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GIVEN BEFORE THE UNITED STATES SENTENCING COMMISSION
ON BEHALF OF THE PRACTITIONERS ADVISORY GROUP
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I. Introductory comments.

On behalf of the Practitioner's Advisory Group to the Commission, I would like to express our appreciation for this opportunity, particularly at this pre-publication stage of the amendment process. The guidelines governing economic crimes are perhaps the single the most important work of this Commission. They apply to a very large number of cases. Together with drug cases, economic crimes are typically the most important cases committed to federal criminal Unlike the guidelines governing drug cases, however, the Commission's work in the area of economic crimes is unfettered by Congressionally mandated minimum sentences. It is with the guidelines for economic crimes, therefore, that this Commission faces its greatest challenges and can reap the greatest rewards offered by the promise of determinant sentencing.

The cornerstone of the current guidelines for economic crimes is the concept of "loss" as a means of determining offense severity and the defendant's level of culpability. The PAG agrees with this general approach. Although there are a myriad of factors bearing on offense severity in the variety of factual scenarios governed by these guidelines, the avoidance of undue complexity demands a fixed starting point in the analysis. The loss inflicted serves as the best overall measure of the severity of the offense and, although with far less precision, the culpability of the offender.

Looking at the current versions of the fraud and theft guidelines reflects a collage of ten years worth of tinkering, perhaps not always with a unified theme or approach. Moreover, litigation and uncertainty regarding a fairly small number of fairly significant issues remains. Once these issues are identified, which we believe the staff has done a good job of doing, they really are not insurmountable. The Commission can and should address these issues. With a small number of carefully drafted amendments - we have submitted a few suggestions - and follow-up study to measure their impact, the Commission can make greats strides toward the elimination of unwarranted disparity and the administration of just punishments for those who commit economic crimes.

The PAG's approach to these issues is driven by two guiding principles. The first is that we must not to lose sight of the fact that loss, and its role as the driving force in guideline calculations, should not be thought of as an end in itself, but rather to serve as a rough and approximate proxy for culpability and offense severity. The point behind the definition and calculation of loss should not be to seek mathematical certainty regarding the precise quantity of funds lost by the victim(s). The objective is instead a far more limited one - to measure in approximate terms the relative severity of the offense conduct and culpability of the offender. Accordingly, the general approach should be to look only at the loss proximately caused by the defendant's criminal conduct, and then to make every effort to simplify the calculation of that loss

in a rough and approximate way. Side issues which require detailed and complex fact finding, particularly where the impact on the total loss figure is small in most cases, should be relegated to departures in unusual cases.

This is not a political issue; it is one of rationality and efficiency of approach. The ultimate punishment is determined by the offense levels plugged into the loss table. To the extent that changes in the calculation of loss which err for the sake of simplicity on the side of exclusion result in loss figures which are lower than they are under the current guidelines, the offense levels in the table may be adjusted accordingly. This potential, as an aside, is a compelling reason to consider changes to the definition of loss and the offense level tables at the same time, rather than piecemeal.

The second guiding principle behind our views is that the use of "loss" as a surrogate for culpability must be coupled with encouraged departures where gain differs significantly from loss. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. We cannot prove it with any documented study, but we find that almost every case in which there is dissatisfaction with the result obtained by looking only at loss, the root cause of the dissatisfaction can be traced to a large variance between loss and gain or intended gain. This is a door which swings both ways. Where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure may be necessary and should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, a downward departure may be necessary and should be encouraged. Unless these departures are encouraged by the guidelines, undue uniformity will result.

II. The Commission should modify the guidelines' definition of loss.

The PAG believes it is important for the Commission to address a small number of extremely important issues concerning the definition of "loss," and suggests that should be done in tandem with its consideration of revised loss tables. Unless it is clearly understood how loss will be calculated, any discussion of revisions to the tables utilizing the resulting loss calculations occurs in a vacuum.

We are much more interested in the qualitative question posed by the Commission than we are in the quantitative question. The goal here is to reduce disparity and achieve just sentences. The issues of causation and gain, for example, should be addressed because they are essential to achieve fairness, although we also believe they are unclear and the subject of frequent litigation.

III. Very few of the problems with defining loss can be addressed solely through a general statement of principles.

It would certainly be helpful to have a general statement of principles regarding the definition of loss. This statement could explain that loss is used only as a rough surrogate for culpability, and thus need not be determined with precision or complicated by extraneous issues. The statement could also explain the basis for using a "net" loss approach coupled with a requirement of proximate causation as the best way to measure the harm caused by the defendant's criminal conduct.

But a statement of principles alone will not adequately address the current areas of uncertainty. Specific rules regarding what is included within and excluded from the loss calculation, including much of the current commentary, must accompany the statement of principles in order for the courts to apply the guidelines with the greatest ease to a variety of factual scenarios. Elimination of the current commentary would only return uncertainty to issues which are now relatively settled.

