PREPARED STATEMENT

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The Problem of Loss

Let me begin by thanking the Commission and its staff for giving me the opportunity to contribute to your discussion of the meaning of "loss." My proposals are quite specific, and include a proposed consolidated economic crimes guideline to replace the current theft and fraud guidelines, §§ 2B1.1 and 2F1.1. I have taken the liberty of attaching that proposed guideline to these remarks. The views expressed here are elaborated in far greater detail in a paper I have previously provided Commission staff.[1] Without further ado, let me attempt to address the specific questions you have asked:

I. Why should the Commission tackle the definition of loss?

The best reason to tackle "loss" is that it is a golden opportunity to achieve the goal of simplification this Commission has laudably set for itself, and to do so in a category of cases comprising one-fifth of all federal criminal sentencings. A well-crafted revision of the guidelines provisions involving "loss" would be simplification in all the right senses. It would: (1) shorten the Guidelines themselves, (2) give sentencing and reviewing courts better guidance, and (3) promote sentencing outcomes consistent with one another and with the recognized purposes of Guidelines sentencing.

Moreover, this is the job the Commission was created to do. The Commission wrote guidelines for sentencing economic crimes and made "loss" the centerpiece and linchpin of the

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[1] *See, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, scheduled for publication in the VANDERBILT LAW REVIEW in the spring of 1998.

whole enterprise. Not only is the "loss" measurement the primary determinant of the sentence in crimes of dishonest acquisition, but according to the Commission's figures, a loss determination is necessary in 20% of all federal criminal sentencings. In other words, federal district court judges must make a loss finding in roughly 8,000 cases every year and the fate of 8,000 defendants every year depends on that finding.[2] If so significant a component of the Guidelines sentencing system does not work well, the Commission's mandate is to fix it. The evidence that "loss" does not work well as presently defined is compelling.

The result of the recent Federal Judicial Center survey of judges and probation officers in which both groups ranked the "loss" definition as the second most pressing issue for the Commission to address is not surprising. A search of the Westlaw database shows that the concept of "loss" in either U.S.S.G. §2B1.1 or §2F1.1 has been discussed in nearly 900 federal court opinions. There are at present splits of opinion between the circuits on *at least* eleven separate, analytically distinct, issues concerning the meaning and application of the "loss" concept.[3] Even more significant than the identifiable circuit splits is the overall sense of uncertainty, confusion, and sheer aggravation that emerges whenever lawyers and judges who

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[2] There are roughly 40,000 Guidelines sentencings per year. U.S. SENT. COMM. ANNUAL REPORT 1995, p. 41.

[3] There are surely more than eleven. Among those discussed in the longer article on which these remarks are based are differences of opinion over: (1) Whether "loss" is to be defined differently in theft and fraud cases; (2) Whether "loss" can ever include so-called "consequential damages;" (3) What "consequential damages" means in the loss context; (4) Whether lost interest should be included in "loss;" (5) When "loss" should be measured; (6) Whether assets pledged as collateral must be credited against "loss;" (7) Whether assets paid as or available to pay restitution, but not pledged as collateral by a defendant, should be deducted from "loss;" (8) Whether money repaid before detection of the crime should be deducted from "loss;" (9) Whether factual impossibility reduces "loss" to zero; (10) Whether a defendant's criminal intentions must have been realistic to be counted as "intended loss;" and (11)Whether intended loss can be measured only by applying the attempt guidelines of §2X1.1.

deal with federal economic crime discuss "loss."[4] "Loss" is not only a problem in fact, those in the best position to judge feel it to be so.

II. Would the problems with loss "be best addressed through a more comprehensive, simplified definition of loss coupled with elimination of all or some of the current commentary?"

It has been suggested that the proper approach to the "loss" conundrum would be to provide a one or two sentence basic definition of the term and then leave the details to the courts. I concur strongly with the view of Judge Gilbert and the Committee on Criminal Law that such an approach would not be helpful. The existing imperfect set of rules governing loss creates confusion for the courts and the parties. No rules would create chaos.

