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United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attention: Public Comment

Re: Comment on Proposed Amendments Constituting the
"Economic Crime Package"

To the Commissioners:

I write to comment upon the proposed amendments constituting the "economic crime package" (amendment 12 in the Federal Register notice of January 2001). I recommend that the Commission reject these proposed amendments as unwise.

I comment solely in my personal capacity, primarily as an academic interested in sentencing law and policy. I have published a number of articles on the Commission and its work, and I have occasionally been engaged to provide consultative or representation services to federal criminal defendants. I also am a former staff member at the Commission, having served as Deputy Chief Counsel in 1987-88 and Consulting Counsel in 1988-89. In those capacities, I was involved in the early development of the guidelines' concept of "loss" as used in the guidelines governing fraud, theft, and related offenses.

As I understand the currently proposed amendments, they envision three basic changes from current law: (1) consolidation of the separate fraud and theft guidelines; (2) a revised and unified loss table for those offenses and tax offenses; and (3) modification of the definition of loss for all property offenses, most notably including (a) an expanded concept of "consequential" loss, and (b) expanded responsibility for "inchoate" loss. In my opinion, no aspect of this proposed package of changes is well-considered, and in every case, the proposed modifications are likely to make the guidelines both more difficult to apply in practice and less effective in meeting the statutory purposes of sentencing.

All of the proposed amendments appear to be motivated by a dissatisfaction in some quarters with supposed inconsistencies or discontinuities with the definitions of "loss" set forth in the commentary to the various guidelines. I am most familiar with the critique set forth by

Professor Bowman in various sources, most notably in his article *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes under the Guidelines*, 51 Vand. L. Rev. 461 (1998). I understand that Professor Bowman also has acted as an adviser to the Commission in connection with these proposed amendments, and I obtained a better understanding of the underlying issues by participating in a breakout session with Professor Bowman during the Commission's conference on economic crimes and new technology offenses last October.

As I understand the content of Professor Bowman's critique of "loss," it focuses on four main points: (1) the loss-defining instructions scattered throughout the commentary to the several guidelines sections use a "hodgepodge" of terminology, including some concepts borrowed from civil contract or tort law; (2) the computation of loss for a fraud offense may differ from, say, a theft offense; (3) the loss definitions exclude indirect harms in most instances, but allow them in some cases, which is argued to be inconsistent; and (4) the handling of "inchoate" loss is unclear. In my opinion, most of these criticisms simply miss the point of including a "loss" concept in the guidelines, and some of them attack the more fundamental structure of the guidelines as a "charge offense" system with only limited "real offense" factors.

When the initial guidelines were developed, the predominant approach was empirical. The guidelines were developed from a statistical analysis of some 11,000 cases sentenced in 1985. That analysis found that "loss" was a significant factor in the sentence for fraud, theft, and other property guidelines.¹ As initially formulated in 1987, the guidelines did not define "loss" at all, apparently on the view that the concept of "loss" was sufficiently understood by the functioning system. In hindsight, that assumption appears to have been too heroic, and so the "loss" definitions have evolved in the commentary over time.

The only early attempt by the Commission to develop a systematic and self-conscious definition of "loss" was one that I drafted in 1988 in connection with a proposal for organizational sentencing. As modified and refined by others, that proposal was published as the "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations," and was reprinted at 10 Whittier L. Rev. 7 (1988). I commend that document, and in particular those portions devoted to "loss" and "loss rules," 10 Whittier L. Rev. at 10-12, 17-41, to the Commission's attention, not necessarily as a model or paradigm of what loss definitions "should be," but rather as an illustration of the subtlety of the problem of defining loss across the wide range of offenses prosecuted in the federal courts. In particular, I would call the Commission's attention to the fact that, after extensive consideration of the problem, this proposal embodied seven different "definitions" of loss, including two separate definitions for "private" as opposed to "public" fraud offenses.

¹ I note in passing that "gain" was not found to be a significant sentencing factor in past practice, nor is there any reason in theory why it should be. My recommendation on this topic would be simply to eliminate "gain" from any consideration in the guidelines, except as an estimate of loss.

While the 1988 "Discussion Draft" ultimately was superseded by other proposals for organizational sentencing, some of its concepts ultimately migrated into the commentary to the loss-based sections of the existing guidelines, sometimes without the detailed explanation that accompanied the original formulation. Other changes and refinements, based on other sources, also have found their way into guidelines commentary over the years. Perhaps for this reason, the existing guidelines commentary may appear to the uninitiated as a "hodgepodge." However, most of the distinctions drawn by the existing commentary are based upon very sound considerations of policy and, however inelegantly expressed, have been mostly well-understood by the courts.

If the current critique is analyzed, we can see that its core rests on three supposed instances of "inconsistent" treatment of loss: (1) as among the various guidelines that use loss as a primary sentencing factor; (2) as between the inclusion or exclusion of "indirect" harms; and (3) in the treatment of "actual" versus "intended" loss. In my opinion, none of these are examples of inconsistency; all are products of the basic policy decision to use a "charge offense" sentencing system, which has many virtues, among them to give prosecutors an incentive to charge the crime that they wish to be punished, and to make the sentencing system tolerably administrable. Every proposal to "consolidate" guidelines undercuts the logic of a charge-based sentencing system, and therefore should be viewed with trepidation, even if otherwise apparently justified. But in this case, the proposal is unjustified. It is simply not true that a case charged as simple theft should be treated the same as fraud: the proof requirements on liability are not identical,² and the interests served by the prohibition are not the same. Fraud involves an element of scienter that may or may not be present in simple theft cases. Furthermore, as charged in federal courts, fraud cases invoke a much range of interests than typically are involved in state law fraud cases.

