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Editor's Observations: The 2001 Economic Crime Package: A Legislative History

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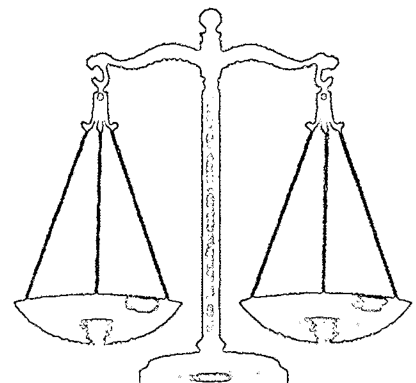

On April 6, 2001, the U.S. Sentencing Commission approved a group of amendments to guidelines governing the sentencing of economic crimes. These measures, collectively known to as the "economic crime package," are the culmination of some six years of deliberations by both the Conaboy and Murphy Sentencing Commissions working together with interested outside groups such as the defense bar, the Justice Department, probation officers, and the Criminal Law Committee of the U.S. Judicial Conference, The package contains three basic components. First, the now-separate theft and fraud guidelines, Sections 2B1.1 and 2F1.1, will be consolidated into a single guideline. Second, the "loss table" in the consolidated guideline will be different from the current theft and fraud loss tables in three ways: (a) the number of "steps" on the table will be reduced from nineteen to fourteen by changing the current one-offense-level steps to two-offense-level steps; (b) the offense levels of some low-loss offenders will be lowered; and (c) the offense levels of some high-loss offenders will be raised. Third, the troublesome term "loss" will, at long last, be redefined. In addition, the Commission approved changes to the money laundering guidelines that tied offense levels for money laundering more closely to the offense levels of the underlying crime from which the illegal funds were derived. Although not conceived of as part of the economic crime package, the money laundering amendments are tremendously important to economic crime sentencing reform insofar as they reduced the incentive of prosecutors to trump the otherwise applicable fraud guidelines by adding a money laundering charge requiring a far higher sentence for the same fraudulent conduct.

The economic crime package is a milestone in the history of the Federal Sentencing Guidelines. Economic crimes comprise nearly one-quarter of all federal sentencings. The economic crime package represents the first occasion in the nearly fifteen-year tenure of the Guidelines that the Sentencing Commission has attempted a thorough rewrite of a guideline governing a major crime category. Of perhaps even greater long-term significance is the fact that the economic crime package will be the first significant guidelines reform accompanied by a detailed, publicly available legislative history. One of the most persistent criticisms of the Sentencing Commission has been that, to those in the legal community, guidelines amendments often seem to appear out of nowhere, with little public debate and no meaningful explanation. Thus, say the critics, guidelines changes sometimes contain defects that might have been avoided had there been a robust debate, and even well-crafted measures are sometimes hard for lawyers and courts to understand because they are unaccompanied by an explanation.

The Commission has been able to act more privately than most federal agencies because of its somewhat anomalous status as a quasi-judicial body exempt from the Administrative Procedures Act. However, the Commission has long been sensitive to the need for increased transparency and has made conscious efforts in debating economic crime sentencing to act openly and collaboratively. Thus, the economic crime package is the first significant sentencing reform initiative in the guidelines era to have been conducted in the public eye from its inception. In my view, the more open and participatory process that produced the economic crime package generated high quality legislation. At any event, the open process generated a rich legislative history that will be of great interpretive value to the bench and bar, particularly when addressing the nuances of the revised definition of "loss." The primary purpose of this edition of FSR is to place in the public domain a set of materials that will assist lawyers and judges in understanding and tracing the genesis of the reforms contained in the economic crime package.

The Definition of "Loss"

Staff work on economic crime sentencing reform began in 1995.[1] In January 1997, the Commission promulgated issues for comment on economic crime sentencing reform,[2] and it held public hearings in 1997 and 1998.[3] In January 1998, the Commission published for comment a comprehensive economic crime reform package that would have consolidated the theft and fraud guidelines, revised the "loss" table, and redefined the pivotal term "loss."[4] Between January and April, staff and outside groups continued to work on the package. (The version of the loss definition circulated for comment in February 1998 is reproduced in this Issue of FSR.[5]) In April 1998, a revised version of the economic crime package and the loss definition came within one vote of obtaining the unanimous approval it required from the only four Commissioners then remaining. Unfortunately, no further formal action was possible in 1998–1999 because, by the fall of 1998, the terms of all the Commissioners had expired and the vacancies remained unfilled until December 1999.

