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APPENDIX TO GUEST EDITOR'S OBSERVATIONS: A Proposal for a Consolidated Theft/Fraud Guideline

Editor's Note: Professor Frank Bowman proposed the following consolidated theft/fraud guideline to the U.S. Sentencing Commission in October 1997. The proposal is explained in detail in a forthcoming law review article, *Coping With "Loss": A Re-Examination of Federal Economic Crime Sentencing Under the Guidelines*, 51 *Vanderbilt L. Rev.* -- (April 1998).

§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:

[INSERT LOSS TABLE]

[Note: Sections 2B1.1 (b)(2), (4), (5), and (6), as well as § 2F1.1(b)(3), (4), and (6) would be retained as §§ 2Z1.1(b)(2I)-(b)(7) of the consolidated guideline.]

(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.

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



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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: (1) 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(1).

(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 28 U.S.C. § 1961, 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.

17. 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.



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