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§2B1.1 Fact Patterns

1. Beginning in March 2007, the defendant was employed by the Bureau of Indian Affairs (BIA) in their accounting department. Periodically he was assigned to administer the phaseout of businesses on Indian reservations. This involved making determinations as to which creditors were to receive payments, and overseeing the disbursement of funds until the businesses were completely closed down. Such administrators are unsupervised until the final audit stage of a phaseout.

The instant indictment stems from the defendant's assignment from March 2008 to April 2008 at the phaseout of the Long Lake Reservation Sawmill. Upon completion of the phaseout, the BIA conducted a routine audit which revealed that between December 2008 and April 2009 the defendant filed nineteen bogus expense forms resulting in the embezzlement of $20,000.

The audit resulted in a criminal investigation being initiated in April 2009, which confirmed the embezzlement and the fact that the defendant had not returned any of the $20,000 to the victim before the offense was detected. When the defendant was interviewed that month by a federal investigative agent, the defendant offered the agent a bribe in the amount of $1500 if the agent would terminate the investigation.

Federal investigators, in conjunction with BIA auditors, also reviewed previous phaseout projects that had been administered by the defendant. They learned that previously when the defendant administered the phaseout of the Birch Lake Reservation Sawmill, he embezzled $15,000 during the period of December 2007 to February 2008, using the same method employed at Long Lake. The defendant had not returned any of the $15,000 to the victim before the offense was detected.

The defendant entered a plea of guilty to Count 4 of a 20-count indictment charging 19 counts of embezzlement and one count of attempted bribery. Count 4 charges that the defendant embezzled $2,500 from the Long Lake Reservation Sawmill on January 5, 2009 in violation of violation of 18 U.S.C. § 1163. The maximum statutory penalties for this offense are 5 years and/or $250,000; Class D Felony: up to 3 years supervised release following imprisonment; up to 2 years imprisonment upon subsequent revocation.

How do you determine which Chapter Two guideline is used in application?

The offense of conviction is a violation of 18 U.S.C. § 1163. Appendix A of the Guidelines Manual references this statute to §2B1.1 (Larceny, Embezzlement and Other Forms of Theft; Offenses Involving Stolen property, Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other

than Counterfeit Bearer Obligation of the United States) and §2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources: Unlawful Sale, Purchase, Exchange , Transportation, or Receipt of Cultural Heritage Resources). Because the offense involved embezzlement from a tribal organization, §2B1.1 is the guidelines section "most appropriate for the offense conduct charged in the count of which the defendant was convicted." See USSG §1B1.2, comment (n.1).

What is the base offense level applicable to this offense?

Because the offense of conviction has a five-year statutory maximum penalty, the base offense level is 6. See USSG §2B1.1(a)(2).

What is the amount of loss involved in the January 5, 2009 offense, the embezzlement from the Long Lake Reservation Sawmill (the offense resulting in the count of conviction, Count 4)? Will this be included in the loss for which the defendant is held accountable in the application of the embezzlement guideline? Which provision(s) of relevant conduct supports this analysis?

The loss amount from the January 5, 2009 offense is $2,500. This amount will be included as loss for the purpose of §2B1.1. This loss qualifies as relevant conduct pursuant to §1B1.3(a)(1)(A), as the embezzlement of $2,500 is an act the defendant committed during the offense of conviction. In fact, the embezzlement of the $2,500 from the Long Lake Reservation Sawmill is the offense of conviction in this case.

Is the defendant accountable for any other losses related to the Long Lake Reservation Sawmill? If so, what amount? Which provision(s) of the relevant conduct guideline supports this analysis?

The defendant will also be held accountable for the additional losses related to the Long Lake Reservation Sawmill. From December 2008 to April 2009, an audit revealed that the defendant embezzled $20,000 from the sawmill. (The $20,000 total includes the $2,500 embezzled on January 5, 2009, the instant offense of conviction.) The additional $17,500 will be included in the loss calculation pursuant to §1B1.3(a)(2), "expanded" relevant conduct. Because §2B1.1 is included in the list at §3D1.2(d), any acts that are the "same course of conduct" or "common scheme or plan" as the offense of conviction are relevant conduct.

