
SUMMARY OF PROPOSED AMENDMENTS AND ISSUES FOR COMMENT



Prepared by the
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PART I

(1) RE-PROMULGATION OF TEMPORARY, EMERGENCY TELEMARKETING FRAUD AMENDMENT

(A) IN GENERAL

- Proposes to re-promulgate the temporary, emergency telemarketing fraud amendment (effective November 1, 1998) as a permanent amendment.
- Builds upon and broadens amendment submitted to Congress on May 1, 1998, that created enhancement for sophisticated concealment in §2F1.1.

(B) PRINCIPAL FEATURES

- Adds **2-level** increase and a minimum offense level of **level 12** in §2F1.1 for offenses that involve **sophisticated means**.
- enhancement at §2F1.1(b)(5) (page 2).
- definition at Application Note 15 (page 5).
- Adds **2-level** adjustment in §3A1.1 (Hate Crime Motivation or Vulnerable Victim) for offenses that involve **large number of vulnerable victims** (pages 6-7).

PART II – SUMMARY OF THE ECONOMIC CRIME PACKAGE

The economic crime package principally is made up of:

(1) THE THEFT, PROPERTY DESTRUCTION, AND FRAUD PACKAGE, which is made up of:

- The proposed consolidated theft, fraud, and property destruction guideline.

- The loss table (built into the consolidation).
- The loss definition (built into the consolidation).

(2) THE TAX PACKAGE, which is made up of:

- A new tax table.
- An issue for comment on conforming the “sophisticated concealment” enhancement to the "sophisticated means" enhancement found in the fraud guideline.

(3) CONFORMING AMENDMENTS TO DELETE MORE-THAN-MINIMAL PLANNING.

(4) AMENDMENTS FOR GUIDELINES THAT REFER TO EITHER THE FRAUD OR THEFT LOSS TABLE.

(5) OTHER TECHNICAL AND CONFORMING AMENDMENTS.

(1) THEFT, FRAUD, AND PROPERTY DESTRUCTION PACKAGE

The principal features are the following:

(A) CONSOLIDATION OF THE THEFT, FRAUD, AND PROPERTY DESTRUCTION GUIDELINES

(B) BASE OFFENSE LEVEL

(Page 24)

- The base offense level is 6.
- The base offense level for theft and property destruction cases is raised by two levels (but, for the most part, that increase will be offset because of the higher floor in the proposed loss table).

(C) THEFT OF UNDELIVERED U.S. MAIL FLOOR

(Not shown)

- That floor (of level 6) is deleted as unnecessary because of the base offense level of level 6.

(D) LOSS TABLE

(Pages 24-25)

- Uses the fraud loss table from April 1997 (the Option 3 fraud loss table).
- Starts at \$2000.
- More-than-minimal-planning built in at \$10,000 (first level) and \$20,000 (second level) (so the mmp soc is deleted).
- Increases severity at \$40,000.

(E) MASS MARKETING ENHANCEMENT

(Page 25)

- Adds a 2-level enhancement if the offense involved mass marketing.
- Added in 1998, in response to telemarketing concerns.

(F) NATIONAL CEMETERIES ENHANCEMENT

(Page 25)

- Adds a 2-level enhancement if the offense involved theft or property destruction at a national cemetery.
- Added in 1998, in response to legislative directive.

(G) VIOLATION OF JUDICIAL ORDER

(Page 25)

- Keeps the current 2-level enhancement and floor of level 10
- Rejects option to make a this factor a departure basis instead

(H) SOPHISTICATED MEANS ENHANCEMENT

(Page 25)

- Included in the proposal assuming the sophisticated means enhancement promulgated as an emergency amendment will be made permanent.
- Specific two-level enhancement and a floor offense level of [12] for three

types of conduct:

- If defendant relocated or participated in relocating a fraudulent scheme to another jurisdiction to evade authorities.
- If substantial part of a fraudulent scheme was committed from outside the United States.
- If offense otherwise involved sophisticated means.
- General definition of “sophisticated means” in Application Note 7.

(I) RISK OF SERIOUS BODILY INJURY ENHANCEMENT
(Page 26)

- Increases floor offense level from level **13** to level **14**.
- Adds risk of death to the enhancement.

(J) GROSS RECEIPTS ENHANCEMENT
(Page 26)

3 Options:

(1) Option 1:

- Keeps the floor of level 24 but deletes the 4-level enhancement (because increases in loss table already substantially provide increase in offense level for fact of high dollar amounts).

(2) Option 2:

- Keeps the floor of level 24 but provides a 2-level enhancement (so that some cases currently getting the 4-level enhancement won't now get a decrease in offense level).

(3) Option 3 (Not shown on draft):

- Maintains the current floor of level 24 and 4-level enhancement.

(K) BRIBERY CROSS REFERENCE
(Page 27)

- Option to add cross reference if offense involved bribery (or related offense).
- Option to have this cross reference apply only if resulting offense level is greater.

