

## ***Comparison of the New Calculation of Economic “Loss” with that of Restitution***

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### **I. Overview**

The biggest change in the sentencing of federal white collar offenders since the inception of the guidelines in 1987 took place when the Commission passed Amendment #617, often called the “Economic Crime Package,” effective November 1, 2001. The multi-faceted amendment did many things, including the following: It consolidated previous guidelines §§2B1.1 and 2F1.1 into a new §2B1.1, it amended various specific offense characteristics of the new guideline to resolve numerous circuit conflicts and to conform with recent legislation, and it changed the loss table that assigns offense levels to ranges of specific amounts of loss. The offense levels were raised for mid-to high-loss amounts, but lowered for very low loss amounts.

But perhaps the biggest change involved the complete rewrite of the “definition” of economic “loss,” as defined in Application Note 2 to the new §2B1.1, pages 71-74 of the 2001 *Guidelines Manual*. The resulting “loss” amount is then used in the loss table at § 2B1.1(b). The resulting offense level is then potentially further modified by the specific offense characteristics at § 2B1.1(b)(2)-(15). Some of the loss definition changes explained existing concepts; some represented organizational and simplification changes; some resolved circuit conflicts; and a few represented a policy decision to provide more explicit guidance to courts in defining loss, such as the addition of a causation standard. The latter changed the scope of loss somewhat, and moved the loss definition a little closer to the computation of restitution (as discussed below).

A summary comparison of the main points of the loss and restitution analyses may be helpful for several reasons. Both are often involved in the sentencing of many federal economic crimes. While both are similar, they remain fundamentally distinct. As a consequence, many orders of restitution have been vacated because the court confused guideline “loss” concepts with those of restitution. Also, there is no case law yet developed on the new loss definition (effective November 1, 2001) to provide guidance to courts and practitioners. By comparison, the fine points of restitution analysis, such as how to value lost or damaged property, are generally developed on case law interpreting the relatively few statutory restitution provisions. (For these reasons, the following discussion of the new loss definition is based solely on the new Application Note 2 to § 2B1.1, whereas the summary of restitution analysis is based on the

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<sup>1</sup>The views expressed herein are those of the author only, and are not intended to represent the position or view of any agency, court, person, or party other than the author.

author's estimation of case law principles analyzing the restitution statutory provisions.<sup>2</sup> Naturally, the final resolution of the points discussed will ultimately depend on the court.

The loss and restitution analyses will always remain fundamentally distinct because they have very different purposes. As the background commentary to the new §2B1.1 states, "... along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability..." On the other hand, restitution is primarily intended to compensate the victims of the offense for the harms caused by the offense. This can produce very different results within the same case. For example, "loss" for a bank robbery is directly related to the amount of money taken in the robbery, while restitution is directly related to how much of that money is not ultimately recovered for the bank. Because "loss" serves several functions, its computation is more complex than that of restitution, and includes adjustments to "loss" based on such things as "intended loss" which are not part of the restitution analysis.

## II. Selected Loss-Definition Provisions Compared to Restitution

Pertinent portions of the new loss definition, at Note 2, 14 and 15 to §2B1.1, effective November 1, 2001, are reproduced below in italics. These portions of the new loss definition can be found on pages 71-74 (Note 2), and page 79 (Notes 14 and 15), of the 2001 *Guidelines Manual*. Each provision is followed by a brief discussion, in brackets, of how that provision compares or contrasts to any corresponding aspect of the computation of restitution.

2. *Loss Under Subsection (b)(1)*. This application note applies to the determination of loss under subsection (b)(1).

(A) *General Rule* – Subject to the exclusion in subdivision (D), loss is the greater of actual loss or intended loss.

[The exclusions in (D) of interest and government/victim costs are discussed below. The rule of the greater of actual or intended loss does not apply to restitution because there is no intended loss concept applicable to restitution. Restitution involves only net, actual loss.]

(1) *Actual Loss*. – "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

[Restitution only involves actual loss, although it may be slightly differently calculated than for loss.]

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<sup>2</sup>It is beyond the scope of this discussion to thoroughly analyze the case law on restitution, which can be found in other articles, including: "Imposition of Restitution in Federal Criminal Cases," (5-step analysis of determining victims and harms), Goodwin, *Federal Probation*, December 1998; "Update on Selected Restitution Issues," Goodwin, *Federal Probation*, June 2001.

- (i) Intended Loss. – “Intended loss” (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

Restitution only involves actual harm. Harm that might have been intended but which did not happen would not be included in restitution, whereas it might be in loss, as defined in this provision. Therefore, while the loss definition would penalize defendants for attempting harm in a sting operation, because no actual harm results to victims there would be no restitution. Nor could restitution be ordered as costs to the government, as courts have uniformly held that such costs are not “harm” caused by the offense for restitution purposes.]

- (iii) Pecuniary Harm. – “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

[Restitution is similar, but broader. Harms statutorily compensable as restitution must necessarily be reduced to a dollar value in order for the defendant to be ordered to pay it; therefore, in this sense restitution does not differ from “loss.” However, the harms that are compensable for restitution can include non-monetary harms – reduced to a monetary value, such as the cost of necessary psychological treatment for the victim who has been traumatized by an offense.

Which costs are compensable in any particular case depends on the applicable restitution statute. For example, restitution can be imposed, where there has been a “bodily injury” to the victim, for “an amount equal to the cost of necessary medical and related professional services [as further described] ...” in eligible offenses, pursuant to § 3663(b)(2) and § 3663A(b)(2). Similarly, restitution can be imposed for the “cost incurred” by the victim for the listed professional services (for which no bodily injury is required) under the specific title 18 mandatory restitution statutes enacted in 1994 (see § 2248, 2259, and 2264).]

- (iv) Reasonably Foreseeable Pecuniary Harm. – For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

[The newly specified causation standard of “reasonably foreseeable” loss appears to bring the loss definition closer to that of restitution. Although some courts had previously used such a standard to determine causation (see, e.g., *U.S. v. Metzger*, 233 F.3d 1226 (10<sup>th</sup> Cir. 2000, finding that injury to bystander by police officer was foreseeable to the defendant), it was never explicitly articulated.

Reasonable foreseeability combines the two aspects of a “proximate cause” standard of causation: a) factual causation, i.e. but for the defendant’s offense, the harm would not have factually occurred, and b) legal causation, i.e. conduct within the larger “but for” category of harms resulting from the defendant’s conduct for which it is reasonable to hold the defendant responsible. The most common method of determining where the cut-off line should be is to hold the defendant responsible only for that harm that was “reasonably foreseeable” to someone in the defendant’s position, i.e., that harm the defendant “should have known” would or might result.

While there is no causation standard specified in the restitution statutes, a fundamental, basic causation standard is implied, which is most often a “reasonably foreseeable” one in both criminal and tort law. Moreover, the restitution analysis was expanded by the Mandatory Victims Restitution Act of 1996 (MVRA), which amended the definition of a victim to be a person “directly and *proximately* harmed as a result of the commission of an offense for which restitution may be ordered...” See §§ 3663(a)(2) and 3663A(a)(2). This obviously connotes the concept of “proximate cause” with its criteria reasonable foreseeability, and may ultimately broaden somewhat the scope of harms included in the restitution computation. See, e.g., the recent case of *U.S. v. Cummings*, 281 F.2d 1046 (9<sup>th</sup> Cir. 2002), including the victim’s attorneys fees in restitution as “foreseeable.”]

(v) Rules of Construction in Certain Cases. – . . .

*(special rules (I-III) describe specific rules of construction for computing the harm in product substitution cases, procurement fraud cases, and protected computer cases.)*

[The rules of construction preserve the special provisions in the previous loss definition that directed courts to include in loss certain unique kinds of harms in the three types of cases. Under the reformed loss definition, these kinds of harms would likely be included as “reasonably foreseeable” for other offenses as well. To the extent that these examples include out-of-pocket expenses to the victims caused by the offense in loss, the same expenses would likely be included in restitution as well.]

(B) Gain. – *The 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.*

[The prerequisite of a loss is shared with restitution. However, gain can not be used to support a restitution order unless the victims are specifically identified, and the amount of harm/loss is identified for each victim. Loss represents a gauge of culpability. For example, in a boiler room case the defendant might be held responsible for the amount of “loss” based on the proceeds from the bogus business deposited into his account, whether or not specific individual victims can be identified for restitution purposes. However, restitution must be ordered paid to identifiable victims in specific amounts.]

(C) Estimation of Loss. – *The court need only make a reasonable estimate of the loss. ...*

[The same is true of restitution, which, like loss, is a sentencing factor determined by a preponderance of the evidence (§ 3664(e)). Scientific precision is not necessary. Moreover, the burdens of proof are similar for both loss and restitution: The government bears the burden of proving the amount of loss for sentencing purposes, and for proving the amount of harm or loss to the victims, for restitution purposes (§ 3664(e)).

However, in restitution cases the defendant bears the burden of demonstrating his or her financial resources, which is relevant to the amount of discretionary restitution or the manner of payment of any restitution, whereas the defendant's financial resources are *not* relevant to the determination of "loss" for sentencing purposes.]

*The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:*

- (i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
- (ii) The cost of repairs to damaged property.*
- (iii) The approximate number of victims multiplied by the average loss to each victim.*
- (iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

[These same methods of computing the value of property or the aggregate loss to the victims could be used, where appropriate, for restitution purposes as well.

The restitution statutes provide guidance only with regard to the timing of valuation of property, with no specification of the method of valuing the property. For example, § 3663(b)(1)(B) provides that, in cases resulting in damage to or loss of property of a victim, the court may (or "shall" in § 3663A(b)(1)) require the defendant, "[where return of the property is not possible, impractical, or inadequate] pay an amount equal to the greater of – (I) the value of the property on the date of the damage, loss, or destruction, or (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned..."

Whether fair market value or replacement cost should be used to determine the "value" of the property is not specified. However, the courts have held that if fair market value of the property is inadequate to restore the victim to his or her pre-offense condition, then replacement value can be used. See, e.g., *U.S. v. Shugart*, 176 F.3d 1373 (11<sup>th</sup> Cir. 1999) (100 year old church); *U.S. v. Simmonds, III*, 235 F.3d 82 (3d Cir. 2000) (personal furniture).

Therefore, any of the methods listed in the loss definition might be used for restitution as well. The method used in each case would vary, based on the different purposes of loss and restitution. That is, in computing loss, the goal is to determine the amount of reasonably foreseeable “loss” that best reflects the seriousness of the offense and the culpability of the defendant, whereas in computing restitution, the goal is to *restore the victim* to his or her pre-offense. As a result, based on these different purposes and goals, it is conceivable that different calculation methods might be used for loss and for restitution in the same case.]

(D) Exclusions from Loss. – *Loss shall not include the following:*

(I) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*

[Case law has determined that pre-judgment interest is not included in restitution. In this regard, restitution and loss are similarly computed.]

(ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*

[Government “costs” such as costs of prosecution or buy-money in “sting” operations has been found by courts to be excluded from restitution, so in this respect loss and restitution are alike. Also, case law has consistently held that victims’ attorneys’ fees, a form of “costs” to victims, are excluded from restitution. The exception is where the victim’s expenditure of attorneys fees is very closely related to the offense conduct. See, e.g., *U.S. v. Cummings*, 281 F.3d 1046 (9<sup>th</sup> Cir. 2002).

Unlike loss, however, restitution is authorized in all cases for the victim’s costs incurred while participating in the case:

“(4) in any case, [the defendant should be ordered to] reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”§§ 3663(b)(4) and 3663A(b)(4).]

(E) Credits Against Loss. – *Loss shall be reduced by the following:*

(I) *[property returned to the victim prior to detection of the offense, as defined] and*

(ii) *[the value of any collateral pledged by the defendant, to be valued as defined].*

[Restitution is a net-loss concept; therefore, it too is reduced by the amount of the property (originally taken or destroyed) returned to the victim (by whatever source, at whatever time prior to sentencing). However in loss, the property must be returned by the defendant and it

must be done prior to detection of the offense, in order to reward the defendant's good deed and to prevent a defendant's return of property in order to receive more lenient treatment at sentencing. In other words, there is a culpability quotient in the treatment of returned property for loss that does not exist in restitution. Restitution analysis is only interested in whether the victim was compensated or not (e.g. the funds returned to the bank after the bank robbery are subtracted from the amount taken, regardless of whether the defendant had anything to do with the return, or the timing of the return).

However, neither loss nor restitution is reduced by compensation paid to the victim by a third party, such as the victim's insurance agent. The full amount of loss is counted, regardless of who ultimately bears it, to reflect the seriousness of the offense and culpability of the offender. It is also counted in the total restitution imposed, to make sure that the costs of defendants' offenses are not born by others or society at large. However, that portion would be ordered to be paid to the victim-compensator rather than to the victim, pursuant to § 3663(j)(1). In this instance, although the purposes vary, the result is probably the same in most cases for loss and for restitution.]

(F) Special Rules. *Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*

(I) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.— *[a specific minimum loss amount is specified for each credit card or access device, whether used or not].*

[A rule of a minimum estimation of value per card or device, even if unused, is appropriate for estimating relative culpability of the defendant or potential harm from the offense, for loss purposes. However, restitution must be computed on actual loss to victims. The "special rules" of what are basically "minimum loss" rules are not applicable to restitution, because they are not based on loss to victims, but rather are a constructive representation of the relative seriousness of the offense.]

(ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.*

[Restitution would likely be computed similarly in such cases, based on the loss to the government agency which was defrauded by the defendant's offense conduct. The same is true for the other Special Rules under (iii), (iv), and (v), based in each case on what the victim (which could be the pertinent government agency) lost due to the defendant's offense conduct. The loss for restitution purposes may not always be clear, however, particularly in professional services or regulated goods cases. Restitution is determined

by victim loss rather than putative culpability for a generalized loss, which means some results may vary.]

(vi) *Value of Controlled Substances.*—*In a case involving controlled substances, loss is the estimated street value of the controlled substances.*

[A similar provision in the restitution statutes is that for “community restitution,” pursuant to § 3663(c). This, however, is not actually “restitution,” in the sense of compensating a victim. Rather, it is intended to be a representative amount (imposed only under certain circumstances) to represent the harm from the offense to society. In this respect, “community restitution” is similar, if not identical, to the special rule in (vi).

However, unlike the loss rule, “community restitution” is seldom imposed because a fine “takes precedence” over this form of restitution, pursuant to § 3663(c)(5). The guidelines require a fine to be imposed (after restitution) based on the defendant’s ability to pay. Therefore, “community restitution” would only be imposed after a full fine is imposed (i.e. at least the minimum of the fine range as determined by the guidelines), where the defendant has some remaining financial resources.]

*[Note: Application Notes 3-14 explain the specific offense characteristics in new guideline §2B1.1, which involve assessing values for various aspects of loss that do not relate to restitution..]*

14. *Multiple Count Indictments.* *Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).*

[Restitution, like loss, is an aggregated amount imposed concurrently on all counts which support it. It is important, however, that the court specify precisely on which counts the restitution is based. If a count or counts are later vacated on appeal, it is important that it be clear whether, or to what extent, the restitution sentence is affected.

Moreover, the aggregated aspect of loss is similar to the restitution provision that states, “... in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.” §§ 3663(a)(2) and 3663A(a)(2). However, the restitution provision is potentially narrower than the loss provision. The loss provision aggregates loss for “a common scheme or course of conduct,” and does not require, as does the restitution provision, that the offense “involves as an element” a scheme, etc. Courts have interpreted the restitution provision rather narrowly, particularly where the government has not alleged the offense in the format customarily used for conspiracies and for bank, wire, and mail fraud, in which the scheme is described and incorporated by reference into each specific-act count, each of which is alleged



to be committed in furtherance of the scheme or conspiracy.]

15. *Departure Considerations.*— *There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. [examples follow]*

[There can be no “departure” for restitution amount, except that discretionary restitution is reduced to the extent the court determines the defendant cannot pay it. For mandatory restitution the court *must* impose restitution for “the full amount of each victim’s losses.” § 3664(f)(1)(A). Unlike loss, restitution need not correlate to the seriousness of the offense or culpability of the defendant, purposes which departures in sentencing guidelines serve. Nevertheless, there are some potential grounds of departure for loss that in fact are part of the restitution calculation in some cases, such as that below.]

- (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, education, or financial records).*

[Restitution cannot be imposed for a risk of harm, whether monetary or non-monetary, or for an invasion of a privacy interest, neither of which represent a loss to a victim that can be quantified. However, restitution *may* be imposed for treatment of physical or psychological harm caused to the victim by the defendant’s offense conduct, depending on the particular authorizing restitution statute involved. For example, as noted elsewhere, treatment of psychological harm is authorized under the general restitution statutes if the victim suffered bodily injury (see § 3663(b)(2) and 3663A(b)(2)), but there is no such predicate requirement for such restitution under the specific title 18 mandatory restitution statutes (see §§ 2248, 2259, and 2264).]

### **III. Loss Provisions That Do Not Correspond to Restitution**

The special offense characteristics of the loss guideline, new § 2B1.1, do not have corresponding provisions or concepts in the determination of restitution. These provisions assign adjustments to the offense level, computed *after* the loss amount is determined for the loss table at §2B1.1(b)(1), to reflect certain aggregating factors that might be involved in the case, such as the number of victims, or whether sophisticated means were used in committing or concealing the offense. These adjustments reflect whether one offense is more serious than another. They are unlike restitution factors in both structure or purpose.

Similarly, departure considerations are irrelevant to restitution; there is no such thing as a “departure” from the appropriate restitution amount in a case. However, as noted above, some of the bases of departures may be part of the harm computed for restitution purposes, such as

psychological injury to a victim.

#### IV. Restitution Provisions That Generally Do Not Correlate to Computation of Loss

**Harms compensated by restitution, but likely excluded from loss.** While restitution is normally much narrower than economic “loss” for the reasons cited above, there are a few ways in which restitution would include certain costs or harms that would not ordinarily be included in “loss:”

1) Restitution is authorized “in any case” for the costs the victim incurs in participating in the investigation and prosecution of the case, such as child care, transportation, and lost wages. §§ 3663(b)(4) and 3663A(b)(4). These costs are specifically *excluded* from the new definition of loss at Note 2(D)(ii).

2) Where there was bodily injury to the victim, restitution is authorized for “income lost by such victim as a result of such offense.” §§ 3663(b)(2)(C) and 3663A(b)(2)(C). While this expense has probably not been included in the calculation of “loss,” it could be that courts, under certain circumstances, will decide that such expenses are “reasonably foreseeable” pecuniary harms to the victim under the new loss definition. The same can be said for “funeral and related services” authorized as restitution in §§ 3663(b)(3) and 3663A(b)(3).

3) Whether restitution can be imposed for specific kinds of harms or costs is based on specific statutory provisions. For example, under §§ 3663A(b)(2) and 3663(b)(2), psychological treatment is authorized where the offense resulted in bodily injury to a victim. However, there is no such restriction on restitution for necessary psychological treatment under §§ 2248, 2269, or 2264. As for loss, it will depend on the circumstances of each case as to whether the court determines that such treatment was “reasonably foreseeable” to the defendant.

**Provisions regarding defendant’s financial resources.** Several restitution provisions pertain to the court’s determination of a defendant’s financial resources (e.g., §§ 3664(d)(3), 3664(f)(2) and 3663(a)(1)(B)). This consideration is not relevant to the calculation of economic “loss” for sentencing purposes, or to the determination of the *amount* of restitution to be imposed in a *mandatory* restitution case. However, it is a *necessary* consideration for the court when determining the *amount* of *discretionary* restitution to impose, or when determining the *manner of payment* of any restitution order (or fine).

**Plea agreements.** Several restitution provisions permit the court to impose a greater amount of restitution than could otherwise be imposed, based on a specific agreement between the parties in the plea agreement. §§ 3663(a)(3), 3663A(a)(3), 3663(a)(1)(A), and 3663A(c)(2). While there is no specific provision for loss to this effect, a defendant can agree that the loss is greater than what would be imposed for the counts of conviction -- subject to the court’s

acceptance of the plea.

**Discovery of new losses.** Restitution can be increased after sentencing upon discovery of new losses that were not “ascertainable” at sentencing, pursuant to § 3664(d)(5). There is no corresponding authorization to increase loss after sentencing, even if the government discovers that the amount of guideline loss was greater than known at sentencing.

**Future harms ascertainable at sentencing.** If harms are “ascertainable” at sentencing, they should probably be included in both loss and restitution. Courts, in interpreting § 3664(d)(5), above, have concluded that the court not only may, but must, include in restitution any costs of, for example, medical or psychological treatment necessitated by the offense, that are reasonably ascertainable (that they will occur) at sentencing. See, e.g., *U.S. v. Laney*, 189 F.3d 954 (9<sup>th</sup> Cir. 1999) and *U.S. v. Julian*, 242 F.3d 1245, 1247 (10<sup>th</sup> Cir. 2001).

Here, however, the same principle probably applies to the court’s determination of “loss,” so long as the harm or cost is determined to have been “reasonably foreseeable” to the defendant (i.e., harm “the defendant knew, or under the circumstances, reasonably should have known, was a potential result of the offense,” under Note 2(a)(iv)). Application of the newly articulated causation standard will ultimately be determined by case law, based on specific fact scenarios.

**Enforcement and collection of restitution.** There are many provisions in § 3664 involving the enforcement and collection of restitution, such as the requirement that funds received by the defendant while incarcerated be paid toward the restitution, in § 3664(n), for which there are no corresponding provisions regarding loss, because the court does not order the defendant to pay the “loss” amount used to calculate the sentence.

However, in cases where the defendant has financial means to pay a fine after the imposition of restitution (if any), the court must impose a fine, which is collected the same way as restitution (see §§ 3664(m)(1), 3572, 3611, 3612, 3613 and 3613A). The factors the court must consider in determining whether there should be a fine, and the amount of the fine, include some that are related to the considerations of both loss and restitution. See, e.g., § 3572(a), citing such factors as the defendant’s financial resources and responsibilities, any “pecuniary loss inflicted upon others” as a result of the offense, whether restitution is ordered or made and its amount, and the need to deprive the defendant of illegal gains.

#### **IV. Conclusion**

Considering the numerous and significant changes made to the determination of economic “loss” in white collar federal cases, it would be prudent for even those experienced in federal sentencing to carefully review the entire new guidelines, including each specific offense characteristic and explanatory Application Note, and especially Note 2, involving the calculation of the “loss” amount. It would also be helpful to review the “Reason for Amendment” for

amendment #617 on pages 185 - 190 in Supplement to Appendix C to the Guidelines Manual, 2001.

In summary, some concepts are common to loss and restitution. For example, restitution most closely resembles the net, actual-loss portion of loss. Also, the new causation standard is likely the unarticulated standard used to determine restitution harms, particularly in light of the new definition of victim as one who is “directly and proximately” harmed. However, the significantly different purposes of the two means that their analysis will always be fundamentally distinct, and confusion of the two can lead to court error. Loss serves the multiple, and partly “constructive,” purposes of representing the relative seriousness of the offense and culpability of the offender, while restitution is intended to compensate the victims of the offense. Both analyses deserve careful review, particularly given the fact that courts have not yet interpreted the new definition of loss, to assist courts in properly analyzing the two concepts.