The problem with the current "loss" rules is not that they are too detailed. Indeed, one of their notable defects is the absence of guidance on many basic issues. The solution to redefining "loss" is not to lop off all the rules, but to draft rules that give guidance on the most commonly occurring issues and that are consistent both with recognized sentencing purposes and with each other.

III. A Proposal for Addressing the "Loss" Problem

A. <u>The Guidelines Should be Simplified By Consolidating §2B1.1 and §2F1.1</u>

There is no good reason to have two separate guidelines for theft and fraud. There are compelling reasons to consolidate §2B1.1 and §2F1.1. First, the distinction between theft and fraud is largely illusory. Although not all theft crimes are frauds, virtually every fraud could be charged as some form of theft. Federal law abounds with instances where the same course of

[4] *See, e.g., United States v. Kaczmarski*, 939 F.Supp. 1176, 1182 n. 7 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1173 (3d Cir. 1997) where Judge Dalzell refers with obvious exasperation to the task of "construing the vaporous word loss."

thievery is chargeable under multiple statutes, some of which are called "frauds," and some of which are traditional "theft-like" offenses. Second, even if it were possible to draw a meaningful distinction between thefts and frauds, it would only be useful to do so in writing sentencing guidelines if the objective were to generate different sentencing outcomes for the two categories of cases. However, the sentencing range under both the theft and fraud guidelines is driven almost entirely by loss amount. Therefore, unless the term "loss" means something different in theft and fraud cases, application of either §2B1.1 or §2F1.1 to the same set of facts will customarily produce either the identical sentencing range, or a pair of ranges so close that the top of one will approach, or even overlap, the bottom of the other.[5] Because the fraud guideline adopts the "loss" definition from the theft guideline, this is exactly what happens. Thus, in the overwhelming majority of cases, the existence of separate fraud and theft guidelines is merely a pointless duplication. Third, the existence of separate theft and fraud guidelines is mischievous. Sections 2B1.1 and 2F1.1, and their commentary regarding "loss," are *slightly* different, albeit for reasons that are not easy to discern. Consequently, creative litigants and judges try to impute meaning into the differences, which only leads to confusion.[6]

B. The Consolidated Economic Crimes Guideline Should Retain the "Loss" Concept, But Identify and Account Separately for Sentencing Considerations for which "Loss" Is Not a Good Measurement

A consolidated economic crimes guideline should retain as a central component a measurement akin to the current "loss" concept. The intuitive judgment, at work among Anglo-

[5] The Sentencing Table is constructed so that the top of one sentencing range will overlap the bottom of the range two offense levels higher. U.S.S.G. Ch. 5, Pt. A (1996).

[6] *See, e.g.*, the series of Third Circuit cases beginning with *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), running through *U.S. v. Badaracco*, 954 F.2d (3d Cir. 1992), *U.S. v. Coyle*, 63 F.3d 1239 (3d Cir. 1995), and *U.S. v. Maurello*, 76 F.3d 1304 (1996).

American lawmakers for at least seven hundred years, that stealing more is worse than stealing less is fundamentally sound. Nonetheless, "loss" as now defined functions as an imperfect proxy for too many sentencing values. Where possible, those values should be identified and accounted for outside the "loss" calculation. In fact, the Guidelines already do this to a large degree. For example, the adjustments for role in the offense, §§ 3B1.1 and 3B1.2, abuse of trust, §3B1.3, and acceptance of responsibility, §3E1.1, pertain to assessment of an economic criminal's mental state, and thus of his relative blameworthiness. Still, more could be done to reduce the overriding importance of the quantitative "loss" measurement. I will forego a detailed discussion of specific suggestions on how to achieve that end,[7] and turn instead to the question of what "loss" should mean in a consolidated economic crimes guideline.