Reconsideration of the loss definition was so plainly essential to any meaningful economic crime sentencing initiative that, even after it became clear that they themselves would be unable to bring reform to fruition, the last Commission arranged for the loss redefinition so nearly passed in April 1998 to be "field-tested" during the summer of 1998. (The April 1998 draft loss redefinition used in the field test is reproduced in this Issue of FSR.[6]) The response to the proposed redefinition by the federal judges and probation officers who participated in the field test was overwhelmingly positive.[7] Consequently, even during the 1998–99 hiatus with no sitting Commissioners, Commission staff, in consultation with interested outside groups, continued to work on refining the draft definition, with particular attention to feedback received during the field test. The staff produced a proposal for a revised definition in May 1999, a copy of which is reproduced in this Issue of FSR.[8]

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When the seven empty seats around the Sentencing Commission table were refilled in December 1999, the newly constituted Commission under the chairmanship of Judge Diana Murphy made continuation of the economic crime initiative a top priority. In October 2000, the Commission sponsored its *Third Symposium on Crime and Punishment in the United States: Federal Sentencing Policy for Economic Crimes and New Technology Offenses* at George Mason University School of Law, Arlington, Virginia. The first day of the symposium was devoted to discussion of problems in sentencing theft and fraud cases, particularly the problems in defining "loss." In order to recapture the essence of the conversations about "loss" at the symposium, we reproduce here a briefing paper on problems of "loss" definition provided to small group discussion leaders prior to the symposium, as well as the transcript of the plenary session at which the small group leaders summarized the results of their discussions.[9]

Work on the economic crime package continued apace following the symposium. In January 2001, the Commission published for comment a new set of economic crime reform proposals, including options for revising the loss table and for redefining "loss."[10] The Commission published two proposals for redefining "loss," a staff draft containing a number of options on each of the contested points, and a separate proposal submitted by the Committee on Criminal Law of the United States Judicial Conference (CLC) (reproduced in this Issue of FSR).[11]
The views of the CLC on "loss" and the economic crime package seem to have been particularly influential among the Commissioners.[12] Preparatory to the Commission's March 2001 meeting, Commission staff prepared yet another draft of a reformed "loss" definition (reproduced in this Issue of FSR[13]). The final loss redefinition approved by the Commission at its April 2001 meeting can fairly be described as an amalgam of the CLC and staff drafts. The new definition (reproduced in this Issue, p. 54)will become effective on November 1, 2001.

The Loss Tables

There appears to be a consensus on two points regarding the loss tables. First, consolidating the theft and fraud guidelines, and their loss tables, is a good idea. Second, it is also a good idea to simplify the loss table by reducing the number of levels on the table and moving from one-offense-level steps to two-offense-level steps. The contentious issue has been whether to "raise" or "lower" the table. That is, the real argument has been over whether to change the breakpoints on the table to alter the offense levels assigned to particular dollar amounts. Those who wished to "raise" the table might, for example, lower the dollar amount of loss necessary for an offense level of 20 from $5 million to $2.5 million, and make other similar changes at the high end of the loss table. Conversely, those who wished to "lower" the table might raise the loss amount necessary for an offense level of 8 from $5,000 to $10,000, and make other similar changes at the low end of the loss table. The debate over the tables finally revolved around a series of proposed tables, each of which would raise offense levels (and thus sentences) for some high-loss offenders, while lowering offense levels and sentences for some low-loss offenders. The alternate table proposals published by the Sentencing Commission in January 2001 are reproduced in this Issue.[14]

Catharine Goodwin, Assistant General Counsel to the Administrative Office of the U.S. Courts, explains the loss table controversy and makes the case both for increasing sentences for high-loss offenders, and for decreasing offense levels for low-loss offenders. Barry Boss, co-chair of the Sentencing Commission's Practitioner's Advisory Group (PAG), and his co-author, Jude Wikramanayake, argue against raising any economic crime sentences. We also reproduce the official response of the PAG to the table proposals, in which they advanced a fourth alternative loss table modification.

Flexibility

As significant as the economic crime package just approved by the Commission undoubtedly is, some observers felt it did not go far enough. Some were distressed that the consolidated theft/fraud guideline retains "loss," a quantitative measure of harm, as a core determinant of offense seriousness. Others felt that the Commission should have used the economic crime guidelines as a vehicle to experiment with methods of giving judges more sentencing flexibility. In this Issue, Judge Jon O. Newman of the Second Circuit sets forth thoughts on how economic crime and other guidelines might be made more flexible.[15] Judge Newman's article limns more precisely views he expressed at the Sentencing Commission's Economic Crime Symposium in October 2000. His views plainly resonated with many in attendance and were, at least in part, the inspiration for a potentially revolutionary "flexibility" proposal authored by Commissioner Sessions. This proposal, together with an alternative plan authored by Commissioner Steer, is reproduced in this Issue.[16] Neither proposal was voted on in this amendment cycle, but there is every likelihood that they will be the focus of lively debate beginning in the summer of 2001.

