Crim. P. 32(c)(1)(B) ("If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution").

Conditions of Probation

In addition to recommending a substantial fine, the Department should recommend (and the Court should impose) a term of probation on Boeing. In its May 14, 2024, notice to the Court (Dkt. 199), the Department reported that it had found that Boeing had breached its DPA obligations "by failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations." Remarkably, Boeing's failure came nearly three-and-a-half years after it had promised to design, implement, and enforce such a program.

Under the Guidelines, a term of probation is required "if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program …." USSG § 8D1.1(a)(3). The Department can provide more information on its breach determination to Judge O'Connor.[16] But assuming (as seems highly likely) that the Department's finding is correct, then the Guidelines direct the Court to impose a term of probation. *See* USSG § 8D1.1(a)(3).

One question that then arises is how long Boeing's term of probation should be. Given the seriousness of this case—including a breach of a deferred prosecution agreement with resulting safety concerns relating to the possibility of a catastrophic third crash—the term of probation should be the maximum authorized by law, five years. *See* 18 U.S.C. § 3561(c)(1). Of course, the conditions of probation should include the mandatory conditions required by law. 18 U.S.C. § 3563(a). But the district court should impose additional terms as well.

[16] The Department should also provide information to the families. The families have, to date, received no specific information whatsoever about the nature of the Department's breach determination, which is inconsistent with the Department's obligation to reasonably confer with the families. 18 U.S.C. § 3771(a)(5). The families continue to request information about how Boeing has breached its obligations.

A district court has broad discretion in imposing probationary conditions. *See* 18 U.S.C. § 3563(b)(22) (the court may require a defendant to "satisfy such other conditions as the court may impose"). The Guidelines similarly extend broad discretion, providing in relevant part that "[t]he court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization …." USSG § 8D1.3. The most important condition that the district court should impose involves an independent corporate monitor, as discussed in the next section.

An Independent Corporate Monitor

One of the conditions of probation should be the court's appointment of an independent corporate monitor.[17] Columbia law professor John Coffee, one of the nation's leading experts on these kinds of cases, described the omission of a monitor from the Boeing DPA as a "glaring failure" because "[r]arely did a clearer case exist for such a monitor." John C. Coffee, *Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement* at 24 (June 7, 2022).[18]

Sadly, I recently learned from the media that more than three years ago, career Justice Department attorneys recommended that the Boeing DPA contain a corporate monitor—only to be overruled by "senior officials." Andrew Tangel & Dave Michaels, *Inside DOJ's Wrenching Decision on Whether to Prosecute Boeing*, WALL ST. J. (June 17, 2024). If the career prosecutors' recommendations had been accepted then, the last three-and-a-half years would likely have been used productively to improve Boeing's corporate compliance and safety measures. No more time should be lost.

As you are aware, the families recommended such a monitor earlier in these proceedings. Dkt. 170 at 18-34. In the hearing before Judge O'Connor on this issue, the Department did not follow the recommendation of some of its career prosecutors but instead opposed the families' request. *See* Hrng. Tr. (1/26/23) at 93. The Department

[17] Alternatively to the court making such an appointment, Boeing could be required, as a condition of its plea, to retain an independent corporate monitor. With regard to the selection of the monitor, in some past agreements, the Department has agreed to select a monitor from a list of candidates provided by the defendant. In this case, that approach would cast doubt on the true independence of a monitor. Accordingly, Judge O'Conor should select the monitor from a list of names provided not by Boeing but by the families after the families have conferred with the Justice Department and Boeing.

[18] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4105514.

argued that a corporate monitor/corporate examiner was "unprecedented," "unnecessary," and "inappropriate." *Id.* Given the new stage of the proceedings in which this case will stand shortly (i.e., the sentencing stage), the Department's previous opposition to the families' request is now misplaced.

First, the families' earlier request was for the imposition of a corporate monitor as a condition of supervised release. Now, the discussion concerns imposing a corporate monitor as a condition of sentencing. Of course, at the sentencing stage of criminal proceedings, the Department often asks for corporate monitors. *See, e.g.,* U.S. Dept. of Justice, Press Release, *Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties*, (Jan. 11, 2017) (noting that under plea agreement, a monitor would be appointed to oversee the parent company).[19] The families request that the Department follow that well-trodden path.

Second, the imposition of a monitor has now proven, sadly, to be necessary. At the earlier hearing, the Department argued that it was best positioned to evaluate Boeing's compliance with its DPA obligations. *See, e.g.,* Hrng. Tr. (1/26/23) at 96 ("The Fraud Section has compliance experts who routinely evaluate compliance programs and oversee corporate monitorships and self-reporting."). But now, after nearly three-and-a-half years of DOJ's "expert" efforts to monitor Boeing, the end result has been that Boeing has breached its obligations. At some level, the failure of the Fraud Section's efforts is unsurprising. Boeing is a massive corporation, and its production processes are extraordinarily complicated. It is hard to see how the Fraud Section would have the resources and expertise to undertake the kind of expansive and aggressive monitoring efforts necessary to change Boeing's current corporate culture.

