

**PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS JIM FELMAN & BARRY BOSS
C/O ASBILL, JUNKIN, MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
202 234 9000 (BARRY BOSS)
813 229 1118 (JIM FELMAN)
202 332 6480 (FACSIMILE)**

March 16, 2001

via hand delivery

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG's submission on proposed amendments

Dear Judge Murphy:

During the course of the cycle, the PAG has attempted to provide the Commission with its perspective on the pending proposed amendments. At this juncture, the PAG wishes to comment on a few of the pending amendments for which public comment is now being solicited. Please do not construe our failure to provide written submissions on each amendment as an indication that we do not consider a particular amendment to be significant; rather, we have focused this submission on just a few of the proposed amendments for which we believe we may have something to add beyond that of the other defense organizations that have submitted written comments to the Commission, particularly The Defenders and the New York Council of Defense Lawyers.

Specifically, the PAG wishes to provide the Commission with its perspective on the economic crime package, amendments 12-13, and the money laundering amendment, amendment 20.

With regard to the economic crime package, the PAG does not believe that any increase in the loss tables is justified. Although some judges and prosecutors appear to believe strongly that economic offenders are being punished too leniently,

[151]

particularly when compared with drug offenders, the empirical data clearly refutes this proposition. In addition, using the sentences in drug cases (driven largely by the congressionally-imposed mandatory minimum terms of imprisonment) as a baseline for determining sentences in economic crime cases merely incorporates the irrational sentencing scheme in drug cases into economic cases. We have addressed these issues in more detail in the attached memorandum.

While we recognize that there are significant problems with the current loss definitions, we echo the numerous opinions voiced at the Commission's economic crime symposium that the current guidelines overemphasize "loss" as a basis for determining overall culpability. In this regard, we welcome the "flex proposals" that have been promulgated as amendment 13, and strongly support option one, assuming that the bracketed language in (B) is included in the final amendment.

Regarding the specific loss definition issues, the PAG has provided the Commission with its perspective on these issues during our meeting on February 12th. In the attached memorandum, we address several issues of importance: intended loss, interest, and "net loss."

Finally, we are compelled to comment on amendment 20, money laundering. Although we have not separately submitted written comments on this proposed amendment, the PAG has over the last 6 or so years been a steady voice in favor of reforming this area of the guidelines. The defense bar, and for that matter judges and line prosecutors, recognize that the existing money laundering guidelines grossly over-punish offenders and are used for plea leverage in many cases. The guidelines were drafted under the assumption that the Department of Justice was going to use these statutes to prosecute drug king-pins and organized criminals, but as we know the statutes have been used to prosecute garden variety fraud and drug cases. The money laundering guidelines are desperately in need of repair.

Amendment 20 represents the product of many hours of meetings with Commission staff members, the Department of Justice and the defense bar. We will concede that from the defense perspective, amendment 20 is not perfect; but, it is a vast improvement over the existing guidelines.¹ We are, to say the least, disappointed that after spending so many hours in meetings with representatives from the Department of Justice and producing the draft of the amendment that is presently before the Commission that the Department is now opposing passage of amendment 20 during this amendment cycle. We remain hopeful, however, that the Commission during this cycle will amend these guidelines so as to bring a measure of rationality to sentencing in money laundering cases.

As always, we appreciate the opportunity to provide the Commission with our

¹ With regard to the issues that remain in brackets, we have previously presented our perspective to the staff and the Commission.

input. Please do not hesitate to contact us if you have any questions or would like additional information.

Sincerely,


Barry Boss
James Felman

cc: Andy Purdy, Esq.

