

**Statement of  
United States District Judge J. Phil Gilbert<sup>1</sup>  
Representative of the Committee on Criminal Law  
To the United States Sentencing Commission  
October 15, 1997**

On behalf of the Criminal Law Committee, I want to thank Judge Conaboy and the Sentencing Commission for the invitation to participate in this public hearing.

**Introduction**

This submission by the Committee on Criminal Law is in response to the issues to be discussed at the public hearing on October 15, 1997. The Committee on Criminal law would like to emphasize first the adoption of modified and augmented loss tables for Sections 2F1.1 and 2B1.1. The Commission should complete its adoption of new loss tables prior to considering how to clarify and improve the definition of loss. It would be much more difficult for the Commission to attempt reform of the loss tables at the same time as it attempts to reform the loss definition and rules. In fact, simultaneous analysis of the tables and loss may well result in the Commission not being able to accomplish either.

On the other hand, sequential analysis is more logical, practical, and takes advantage of the considerable work already done by the respondents and the Commission. Introduction of the loss issues, which will require significant study, analysis and effort, would complicate and delay accomplishing the reform of the tables, which is nearly complete and which accomplishes the goal of increased punishment for more serious offenses and eliminates the specific offense characteristic for more than minimal planning. This Commission should follow through with its reform of the tables in the 1998 amendment cycle, which would be a significant contribution by the current Commission. It would then be providing the new-formed Commission, later in 1998, the gift of a stationary backdrop against which the new Commission can begin the analysis of the loss issues.

Although some argue that the loss tables and loss definition have to be done simultaneously, the two are in fact separable. They would only be tied if anticipated changes to the loss determination represented an enormous ideological shift, either expanding or contracting the concept of "loss" in white collar offenses. No such shift is proposed nor seriously anticipated. Rather, the discussed potential changes are systemic, policy-neutral clarifications and improvements that would not result in wholesale changes in the computation of loss. Metaphorically, anticipated changes do not divert the loss road, but merely smooth out the rough spots, fill in the holes, and add a few meaningful road signs.

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<sup>1</sup> Hon. Gerald E. Rosen, U.S. District Court for the Eastern District of Michigan, will appear for Judge Gilbert, Chief Judge, Southern District of Illinois, who is unable to attend.

To do both the table and definitional issues together would be the most difficult way to proceed, and may end up being a recipe for failure on both counts, because simultaneous consideration would be attempting to focus two moving targets. While the tables and loss are not integrally intertwined, there will be numerous arguments to the Commission that they are, resulting in confusion, needless complication, and delay - making any clear focus on either the tables or the issues next to impossible. If, on the other hand, the Commission were to do the tables first, it would then provide a stationary backdrop against which the loss definitional analysis can take place.

### **1. Why should the Commission consider tackling the definition of loss?**

Once the tables are reformed, the Commission definitely should consider reforming the definition and rules used in the determination of loss. The current definition for loss is larceny-based, which makes it difficult to apply to fraud cases. The results are ambiguity, disparate application, and cumbersome litigation. The definition, “property taken, damaged, or destroyed,” is at once insufficient, ambiguous, and overbroad, especially in application to a complex fraud case. It is incomplete because it does not state what the causation standard should be - how broad to cast the net - without which, identification of victims and determination of loss are much more difficult and open to disparate results.

The problems with the current definition and rules cannot be gleaned from analysis of appellate data only - although there are numerous hair-splitting appellate cases on the determination of loss, along with what are estimated to be at least eleven conflicts among the circuits. However, the many contested and lengthy sentencing hearings are not visible in the appellate data. Moreover, the natural result of incomplete, inconsistent and ambiguous rules is, inevitably, disparate results - of which we are all aware, sometimes even within the same courthouse. These results are not readily apparent, either, from numerical sentencing or appellate data.

There needs to be not only an improved “core” definition of loss, but also improved application rules, to assist courts with some of the more commonly encountered situations and problems in determining loss. The current rules, like the core definition, are incomplete, inconsistent, confusing, and a patchwork of concepts. They do not provide a unified theme, perhaps because the “core” definition lacks one. There are omissions of key clarifications regarding, for example, the point in time that loss and the value of collateral should be measured. None of these changes would drastically change the loss landscape, but would instead even out the uneven applications and the rough road that results from the current rules.