Notes

1 *See, e.g.*, Memorandum of Frank O. Bowman, III, Special Counsel, U.S. Sentencing Commission, to Donald A. Purdy, Chief Deputy General Counsel, U.S. Sentencing Commission, "Summary and Analysis of Judicial Interpretations of the Term 'Loss' in U.S.S.G. §§ 2B1.1 and 2F1.1," April 16, 1996 (on file with author). This memo later germinated into a law review article. *See*, Frank O. Bowman, III, *Coping With "Loss": A Re- Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998).

2 Federal Register Notice BAC2210-40, 62 Fed. Reg. 152, 171–74 (1997).

3 In October 1997 and again in March 1998, the Commission held public hearings on proposals to reform economic crime sentencing. *See, U.S. Sentencing Commission October 1997 Hearing on the Definition of "Loss": Excerpts*, 10 FED. SENT. REP. 157 (1997) (Transcripts of the hearings and copies of the written statements of the witnesses at both the October 1997 and March 1998 hearings can be obtained at the Sentencing Commission website, http:\\www.ussc.gov.) For a discussion of the status of the evolving debate on economic crime sentencing reform as it existed in early 1998, *see* Frank O. Bowman, III, *Back To Basics: Helping the Commission Solve the "Loss" Mess With Old Familiar Tools*, 10 FED. SENT. REP. 115 (1997). *See also*, the other articles in Vol. 10, No. 3, of FSR (Nov./Dec. 1997), discussing particular aspects of the economic crime sentencing debate.

4 63 Fed. Regis. 601–635 (January 6, 1998).

5 13 FED. SENT. REP. 43 (2000).

6 13 FED. SENT. REP. 45 (2000).

7 *See, A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission*, October 20, 1998 (available at http://www.ussc.gov) (hereinafter "Field Test"). 1999.

8 13 FED. SENT. REP. 47 (2000). During 1999, work also continued on possible revisions of the loss table.

9 Video webcasts of most of the Economic Crime Symposium proceedings can be viewed on the Sentencing Commission website, http://www.ussc.gov.

[10] Federal Register Notice BAC2210-40/2211-01 (Jan. 2001) (available at http://www.ussc.gov/FEDREG/fedr0101.htm)

[11] 13 FED. SENT. REP. 49 (2000). *See also,* Letter of Hon. William W. Wilkins, Jr., Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Chair and Members of the U.S. Sentencing Commission (with attachments), November 9, 2000 (on file with author). The Commission voted to publish the CLC proposal for comment in the Federal Register. *See,* Federal Register Notice BAC2210-40/2211-01 (available at http://www.ussc.gov/FEDREG/fedr0101.htm). For a detailed discussion of the November 2000 CLC "loss" definition proposal, *see* Frank O. Bowman, III, *A Judicious Solution: The Criminal Law Committee Draft Redefinition of the "Loss" Concept in Economic Crime Sentencing,* 9 GEO. MASON L. REV. __ (2001), forthcoming.

[12] The CLC has been an interested and active participant throughout the Sentencing Commission's consideration of economic crime sentencing reform. Representatives of the Criminal Law Committee testified at Commission hearings and were heavily involved in negotiations over the shape of the package formally presented to the Sentencing Commission in April 1998. *See, e.g., U.S. Sentencing Commission October 1997 Hearing on the Definition of "Loss": Excerpts,* 10 FED. SENT. REP. 157 (1997) (testimony of Hon. Gerald Rosen before U.S. Sentencing Commission on behalf of the CLC); J. Phil Gilbert, *Statement on "Loss" on Behalf of the Judicial Conference Committee on Criminal Law,* 10 FED. SENT. REP. 128 (1997) (statement by then- Chair of CLC Sentencing Guidelines Subcommittee endorsing a common definition of loss in both theft and fraud).

[13] 13 FED. SENT. REP. 51 (2000).

[14] 13 FED. SENT. REP. 18 (2000).

[15] Jon O. Newman, *Toward Guidelines Simplification,* 13 FED. SENT. REP. 56 (2000).

[16] 13 FED. SENT. REP. 60 (2000).