"Common scheme or plan" is defined in Application Note 9 at §1B1.3 as acts that are substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. "Same course of conduct" is defined as acts that are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity

(repetitions) of the offenses, and the time interval between the offenses.

The defendant filed 19 separate bogus expense forms resulting in losses of $20,000. The offense of conviction involves the filing of one bogus expense form resulting in a loss of $2,500. The other 18 bogus expense forms (resulting in additional losses of $17,500) would qualify as the same course of conduct as the offense of conviction, and therefore will be included in the loss calculation at §2B1.1.

Is the defendant accountable for any losses related to the Birch Lake Reservation Sawmill? If so, what amount? Which provision(s) of the relevant conduct guideline supports this analysis?

The defendant will also be held accountable for the losses related to the Birch Lake Reservation Sawmill. Using the same method of embezzlement as with the instant offense of conviction, the defendant embezzled an additional $15,000 from December 2007 through February 2008. This additional amount of loss will also be included in the calculation at §2B1.1. First, the conduct is included in the list at §2B1.1, and would group with the instant offense of conviction under §3D1.2(d). Second, the embezzlement conduct from the Birch Lake Reservation Sawmill is the same course of conduct and common scheme or plan as the embezzlement conduct from the instant offense of conviction (Long Lake Reservation Sawmill). Accordingly, the defendant will receive an 8 level increase pursuant to §2B1.1(b) for losses more than $30,000.

What would be the defendant's final offense level under §2B1.1?

14. The base offense level of 6 plus the 8 level increase for the loss. None of the other specific offense characteristics under §2B1.1 apply to these facts.

Is the defendant accountable for the attempted bribe of the federal agent? Which provision(s) of the relevant conduct guideline supports this analysis?

The act of the attempted bribe of the agent is certainly an act the defendant committed to avoid detection or responsibility for the offense of conviction, which would qualify as relevant conduct per §1B1.3(a)(1)(A). This will most likely result in an increase of 2-levels at §3C1.1 (Obstruction).

However, the definition of loss under §2B1.1, "reasonably foreseeable pecuniary harm that resulted from the offense" would not include the amount of the bribe the defendant offered to the federal agent.

Also, this bribe amount would not qualify as relevant conduct under §1B1.3(a)(2). Although bribery (§2C1.1) is an offense that is included at §3D1.2(d), it is not an offense that would group with §2B1.1 under §3D1.2(d). To require grouping under rule (d), the counts must use the same (or similar) guideline. Guidelines 2B1.1 and 2C1.1 are not

sufficiently similar in this case to require grouping of multiple counts under rule (d). Therefore, the bribe cannot be considered to be the same course of conduct or common scheme or plan as the offense of conviction of embezzlement.

Would the relevant conduct analysis change if the defendant had been convicted of all counts? If so, how?

The defendant would be held accountable for the same amounts of loss as if convicted of all counts.

However, if convicted of all counts of conviction, the analysis under §1B1.3 would change in that the $20,000 the defendant embezzled would all be considered acts that the defendant committed during the offense of conviction pursuant to §1B1.3(a)(1)(A). The embezzlement amounts from the Birch Lake Reservation Sawmill would still be considered "expanded" relevant conduct pursuant to §1B1.3(a)(2).

2. The defendant has pled guilty to one count of mail fraud, a violation of 18 U.S.C. § 1341 with a statutory maximum punishment of 30 years imprisonment. The offense involved a scheme in which she conspired with others to defraud American Mortgage Bank, N.A. ("Bank") in connection with the sale of four properties.

