

ECONOMIC CRIMES: Mortgage Fraud, Securities Fraud, Identity Theft



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COMMISSION'S REVIEW OF USSG §2B1.1

◎ Multi-Year Study

- Comprehensive, multiyear study of §2B1.1 and related guidelines, including examination of the loss table and the definition of loss;
- Consideration of any amendments to such guidelines that may be appropriate in light of the information obtained.

◎ Symposium on Economic Crime (September 2013)

FRAUD TOPICS

- ◎ “Actual loss” vs. “intended loss”
- ◎ Special rules for some offenses
 - Securities Fraud – Fraud on the Market
 - Ponzi and Other Investment Schemes
 - Credit Card Fraud
- ◎ Credits Against Loss
- ◎ Definition of Victims
 - Special Definitions of Victims
- ◎ Other Common SOCs
 - Sophisticated Means (b)(10)
 - “Means of Identification” (b)(11)
- ◎ Application Note 19: Departure Provisions

ALTERNATIVE BASE OFFENSE LEVELS

§2B1.1(a)

BOL 7, if

- ⊙ Referenced by Appendix A or §2X1.1

AND

- ⊙ Offense of conviction has a **statutory maximum term of imprisonment of 20 years or more**

BOL 6, otherwise

LOSS TABLE

§2B1.1(b)(1)

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14

LOSS TABLE (CONT.)

§2B1.1(b)(1)

(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30

DEFINITION OF LOSS

Application Note 3(A)

Use greater of:

“actual” or “intended” loss

ACTUAL LOSS

Application Note 3(A)(i)

Reasonably foreseeable pecuniary harm
that resulted from the offense

Causation standard:
“but for” and “reasonably foreseeable”

INTENDED LOSS

Application Note 3(A)(ii)

The pecuniary harm that was intended to result from the offense

- Includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., government sting)

ESTIMATION OF LOSS

Application Note 3(C)

- ◎ Court need only make a reasonable estimate of loss
- ◎ Some factors include:
 - Fair market value of property unlawfully taken or destroyed
 - Cost of repairs
 - Approximate number of victims multiplied by average loss to each victim

EXCLUSIONS FROM “LOSS”

Application Note 3(D)

Loss does not include:

- emotional stress
- harm to reputation
- other non-economic harms
- costs to government or victims for investigation or prosecution
- Interest

SPECIAL RULES IN THE DETERMINATION OF LOSS

Application Note 3(F)

- Securities Fraud – Fraud on the Market
- Investment schemes (e.g., Ponzi schemes)
- Credit card fraud
- Healthcare fraud

SPECIAL RULES IN THE DETERMINATION OF LOSS

Fraud on the Market Offenses Application Note 3(F)(ix)

- Fraud involving fraudulent inflation or deflation of the value of publicly traded securities:
 - Rebuttable Presumption for Actual Loss
 - Change in Stock Price
Average Stock Price (90-Day Period After Disclosure)
Less
Average Stock Price During Fraud
 - Average Price Change x Number of Shares = Actual Loss
 - Rebuttable By Changes Caused by External Market Forces

SPECIAL RULES IN THE DETERMINATION OF LOSS

Ponzi and Other Investment Schemes Application Note 3(F)(iv)

- Loss shall not be reduced by gain to an individual investor
 - Returned principal investment can be credited

SPECIAL RULES IN THE DETERMINATION OF LOSS

Federal Health Care Offenses Application Note 3(F)(viii)

- Aggregate dollar amount of fraudulent bills submitted is prima facie evidence of the amount of loss the defendant intended to cause
 - Rebuttal
 - the parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the defendant's intent

SPECIAL RULES IN THE DETERMINATION OF LOSS

Credit Cards and Access Devices Application Note 3(F)(i)

- Stolen or counterfeit credit cards and other access devices:
 - Loss includes any unauthorized charges made
 - Shall be not less than \$500 per card or device

CREDITS AGAINST LOSS

Application Note 3(E)

Loss may be reduced by:

- certain benefits transferred
- collateral pledged

to the victim prior to the detection of the offense

VALUATION AND TIMING OF CREDITS

Application Note 3(E)

- ◎ Transferred benefits:
 - *Fair market value* of services or property returned as of date of detection of offense

- ◎ Pledged collateral:
 - *Amount recovered* upon disposition;
 - If not disposed, *fair market value* as of date of sentencing

MORTGAGE FRAUD – §2B1.1

Application Note 3(E)(iii)

Created a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of plea is the fair market value

VICTIMS SOC

§2B1.1(b)(2)

◎ (Apply the greatest) If the offense -

(A)(i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2 levels**

(B) involved 50 or more victims, increase by **4 levels**

(C) involved 250 or more victims, increase by **6 levels**

GENERAL DEFINITION OF “VICTIM”

Application Note 1

- ⦿ Any person who sustained any part of the *actual loss* determined under subsection (b)(1)
- ⦿ Any individual who sustained bodily injury as a result of the offense

DEFINITION OF “VICTIM” IN MEANS OF IDENTIFICATION CASES

Application Note 4(E)

⦿ For subsection (b)(2), in a case involving means of identification, “victim” means:

(i) Any victim as defined in Application Note 1

OR

(ii) Any individual whose means of identification was used unlawfully or without authority

MEANS OF IDENTIFICATION SOC

§2B1.1(b)(11)

If the offense involved –

(A) the possession or use of any (i) device-making equipment, or (ii) authentication feature;

(B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or

(C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification

increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

MEANS OF IDENTIFICATION

Application Note 1

- ◎ “Means of identification”
 - Has the meaning given the term in 18 U.S.C. § 1028(d)(7), *except* that the means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)

SOPHISTICATED MEANS SOC

§2B1.1(b)(10)(C)

If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or **(C) the offense otherwise involved sophisticated means**, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

SOPHISTICATED MEANS SOC

Application Note 9

“Sophisticated Means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.

- *Hiding assets or transactions through*
 - *Fictitious entities*
 - *Shell companies; Offshore Financial Accounts*

OTHER CONSIDERATIONS AND COMMON LITIGATION ISSUES

Web Site

www.usssc.gov

HelpLine

202-502-4545