IV. Specific loss-related issues.

A. Actual loss

1. Causation. Only those losses proximately caused by the defendant's criminal conduct should ordinarily be included within the definition of loss for guideline application purposes. The current guidelines do not provide guidance as to the appropriate standard for determining whether a defendant's conduct "caused" the loss in a particular case. As a result, courts have applied different causation standards leading to disparate results.

The PAG believes that application note 7 should be revised to state explicitly that the defendant is only responsible for losses which are proximately caused by his or her conduct, i.e., those losses which were reasonably foreseeable. Such a result is appropriate because a defendant's culpability is more appropriately tied to those losses which the defendant could reasonably anticipate as opposed to those which completely beyond the defendant's control. Loss that a defendant either did not cause or that was not reasonably foreseeable has little (if any) bearing upon culpability. In unusual cases in which a defendant causes extraordinary unforeseen loss as a result of criminal conduct, an upward departure may be appropriate.

In addition to a requirement of proximate causation, the PAG also believes that some provision should be made for "multiple causation" situations. In a "multiple causation" case, the defendant's criminal conduct may both actually and proximately cause a loss, but it does so in combination with other factors - for example, a sharp downturn in the economy or unrelated criminal conduct by another person. To hold the defendant responsible for the entire loss in such a case could overstate his culpability. There are two different ways to deal with the issue of multiple causation -- either through incorporation in the loss calculation, or by downward departure in unusual cases.

2. Consequential damages. The inclusion of consequential damages within the

definition of loss would, we respectfully submit, frequently cause protracted litigation, uncertainty and disparity in application, and, at the end of the entire process, sheer speculation. In the interests of simplicity and ease of application, the PAG strongly opposes the use of consequential damages to calculate loss under the guidelines.

As a practical matter, evidence regarding consequential damages will almost never be within the possession of either the government or the defendant. Development of these factual issues will require large amounts of investigation, research, and discovery from third parties. Determination of consequential damages, by the very "what if' nature of the inquiry, involves litigation of frequently complex issues which may have almost no factual connection to the conduct underlying the charged offense. This type of issue is a perfect candidate for treatment as a departure issue where consequential damages are out of proportion to the direct loss caused by the defendant's conduct.

3. Interest. The PAG does not believe interest or any other lost profits should be included within the definition of "loss." Why should a defendant who fraudulently borrows money he promises (and may actually intend) to repay be punished more severely than a defendant who outright steals the same amount of money? Unpaid interest, whether "bargained for" or not, simply has nothing to do with the concept of loss. Moreover, even if there were any connection between the amount of unpaid interest and a defendant's culpability, the added complexity of including such matters - which is likely to be a rather small component of the total loss figure in most cases - is not justified by any measurably increased accuracy in determining culpability or offense severity.

4. Value received/credits against loss.

a. Amounts credited. The PAG believes that the actual loss figure should be reduced by all amounts received or readily recoverable from the defendant at the time law enforcement authorities discover the offense. This would include, for example, (1) any services, goods, or money furnished by the defendant before authorities discover the offense; (2) any security pledged by the defendant before authorities discover the offense; and (3)) any other thing of value belonging to the defendant that the victim is in a position to recover through reasonable effort before authorities discover the offense, provided that the defendant does not interfere with the victim's recovery. Category (3) would include, for example, the defendant's money in an account with a victim bank at the time authorities discover the offense and the defendant's goods in the possession of a victim bailee at the time authorities discover the offense.

Reducing actual loss by these amounts will help ensure that the loss figure provides a rough measure of the defendant's culpability. Value that the defendant has already furnished to the victim at the time authorities discover the offense (category (1) above) plainly reduces his culpability; by the act of famishing the value, the defendant has, to that extent, diminished the harm to the victim and provided tangible evidence of his own good faith. Similarly, value that the defendant has placed at the victim's disposal before authorities discover the offense (categories (2)

and (3) above) reduces culpability, since the defendant presumably expects the victim to recover that amount.

The PAG believes that discovery of the offense by law enforcement authorities should represent the cut-off point for credits against loss. Discovery of the offense by the victim or another non-law enforcement person should not be used as the cut-off for two reasons. First, usually it will be easier to prove when law enforcement authorities discovered an offense than when some other person or entity did so, since law enforcement authorities generally keep records of information received and no resort to third-party witnesses will be necessary. Second, value given after law enforcement authorities have discovered the offense often will be viewed as an attempt by the defendant to buy his way out of trouble. Although such a post-detection payment may merit a downward adjustment or departure for acceptance of responsibility, it does not otherwise diminish the defendant's culpability. By contrast, value given before law enforcement authorities have discovered the offense (whether or not the victim has discovered it) is more likely to reflect the defendant's genuine desire to make the victim whole and thus to reduce the defendant's culpability.

b. When credits are valued. The PAG suggests that goods and services furnished to the victim before law enforcement authorities discover the offense (category (1) above) should be valued as of the time they are provided. Goods that are pledged as security or that are otherwise readily recoverable at the time authorities discover the offense (categories (2) and (3) above) should be valued as of the time pledged or otherwise put at the victim's disposal. Valuing such goods in this manner will ensure that the defendant does not receive an undeserved windfall or suffer an unjustified penalty from increases or decreases in value after he has made the goods available to the victim.