Investigation uncovers that the defendant worked as a certified mortgage broker and recruited four individuals ("buyers") to purchase what she termed "investment properties." The defendant told the four buyers that she would use her real estate expertise to find "distressed investment properties" from which they could make a quick profit. Prior to approaching the four buyers, the defendant purchased four properties herself:

(1) property one sold to the defendant at $200,000, and it appraised at $225,000 at the time she re-sold it to the first buyer for the appraised value;
(2) property two sold to the defendant at $175,000, and it appraised at $200,000 at the time she re-sold it to the second buyer for the appraised value;
(3) property three sold to the defendant at $250,000, and it appraised at $275,000 at the time she re-sold it to the third buyer for the appraised value; and
(4) property four sold to the defendant at $300,000, and it appraised at $325,000 at the time she re-sold it to the fourth buyer for the appraised value.

None of the four buyers had ever previously purchased property, and their incomes were all below $20,000 per year.

The defendant employed five people in her office who aided in preparing the loan applications for the four buyers the defendant recruited. These loan applications included forged bank records, pay stubs, and other materials provided to the Bank. The Bank provided mortgage financing for the full amount of the re-sale prices for all of these properties; there were no down payments required. The buyers were all unable to

make any payments on these houses and after default the houses all went into foreclosure. The Bank conducted an internal investigation and contacted the authorities two months prior to foreclosure.

The defendant has no prior criminal history. She has cooperated with the investigation and provided a written statement accepting responsibility for her actions.

The defense argues that there was no loss in this case because the Bank received title to the properties which secured the loans after foreclosure. The defense argues that, since the Bank does not dispute the appraisals or value of the homes, there is no loss. The defense also argues that after calculating her guideline range under §2B1.1, and applying a two -level reduction for acceptance of responsibility, the final guideline offense level is 5.

How would the guidelines be calculated in this case?

Answer: Under §2B1.1 loss would be calculated based on the higher of the actual or intended loss.

a) Recall that "credits against loss" are generally only valid when property or money is returned before the offense was detected by a victim or a government agency. (See Application Note 3(E)(i)). In such cases, while the value of the property may be a consideration in restitution, for the purposes of loss calculation the defendant will not receive any credit under these circumstances. This case triggers a special rule, however. In a case involving collateral pledged or otherwise provided by the defendant, loss is reduced by the amount the victim (here, the Bank) 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. (See Application Note 3(E)(ii)).

b) The actual loss is the "reasonably foreseeable pecuniary harm" that resulted from the conduct. This would include the entire amount procured from the bank based on the fraud, or specifically, $1,025,000, minus the fair market value of the properties at the time of sentencing (or the amount recovered for them if they are disposed of before sentencing). Thus, if the appraised values do not decrease, the loss could be zero.

c) Under §2B1.1(a)(1), a mail fraud case involving a financial institution has a base offense level of seven. At most, sixteen levels would be added for the $1,025,000 loss amount under §2B1.1(b)(1), bringing the offense level to 23. As best, no addition would be made for loss, leaving the offense level at seven.

d) Two additional levels might be added for the use of sophisticated means (preparation of the fraudulent documentation to supply the lender) under

§2B1.1(b)(9)(C). This is likely to be a disputed issue.

e) *Additionally, consideration must be given to whether §2B1.1(b)(14)(A) applies (a 2-level increase if "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense"). Note that this is one of the few specific offense characteristics that focuses on the defendant personally rather than relevant conduct (which extends beyond the defendant personally). Note that if the resulting offense level were to be less than level 24, §2B1.1(b)(14)(E) requires that it be increased to level 24.*

f) *[Aggravating role? An argument can be made for a four level increase because the defendant directed the activities of her five employees and was the leader or organizer of the fraud scheme. See §3B1.1(a). The defense may argue that the employees were not "participants" as defined in the guidelines. See §3B1.1, comment. (n.1).]*

g) *[Abuse of trust? Although she was not in a position of trust with the Bank, the government might argue that she occupied at position of trust with the borrowers.]*

h) *[Vulnerable victims? Although she took advantage of the buyers, they probably could not be considered victims of the offense.]*

i) *Assuming the court did not apply any Chapter Three adjustments but did apply all of the specific offense characteristics discussed above, the total offense level for the defendant will be a maximum of 24 (taking into consideration a three point adjustment for acceptance of responsibility). If the court did not apply any of the specific offense characteristics, the total offense level would be 5 (BOL of 7 less 2 points for acceptance of responsibility).*