**2. Would all or some of 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?**

A simplified and improved definition for loss would address some of the problems in determining loss. The “core” definition for loss in both fraud and theft cases is currently inadequate. A simple, but improved, definition should be developed that would fit both. Currently, one must conduct a side-by-side comparison to determine the subtle, and sometimes inexplicable, ways in which the two definitions differ. Differences, where necessary (such as perhaps the differing rules for crediting returned property for theft than for fraud) should be made clear. As much as possible, however, the definition and rules should be the same, to avoid disparate results from alternative charging decisions.

The consolidated and improved definition should include a causation standard, which would, in itself, be a significant improvement. Such a standard, modified by the familiar concept of foreseeability, would assist courts by telling them how wide to cast the net for loss. Courts are accustomed to determining foreseeability. It is a basic concept in torts, contracts, and determining liability among co-defendants under the current relevant conduct rules. It is only fair that it be applied to a defendant’s loss liability, and no doubt much of the anguishing done by the courts amounts to an attempt to find a rule of fairness, that foreseeability would provide. In some cases it may result in a wider net being cast than currently available, and in others it would result in a somewhat narrower net. It is policy-neutral, but, most importantly, it is fair. It also brings loss determination back into the fold of otherwise familiar legal concepts, to which courts are accustomed. By clarifying loss determination with familiar concepts, the Commission would, in effect, be simplifying the process.

However, even given such an improved definition, courts would also need an improved set of rules to provide guidance to them on the many commonly occurring situations and problems that arise in the determination of loss. For example, the current rules do not have a consistent rule for measurements (such as at what point in time to determine loss and how and at what point in time to value collateral or other credits against loss). Indeed, if courts were not given such guidance, it is inevitable that circuit courts would gradually develop such rules and applications for the courts, resulting in considerable confusion, continued disparity, and additional circuit conflicts.

Because courts need clarified and consistent rules to assist them in applying an improved core definition of loss, it would not be helpful to relegate significant, recurring areas of loss determination to departure. For example, issues involving intended loss and gain can make a significant difference in loss determination and conceivably arise too frequently to be considered outside the heartland. In many cases, for example, one party or the other can credibly argue that there is a difference between the actual, net loss and the intended loss. Such commonly recurring issues should be the subject of guidance for the courts.

**3. In addition to the possible statement or clarification of generalized principles for defining and determining loss, are there specific loss issues that need to be separately addressed?**

Actual Loss

As noted above, it would be helpful to courts if there were a causation standard specified. This should be modified to incorporate the concept of foreseeability to reflect the relevant conduct provisions in Chapter 1. This clearer standard would not only provide guidance and a central theme, but it would also eliminate the current inconsistency of including foreseeable consequential damages only in certain kinds of cases.

Interest

The current rule is ambiguous and implies the exclusion of all interest. It needs, at a minimum, to be clarified. What form(s) of interest does the Commission intend to exclude? Some courts have found that the Commission did not intend to exclude as “interest” appreciation of a victim’s money or investment that the victim relied-upon, and bargained-for. The Commission should make clear the intention of commentary note 7 under Section 2F1.1 as it relates to interest.

Value Received - Credits Against Loss

The rules are incomplete and inconsistent on when loss or collateral is measured or how the loss or credit should be valued. This quandary comes up frequently, and courts should be given guidance. Any such rule should include specific guidance on how to value money given to early investors in “Ponzi” schemes. In this area, as in several others involving loss, there is no rule, currently, so courts are trying to develop their own rules, some of which their circuit courts like, and some of which their circuit courts do not like.

Diversion of Government Benefits

As with the other issues, the Commission should clarify the issue so that courts are not required to guess what the Commission’s intent was.

Alternatives to Actual Loss

The issues of intended loss, risk of loss, and gain are frequently occurring considerations which merit guidance from the Commission. The Commission should give careful analysis to these issues, with a mind toward clarification rather than relegation to departure, as some have suggested. These concepts are integral to many loss cases and should be part of the loss calculation, as specified by the Commission. Any such rules should include guidance on how to handle factual impossibility and reverse sting cases.