In any event, the Fraud Section has had its shot at monitoring Boeing—and it failed. A new and different effort is now needed.

Third, the Department argued earlier that a corporate monitor for a DPA was inappropriate because a monitor in the context of DPA enforcement was beyond judicial authority. *See, e.g.*, Hrng. Tr. (1/26/23) at 98. Whatever may have been the merits of that earlier position at the arraignment, at sentencing the district court possesses broad discretionary authority to appoint a monitor. The Department should join the families in urging the appointment of such a monitor.

[19] Available at https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

Finally, since the adoption of the DPA, the Department's leadership has provided new guidance on monitors. The "Monaco Memorandum" explains that "[i]n general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship." Deputy Atty. Gen., Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021). This case is one that has a "demonstrated need for, and clear benefit to be derived from, a monitorship." To be consistent with Deputy Attorney General Monaco's guidance, the Fraud Section should recommend a monitor here.

Funding for the Monitor

It seems likely that one of the reasons for the failure of the Department's earlier monitoring efforts was the lack of resources devoted to the project. To avoid a recurrence of such problems, in this case, funding for the monitor's efforts—and Boeing's implementation of any recommendations made by the monitor—could come from funds that would otherwise go toward paying a fine. As recounted above, the size of the potential fine in this case is substantial. Suspending payment of part of the fine conditioned on those funds going to monitoring and implementation of monitoring proposals should provide the necessary funding for important monitoring and implementation efforts.

Particular Areas for a Monitor to Investigate

The monitor should be given a broad mandate to evaluate, suggest, and direct improvements in Boeing's compliance and ethics programs, as well as related quality assurance and safety measures. While the monitor should have discretion (based on his or her expertise) as to how best to proceed, the following areas should be included as recommended areas for monitoring, investigation, and recommendation:

1. Overtime Report:
    - Closely monitor the amount of overtime individual factory employees are performing each week. This includes all employees, not just union employees. Fatigued employees are prone to mistakes, and it's crucial to track actual working hours.
2. Non-conformance Reports (NCRs):

- Track the number and type of NCRs on each airplane at roll-out. Ideally, there should be 0 NCRs at this stage. Unresolved flight safety-related items at roll-out are extremely dangerous.

3. Shipside Action Tracker (SATs):
    - Monitor the number and type of SATs on each airplane at roll-out. Similar to NCRs, there should be 0 SATs. Any unresolved SATs, especially those related to flight safety, should be addressed immediately.
4. Traveled Work:
    - Track the amount and type of traveled work by airplane and flow day. The criteria for allowing traveled work should be stringent to avoid the dangerous habit of justifying incomplete work.
5. Incomplete Jobs Due to Missing or Damaged Parts:
    - Identify suppliers struggling with timely deliveries by tracking incomplete jobs due to missing or damaged parts. This can help address stress points in the supply chain.
6. Parts That Fail to Meet Load Date:
    - Monitor the number and type of parts that fail to meet the planned load date for factory installation.
7. Functional Test Results:
    - Report on functional test results by airplane, including both failures and passes.
8. Missed Deliveries:
    - Track airplanes that failed to deliver to the customer on time.
9. Grounding Due to Mechanical Defects:
    - Track the number of airplanes experiencing grounding for more than 12 hours due to mechanical defects within one year of delivery.
10. Minimizing Traveled Work:
    - Data and common sense show that out-of-sequence work is a disaster risk. Minimizing traveled work should be a key part of the safety plan.
11. Hold-Ups at FAA Sign-Off:
    - Track the number of airplanes held up for more than one day at FAA sign-off. Such delays are not only due to FAA finding problems but Boeing's own inspectors not passing them.
12. Airworthiness Directives (ADs) and Exemptions:
    - Evaluate and implement ways to reduce the time periods for correcting unsafe conditions. ADs for unsafe conditions and exemptions for mistakes during recertification are currently taking up to three years to correct. Ways to reduce those time periods should be implemented.
13. Reinstate Inspections:

- Evaluate and implement ways of reinstating inspections that were removed in the last five years to ensure rigorous compliance.

14. EICAS Retrofit:
    - Evaluate and implement a retrofit to the MAX with the Engine-indicating and crew-alerting system (EICAS) flight crew alert system for all new aircraft and retrofit in-service aircraft with an EICAS-light system.
15. Compensation System:
    - Examine ways of strengthening Boeing's restructured compensation system, which is supposed to focus on safety metrics rather than stock price or delivery targets.

Boeing's Board Should Be Directed to Meet with the Families

Another condition of probation should be that defendant Boeing, acting through its Board of Directors, should be directed to meet for a half-day with the families. The Board needs to hear directly from the families but has thus far been insulated from them. A meeting would allow the families to convey directly to the Board the human impact of Boeing's crime and suggestions for improving Boeing's safety and quality assurance measures.