**SUBMISSION OF THE PRACTITIONERS' ADVISORY GROUP
TO THE UNITED STATES SENTENCING COMMISSION
REGARDING PROPOSED ECONOMIC CRIMES AMENDMENT**

**1. THERE IS NO JUSTIFICATION FOR INCREASING THE SENTENCES
IN ECONOMIC CRIME CASES**

In the 2001 amendment cycle, the Sentencing Commission is again considering proposals to increase the loss tables in order to increase the sentences for individuals convicted of economic crimes. During the 1998 cycle, similar proposals were made, but none garnered the necessary votes for passage. At that time, the PAG argued that there was no justification for increasing the loss tables. Unfortunately, despite the passage of two amendment cycles, the justification for this change has yet to be provided, but the vigor with which proponents for higher loss tables have sought their objective has not abated.

At the outset, it is important to remember that when the guidelines were first drafted in 1987, the offense levels were set with the objective of keeping sentences at their present levels, except in the area of economic crime cases. In those cases, the Commission decided that the present sentences were not sufficiently punitive and it issued offense levels designed to increase sentences above their then-current levels. In 1989, without any empirical justification that the PAG is aware of, the offense levels were increased again. Since that time, there have been a number of upward adjustments added to the fraud and theft guidelines (e.g., mass marketing, sophisticated means, financial institutions), but no significant downward adjustments of which we are aware. Now, the Commission is poised to again increase offense levels across-the-board in economic crime cases despite the fact that the empirical data conclusively demonstrates

the existing sentencing ranges are sufficiently punitive.

The 2001 Proposals to Amend the Loss Tables¹

There are presently three specific proposals to amend the loss tables in theft, fraud and tax cases. These proposals, referred to in Commission materials as Option One, Option Two, and Option Three, increase the severity of the offense levels for most offenders in economic crime cases. As in the 1998 amendment cycle, the 2001 proposals eliminate the current upward adjustment for more than minimal planning in theft cases, §2B1.1(b)(4)(a), and in fraud cases § 2F1.1(b)(2).

Option One² incorporates a one level enhancement over current levels beginning at \$40,000 and provides for two additional enhancements at \$80,000. The current Option One, beginning at levels of \$40,000, provide for guideline ranges that are higher than those which currently exist for defendants in theft and fraud cases who would have been subject to an enhancement for more than minimal planning.

Option Two³ revises the cliffs which control the specific upward adjustments and, for the most part, is more lenient for offenders with loss amounts under \$70,000. Although Option Two may provide beneficial sentencing to individuals in those limited categories, Option Two enacts significant upward adjustments from existing guidelines if the offense involves loss amounts of greater than \$120,000. At \$120,000, Option Two mandates a one-level enhancement to 16 from the current level of 15. At \$200,000, there

¹ All references to "Options" are to the sentencing options for the 2001 amendment cycle unless specifically stated otherwise.

² Option One of the 2001 amendment cycle was Option Three in the 1998 amendment cycle.

³ Unlike Option One and Option Three, this option was not proposed in any form during the 1998 amendment cycle.

is a two-level enhancement to 18 from the current level of 16. At \$400,000, a three level enhancement is required bringing the offense level to 20 from the current level of 17. Thus, in cases involving higher loss amounts, defendants will see much harsher sentences.

Option Three, which is a variation of 1998 sentencing Option Two, is nearly identical to 2001 Option One in that it calls for an upward adjustment of one offense level to 14 for loss amounts involving \$40,000. Both Option One and Option Three would have a two-level enhancement over existing guidelines to 16 for loss amounts in excess of \$80,000. At \$160,000, Option Three would impose a three-level enhancement from existing guidelines to 18. Option One would impose a three-level enhancement from existing guidelines to 18 at \$200,000. Thus, consistent with the other options of this amendment cycle, Option Three, if adopted, will substantially increase the sentences of defendants convicted of crimes involving mid to high loss amounts.

The Criminal Law Committee of the Judicial Conference has led the efforts to increase the sentences in economic crime cases. In the 1998 amendment cycle, "Option Two," which as noted above has been revised and submitted as 2001 Option Three, was attributed to the joint efforts of the Committee and the Department of Justice. In September 1997, despite strenuous objections by Commissioner Gelacak, the Commission published 1998 "Option Two." As in the 1998 sentencing revision debate, the recommendations in the 2001 Options seem to have arisen in response to criticisms that "fat cat" white collar offenders who committed crimes involving loss amounts in the hundreds of thousands or millions were not receiving adequate sentences.