B. Alternatives to actual loss.

1. Gain. Actual or intended gain must be included as a recognized ground for departure in certain cases in which gain differs substantially from loss. The first sentence of the current background commentary regarding the definition of loss (found within the theft guideline and incorporated by reference in the fraud guideline) explains that loss is used to determine culpability in theft cases because loss is generally a measure of the two key aspects of culpability in such cases -- harm to the victim and actual or intended gain to the defendant. By using the same tables and offense levels in fraud cases, there appears to be a built-in assumption that loss also generally equals actual or intended gain in fraud cases. Indeed, the current fraud guideline considers gain only where the amount of the loss is difficult to determine with precision. The PAG respectfully submits that this is a serious defect in fairness and rationality which contributes greatly to dissatisfaction with the guidelines in many so-called white collar cases. Simply stated, there is a significant and palpable difference 'in culpability between defendants who purposely and intentionally derive gain in an amount similar to the loss caused by their conduct on the one hand, and defendants who actually or hope to gain little or no personal benefit on the other hand. For example, a defendant who swindles a victim out of $500,000 and uses the funds to live a lifestyle

beyond his means would appropriately be sentenced using a guidelines application reflecting a $500,000 loss. Such a case is essentially akin to a $500,000 theft. By ignoring the concept of gain, however, the guidelines treat in an identical fashion a corporate employee who submits a claim for payment to the government which overstates the amount owed to his employer by $500,000.

By the same token, in other types of cases the actual or intended loss caused by the defendant may be minimal or even zero, while the actual or intended gain from the offense may be significantly greater. In such cases, consideration only of the harm to the victim will potentially understate the severity of the offense.

In sum, although harm to the victim and gain to the defendant will be the same in typical theft cases, there often will be little correlation between the two in fraud cases. The question then arises as to how to address this issue while simultaneously simplifying the guidelines. If it were possible to draft a guideline which factored actual or potential gain into the initial determination of the base offense level, this would certainly be preferable. After some consideration of the issue, however, the PAG believes that it would unduly complicate the sentencing process to attempt to merge within the base offense level determination concepts of both gain and loss. Accordingly, the only remaining alternative appears to be the use of loss in the first instance to determine the applicable guideline range, followed by an encouraged departure in cases in which gain significantly differs from loss.

2. Intended loss. The concept of intended loss as currently set forth in application note 7 is too broad. It invites speculation about every defendant's subjective intent in engaging in fraud, and where that subjective intent is greater than the actual loss, the note requires that the intended loss be used for purposes of determining the defendant's offense level. This approach can result in serious disparities between defendants. For example, one who engages in a scheme which could never successfully defraud anyone, but who intends to swindle someone out of $ 1 00,000, is punished more harshly than a defendant who successfully defrauds individuals of $70,000, even though in the latter case victims have actually lost money. The guideline should be amended to reflect that where the defendant is incapable of causing the loss intended, the defendant's offense level should be based on the loss which would have been caused had the defendant's fraud been successful.

3. Impossibility. The "impossibility" (or "economic reality") doctrine limits intended loss. The doctrine has significance only to the extent that the guidelines base the loss figure on intended loss when intended loss is greater than actual loss (for example, setting the loss figure at $100,000 when the defendant intends to cause a. $ 1 00,000 loss but causes no actual loss). As set forth above, the PAG believes the guidelines should not continue using intended loss as an alternative to actual loss for determination of the base offense level. Instead, intended loss should only be used as an encouraged departure ground where it differs significantly from actual loss. If the PAG's position were adopted, the impossibility issue would largely be eliminated except in determining the appropriateness or extent of a possible upward departure in such cases. If he

current use of intended loss is continued, however, the PAG believes that the impossibility doctrine should play a role in preventing unfair sentences based on unrealistically high intended loss figures. This is particularly so in "sting" cases, where the government can manipulate the intended loss figure almost at will to produce a higher sentence. We suggest that the impossibility doctrine be expressly included in the commentary to the fraud guideline, with allowance for upward departures in exceptional cases where the actual loss figure does not fully capture the defendant's culpability. See United States v. Gailbrath, 20 FM 1054, 1059 (10th Cir. 1994)(Tacha, J.)