A meeting between the families and the Board would be similar to what has been done in some other criminal cases, where victim-offender mediation has been recommended as a restorative justice approach to criminal justice. *See, e.g.,* Douglas Evan Beloof, Paul G. Cassell, et al., VICTIMS IN CRIMINAL PROCEDURE 467-72 (4th ed. 2018). There is no real downside to such a meeting, and potential upside if the families and the Board can directly address the crime and its aftermath.

Continued Investigation of Boeing for Other Crimes

The foregoing describes how the Department should pursue prosecuting Boeing for its conspiracy to defraud the FAA. *See* Dkt. 1. Of course, the Department should aggressively also continue to investigate other possible crimes by Boeing. For example, the Department should get to the bottom of the Alaskan Air door-plug blowout on January 5, 2024. The Department should also investigate Boeing's potential crimes in connection with its extortion of Lion Air victims regarding the settlement of civil cases.

What a Prosecution of Boeing's Then-Leadership Should Look Like.

The foregoing describes how the Department's prosecution of the corporation—The Boeing Company—should proceed. But as the Department itself has explained,

"Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or outside the corporation." Justice Manual 9-28.210.

Accordingly, the Department should also move forward with prosecutions of Boeing's then-existing responsible corporate leadership, including specifically former CEO Dennis Muilenburg.

Prosecuting Muilenburg is consistent with the Department's foundational principles of corporate prosecution. The Justice Manual directs that

> prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers, the Department accomplishes multiple goals. First, the Department increases its ability to identify the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and the extent of any corporate misconduct. Second, by focusing on individuals, the Department increases the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, at any level of an organization. Third, the Department maximizes the likelihood that the criminal investigation appropriately identifies and holds accountable culpable individuals and not just the corporation.

Justice Manual 9-28.010. These multiple goals for prosecuting indviduals all apply in this case.

In a recent speech, Deputy Attorney General Monaco described the current Administration's white-collar crime efforts by saying that "from the beginning, we promised to follow every corporate case up the company's org chart—no matter where the evidence took us. We also asked prosecutors to be bold …." Remarks of Deputy Attorney General Lisa Monaco to the ABA Nat'l Institute on White Collar Crime (Mar. 7, 2024).[20] In this case, sadly, the prosecutors have not acted boldly, but timidly. This timidity appears likely to have come from the direction of the political appointees. *See* Andrew Tangel & Dave Michaels, *Inside DOJ's Wrenching Decision on Whether to Prosecute Boeing*, WALL ST. J. (June 17, 2024) ("Some prosecutors wanted to probe

[20] Available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

whether the company or its executives defrauded investors by denying problems with the 737 MAX's safety, according to people familiar with the discussions, but supervisors told them to focus on Mark Forkner, a pilot in charge of dealing with certain Federal Aviation Administration officials on training matters.").

Independent observers agree with the families that responsible senior executives within Boeing at the time of its conspiracy crime should be prosecuted. During yesterday's Senate hearing, Senator Blumenthal stated, "In my view, and I said it at the time [of the DPA], individuals should be held accountable for those [346] deaths." Senator Blumenthal reiterated: "I'm saying … to the Department of Justice individuals should be held accountable because that's the only way that deterrence works."

As I mentioned at the May 31 meeting, it is clear that the Department possesses sufficient evidence to pursue prosecution of individuals for the same § 371 conspiracy that is charged against the Company. The idea that just two mid-level pilots alone executed the vast, multi-year conspiracy is far-fetched—which (among other things) helps to explain the Department's botched prosecution of Mark Forkner. Now that Forkner's charges have been resolved, the Department should immediately question him (and other former Boeing employees) to determine the full scope of the conspiracy.

The Department's sister agency—the Securities and Exchange Commission—has usefully laid out the evidence that Muilenburg (for example) was directly and personally involved in concealing MCAS problems from the public and thus also from the FAA and others. *See* discussion above. And in the current DPA, the Department has indicated that its effort to investigate the cause of the crashes was frustrated by Boeing for six months—thereby creating at least one overt act during the six months after the ET 302 crash. That time frame would extend the conspiracy within the existing five-year statute of limitations.

In view of the potential statute of limitations issues, the Department should quickly ask for tolling agreements from Muilenburg and the other Boeing leaders involved. The Department commonly uses this approach where, as here, it possesses sufficient evidence to indict but investigations are still ongoing. Of course, if the individuals decline to sign the tolling agreements, then the Department should indict them promptly to avoid allowing the statutes to run due to inaction.

Finally, in connection with prosecuting responsible corporate leadership, the Department should disclose to Judge O'Connor that the DPA's statement that the "misconduct" was not "facilitated by senior management" is inaccurate (at least as of

today). The Department has a duty of candor to the court that requires this inaccurate information to be withdrawn.

* * *

Thank you in advance for considering all these requests. The families look forward to conferring with the Department on all these issues.

Sincerely,

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