The Proposals Continue to Represent Unsound Sentencing Policy

Our collective conscience balks at the notion that these "fat cat" defendants seem to be receiving such relatively light sentences, at least compared to individuals sentenced in drug cases. Our concern is heightened by the fact that many of the defendants in drug cases are from low income backgrounds and are minorities.⁴ However, by simply focusing on the "quick fix" of increasing the sentences in economic crime cases, the Sentencing Commission risks compounding, rather than reducing, the irrationality of the current drug sentencing scheme. The simple fact is that the sentences imposed in these drug cases, due largely to Congressionally-imposed, mandatory-minimum sentences, are excessive, and reflect political pressure rather than a rational sentencing strategy. There is little, if anything, that the Commission can do to restore a measure of rationality in these drug cases. However, the Commission's inability to lower drug sentences should not serve as a justification for increasing sentences in other types of cases in an effort to achieve proportionality among defendants convicted of different crimes. Such action would simply ensure that the irrationality underlying the sentences in drug cases is incorporated in the sentencing structure for other offenses.⁵

Interestingly, the empirical evidence fails to support the proposition that the current guidelines are insufficiently onerous even for those individuals convicted of economic crimes involving substantial losses. Although the Criminal Law Committee of the Judicial Conference is a strong proponent for increasing the sentences in fraud and

⁴ See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 156 (1995).

⁵ It should be noted that Congress only directed the Commission to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ." 18 U.S.C. § 991(b)(1)(B) (emphasis added).

theft cases,⁶ judges do not currently sentence these defendants at the top of the applicable guideline range. The Sentencing Commission's data⁷ reveals that in theft, fraud and tax cases, where the loss exceeds \$1.5 million, approximately 25% of defendants receive sentences in the first quarter of the guideline range and less than 15% receive sentences in the fourth quarter of the range. Interestingly, in fraud cases, the percentage of defendants who are sentenced at the top of the applicable guideline range does not change significantly even at the high loss levels. For example, in cases involving losses up to \$1,500,000, only about 11% of defendants were sentenced in the top quarter of the applicable guideline range. In cases involving losses over \$1,500,000, only about 15% of defendants were sentenced in the top quarter of the range. In theft cases involving losses of greater than \$1,500,000, defendants were somewhat more likely to be sentenced at the top of the guideline range, with 19% receiving sentences in the top quarter of the range. Yet, a significantly higher percentage of such defendants, approximately 27%, received sentences in the bottom quarter of the range.⁸

What does this data mean? For one thing, it does not support the proposition that sentencing judges find the current levels of punishment for theft and fraud defendants insufficiently punitive, even for mid- to high-range offenders. During 1995, in theft,

⁶ See, e.g., Statement of United States District Judge J. Phil Gilbert, Representative of the Committee on Criminal Law to the United States Sentencing Commission, October 15, 1997, submitted as Written Testimony for the October 15, 1997 Public Hearing on the Definition of Loss (referring to the goal of revising the loss tables to increase punishment "for more serious offenses" and to eliminate the adjustment for more than minimal planning).

⁷ We were unable to obtain from the Commission the most recent break-down of sentences categorized by loss amount and the guideline range; however, there is no indication that the trends reflected by the Commission's 1997 data are no longer accurate).