Furthermore, it is not true that the treatment of "direct" versus "indirect" harms is inconsistent, nor is it confusing to the courts. According to last year's report by the Commission's Economic Crimes Policy Team, most courts had reached the correct interpretation of the current guideline rule (albeit an implicit one) that "indirect" harms generally were excluded from "loss" computations, with two specific exceptions, both of which involved frauds committed in the context of government contracting. The reason for those exceptions should be obvious: criminal prosecution plays a different role in such cases than in the ordinary fraud practiced upon a private victim; this was the main reason why the 1988 Discussion Draft had two

² Unlike the Model Penal Code's approach of "consolidating" larceny, fraud, and embezzlement into a single offense of theft, federal law, like the common law, treats those crimes differently. The common-law approach had a sound policy basis in distinguishing, for example, "larceny by trick" (possession obtained with the victim's consent, followed by asportation) from "false pretenses" (title obtained with the victim's consent, voluntarily induced), on the ground that transfer of title should induce more attention on the part of the victim. In the earliest days, "false pretenses" was a tort, but not a crime, where larceny by trick was a crime.

separate “loss” guidelines distinguishing public from private fraud. Even if the propriety of those exceptions were questionable, the general rule clearly is the correct one from a policy perspective: in the interest of simplicity in administration, the guidelines simply should cut off arguments about remote or indirect effects, except as departure arguments in extreme and unusual cases. After all, the rationale of a fraud prohibition is to punish the misleading aspect of the wrongdoer’s behavior, and not to make the wrongdoer an insurer for all consequences that might be factually caused by the fraud, whether or not “foreseeable.” The current proposal seems to be the worst of all possible worlds, as it substitutes a vague “foreseeability” concept for the straightforward “out of pocket” loss test that exists in current law. Millennia of experience in all fields of remedial law have taught us the necessity of focusing on the direct and immediate, and largely excluding consideration of the indirect, the remote, or the speculative. This common reticence should apply a fortiori to the problem of criminal sentencing, not only because of administrative difficulties but also because of our strong interest in sharpening the message of deterrence. If a person convicted of fraud is punished incrementally because of downstream effects that could have occurred with or without the fraud, what message is being sent by the incremental punishment? Very quickly, fraud penalties could escalate beyond those imposed for more serious crimes. In that instance, an over-expanded system of fraud or theft penalties could fail to distinguish those offenses from extortion. What message is then being sent?

As an illustration, consider the two examples used by Professor Bowman in last Fall’s conference to demonstrate the “problems” of the current loss definitions in terms of the “problem of causation.”³ I gave these cases to the students in my Federal Sentencing Law this term, and gave them 10 minutes to solve both cases. Within that time, 20 of my 21 students had reached the correct solutions under current law. Only 2 students even posed arguments that the answer “should” be different. All 21 students clearly recognized the point that going off into remote effects that may or may not be “foreseeable” would increase the cost and complexity of the sentencing system, which after all is not designed to replace the tort compensation system, but only to draw meaningful punishment distinctions among charged offenses of the same type.

Similar considerations apply to the proposed changes to the treatment of “intended” or “inchoate” harms. These proposals are slightly less objectionable, because at least they focus attention on the criminal state of mind of intent as opposed to a tort-like standard of “foreseeability.” Nevertheless, to the extent that the proposals seek to expand the inclusion of potential harms, they operate in the wrong direction. For the most part, the guidelines seek to focus on actual as opposed to imagined possible harms, and that is the appropriate focus from a policy point of view, because sound policy would seek to give everyone in the system—offenders, police, and prosecutors—the incentive to avoid actual harm. For this reason, potential harms should always be discounted in sentencing as opposed to actual harms. For the same reason, any loss considered, actual or potential, should be “net” loss to the victim rather than “gross” loss.

³ Entitled “Adventures in Fraud Loss and the Problem of Causation.”

Overall, I believe that these proposed amendments are an overreaction to what appears to be no more than a cosmetic defect in the elegance of expression used by previous drafters of guidelines commentary. But the remedies proposed are far worse than the cosmetic disease, if any there be, because each of the amendments proposed would undermine the structural integrity of the existing "charge offense" system, and deprive the courts of the best rationale for resolving disputed questions of loss determination, which is the policy vindicated by the underlying substantive prohibition that was charged and proved at trial. Without that principled guidance of statutory policy, no amount of detailed commentary will bring the desired level of consistency to the process. The Commission should be modest in demanding precise refinements from a system that is capable of making only rough determinations of relative punishments. Moreover, the Commission should always resist the false economy promised by "consolidation" proposals, for every "consolidation" sacrifices the distinctions that have been found meaningful in past practice.

For the foregoing reasons, I recommend that the current proposals be rejected in their entirety. In lieu of these sweeping changes of largely uncertain consequence, I would suggest that the Commission direct its staff to reformulate commentary on an evolutionary basis, as required to address Circuit conflicts or similar instances of actual problems in practice. Otherwise, the Commission should leave well enough alone.

Very truly yours,

Jeffrey S. Parker
Professor of Law

