

PROPOSED AMENDMENT: COUNTERFEITING

Synopsis of Proposed Amendment: *This proposed amendment (A) increases the base offense level in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) from level 9 to level 10; (B) replaces the "floor" offense level of level 15 for manufacturing with a two-level enhancement; and (C) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".*

First, the amendment increases the base offense level from level 9 to level 10. Setting the base offense level at level 10 for 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.

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 irrespective of the economic harm each causes. This means that the manufacturer of twenty dollars worth of counterfeit, who many would contend does not deserve to be sentenced at offense level 15, receives the same sentence as the manufacturer of seventy thousand dollars worth of counterfeit. In the context of a system which recognizes the scope of economic harm caused as a prime determinant of relative culpability, this disproportionate grouping of all manufacturers at level 15 is neither logical nor desirable.

A second benefit of this change is that, unlike the current guideline, which provides no incremental punishment for manufacturers of more than seventy thousand dollars in counterfeit, the proposed two-level enhancement provides reasonable incremental punishment for all manufacturers. Such a result also fosters the central goal of proportionate sentencing.

Third, the amendment proposes to delete the language in Application Note 4 that suggests, as a minority of courts have interpreted it, 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.

In addition to these changes, the Commission also asked staff to explore the possibility of adding a sophisticated means enhancement to the counterfeiting guideline as a tool to combat digital counterfeiting. This proposed amendment does not include a sophisticated means enhancement for the following reasons. First, a two-level enhancement for “sophisticated means” is not an appropriate way to address the current proliferation of digital counterfeiting because the data indicate that the problem – digital counterfeiting – is essentially an unsophisticated crime. Even the Treasury Department, the proponent of harsher sentencing for counterfeiters, acknowledges that virtually anyone who owns a personal computer and inkjet printer can produce credible counterfeit currency. Sophistication is simply not the hallmark of digital counterfeiting. Second, if the Commission provided a sophistication enhancement for digital counterfeiting, proportionality would suffer. This would produce an anomaly in which offset printing, the traditional method of counterfeiting and one requiring great expertise and much training, would be drawing less severe sentences than digital counterfeiting, an offense requiring little or no expertise.

Proposed Amendment:

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

- (a) Base Offense Level: **910**
- (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.

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Commentary

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Application Notes:

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- 4. 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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