⁸ U.S. Sentencing Commission, Distribution of Sentences Across Applicable Sentencing

fraud and tax offenses involving losses of greater than \$1,500,000, a significantly greater percentage of defendants were sentenced at the bottom of the applicable guideline range than at the top of range. Also, although both the theft and fraud guidelines invite an upward departure where the loss does not fully capture the harmfulness of the defendant's conduct, see § 2B1.1, comment (n.14), § 2F1.1, comment (n.11), according to the Commission's FY 1999 statistics, judges implemented upward departures in less than 1% of the cases in both theft (0.5%) and fraud (0.9%) matters. On the other hand, 12% of these high-end theft, fraud and tax cases involved downward departures (other than for substantial assistance).⁹ When judges are confronted with a real, not theoretical, individual, and they assess the individual's conduct and background and other relevant sentencing factors, they apparently find, in most cases, that the current guidelines are sufficiently punitive.

The empirical data also fails to support the proposition that heavy sentences in white collar sentences are necessary for deterrence. Rather, when white collar criminal defendants who received non-prison sentences were compared with those who received a sentence of incarceration, a study found no specific deterrent impact upon the likelihood of re-arrest over a ten year period. Weisburd, Waring and Chayet, Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 *Criminology* 587 (1995). The authors suggest that for many white collar individuals, who otherwise have a high degree of stability in their personal and professional lives, the punitive impact comes from the arrest, prosecution and sentencing. "Whatever specific deterrence is gained may be produced before the imprisonment sanction is imposed." *Id.* at 599. The authors

Range (table).

conclude by noting the assumption “by scholars and policymakers that white-collar criminals will be particularly affected by imprisonment.” However, the authors conclude that this assumption is wrong, “at least as regards official reoffending among those convicted of white collar-crimes in the federal courts.” *Id.* at 601.

Similarly, the notion that the general public believes that higher sentences are called for in white-collar cases should not serve as a basis for increasing the loss table. To the extent that the public perceives that white-collar defendants are “getting off easy,” it is undoubtedly based on its image of the stereotypical defendant like Marc Rich or Michael Milken. Any such generalized opinions fail to reflect the actual characteristics of the vast majority of “white collar” defendants. Furthermore, the public mis-perception in this regard is certainly based on a comparison of the relatively lenient sentences meted out in economic cases compared to those in drug cases. Finally, the public’s perspective on these issues must be considered in light of the omnipresent impression that criminals “get off” too easily. As Paul J. Hofer and Courtney Semisch point out in their recent article in the Federal Sentencing Reporter, the public’s general perception that criminals are not being punished harshly enough remains constant despite the fact that sentences across the board have been increased significantly over the past twenty years. 12 Federal Sentencing Reporter (July/August 1999).

⁹ See *id.*

CONCLUSION

Although the prison impact statements were not available as of the date of this submission, the data generated during the 1998 amendment cycle make plain that Option One and Option Three would result in significant increases in sentences for white collar defendants. While Option Two represents a definite improvement over the options that were previously presented during the 1998 amendment cycle, the existence of a better option does not address the underlying issue of whether there is a justification for any increase in the severity of the loss tables at any level. If forced to choose between bad policy decisions, Option Two is the least offensive.¹⁰ But, regardless of whether or not Option Two is more palatable, in light of the questionable assumptions underlying the loss debate, it would appear that any amendment to increase the loss guidelines is unjustified.

As we debate proposals for increasing the loss tables in fraud, theft and tax cases, it is important that we examine the underlying assumptions which are fueling the amendment fire. The fact that drug defendants may be receiving disproportionately heavier sentences than some "white collar criminals" reflects the excessively high sentences in drug cases, not the unjustifiably low sentences in theft and fraud cases. By adopting any of the Commission's proposals, we are not only artificially and unnecessarily increasing the sentences in these economic crime cases, but also legitimizing as a sentencing baseline the draconian and irrational sentencing scheme in drug cases.

¹⁰ Actually, the PAG "Option Four" is the best of a bad lot, but this submission only addresses the published alternatives.

2. THE PAG QUESTIONS THE NEED FOR INCLUDING “INTENDED LOSS” IN THE LOSS CALCULATION AND OPPOSES THE COMMISSION’S PROPOSED AMENDMENTS IN THIS AREA

In the current Guidelines, the only reference to “intended loss” is found in the following sentence from Application Note 8 to § 2F1.1: “Consistent with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.” No further definition of “intended loss” is provided.

