

**REVISED PROPOSED AMENDMENT: COUNTERFEITING OFFENSES**  
**(Proposed Amendment 2 of User Friendly, Volume One)**

*Synopsis of Proposed Amendment:* This revised proposed amendment (1) increases the current base offense level of level 9 in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) by providing alternative base offense levels of level 15 if the defendant was convicted under 18 U.S.C. § 474A or level 10, otherwise; (2) replaces the "floor" offense level of level 15 for manufacturing with a two-level enhancement; and (3) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".

First, the amendment increases the current base offense level of level 9 in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) by providing alternative base offense levels of level 15 if the defendant was convicted under 18 U.S.C. § 474A or level 10, otherwise. Setting the base offense level at level 10 for most counterfeiting crimes promotes proportionality in sentencing for counterfeiting vis-a-vis other, similar economic crimes. For example, fraud crimes sentenced under §2F1.1 receive a base offense level of level 6 and almost invariably (roughly 85% of the time) 2 additional levels for "more than minimal planning." Thus, before any "loss" enhancement is applied, fraud defendants are routinely at a minimum of level 8. Placing the base offense level for counterfeiting at level 10 recognizes that counterfeiters, who essentially are people engaged in frauds requiring more than minimal planning, cause additional harm in that they shake public confidence in the currency, and cause the government to spend great sums of money to build anti-counterfeiting safeguards into the currency.

The alternative base offense level of level 15 is provided for defendants convicted under 18 U.S.C. § 474A. The enhanced base offense level will apply to a defendant convicted of possessing or controlling (1) paper that is similar to a distinctive paper used by the United States for its currency, obligations, or securities; or (2) a feature or device that is essentially identical to a distinctive counterfeit deterrent used by the United States for its currency, obligations, or securities. The higher base offense level is justified because of the higher statutory maximum penalties under 18 U.S.C. § 474A (i.e., 25 years compared to 10, 15, and 20 years for other counterfeiting offenses). In addition, use of paper similar to "distinctive paper" and use of features and devices essentially identical to "distinctive counterfeit deterrents" (both of which are defined in the statute) make the counterfeit item more passable and the offense more sophisticated.

Few defendants have been convicted under 18 U.S.C. § 474A, but it can be expected that convictions under that statute will increase as counterfeiters seek ways to copy relatively new deterrent features and devices incorporated into United States currency. Commission data indicate that five defendants were convicted under 18 U.S.C. § 474A in the past three fiscal years. One of the defendants was subject to the manufacturing floor and received an offense level under the counterfeiting guideline of level 15. One of the defendants received an offense level under the fraud guideline of level 13, due to high loss amounts. Two of the defendants

*received an offense level under the counterfeiting guideline of level 9 (i.e., they received only the base offense level). No sentencing information was available for the fifth defendant.*

*Second, the amendment replaces the "floor" offense level of level 15 for manufacturing with a two-level enhancement. Replacing the floor offense level of level 15 with a two-level enhancement has a double benefit. First, it eliminates the "cliff" inherent in setting a sentencing floor. Specifically, the existing floor of level 15 for manufacturing activity takes all defendants who engage in manufacturing to level 15 regardless of the economic harm each causes. This means that the manufacturer of twenty dollars worth of counterfeit receives the same sentence as the manufacturer of \$70,000 worth of counterfeit.*

*The staff's review of cases indicates that approximately 68 percent of the FY99 counterfeiting cases in which the manufacturing/production enhancement applied would receive lower sentences under the proposed amendment, but the reductions would be minimal. Half of defendants receiving a reduction would receive a level 13, and the other half would receive a level 14. Offenders receiving reductions are those who were involved with less than \$10,000 in counterfeit currency. (More than \$10,000 is required under the proposal to reach level 15 for manufacturers who do not received the base offense level of level 15. The proposed base offense level of level 10 plus the proposed 2-level enhancement for manufacturing results in an offense level of 12, before applying the enhancement based on amount of counterfeit currency.) In fact, approximately 65 percent of defendants who received the floor of level 15 were involved with less than \$5,000 in counterfeit currency. Thus, 65 percent of manufacturers in the sample received an increase of either 5 or 6 levels because of the floor for manufacturing/production.*

*In addition, unlike the current guideline, which provides no incremental punishment for manufacturers of more than \$70,000 in counterfeit, the proposed two-level enhancement provides incremental punishment for all manufacturers. As a result of this change, approximately 25% of offenders would receive increased sentences under the proposed amendment.*

*Third, the amendment proposes to delete the language in Application Note 4 that suggests, as a minority of courts have so interpreted, that the manufacturing adjustment does not apply if the defendant "merely photocopies". That application note was intended to make the manufacturing floor inapplicable to notes that are so obviously counterfeit that they are unlikely to be accepted. Particularly with the advent of digital technology, it cannot be said that photocopying necessarily produces a note so obviously counterfeit as to be impassible.*

*The sentencing and prison impact of the revised proposed amendment was estimated using data derived from a sample of counterfeiting cases coded by staff. These findings were applied to the entire relevant 1999 sentencing cohort. Of the 734 cases sentenced under §2B5.1 during 1999, 694 (94.6%) are estimated to be affected. The current average sentence for the affected cases will increase from nine months to 10 months. An additional 43 prison beds would be required.*

Using the sentence length estimates from the prison impact model, the number of cases that may be affected by retroactivity can be approximated. If this amendment is made retroactive effective November 1, 2001, it is estimated that 111 cases, incarcerated on the effective date, may receive a shorter sentence. Because of the general brevity of the sentences, most of these cases (82 or 73.9%) will have been sentenced during 2001.

**Proposed Amendment:**

**§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States**

- (a) Base Offense Level: ~~9~~(Apply the greater):
- (1) **15**, if the defendant was convicted under 18 U.S.C. §474A; or
  - (2) **10**.
- (b) Specific Offense Characteristics
- (1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).
  - (2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, ~~and the offense level as determined above is less than 15, increase to level 15~~ increase by **2** levels.

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 470-474A, 476, 477, 500, 501, 1003. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

- 1. Definition.— \* \* \*
- 2. Applicability to Counterfeit Bearer Obligations of the United States.—
- 3. Inapplicability to Genuine but Fraudulently Altered Instruments.—
- 4. Inapplicability to Certain Obviously Counterfeit Items.—Subsection (b)(2) does not apply to persons who [merely photocopy notes or otherwise] produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.

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