Note that the loss calculation in this hypo will be different after November 1, 2012, if the Commission's recent amendments to §2B1.1 are not disapproved by Congress. The amendment adds language to the credits against loss rule, found in Application Note 3(E) of the commentary to §2B1.1, establishing a new Application Note 3(E)(iii) applicable to fraud cases involving a mortgage loan where the underlying collateral has not been disposed of by the time of sentencing. In such cases, new Application Note 3(E)(iii) changes the computation of credits against loss in two material ways: 1) by changing the date on which the fair market value of the collateral is determined from date of sentencing to the date on which the defendant's guilt is established; and 2) by creating a rebuttable presumption that the most recent tax assessment provides a reasonable estimate of the fair market value of the property.

2A. Imagine the same facts but, in this case, the defendant did not recruit the purchasers, but

paid an appraiser to inflate the appraised values of the properties by $25,000 each. The homes in this case do not go into foreclosure. At the time of sentencing the value of the four properties now exceeds or equals the inflated value.

Is there still a loss, and what would it be?

a) *It depends on whether the Bank has already disposed of the properties. The defendant may get the benefit of the rising market under Application Note 3(E)(iii) even though she would be stuck with the price at which the properties were sold if the Bank completed the foreclosure sale before the properties appreciated in value. There is a separate issue of "intended loss" however. It could be argued that she intended to defraud the Bank of the difference between the true value and the falsely appraised value at the time of the offense. Loss is calculated at the time of the offense, or the time that the conspiracy ended. If the intended loss exceeds the actual loss, the intended loss would be used (and vice versa).*

Case law example: In United States v. Radziszewski, 474 F.3d 480, 487 (7th Cir. 2007), *the defendant objected to the sentencing judge's use of a foreclosure value for a property secured with a fraudulent loan rather than a higher appraisal of the property at a date prior to foreclosure. The court declined to use the defendant's preferred value in part because it did not represent the amount the bank actually recovered from foreclosure.*

b) *Recall that under §2B1.1(b)(13)(E), when the defendant receives more than $1,000,000 in gross receipts from a financial institution, the resulting offense level floor is 24. Therefore, the total offense level for the defendant could be* ***21,*** *taking into consideration a three-level adjustment for acceptance of responsibility, even if the Bank suffered no actual loss in the end.*

2. Also, imagine that there was a fifth property sold to one of the buyers, using the buyer's information, without the buyer's knowledge.

How would this change the sentence?

a) *The calculation would be the same with two levels added because of the defendant's use of a means of identification to obtain another means of identification (the new mortgage application for the fifth property) under §2B1.1(b)(10)(C)(i).*

3. The defendant has pleaded guilty to one count of wire fraud, a violation of 18 U.S.C. § 1343 with a statutory maximum punishment of 20 years imprisonment. The defendant used his home computer to gain access to the UberBank online banking system's password file after he noticed a loophole in the bank's security. The password file identified the name, account number, social security number and e-mail address of 260

UberBank account-holders. He used the passwords to access 48 different checking and savings accounts that belonged to 48 different UberBank account-holders. The defendant transferred $50 from each account into a separate UberBank account that he opened using the name, address, and social security number of his neighbor Dillford Grimely. A few days before the defendant had removed a letter from Dillford's mailbox which contained Dillford's name and social security number. The defendant signed up for a new account and received an account number in Dillford's name. The defendant was then able to transfer the money online in about ninety minutes. Soon after the defendant transferred the money using the UberBank online banking system, the online security manager at UberBank noticed the unusual transfers. The security manager conducted a quick investigation and then reversed all of the transfers and closed the account in Dillford's name. The defendant did not withdraw any cash from the new account before the fraud was discovered and the new account was closed. UberBank's action in reversing the 48 transfers happened before any of the 48 account-holders noted the shortfall in their respective accounts. UberBank subsequently spent $25,000 to remedy the fraudulent transfers and the loophole in online security.