(L) GENERAL CROSS REFERENCE TO OTHER APPROPRIATE GUIDELINE
(Page 27)

- Option to add cross reference to any other offense guideline if conduct of conviction makes out offense more appropriately sentenced under that other guideline.
- Intent is to make current Application Note 13 in fraud guideline more visible.
- Does not change the way Application Note 13 is intended to work.

(M) LOSS DEFINITION
(Starting on page 28)

- The published loss definition is the April 2, 1998 version.
- The April 2, 1998 version was field tested over the summer.
- Andy Purdy will discuss recommended changes to the definition based on the results of the field testing.

(N) DISCOURAGED OR PROHIBITED DEPARTURE BASED ON MORE THAN MINIMAL PLANNING
(Page 32)

- MORE THAN MINIMAL PLANNING SOC IS DELETED AND BUILT INTO THE LOSS TABLE
- 2 Options:
 - (1) More-than-minimal planning, or lack thereof, is a prohibited upward and downward departure factor.
 - (2) More-than-minimal planning, or lack thereof, is a discouraged

upward and downward departure factor.

(2) THE TAX PACKAGE

Principal features are the following:

(A) NEW TAX TABLE

(Page 35)

- increases severity almost the same as severity increases are proposed in the Option 3 fraud loss table (except at amounts between \$12,500 and \$80,000).

(B) ISSUE FOR COMMENT ON THE SOPHISTICATED CONCEALMENT ENHANCEMENT

(Pages 36-37)

- Invites comment on whether the Commission should conform the sophisticated concealment enhancement in the tax guidelines to the “sophisticated means” enhancement added to the fraud guideline in 1998.
- Invites comment on whether a minimum offense level of level 12 should be provided for tax offense that involve sophisticated concealment (or sophisticated means, if the enhancement is so conformed).

(3) MORE THAN MINIMAL PLANNING CONFORMING AMENDMENTS

(Starting on page 37)

- Deletes references to more than minimal planning in appropriate places throughout the guidelines.

(4) THE REFERRING GUIDELINES

- In general, the amendment:
 - Shows how the guidelines that refer to the theft or fraud loss tables might be amended if the Commission adopts the April 1997 fraud loss table (the Option 3 table).
 - Proposes an alternative reference monetary table.
- The principal features of the amendment are the following:

(A) A proposed REFERENCE MONETARY TABLE
(Page 42)

- Coordinated with the proposed April 1997 fraud loss table (the Option 3 table) but does not have more than minimal planning built into the table.
- To be used in referring guidelines that already build in more than minimal planning somewhere else in the guideline.

(B) REFERRING GUIDELINES THAT ALREADY HAVE MORE THAN MINIMAL PLANNING BUILT INTO THE GUIDELINE
(Starting at page 42)

- These guidelines are proposed to be referenced to the proposed Reference Monetary Table.
- Applies to the following guidelines:
 - (1) Counterfeiting (§2B5.1)
 - (2) Altering Motor Vehicle Identification Numbers (§2B6.1)
 - (3) Insider Trading (§2F1.2)
 - (4) Commercial Bribery (§2B4.1)
 - (5) Blackmail/Extortion (§2B3.3)
 - (6) Fish and Wildlife Offenses (§2Q2.1)
 - (7) Noncommercial (Public) Bribery (§2C1.1)
 - (8) Gratuity (§2C1.2)
 - (9) Deprivation of right to honest services of public officials (§2C1.7)
 - (10) Bribery or gratuity regarding employee benefits (§2E5.1)

(C) PORNOGRAPHY AND OBSCENITY
(Starting at page 46)

3 Options:

- (1) Option 1: References these guidelines to the proposed Reference Monetary Table.
- (2) Option 2: References these guidelines to the proposed fraud loss table (assumes more than minimal planning is involved).

(3) Option 3:

- Deletes the reference to any monetary table.
- Provides a 5-level enhancement (similar to the current 5-level enhancement).
- Invites upward departure for large-scale pornography and obscenity offenses.
- Provides option to define "large-scale" as having retail value of more than \$40,000 (the amount that applies to the current 5-level enhancement).

(D) COPYRIGHT AND STRUCTURING TRANSACTIONS

(Starting at page 49)

2 Options:

- (1) Option 1: Refers these guidelines to the proposed Reference Monetary Table.
- (2) Option 2: Refers these guidelines to the proposed fraud loss table (assumes these offenses involve more than minimal planning).

(E) TRESPASS OFFENSES INVOLVING INVASION OF PROTECTED COMPUTERS

(Starting at page 50)

2 Options:

- (1) Option 1: Refers these guidelines to the proposed Reference Monetary Table (assumes these computer trespass offenses are simpler than other computer crimes referenced to fraud and/or theft).
- (2) Option 2: Refers these guidelines to the proposed fraud loss table (assumes these offenses involve more than minimal planning; under consolidated theft/fraud guideline, would apply to these cases).

(F) CONSOLIDATION OF THEFT AND PROPERTY DESTRUCTION GUIDELINES

(Not shown because taken care of by consolidation proposal)

(G) CONSOLIDATION OF BANK GRATUITY AND PRINCIPAL GRATUITY GUIDELINES

(Starting at page 51)

- Mitigates the need to refer bank gratuity guideline to the proposed Reference Monetary Table.
- No substantive change in operation of guideline.