The Commission’s Economic Crime Package includes proposed amendments which would make the following changes with respect to “intended loss”:

1. Create a new application note stating explicitly that for purposes of applying the loss table (subsection (b)(1) of § 2B1.1), the “General Rule” is that “loss is the greater of actual loss or intended loss,” subject to the exclusions in subdivision (B) (emphasis added);
2. Include in that same application note, the following definition of “intended loss:”
 1. “Intended loss” means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3. “Intended loss” includes intended 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) [so long as the intended loss reasonably would have resulted if the facts were as the defendant believed them to be].
3. Make “intended loss” applicable to cases involving theft and property damage or destruction crimes, as well as fraud and deceit crimes (by combining the theft and fraud guidelines).

The Practitioners’ Advisory Group (“PAG”) urges the Commission not to adopt the proposed amendments concerning “intended loss.” The proposed amendments would increase the workload

of courts, probation officers, and lawyers and create potential confusion and possible error. No countervailing benefit exists. The cases to which "intended loss" would apply can be dealt with adequately by the existing rules for determining the offense level in cases involving inchoate crimes.

Alternatively, if the Commission does adopt the proposed amendments concerning "intended loss," the PAG submits that several changes should be made to clarify the meaning of intended loss, and how it is to be calculated.

1. **Do We Need Intended Loss?**

In considering the proposed "intended loss" amendments, the PAG respectfully urges the Commission to consider first the question of whether "intended loss" is needed at all, especially given the amount of work it entails, and the confusion and potential for error it creates.

The sentencing guidelines do not generally calculate punishment based on what a defendant might have intended (other than in instances in which the defendant's intended conduct has advanced to the stage of being an inchoate offense, such as conspiracy or attempt). For example, sentences are not generally based on the amount of money a bank robber intended to take, the number of aliens someone intended to smuggle, or the amount of drugs someone intended to distribute. Even the current theft guideline has no intended loss concept. Why then should it be used in fraud offenses?

The present and proposed guidelines suggest that intended loss is meant to apply to inchoate offenses. To the extent the guidelines need to address the punishment of fraud (and theft) offenders in conspiracy, attempt and other inchoate crime cases, it is already accomplished by application of § 2X1.1.

Moreover, intended loss creates more work for judges, probation officers, and the parties. Under the present Guidelines, an "intended loss" amount is to be calculated in fraud cases "if an intended loss that the defendant was attempting to inflict can be determined . . ." The proposed

amendments remove the limitation that an "intended loss" be calculated only in those cases where it "can be determined," and thus seem to require that an "intended loss" amount be calculated in every case. In addition, because the theft and fraud guidelines would be combined under other amendments proposed as part of the Economic Crime Package, the calculation of an "intended loss" would seem to be required in every theft case as well.

The additional effort caused by the requirement that an intended loss amount be calculated in every fraud and every theft case is especially significant because of the difficulty and confusion associated with the task of discerning the dollar-figure loss a given defendant intended. As Judge Newman so eloquently pointed out at the Economic Crimes symposium last year, the answer to the question, "How much did the defendant intend to steal?" is invariably, "As much as he could."

The PAG believes that the above reasons all strongly support abandonment of intended loss as a special inchoate-crime rule that must be calculated in every fraud and theft case, regardless of whether the case actually involves an inchoate crime. To the extent the Commission believes a special rule is appropriate for fraud and theft cases, the PAG would urge the Commission to replace the "whichever is greater" rule, with a rule such as the following:

For all offenses except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. "Inchoate offenses" are those offenses in which the defendant is apprehended before the offense has been completed.

The advantage of this approach is that it makes less work for courts, which would no longer have to calculate both actual loss and intended loss in every case. Another advantage is that this approach focuses on those inchoate offenses that intended loss was always meant to cover.