The defendant has no prior criminal history. He has cooperated with the investigation and provided a written statement accepting responsibility for his actions.

The defense argues that since UberBank noted the issue before any account-holder was deprived of his or her money, and since UberBank closed his fraudulent new account prior to the defendant removing any cash, the loss is zero. Further, the defense states that even if an intended loss is determined there is only one victim: UberBank. The defense contends that because the account-holders and Dillford suffered no pecuniary harm they are not victims. The defense argues that after calculating his guideline range under §2B1.1, and applying a two -level reduction for acceptance of responsibility, the final guideline offense level is 5.

How would the guidelines be calculated in this case?

Answer: Under §2B1.1 loss would be calculated based on the higher of the actual or intended loss.

a) *In this case the actual loss would include the $25,000 that UberBank spent to remedy the fraud and the security issue. Repairs that may also be improvements of property can be included in loss. See United States v. Lindsley, 254 F.3d 71 (5th Cir. 2001)(Improvements made to a victim company's computer system after a hacker broke in could be attributed to the loss figure as necessary repair costs).*

A court can also reasonably estimate the intended loss by looking at the available facts. In this case the intended loss could be calculated based on the amounts that the defendant transferred from the account-holders into his bogus account, or $2,400. However, intended loss could also include amounts that the defendant did not necessarily appropriate (or did not yet appropriate), but that

he or she had clear access to appropriate. See United States v. Wilfong, 475 F.3d 1214 (10th Cir. 2007)(the defendant fraudulently opened credit accounts at local businesses in the names of victims and the court calculated intended loss by totaling up the credit limits of all open accounts even though the defendant had not used all of the available credit);United States v. Kushner, 305 F.3d 194, 198 (3d Cir. 2002)(Holding that the "intended loss" in a fraudulent check scheme can include the value of counterfeit checks turned over by the defendant at the time of his voluntary surrender even if those checks were never used); United States v. Ravelo, 370 F.3d 266 (2d Cir. 2004)(A case where the defendant unsuccessfully attempts to obtain cash advances from stolen credit cards, each unsuccessful attempt represented an intended loss); and United States v. Rettenberger, 344 F.3d 702, 708 (7th Cir. 2003)(A case where the sentencing judge assumed that the defendant would have continued to collect benefits until the age of 65 and assessed the intended loss as that full amount, holding that when confronted with an ongoing scheme, a sentencing judge may have to extrapolate to find the intended loss). A sentencing judge in this case could determine, based on the evidence, that the intended loss included $50 from each of the accounts for which the defendant had access information. This would raise the loss figure to $13,000.

b) *Effective November 1, 2009, the Commission broadened the definition of victim to include any individual whose "means of identification" was improperly used. Such individuals are considered "victims" regardless of whether they sustained any pecuniary harm. In this case, the defendant had access to the means of identification of 260 account-holders, but only "used" the means of identification for 48 of these accounts. This, along with the use of Dillford's means of identification and the pecuniary loss suffered by UberBank to repair their system, bring the total number of victims to 50. Under §2B1.1(b)(2)(B) this would add four levels to the defendant's guideline calculation for number of victims.*

