

PROPOSED AMENDMENTS: REFERRING GUIDELINES FOR THEFT AND FRAUD

Synopsis of Amendment: *The following proposed amendments indicate the changes that might be called for in several guidelines that refer to the loss tables in either §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2F1.1 (Fraud and Deceit) if the Commission adopts one of the proposed new loss tables, each of which proposes the first increase for loss amount when loss exceeds \$5,000.*

With respect to these guidelines, the Commission will have to decide whether the initial offense level increase from the referenced table should occur at \$2,000 (the current status) or at \$5,000.¹ If the Commission chooses to make no other changes in these guidelines other than to begin increments for loss amounts when loss exceeds \$5,000, then those offenses that involve offenses between \$2,000 and \$5,000 will result in a one-level decrease. Accordingly, these amendments present options for addressing these issues.

Option 1 shows how the guideline might be amended if the Commission were to reference a monetary table for which the starting point is \$5,000. This option also raises the issue of a possible increase in the base offense level that would avoid a decrease in offense level for cases involving loss amounts between \$2,000 and \$5,000. Correspondingly, this would cause a one-level increase for offenses involving loss of less than \$2,000. Option 1A shows how, even with a reference table starting at \$5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the loss is more than \$2,000 but not more than \$5,000, without an increase in the base offense level.

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

- Option 1:
- (a) Base Offense Level: [9][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):~~
 - (1) If the face value of the counterfeit items exceeded \$5,000 increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

Option 1A: (a) Base Offense Level: 9

¹To be precise, the “cutting points” in the monetary tables occur when the monetary amount is “more than \$2,000” or “more than \$5,000”, etc. For simplicity, this discussion generally will omit the “more than” modifier.

- (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):~~
 - (1) If the face value of the counterfeit items (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

- Option 1:
 - (a) Base Offense Level: ~~[8]~~[9]
 - (b) Specific Offense Characteristics
 - (1) ~~If the retail value of the motor vehicles or parts involved exceeded \$2,000; increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~
 - (1) If the retail value of the motor vehicles or parts involved exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
 - (a) Base Offense Level: 8
 - (b) Specific Offense Characteristics
 - (1) ~~If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~
 - (1) If the retail value of the motor vehicles or parts (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2F1.2. Insider Trading

- Option 1:
- a) Base Offense Level: [8][9]
 - (b) Specific Offense Characteristic
 - (1) If the gain resulting from the offense exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
- a) Base Offense Level: **8**
 - (b) Specific Offense Characteristic
 - (1) If the gain resulting from the offense (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

- Option 1:
- (a) Base Offense Level: [8][9]
 - (b) Specific Offense Characteristics
 - ~~(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1.~~
 - (1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
- (a) Base Offense Level: **8**
 - (b) Specific Offense Characteristics
 - ~~(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1.~~
 - (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1**

level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2B3.3. Blackmail and Similar Forms of Extortion

- Option 1:
- (a) Base Offense Level: ~~[9]~~**[10]**
 - (b) Specific Offense Characteristic
 - ~~(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1.~~
 - (1) If the greater of the amount obtained or demanded exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).**
- Option 1A:
- (a) Base Offense Level: **9**
 - (b) Specific Offense Characteristic
 - ~~(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1.~~
 - (1) If the greater of the amount obtained or demanded (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).**

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§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

Option 1: (a) Base Offense Level: [6][7]

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(3) (If more than one applies, use the greater):

~~(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~

(A) If the market value of the fish, wildlife, or plants exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud), [but in no event more than **[18]** levels]; or

(B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

Option 1A: (a) Base Offense Level: **6**

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(3) (If more than one applies, use the greater):

~~(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~

(A) If the market value of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud), [but in no event more than **[18]** levels]; or [but in no event more than **[18]** levels]; or

(B) If the offense involved (i) marine mammals that are listed as

depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

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§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

- Option 1:
- (a) Base Offense Level: **[10][11]**
 - (b) Specific Offense Characteristics

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(2) (If more than one applies, use the greater):

~~(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
- (a) Base Offense Level: **10**
 - (b) Specific Offense Characteristics

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(2) (If more than one applies, use the greater):

~~(A) — If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

- Option 1:
- (a) Base Offense Level: [7][8]
 - (b) Specific Offense Characteristics

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(2) (If more than one applies, use the greater):

~~(A) — If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~

(A) If the value of the gratuity exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
- (a) Base Offense Level: 7
 - (b) Specific Offense Characteristics

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(2) (If more than one applies, use the greater):

~~(A) — If the value of the gratuity exceeded \$2,000, increase by the~~

corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):

- (A) If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

Option 1:

- (a) Base Offense Level: [10][11]
- (b) Specific Offense Characteristic
 - (1) (If more than one applies, use the greater):
 - ~~(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~
 - (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

Option 1A:

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristic
 - (1) (If more than one applies, use the greater):
 - ~~(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~
 - (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded \$2,000 but did not

exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

- Option 1:
- (a) Base Offense Level:
 - (1) **[10][11]**, if a bribe; or
 - (2) **[6][7]**, if a gratuity.
 - (b) Specific Offense Characteristics

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~~(2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.~~

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A:
- (a) Base Offense Level:
 - (1) **10**, if a bribe; or
 - (2) **6**, if a gratuity.
 - (b) Specific Offense Characteristics

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~~(2) Increase by the number of levels from the table in §2F1.1 (Fraud and~~

~~Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.~~

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics

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- (2) (Apply the Greatest) If the offense involved:
- (A) Distribution for pecuniary gain, increase by the number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
- (C) Distribution to a minor, increase by **5** levels.
- (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (E) Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.

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Application Notes:

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4. *Subsection (b)(2) provides a five-level enhancement if the offense involved distribution. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000]), an upward departure may be warranted.*

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§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
- (1) (Apply the Greatest) If the offense involved:
- (A) Distribution for pecuniary gain, increase by the number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
- (C) Distribution to a minor, increase by **5** levels.
- (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (E) Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.

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Application Notes:

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2. *Subsection (b)(1) provides a five-level enhancement if the offense involved an act related to distribution for pecuniary gain.. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000])], an upward departure may be warranted.*

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§2G3.2. Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material

- Option 1:
- (a) Base Offense Level: **12**
 - (b) Specific Offense Characteristics
 - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by **4** levels.
 - (2) If **6** plus the offense level from the table at ~~2F1.1(b)(1)~~ in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

- Option 1A:
- (a) Base Offense Level: **12**
 - (b) Specific Offense Characteristics
 - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by **4** levels.
 - ~~(2) If **6** plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

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Application Notes:

1. *Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it.*

2. *If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [(i.e., a commercial enterprise engaging in a volume of commerce having a value that is more than [\$40,000])], an upward departure may be warranted.*

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§2B5.3. Criminal Infringement of Copyright or Trademark

- Option 1: (a) Base Offense Level: ~~[8]~~**[9]**
- (b) Specific Offense Characteristics
- (1) ~~If the infringement amount exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.~~
- (1) If the infringement amount exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- Option 1A: (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
- (1) ~~If the infringement amount exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.~~
- (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

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§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

- (a) Base Offense Level: **6** plus the number of offense levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds.

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§2B2.3. Trespass

- Option 1: (a) Base Offense Level: [4][5][6]
(b) Specific Offense Characteristics

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~~(3) — If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.~~

(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).

- Option 1A: (a) Base Offense Level: 4
(b) Specific Offense Characteristics

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~~(3) — If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.~~

(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud).