

JUDGE CONABOY DRAFT REVISED DEFINITION OF LOSS¹

– “Loss” is the greater of the actual loss or the intended loss. “Actual loss,” in general, means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). “Intended loss” means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct) [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

- (1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;
- (2) the cost to the victim of replacing property taken, damaged, or destroyed;
- (3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;
- (4) the approximate number of victims and an estimate of the average loss to each victim;
- (5) the scope and duration of the offense, or revenues generated by similar operations[;][.]

[(6) **Gain — Option A:** The gain to criminally responsible participants from committing the offense.]

[**Gain — Option B:** If the loss is difficult or impossible to calculate, or the gain exceeds the loss, the gain to criminally responsible participants from committing the offense.]

(B) Time of Measuring Loss, Credits Against Loss. In general, loss is to be measured at the time the offense is detected (*i.e.*, when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).

¹Note: This definition is intended to be inserted as application note x in the combined theft-fraud guideline.

[Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.]

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall be credited.

Provided, however, if acts or omissions for which the defendant is accountable diminish the value of pledged assets or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

- [(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]
- (D) Departure considerations. There may be cases in which the approximated loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:
- (1) a primary objective of the offense was non-monetary;
 - (2) the offense caused or risked substantial non-monetary harm;
 - (3) false statements were made for the purpose of facilitating some other crime;
 - (4) the offense caused physical or psychological harm or severe emotional trauma;
 - (5) the offense endangered national security or military readiness;
 - (6) the offense caused a loss of confidence in an important institution;
 - (7) the offense endangered the solvency or financial security of one or more victims;[.]
 - [(8) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);]

- [(9) the offense created a serious risk of substantially greater economic harm than the loss that actually occurred;]
 - [(10) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;]
 - [(11) the offense involved [ten or more victims][a large number of victims;]
 - [(12) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;]
 - [(13) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]
- [(E) The following special rules are to be used in determining loss in the situations indicated:
- (1) “Sting” Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.
 - (2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, *i.e.*, the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.
 - (3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than \$100 per card.
 - (4) Diversion of Government Program Benefits

[Option A: In a case involving the diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.]

[Option B: In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.]

Background

“Loss” is a term of art that, along with other relevant factors under the guidelines, serves as an approximate measure of the seriousness of the offense and the defendant’s relative culpability. Because of the heavily fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court’s determinations in this regard are entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

JUDGE TACHA ALTERNATIVES

[(C) **Interest** — Loss shall not include interest the victim could have earned had the offense not occurred (i.e., “opportunity-cost interest”). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned].

[Departures — Option A: Create SOC in the guideline itself for the listed factors, instead of making them departure grounds:

- (b)() If the offense involved one or more of the following aggravating factors, increase by **2** levels:
- (i) the primary objective of the offense was non-monetary;
 - (ii) the offense caused or risked substantial non-monetary harm;
 - (iii) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline;
 - (iv) reasonably foreseeable (A) bodily injury, or (B) psychological harm or emotional trauma that is substantial and severe;
 - (v) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred.]

[Departures — Option B: Create an SOC for multiple victims, instead of making it a departure ground:

- (b)() If the offense harmed multiple victims, increase as follows:

<u>Number of Victims</u>	<u>Increase in Level</u>
[9 or less]	no increase
[10-99]	add 2
[100-299]	add 3
[300 or more]	add 4]

Commentary

[_. *Under subsection (b)() (iv), psychological harm or emotional trauma shall be considered to be “substantial and severe” if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance. Under subsection (b)() (v), a risk of additional loss shall be considered “substantial” if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was even greater, an upward departure may be warranted.]*