If the Commission continues to require that intended loss be considered in every fraud and

theft case, the PAG submits that loss should be defined as the *average*, rather than the *greater*, of actual loss and intended loss. If intended loss matters to sentencing, it should matter all the time, even when it is *not* greater than actual loss. A defendant who causes a loss beyond what he or she intended should not be punished as if he or she intended that loss. After all, we do not punish a defendant who accidentally causes someone's death as severely as someone who intentionally murders someone. See James Gibson, *How Much Should Mind Matter? Mens Rea in Fraud and Theft Sentencing*, 10 Fed. Sentencing Rep. 136 (1997).

Indeed, the guidelines' treatment of drug offenses incorporates this idea. If the quantity of drugs a defendant agrees to sell is greater than the quantity actually sold, the lower quantity may be used for sentencing purposes. U.S.S.G. § 2D1.1, comment. (n.12). And if a defendant in a reverse sting can prove that he or she did not intend to provide the agreed-upon quantity of drugs, the quantity that was not intended is excluded from the sentencing calculation. *Id.*

2. **If Adopted, Four Points Of Clarification Should Be Made In The Definition Of Intended Loss**

If the Commission adopts the proposed intended loss amendments, including the "whichever is greater" rule, the proposed definition of intended loss should be modified to provide clarification as to four issues.

First, the definition should be modified to clarify that it measures harm that the *defendant* intended to cause. The current guidelines make this point clear, as they refer to "an intended loss that the defendant was attempting to inflict . . ." The proposed definition, however, refers only to the harm that "was intended to result." This phrase might be read as suggesting a defendant should be held responsible for the intent of anyone who participated in a "jointly undertaken criminal activity" under the relevant conduct rules. A defendant should not be held responsible for what goes

on in the brains of other offenders. The definition should therefore focus on just the defendant's intent: "the pecuniary harm that the defendant intended to cause."

Second, the definition should be explicit as to the *mens rea* necessary for something to qualify as intended loss. The field testing the Commission did several years ago showed some confusion as to the *mens rea* necessary for something to qualify as intended loss. Some people were confused by the "actual loss" concept of reasonable foreseeability and imported it into the intended loss definition as well, defining intended loss as all loss that was reasonably foreseeable. Although it seems obvious that intended loss must be *intended*, not just foreseen or foreseeable, the potential for confusion can be removed by adding the word "intentionally" or "purposely" before the term "intended to result."

Third, the guidelines should make it clear that no "impossible" intended loss is to be included in the calculation of intended loss. Such a rule is justified because a defendant who cannot cause any loss poses less of a threat to society (and therefore deserves less punishment). At a minimum, the bracketed language in the proposed amendment regarding impossibility needs to be included, so as to distinguish between harm that was intended in a sting operation, and harm that was intended in an overly ambitious fraud (such as an insurance claim that seeks \$50,000 in insurance payout for a \$10,000 car for an accident that never happened). Also, because the parenthetical may be confusing to those unfamiliar with this issue, the definition should instead spell out the difference between a sting operation (an example of counting impossible harm) and the insurance fraud (an example of not doing so).

Fourth, the definition should make clear that the credits principle apply to intended loss. The best way to deal with this issue is to include in the definition a statement that makes it clear that if the defendant intended to transfer any economic benefit to the victim, the value of that economic

benefit should be deducted from the intended loss, consistent with the section on credits against loss. Concern that such a rule would lead every defendant to claim that they intended to transfer economic benefit to the victim (e.g., by paying back the fraudulent loan), is answered by the requirement that the defense would have the burden of proof on this issue and would have a tough time convincing the judge without some corroboration of intent.¹

¹ On a related point, the PAG suggests the "Exclusions from Loss" section be renamed "Exclusions from Pecuniary Harm."

3. INTEREST SHOULD NOT BE INCLUDED IN THE LOSS CALCULATION

Interest of all kinds should be excluded from the calculation of loss for two reasons.