C. "Loss": What Should It Mean and How Should It Be Measured?

1. *What's Wrong With the Existing Definition of "Loss"?*

The root of the "loss" problem is that the Guidelines do not now contain a meaningful definition of the term. The descriptive commentary regarding "loss" following §§2B1.1 and 2F1.1 includes a series of directives which neither singly nor together amount to a coherent definition. The basic definition of "loss" announced in the theft guideline and adopted by reference into the fraud guideline -- "the value of the property taken, damaged, or destroyed" -- uses the language of larceny. The word "taken" is a term of art, denoting to any Anglo-American criminal lawyer the "taking" element of common law larceny, with its insistence on a transfer of

[7] I have proposed: (1) Abolishing the "more than minimal planning" upward adjustment and building those two levels into the loss table, and then adding a two-level upward adjustment for sophisticated means and a two-level downward adjustment for cases *not* involving even minimal planning; (2) Adding separate upward adjustments for the number of victims and the infliction of significant financial hardship.

possession of moveable personalty. Thus, the basic definition of "loss" apparently includes only what might be termed the *corpus delicti* of basic property crimes, the "thing of value" physically abstracted from the victim. Outside the limited context of simple larceny-like offenses, this definition is virtually useless. For example, if "taken" retains some vestige of its common law meaning, when is property "taken" in a wire fraud or a bankruptcy fraud or an insider trading case, and how, and from whom? Alternatively, if "taken" is intended to invoke no particular doctrinal association, what on earth does it mean?

Perhaps the most glaring defect in the current structure is its treatment of the question of causation. "Loss" is first and foremost a measurement of pecuniary harm. When we ask what the "loss" is in any particular case, we are really asking two questions about causation: First, what economic harms resulted from defendant's conduct? Second, which among the harms the defendant caused in fact should count in law in setting his sentence? The Guidelines provisions relating to these questions and the cases construing them have created an ugly and nearly incomprehensible patchwork, which so far as I can discern looks roughly like this:

a. The Guidelines contain no rules for identifying the "victims" whose "losses" will count.

b. The relevant conduct guideline, §1B1.3, mandates a broad measurement of harm, saying that offense levels are to be determined based on "all harms resulting from" a defendant's own conduct, and thus apparently sets up a rule of pure "but for" causation.

c. However, both the fraud and theft guidelines define "loss" narrowly as the "thing taken," the *corpus delicti* of the crime.

d. Moreover, §2F1.1, Application Note 7(c), says only "direct damages" count, and excludes from consideration "consequential damages." Both these terms are drawn from contract

law and are difficult, if not impossible, to apply in the criminal context. If the latter term is given its customary contract law meaning, Note 7(c) excludes from "loss" even economic harms which are both directly caused by defendant's conduct and foreseeable to him.

e. On the other hand, in cases of procurement fraud and product substitution the Guidelines specifically *include* in "loss" the "consequential damages" elsewhere excluded, if the loss is "foreseeable."

f. Likewise, if a defendant has co-conspirators or other criminal cohorts, he is responsible for all harms that resulted from all of their "reasonably foreseeable acts and omissions" in furtherance of the crime.

g. In loan fraud cases, the loss to banks caused by a drop in value of pledged collateral is a part of the "loss," regardless of whether it was foreseeable and despite the fact that such a loss is a classic "consequential damage."

h. Except in loan fraud cases, if a victim's loss is genuinely attributable to several causes, there is no rule for determining what the causal nexus to a defendant's conduct must be before the loss should be counted.

i. In any case, courts routinely evade the no-consequential-damages rule by ignoring it or by interpreting it to impose something like a rule of "proximate cause."

In short, as Professor Higgins says in *My Fair Lady*, you have a ghastly mess.

2. *How do we fix it?*

A usable definition of "loss" must address two basic problems: the *problem of inclusion*, that is, deciding which harms to include and which to exclude from the ambit of "loss," and the *problem of measurement*, that is, creating rules that assist courts in calculating the

monetary value of the included categories of economic harm.

a. The Problem of Inclusion

The problem of inclusion should be addressed by redefining "loss" in terms of cause-in-fact and foreseeability.