If the defendant s conduct occurred prior to November 1, 2009, the applicability of the enhancement at §2B1.1(b)(2) may vary, depending on the law of the circuit in which the defendant was sentenced. For such offenses, the definition of victim in the guidelines required that the person suffer actual loss (or bodily injury) and actual loss requires pecuniary harm. Courts have differed on what "pecuniary harm" can mean. See United States v. Lee, 427 F.3d 881 (11th Cir. 2005)(Where the court determined that businesses who were able to offset losses due to return of collateral were still "victims" under §2B1.1(b)(2) since they had suffered a "pecuniary harm" when the defendant had not returned the property prior to discovery); and United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008). The Second Circuit decided that individuals who are reimbursed for losses by their credit card companies or banks can still be considered "victims" for the purposes of §2B1.1(b)(2) as long as they have experienced a loss that can be measured in 'monetary terms." Such a loss could include a "loss of time" due to

the victim attempting to secure reimbursement). In this case it appears that, in most circuits save possibly the Eleventh Circuit, the account-holders would not be considered victims under earlier versions of the guidelines. Thus, using the current manual under those circumstances may be an ex post facto violation.

c) Two additional levels may be added for the use of sophisticated means (using a computer to access the UberBank files) under §2B1.1(b)(9)(C). Defense counsel could rebut any evidence that the accessing of the UberBank user file required sophisticated means. If, for example, the loophole in security was obvious and did not require any specialized computer knowledge, the court might determine that sophisticated means would not apply.

d) Under §2B1.1(b)(10)(C)(I), a two level enhancement for the unauthorized use of a means of identification to obtain another means of identification, would apply in this case since the defendant used Dillford's name and information to open a bank account in his name and was given a new account with a new account number. Note that under §2B1.1(b)(10) that the defendant s offense level must have a floor of level 12.

e) The total offense level for the defendant using the intended loss figure of $13,000 and applying all the other specific offense characteristics discussed above, less a three point downward adjustment for acceptance of responsibility, would be 16. This calculation would resulted in the same total offense level if the court used the actual loss figure.

3A. Assume the same facts as in Fact Pattern 1, but 100 accounts were accessed instead of 48, and the amount withdrawn from the account-holder's bank accounts was $5,000 rather than $50.

How would the guidelines be calculated in this case?

Answer: If the loss figure included $5,000 per victim (assuming 100 account-holders were determined to be victims), then §2B1.1(b)(14)(B)(iii) may be applicable. This provision calls for a four level enhancement if the offense "substantially endangered the financial security of 100 or more victims." The court would have to determine whether the loss of $5,000 constitutes "substantial" financial endangerment under the circumstances. There are no reported cases interpreting this subsection. Note that §2B1.1(b)(14)(C) notes that the cumulative adjustments from application of both (b)(2) for number of victims, and (b)(14)(B)(iii) cannot exceed eight levels.

4. The defendant pleaded guilty to one count of computer fraud, a violation of 18 U.S.C. § 1030 with a statutory maximum punishment of 10 years imprisonment. The defendant is a computer database designer who had contracted with the Department of Transportation to design and implement a new database platform. The new database

was to contain information about several sensitive public programs including the new national Supertrain program. The database contract was worth $120,000 for one year of work at $10,000 per month. The defendant bribed Pearl Dailey, a procurement officer at DOT, with $10,000 to pick his bid over any other bids. The defendant was given access to some, but not all of the DOT's files, after he was awarded the contract. The DOT paid the entire $120,000 up front. Six months after the project started Pearl Dailey was suddenly dismissed. The defendant, fearing discovery of his misconduct, determined he would access the DOT Supertrain data files including the bid files in an attempt to delete any evidence of the bid rigging. To gain access to these files he removed a card with access code information from a DOT employee's jacket pocket while that employee was distracted. After he gained access to the files, the defendant was unable to erase the files related to his bid. Frustrated, the defendant then released a computer virus which he hoped would destroy the evidence surrounding the bids. Although the defendant did not intend for it to happen, the virus also corrupted some of the technical and proprietary data surrounding the Supertrain project and will likely set the project back several weeks at an estimated cost of $330,000. Internal DOT computer security noted the breach soon after this event and the defendant was dismissed from his database contract.