First, including interest would result in increased litigation without noticeable effect on sentencing outcomes. Second, for those few cases in which inclusion of interest would make a difference, the effect of the inclusion would be to treat similar defendants differently.

The guidelines should also ensure that interest payments that the defendant makes to the victim of the offense are deducted from the loss amount.

A. Increased Litigation

If interest is included, how will it be defined? Will it be “bargained-for” interest, i.e., interest to which the defendant agreed in the course of the transaction? Or will it include other forms of opportunity cost, such as reasonably anticipated profits and stock dividends? (If the answer is yes to the first question and no to the second, why the difference? What makes bargained-for, transactional interest more important to loss calculation than equally reliable means of making a profit?) What if the victim removes money from an interest-bearing investment and gives it to the defendant - should the interest that the investment was accruing be used? What about speculative or unrealistic interest rates promised by a defendant - is there an “economic reality” limitation on the interest that would count? If a defendant’s fraudulent \$100,000 mortgage loan is discovered the day after it is procured, is the defendant accountable for \$100,000 plus one day’s interest or \$100,000 plus the total interest that would have accrued over the life of the loan? What if the loan agreement includes an acceleration clause that makes all principal and interest due on default?

It may be possible to agree on answers to these questions, but incorporating such agreement into the guidelines would require a lot of language, and lots of language leads to lots

of litigation. What would be the upside of all this litigation? Given the limited number of break points in the loss tables (and the even fewer break points contemplated under the proposed loss tables), in how many cases would the inclusion of interest actually make a difference in the offense level?

B. Treating Similar Defendants Differently

Even if excess litigation and minimal results did not argue against inclusion of interest, it would still be a bad idea because it would lead to inappropriate distinctions between similar defendants. No one has identified any sound policy reason to punish crimes that involve interest more than those that do not.

Suppose that bargained-for interest is included in loss, and that we have a defendant who fraudulently procured a \$100,000 loan. He or she would be accountable for \$100,000 plus interest-perhaps as much as \$350,000 for a mortgage loan, depending on the mortgage rate and how interest is calculated for sentencing purposes. But if another defendant simply embezzles \$100,000 from the bank, he or she would be accountable for only \$100,000, with no interest. In both cases, the bank is out \$100,000, but one defendant is accountable for a greater loss amount simply because of the *means* by which he or she swindled the bank. No one has identified a good policy reason to differentiate between these two types of defendant, i.e., to punish crimes that involve interest more than those that do not.

Proponents of the inclusion of interest might respond that the interest should be included because in a bargained-for interest scenario the court can determine the exact interest that would have accrued. One problem with this response is that it assumes that the rules on calculation of included, bargained-for interest would be so clear that each judge would arrive at roughly the same loss figure. But the main problem is that this response confuses the *availability* of

information with the *appropriateness of using* information. The fact that we may know a lot about the interest that would have accrued in a given situation does not make interest any more applicable to loss calculation; it simply makes it easier to include *if there are good reasons to include it*:

Proponents of counting interest may also argue that the solution is to include more than just bargained-for interest, to include *all* opportunity costs. Under this approach, the thief who stole from the vault should be accountable for the same amount as the fraudulent debtor: \$100,000 plus interest. This view at least recognizes one of the fundamental problems of the interest issue: *all money has time value*, whether one steals it from the vault, cookie jar, or escrow fund. The solution, however, is not to include interest in all cases; it is to include interest in *no* cases. This is a much more efficient solution because it avoids all the litigation worries described above without changing the proportionate sentencing balance among similar defendants.

C.. Excluding Interest Payments from the Loss Amount

If interest is not included in loss, the question will arise as to whether payments against interest should be credited against the loss amount. Although at first blush it might seem unfair to allow the defendant to benefit from interest payments when interest was not included in the loss amount, a more thorough analysis of this issue reveals that crediting such payments is the equitable result. In fact, the same reasons that militated against including interest in loss argue in favor of crediting interest payments: doing so will reduce unwarranted litigation and ensure that similar defendants are treated similarly.