I. Cause in fact.

At a minimum, a defendant's conduct must be a "necessary antecedent to the harm at issue."[8] Any Guidelines definition of "loss" must at the very least require this sort of "but for" causation. If a harm would have happened regardless of defendant's behavior, there can be no justice in punishing him for its occurrence. The more difficult question is whether to impose on the "loss" calculation a standard of logical causality stricter than pure "but for" causation. Chains of cause and effect, once initiated, run on infinitely through time. As Benjamin Franklin observed, "A little neglect may breed great mischief ... for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost."[9] The recurring legal question is whether, when a defendant abstracts a horseshoe nail, he should be sentenced for the loss of the nail, the horse, the rider, or perhaps even greater harms flowing from their loss.

The Commission should adopt as part of the "loss" definition a standard of cause-in-fact more stringent than "but for" causation. It seems plain that neither the Sentencing Commission nor the courts are disposed to count as "loss" harms logically remote from a defendant's conduct. The proposed "substantial factor" language maintains continuity with that established approach,

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[8] *United States v. Needle*, 72 F.3d 1104, 1119 (3d Cir. 1996) (Becker, J., concurring and dissenting), *citing* 4 FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 20.2, at 89-91 (2d ed. 1986).

[9] BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC, *Preface: Courteous Reader* (1758).

and is consistent with the general principle of criminal fault that people should be sent to jail only for harms to which they have a significant connection.

ii. *Foreseeability*

In every area of law that has wrestled with it, the solution to the problem of placing reasonable limits on legal liability for harm which a defendant caused in fact has centered on the concept of "foreseeability," that is, some assessment of which harms the defendant could or should reasonably have anticipated. Criminal law is no different. Foreseeability has long been a staple of analysis both in determining guilt and in imposing sentences.

Guilt: Foreseeability is expressly an element of crimes of criminal negligence and even the most aggravated degrees of recklessness. It is also integral to determinations of guilt for crimes in which the ostensible *mens rea* involves intentionality or knowledge.[10] For example, a party to a conspiracy is responsible for any crime committed by a co-conspirator if it is within the scope of the conspiracy, or is a foreseeable consequence of the unlawful agreement.[11] An accomplice "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets."[12] The felony murder rule, which imposes liability for the highest available degree of criminal homicide for killings occurring during

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[10] *See, e.g.*, *People v. Rakusz*, 484 N.Y.S.2d 784 (N.Y. Crim Ct. 1985) (finding defendant guilty of assault, defined as: "with intent to prevent ... a police officer ... from performing a lawful duty, he causes physical injury to [the officer]," when an officer frisked a struggling defendant and cut his hand on the knife, because the injury was foreseeable to defendant); *State v. Williquette*, 385 N.W.2d 145 (1986) (holding that a defendant "subjects a child" to abuse if, by act or omission, "she causes the child to come within the influence of a foreseeable risk of cruel maltreatment").

[11] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). *See also*, *United States v. Laurenzana*, 113 F.3d 689, 693 (7th Cir. 1997)(defendant guilty of conspiracy to commit mail fraud where he enters scheme in which it is reasonably foreseeable that mails will be used).

[12] *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

certain dangerous felonies, in effect substitutes foreseeability of death for the intent to cause it.

Sentencing: Foreseeability of harm is also widely employed in sentencing. The Guidelines themselves repeatedly use foreseeability as the dividing line between those harms which count for measuring offense seriousness and those which do not.[13] This approach has received the imprimatur of the United States Supreme Court, even in the capital sentencing context.[14] The inclusion of foreseeable harms in the sentencing calculus is not only sanctioned by long precedent, it is entirely consistent with the fundamental principles and purposes of criminal sentencing. Criminal law is preeminently about fault. It is unjust to put someone in prison for harms he did not intend or that he could not reasonably have anticipated would follow from his choice to do wrong. It is entirely appropriate, however, to punish based on harms that would not have occurred but for the defendant's evil choices, and which the defendant either anticipated, or with even modest thought, could and should have anticipated.