The defendant has no prior criminal history. He has cooperated with the investigation and provided a written statement accepting responsibility for his actions.

The defense argues that the defendant intended no loss to the DOT and was performing his duties under the contract. The defendant also returned the entire $120,000 he had received under the contract as soon as he was contacted by DOT investigators. The defense argues that after calculating his guideline range under §2B1.1, and applying a two -level reduction for acceptance of responsibility, the final guideline offense level is 4.

How would the guidelines be calculated in this case?

Answer: Under §2B1.1 loss would be calculated based on the higher of the actual or intended loss.

a) The actual loss is the "reasonably foreseeable pecuniary harm" that resulted from the conduct. While the defendant may not have intended to cause the damage that resulted from his release of the computer virus, it is a reasonably foreseeable outcome. The cost of repairs to damaged property is to be included in any actual loss calculation (n. 3(C)(iii)). Under n. 3(C)(iii), the $330,000 represents a fair estimation of the repair costs involved and it is included in the loss calculation. The defendant will receive no credit against loss for the return of the entire $120,000 because he returned it after the investigation at DOT had already begun (n. 3(E)(I)). Assuming the defendant has completed six months of his contract properly, and assuming that $10,000 per month is determined to be a reasonable estimate of the value of the work performed, then the defendant will get a credit of $60,000 against the loss. Id. The total loss in this case is

$390,000.

b) Two levels would be added since his conduct also included theft from the person of another (the taking of the access card from the jacket) under §2B1.1(b)(3) .

c) Two additional levels may be added for the use of sophisticated means (using a computer virus) under §2B1.1(b)(9)(C). The defense could rebut the argument that setting loose a computer virus in a computer system is evidence of the use of sophisticated means. Sophisticated means require "a greater level of planning or concealment"than the average fraud. Id. If the defendant had created the virus for the purposes of destroying the files then it would seem likely that the enhancement would apply. In this case it would be a fact question for the court as to whether the manipulation and use of a computer virus requires a "greater level" of planing than an average fraud defendant's conduct.

d) Under §2B1.1(b)(16)(A)(ii), a four level enhancement would apply in this case, and a strong argument could be made under §2B1.1(b)(16)(A)(iii) that a six level enhancement should apply if the court determined there was a "substantial disruption of a critical infrastructure" (the Supertrain project). There are no reported cases discussing what constitutes a "substantial disruption" nor a "critical infrastructure" under this guideline so it will be a fact question for the court to decide if delay of the project for several weeks meets the criteria. Note that under §2B1.1(b)(16)(B) the defendant's offense level must have a floor of level 24 if §2B1.1(b)(16)(A)(iii) applies.

e) The total offense level for the defendant will be 25 (taking into consideration a three point downward adjustment for acceptance of responsibility) if the court adopts all enhancements, including the six level enhancement for a "substantial disruption" of a critical infrastructure.

4A. Assume the same facts as in Fact Pattern 4, but in this case the contract was to be awarded to a Disadvantaged Business Enterprise to increase the participation and opportunities for women and minority-owned businesses in DOT contracting. When the defendant bids for the contract he also misrepresents that he is a DBE.

How would the guidelines be calculated in this case?

Answer: Some sentencing courts have determined that the special rule in n. 3(F)(ii) (for Government Benefits) could apply in some cases where government grants and set-asides fund the contract. In so applied in this case the calculation of loss would include the entire contract award of $120,000 despite any services honestly rendered. See United States v. Tulio, 2008 WL 324193 (3d Cir. Feb. 7, 2008); United States v. Tupone, 422 F.3d 145 (3d Cir. 2006); and United States v. Leahy, 464 F.3d 773 (7th Cir. 2006). Thus loss calculation would be increased to $450,000 and two levels would be added under the SOC. The total offense level, if all the other enhancements were determined to

apply, would therefore be a 27.