First, excluding interest payments will create more litigation, or at least more work for courts, attorneys, and probation officers. Rather than simply totaling the payments the defendant

made on a fraudulently procured loan, the court will have to figure out what payments were made against interest and then discount them. Second, the result of this exercise will probably rarely affect the defendant's offense level; such small amounts are involved that it would not be worth the court's time to worry about it.

Finally, the exclusion of interest payments from credits will again irrationally disadvantage those defendants who happened to steal money by means of a transaction that involved interest. This is especially true for those many lending transactions that are structured so that early payments go almost entirely toward interest. Suppose Defendant *A* fraudulently borrows \$100,000 at 10% annual interest and Defendant *B* fraudulently borrows the same amount interest-free. After one year, both have made \$35,000 in payments. *B* has a loss amount of \$65,000. Assuming that 85% of *A*'s payments are earmarked against interest, *A* has a loss amount closer to \$95,000. If the Commission has decided not to include opportunity costs in loss, is there a good reason to treat these defendants differently?

4. SPECIFIC "NET LOSS" ISSUES

The following comments address certain portions of Proposed Amendment 12, Part C which appear in Volume II of the January 24, 2001 Commission's Proposed Amendments.

PART (C) "Exclusions from Loss" [appearing on page 120 of Volume II]

Subsection (IV)(1):

PAG opposes this proposed subsection as drafted. Paragraph (1) precludes reduction of the loss calculation by the value of items having only a "de minimus" value or having "no value" to the victim because it is substantially different that what the victim had anticipated receiving. First, there is no Guideline definition of de minimus which will lead to litigation over the issue and possibly conflicting circuit decisions.

Second, the present draft conflates what we see as two separate issues. Whether an item is only of de minimus value is distinct from whether an item has "no value" to a particular individual because the item received is "substantially different" from the victim's expectations. For example, if a wealthy victim had intended to receive a Mercedes-Benz as part of some sort of fraud scheme, but instead received only a base model Ford, conceivably it could be argued that the Ford has "no value" to the victim notwithstanding that it has real market value. Concepts of loss as a measure of economic harm should not be pressed into duty as also measuring a victim's disappointment.

PAG recommends that "de minimus" be defined and that the portion concerning the victim's determination of "no value" be deleted.

Subsection (IV)(2):

PAG opposes proposed Paragraph (2) to this subsection. This paragraph precludes a reduction in the loss calculation by the value of services competently performed or of adequately

functioning goods if the fraud involved persons posing as licensed professionals or if the goods were falsely represented to be legitimately approved by a governmental agency. If the goal of the loss function is to measure economic harm, then the loss calculation should be reduced by the value of such goods and services. Competently performed services and adequately functioning goods have bona fide economic value to the victim-consumer. It is a separate issue whether the defendant's fraud has harmed a specified licensing or regulatory system. That separate question should be resolved in a manner other than by reference to the victim's economic loss, *e.g.*, in a separate count or prosecution other than one dealing with a fraud against the individual. In addition, the base offense level accounts for the intangible harms done to a licensing or regulatory system.

Subsection V:

PAG supports Option 1. If loss is a measure of economic harm, a principled application of such a measure requires deducting from loss any value returned to the investor up to the amount of the principal investment. That individual suffered no loss and thus the total harm is reduced.

PAG further supports the idea that all amounts returned to the investors as a whole should be deducted from the calculation of loss. Loss is a measure of economic harm. Amounts returned, regardless of the perceived motive for the return, reduces the total loss. Civil law allows individual victims of these types of fraud to seek a remedy to make them whole. Criminal law, on the other hand, should look to the overall economic harm done by the fraud. The overall economic harm is reduced by all amounts returned to the investors as a whole.

