

Revised Part C. Definition of Loss for Offenses Sentenced Pursuant to §2B1.1, the Consolidated Guideline

Synopsis of Proposed Amendment: *The proposed amendment revises the definition of loss for offenses sentenced pursuant to §§2B1.1 (Larceny, Embezzlement and Other Forms of Theft) and 2F1.1 (Fraud and Deceit). The revision is designed to resolve circuit conflicts, address case law and application issues, and to promote consistency in application. To the extent practicable, the proposed definition retains concepts that have not proven problematic.*

The proposed amendment would accomplish the following purposes:

- (1) Combine the loss definitions in the commentary to the theft and fraud guidelines into one definition with a simplified format;*
- (2) Provide definitions for key concepts of loss, including “actual loss”, “intended loss” and, “gain”;*
- (3) Limit loss to reasonably foreseeable pecuniary harm resulting from the offense;*
- (4) Provide a definition of "reasonably foreseeable pecuniary harm";*
- (5) Resolve a circuit conflict to provide that intended loss includes unlikely or impossible losses that are intended;*
- (6) Clarify that gain may be used as an alternative measure of loss when there is a loss that cannot reasonably be determined;*
- (7) Provide greater clarity regarding the flexibility that judges have in estimating loss;*
- (8) Exclude interest of any kind;*
- (9) Exclude certain costs incurred by the government and victims in connection with prosecution and criminal investigation of the offense;*
- (10) Clarify the concept of loss in terms of the applicability of any credits or offsets;*
- (11) Provide for exclusion from loss, certain money and property returned, or services rendered to victims;*

(12) Exclude from applicable credits: (A) the value of property or services that are substantially different from what the victim intended to receive; and (B) services fraudulently rendered by defendants posing as licensed professionals and for goods falsely represented as approved by a regulatory agency or for which regulatory approval was obtained by fraud;

(13) Provide that where appropriate the special loss rules establish a minimum loss rule in the specific context described;

(14) Further revise the special rule on determining loss in cases involving diversion of government program benefits to resolve an apparent circuit conflict;

(15) Exclude from applicable credits the gain of individual investors in fraudulent investment schemes;

(16) Provide rules of construction for items that constitute reasonably foreseeable pecuniary harm in cases involving protected computers, product substitution and defense contracts; and

(17) Reformat and clarify the provisions dealing with departures, including a permitted downward departure for non-monetary and mitigating objectives, such as funding medical treatment.

Proposed Amendment (Part C):

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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Commentary

Application Notes:

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2. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (C), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

- (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary 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)
- (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include non-economic harm, such as emotional distress or injury to reputation.
- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
- (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the reasonably foreseeable cost of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.
- (II) Defense Contract Fraud Cases.—In the case of a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.
- (III) Protected Computer Cases.—In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), reasonably foreseeable pecuniary harm includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.
- (B) Gain.—The court shall use the defendant's gain as an alternative measure of loss

only if there is a loss but it reasonably can not be determined.

- (C) Estimation of Loss.—*The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) *The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
- (ii) *The cost of repairs to damaged property.*
- (iii) *The approximate number of victims multiplied by the average loss to each victim.*
- (iv) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

- (D) Exclusions from Loss.—*Loss shall not include the following:*

- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*

- (E) Credits Against Loss.—*Loss, as estimated pursuant to subdivision (C), shall be reduced by the following:*

- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant to the victim before the offense was detected. However, loss shall not be reduced by the value of (I) any property or service transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive; (II) the services fraudulently rendered to the victim by persons falsely posing as licensed professionals, (III) goods falsely represented as approved by a governmental regulatory agency, or (IV) goods for which regulatory approval by a government agency was obtained by fraud.*

The time of detection of the offense is the earlier of the time the offense was

discovered by a victim or government agency or the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*

(F) *Special Rules.*—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

- (i) *Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.*—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.

- (ii) *Government Benefits.*—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, the loss is \$50.

- (iii) *Davis-Bacon Act Violations.*—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required and actual wages paid.

- (iv) *Ponzi and Other Fraudulent Investment Schemes.*—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal

investment (*i.e.*, the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

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Departure Considerations.—

(A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.
- (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).
- (iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).
- (v) The offense endangered the solvency or financial security of one or more victims.

(B) Downward Departure Considerations. There also may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted.

- (i) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.

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Background:

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The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

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