Because the emphasis in criminal law is on fault, the definition of what is foreseeable for sentencing purposes should be relatively narrow. The proposed language on foreseeability emphasizes two points: 1) Although the idea of foreseeability is, by definition, an objective

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[13] *See* §1B1.3(a) (dictating that sentencing be based on harms resulting from the foreseeable conduct of defendant's criminal partners); §2F1.1, n. 7(c) (including in "loss" foreseeable consequential damages in procurement fraud and product substitution cases); § 2F1.1, n. 10(a) (authorizing a departure for "reasonably foreseeable non-monetary harm"), § 2F1.1, n. 10(c) (authorizing departure for "reasonably foreseeable" physical, psychological, or emotional harm). *See also, United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995) (finding all losses on fraudulently procured loan attributable to the defendant even where the default was not his fault because it was reasonably foreseeable from the defendant's conduct that the loan would be approved, putting the bank's money at risk.)

[14] *Payne v. Tennessee*, 501 U.S. 808 (1990) (Approving use of victim impact evidence over the objection that such evidence concerns "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," and thus had nothing to do with the "blameworthiness of a particular defendant." Justice Souter, concurring, observed that the harms to the surviving victims of homicide are morally, and therefore legally, relevant precisely because they are so plainly foreseeable.).

standard (we ask not what the defendant *did* foresee, but what he *could have* foreseen had he troubled to think about consequences), the definition insists that the harm have been foreseeable to *this* defendant given the facts available to him at the time he acted. 2) The standard requires that a reasonable person in defendant's shoes "would have foreseen" the harm in question "as a probable result."

The combination of a more-than-but-for cause in fact standard and a tougher-than-tort-law foreseeability standard should produce several practical results. First, a somewhat expanded universe of pecuniary harms will be counted as "loss." This is desirable as providing a closer congruence between the true harm caused by economic offenders and the sentences they serve. Second, the new rule should pose a much simpler analytical task for sentencing courts.

Some will contend that the rules proposed here will impose a greater fact-finding burden on courts. I respectfully disagree. Zealous government advocates in search of more severe sentences will present roughly the same evidence and arguments whether or not the changes advocated here are adopted. Zealous defense counsel will argue just as strenuously that the harms urged by the government have not been proven, or if proven, should not count. The only difference will be that courts will draw the lines of inclusion and exclusion from "loss" in different (and I hope easier to find) places. District courts are very well equipped to make findings of fact. That is, after all, what they do for a living. The problem with the loss calculation has never been the factual issues; it has been with trying to apply an incomprehensible set of conflicting rules to well-understood facts.

As some workingman's sage once observed, half the key to success in any undertaking is having the right tools. The current Guidelines use the wrong verbal tools to define loss, tools

designed for other tasks. The core issues in defining loss are questions about causation -- cause-in-fact and foreseeability. The Guidelines should deal with these questions squarely and should give sentencing judges the definitional tools they need to make case-by-case decisions. The tools offered here are simply specialized manifestations of the old familiar ones, rendered both comfortable and adaptable by centuries of use. Judges do not know how to merge larceny language ("taken") with contracts terminology ("consequential damages"). They do know how to determine cause-in-fact. They do know how to determine foreseeability. The Commission should let them.

For reasons of space, I will not discuss the issues of "gain" as an alternative measure of loss, and the problem of interest other than to say: (1) I believe the "gain" problem largely disappears once "loss" is properly defined; and (2) the interest problem is simply a special case of the general causation problem and its solution is readily inferable from a properly conceived set of causation rules.[15]

b. The problem of measurement

Even if the Commission were to redraft the core definition of "loss" in terms of cause-in-fact and foreseeability, there remain a number of critical problems of measurement that should be addressed in the commentary. These include: (1) The question of *when* "loss" should be measured. I have proposed a rule that "loss" should ordinarily be measured at the time of detection of the crime, subject to two exceptions. (2) The question of what amounts to credit a defendant in calculating loss. I propose a "net loss" rule which largely tracks current case law.

3. Intended Loss

[15] For detailed discussion of the interest problem, *see* Bowman, *supra* note 1, pp. 102-107.