(H) TECHNICAL AND CONFORMING AMENDMENTS

- Mostly redesignations necessitated by the consolidation of the theft, fraud, and property destruction guidelines.

PART III

(6) CONDITIONS OF PROBATION AND SUPERVISED RELEASE

- **New mandatory condition** added to 18 U.S.C. §§ 3563(a) and 3583(d).
- Requires person convicted of sex offense (described in 18 U.S.C. § 4042(c)(4)) to report that person's address and any change of residence to probation officer, and to register as a sex offender in any state where the person works, resides, or is a student.
- Statutory amendments became effective November 26, 1998.
- Guideline amendment adds these new mandatory conditions to §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release).

PART IV – ISSUES FOR COMMENT

(7) UNAUTHORIZED COMPENSATION

- Recent increase in maximum penalty for violations of 18 U.S.C. § 209 (Salary of Government Officials and employees payable only by United States).
- Increase from one year to **five years** if the conduct is **willful**.
- Should Commission increase offense levels in §2C1.4 (Payment or Receipt of Unauthorized Compensation)? If so, by what amount?
- Full text found on page 68 of “Reader Friendly” document.

(8) CLONING OF WIRELESS TELEPHONES

(A) IN GENERAL

- Congressional directive from the **Wireless Telephone Protection Act** to review and amend, if appropriate, the sentencing guidelines to provide appropriate penalty for offenses involving the cloning of wireless telephones, including attempt and conspiracy.

(B) TWO ISSUES PUBLISHED

- Should the Commission amend §2F1.1 to provide tailored SOC that would cover offenses that involve use of cloning equipment? Should the Commission provide an SOC, or a cross reference, if the cloning offense facilitated, or was in connection with, another offense? What offense level increase is appropriate for an SOC?
- Should there be a special rule for offenses involving stolen, unauthorized, or counterfeit access devices used in cloning offenses (e.g., minimum loss amount of \$100 for each access device) even if Commission does not adopt new loss definition (which uses such a special rule).

- (C) Full text found on pages 68-69 of “Reader Friendly” document.

(9) NUCLEAR, CHEMICAL, AND BIOLOGICAL WEAPONS

(A) SENSE OF CONGRESS

- The Defense Authorization Act for Fiscal Year 1997 expressed sense of Congress that sentencing guidelines are inadequate for offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons material.
- Congress urged Commission to increase penalties for such offenses.
- Should Commission amend §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) to provide increased penalties? Should SOCs be added to account for more egregious conduct? Alternatively, should the Commission encourage upward departures to account for more egregious conduct?

(B) NEW OFFENSES

- Antiterrorism and Effective Death Penalty Act of 1996 incorporated attempt and conspiracy into 18 U.S.C. § 175 (prohibiting the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons). The Act also expanded the meaning of biological agents.
- Chemical Weapons Convention Implementation Act of 1998 created new offense at 18 U.S.C. § 229.
- Unlawful for a person knowingly (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or (2) to assist or induce, in any way, any person to violate paragraph (1), or attempt or conspire to violate paragraph (1).
- How should the Commission amend guidelines to cover these new offenses? Should Commission amend §2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities)? What changes would be appropriate to account for new offenses? Alternative BOL to account for range of likely offense conduct? Commentary encouraging upward (or downward) departures for cases in which certain atypical conduct occurs?

(C) Full text found on pages 69-70 of “Reader Friendly” document.

(10) TAX PRIVACY

(A) Internal Revenue Service Restructuring and Reform Act of 1998 created new offense at 26 U.S.C. § 7217.

- Unlawful for the President, Vice President, anyone employed in their executive offices, or certain other high-ranking officials of the executive branch to request the IRS to conduct or terminate an audit or other investigation of the tax liability of any person.
- Maximum term of imprisonment is 5 years.

(B) Act also amended 26 U.S.C. § 7213 to make it unlawful for federal and state employees and certain other persons to disclose tax-related computer software.

(C) Taxpayer Browsing Protection Act created new offense at 26 U.S.C. § 7213A.

- Unlawful for federal and state employees and certain other persons to inspect tax return information in any way other than that authorized under the Internal Revenue Code.
- Maximum term of imprisonment is 1 year.

(D) New offenses similar to 26 U.S.C. § 7216 (unlawful for persons in the business of preparing tax returns to knowingly or recklessly disclose any such information or to use any such information for any purpose other than the preparation of the tax return).

(E) Should the Commission amend the guidelines to address violations of 26 U.S.C. §§ 7213, 7213A, 7216, and 7217? If so, how? Should the Commission amend §2H3.1 (Interceptions of Communication or Eavesdropping) because arguably all the above offenses implicate the privacy interests of the taxpayer whose tax information was the subject of the offense? Are there alternative approaches?

(F) Full text found on page 70 of “Reader Friendly” document.