The concept of "intended loss" should be retained. Because application of the Guidelines requires a method for ranking the seriousness of particular instances of crimes of the same general type, "intended loss," or something very like it is indispensable. There must be a way of distinguishing among inchoate (and also partially successful) economic crimes. Laws penalizing inchoate crimes exist because such conduct is blameworthy and because it poses a risk of actual harm. Because inchoate (or only partially successful) economic crimes are, in essence, wholly or partially unconsummated efforts to inflict pecuniary loss, it makes perfect sense to rank such crimes in large measure based on the amount of harm the defendant desired to inflict. A crook who sets out to steal a million dollars is, all else being equal, both morally less attractive and a greater social risk than one whose more modest goal is to snitch a pack of cigarettes.

Although blameworthiness and risk of harm are both considerations in punishing uncompleted conduct, the first consideration is more significant than the second. Therefore, just as in the liability phase of a criminal trial, at sentencing the factual impossibility or improbability of success of a criminal plan should, in general, be no defense. The proposed application note focuses on the defendant's state of mind, on what he intended and what he believed. It holds him responsible for losses he intended, so long as they "might reasonably have occurred if the facts were as he believed them to be." The objective is to hold defendants responsible for their evil objectives, but takes account of risk to leave a window, albeit a small one, to subtract from "loss" those rare harms that simply could not have befallen, *even if* things were as the defendant thought them.

It might be argued that there should be a discount for unrealized, but intended, losses as compared to loss actually inflicted. There is such a discount in the consolidated guideline

proposed here, but it requires a moment's thought to see it. The proposed definition of actual loss expands the universe of pecuniary harms counted in "loss" to include reasonably foreseeable ones. Hence, where a criminal plan is successful, the perpetrator will be liable, not only for those harms he desires, but for such additional harms as are foreseeable to him. By contrast, the unsuccessful criminal is responsible only for the losses he desired to inflict; "foreseeability" does not enter the picture. Hence, the cross-reference to the attempt guideline, §2X1.1, is unnecessary, as well as intensely confusing, and ought to be abandoned.

IV. CONCLUSION

As I think this body is aware, I am a fan of the Commission and the Federal Sentencing Guidelines. I think the Guidelines are an improvement on the system they replaced and, in general, work far better than their many critics believe. Nonetheless, they remain an experiment. If the experiment is to succeed over the long term, the Guidelines and the Commission which shepherds them must be flexible and innovative enough to reinvent parts of the system that do not work as they should. The Guidelines machinery for sentencing economic criminals is not broken, but it is unwieldy, inefficient, the gears are creaking, frustration is growing, and it is time for a new model. Whether the approach I have sketched out has sufficient merit to be part of the blueprint for that new model remains to be seen. At the least, I hope it provides a place to start.

Appendix A

[*A proposed consolidated economic crimes guideline*]

§2Z1.1. Economic Crimes, Including Fraud, Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add **1**
(C)	More than $1,000	add **2**
(D)	More than $2,000	add **3**
(E)	More than $5,000	add **4**
(F)	More than $10,000	add **5**
(G)	More than $20,000	add **6**
(H)	More than $40,000	add **7**
(I)	More than $70,000	add **8**
(J)	More than $120,000	add **9**
(K)	More than $200,000	add **10**
(L)	More than $350,000	add **11**
(M)	More than $500,000	add **12**
(N)	More than $800,000	add **13**
(O)	More than $1,500,000	add **14**
(P)	More than $2,500,000	add **15**
(Q)	More than $5,000,000	add **16**
(R)	More than $10,000,000	add **17**
(S)	More than $20,000,000	add **18**
(T)	More than $40,000,000	add **19**
(U)	More than $80,000,000	add **20**.

(2) If the offense involved (A) a theft from the person of another, (B) the conscious or reckless risk of serious bodily injury, or (C) possession of a dangerous weapon, increase by **2** levels. If the offense involved either (B) or (C) and the resulting offense level is less than **13**, increase to level **13**.

(3) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **4** levels.

(4) If (A) undelivered United States mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level **6**, increase to level **6**.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level **14**, increase to level **14**.

(6) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order,

injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, then increase to level **10**.

(7) If the offense --
  (A) substantially jeopardized the safety and soundness of a financial institution; or
  (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,
  increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(8) If sophisticated means were used to commit the offense, or to impede the discovery of the existence or extent of the offense, increase the offense level by **2** levels.

(9) If the offense involved only minimal planning or represented a single instance of impulsive behavior, decrease by **2** levels.

(10) If the offense involved more than one victim, increase the offense level as follows:
  (A) If the offense involved 2-4 victims, increase by **1** level.
  (B) If the offense involved 5-20 victims, increase by **2** levels.
  (C) If the offense involved 21 or more victims, increase by **3** levels.

(11) If the offense caused significant financial hardship to any victim, increase by **2** levels.

(C) Cross Reference [regarding theft of firearms -- to remain same as in present §2B1.1(c).]

Application Notes:

1. "Loss" means all pecuniary harm caused by the acts and omissions specified in subsections (a)(1) and (a)(2) of §1B1.3 (Relevant Conduct) that was reasonably foreseeable to the defendant at the time of such acts or omissions. "Victims" are all persons or entities (public or private) which suffered such harms.

(a) Pecuniary harm

The phrase "pecuniary harm" is to be given its common meaning. Many physical and emotional harms, injuries to reputation, etc. can be assigned a monetary value. However, "loss" does not measure harms of this kind. Its purpose is to measure economic harms.

(b) Causation

A harm has been "caused" for purposes of this guideline if one or more of the acts or

omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) was a substantial factor in producing the harm. "Loss" should not include harms that are causally remote from the specified acts or omissions.

(c) *Foreseeability*

A foreseeable harm is one that ordinarily follows from one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) in the usual course of events, or that a reasonable person in the position of the defendant would have foreseen as a probable result of such acts or omissions.

Examples: (1) In a case involving product substitution, the loss includes the purchaser's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the purchaser's reasonably foreseeable cost of rectifying the actual or potential disruption of the purchaser's activities caused by the product substitution. (2) In a case of fraud involving the award of a government contract, loss includes the reasonably foreseeable administrative cost to the government and other public and private participants of repeating or correcting the contracting process affected, plus any reasonably foreseeable increased cost to secure the product or service contracted for. (3) In a case of destruction of commercial property by fire as part of a scheme to defraud, loss includes reasonably foreseeable added costs incurred by local government authorities in suppressing the fire, and reasonably foreseeable pecuniary harm to the owner of the property (if not the defendant) resulting from interruption in his business activity.

Loss does not, however, include costs incurred by government agencies in criminal investigation or prosecution of the defendant.

(d) *Cases of theft, receipt of stolen property, and destruction of property*

In cases involving larceny, false pretenses, embezzlement, and other forms of theft, as well as cases involving receipt of stolen property or the destruction or damage of property, loss includes, but may not be limited to, the value of the property stolen, embezzled, damaged, or destroyed.

(e) *Congressional intent*

In determining the loss (including the identification of the persons or classes of persons to be treated as victims), the sentencing court shall give particular weight to congressional intent. It shall be rebuttably presumed that pecuniary harm which was: (I) caused by one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct); and (ii) suffered by any person or class of persons whose interests Congress intended to protect by passage of the offense(s) of conviction or offense(s) considered by the sentencing court as relevant conduct, was foreseeable to the defendant. For example, in a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended beneficiaries or uses. Similarly,

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.

(f) *Time of measurement of loss*

Loss should ordinarily be measured at the time the crime is detected. However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time. For purposes of this guideline, a crime is detected when either a victim or a public law enforcement agency has (at least) a reasonable suspicion that a crime is being or has been committed and the defendant becomes aware that such suspicion exists. Examples: (I) In the case of a defendant apprehended in the act of taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately. (ii) In the case of an embezzlement in which the defendant converts to his own use money from a bank to invest or to cover short-term cash flow problems and then returns it before being caught, the loss is the amount of money originally converted. (iii) In the case of a bank fraud involving a bank officer, the crime would be detected when defendant became aware that bank examiners were reviewing irregularities in the bank's books relating to the fraud, or when the defendant became aware that federal agents were interviewing witnesses or serving grand jury subpoenas relating to the fraud.

(g) *Net loss*

The loss shall be the net loss to the victim or victims.

(I) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. For example, where a defendant sells stock to the victim by fraudulently representing that the stock is worth $40,000 when it is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). However, where there is more than one victim, the loss will be the total of the net losses of the losing victims. For example, in a Ponzi scheme in which the defendant repays early victims their entire investment plus a profit in order to keep the scheme going and attract new investments and investors, the defendant should be credited for repayments to early victims only to the extent of their original investment, plus statutory interest in an amount determined by reference to Application Note 7(I).

(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim had not foreclosed on its security interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.

(iii) With the exception of amounts recovered or readily recoverable by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the

defendant to a victim after detection of the crime. With the same exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.

(h) Valuation

Ordinarily, loss will be calculated using the fair market value of the property or other thing of value at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged, the loss is the cost of repairs up to the replacement cost of the property (plus any other reasonably foreseeable pecuniary harms).

(I) Interest

Loss shall include interest 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 money, property, or other thing(s) of value lost by a victim as a result of one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) was in a form on which a return on investment would ordinarily be expected or was of a nature that it could readily be invested. In either case, loss shall include a component of interest at the statutory rate specified in -- calculated from the time at which the money, property, or other thing of value was stolen, embezzled, damaged, or destroyed, or the victim was otherwise deprived of its use or benefit, until the time the crime was detected. In all other cases, loss shall not include interest.

2. If the defendant intended to cause a loss greater than the actual loss calculated pursuant to Application Note 1, the figure for intended loss shall be used as the "loss" in subsection (b)(1).

a) Factual Impossibility

The defendant is accountable for all pecuniary harms he intended and which might reasonably have occurred if the facts were as he believed them to be.

b) "Sting" Operations

Intended loss includes pecuniary harms the defendant intended to cause, even if accomplishment of defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

3. For the purposes of subsection (b)(1), loss (or intended loss) need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. For example, this estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the offense and the revenues generated by similar operations.

4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card.

5. A victim suffers "significant financial hardship" if the offense caused him to file for personal bankruptcy protection, to suffer foreclosure on or eviction from his primary residence, to be terminated from employment which was a significant source of the victim's income, to suffer the closure, bankruptcy, or loss of ownership interest in any business that was a significant source of the victim's income, to lose health insurance protection for a period of six months or more, or to pay significant medical expenses during any period in which health insurance benefits were terminated or unavailable to the victim as a result of defendant's conduct, to lose a significant portion of his pension or retirement benefits, or to suffer any other financial deprivation similar in scope and effect to the examples listed above. For purposes of applying §2B1.1(b)(11) only, the term "victim" refers only to natural persons.

[NOTE: Application Notes 5-12 of the current theft guideline, §2B1.1, would become Notes 6-13 in the consolidated economic crimes guideline. Application Notes 14-17 of the current fraud guideline, §2F1.1, are identical to Notes 9-12 in the current theft guideline, and so would be incorporated unchanged as Application Notes 10-13 of the consolidated guideline. Application Note 5 of the current fraud guideline, §2F1.1, would become Note 14 of the consolidated guideline.]

15. For purposes of calculating the number of victims under subsection (b)(10), the court should count only those victims who were actually deprived of something of value. For example, a wire fraud in which calls were made to three different individuals successfully persuading each of them to invest in a pyramid scheme would involve three victims. However, stealing a single car would ordinarily involve only a single victim, even if the owner were fully reimbursed for the loss of the car by his insurance company.

16. "Sophisticated means," as used in subsection (b)(10), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine economic crime of the same type. An enhancement would be applied, for example, where the defendant used offshore bank accounts, multiple transactions through domestic financial institutions, transactions through corporate shells or fictitious entities, or sophisticated technical means.

16. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

(a) a primary objective of the fraud was non monetary; or the fraud caused or risked reasonably foreseeable substantial non-monetary harm;

(b) false statements were made for the purpose of facilitating some other crime;

(c) the offense caused reasonably foreseeable physical or psychological harm or severe emotional trauma;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important institution.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. In such cases, a downward departure may be warranted.