



Economic Crimes

**Annual National Seminar
New Orleans, LA
September 17, 2015**

Presenters

Honorable K. Michael Moore

Chief Judge, Southern District of Florida

Juliana Moore

USPO Specialist, Northern District of Texas

James Strawley

Deputy General Counsel, U.S. Sentencing Commission



Commission Resources



www.ussc.gov



helpline (202) 502-4545



[@theusscgov](https://twitter.com/theusscgov)



pubaffairs@ussc.gov

Discussion Topics

- Fraud/Theft - §2B1.1
 - Amendments to 2B1.1
 - Loss Rules
 - Victims Enhancements
 - Other Common SOCs
- Aggravated Identity Theft - §2B1.6



§2B1.1

**Larceny, Embezzlement, Theft;
Stolen Property; Fraud; Forgery**



www.ussc.gov



(202) 502-4545



@theusscgov



pubaffairs@ussc.gov

§2B1.1 (Fraud/Theft) Pointers

- The guideline is driven largely by “loss”
- “Loss” definitions of “actual loss” and “intended loss”
- Special rules for certain types of offenses (*e.g.*, credit card fraud)
- Determinations as to who qualifies as a “victim”
- Guideline “loss” and restitution “loss” are distinct



Relevant Conduct & Multiple Counts

§§2B1.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of §2B1.1, based on all relevant conduct



Alternative Base Offense Levels

§2B1.1(a)

BOL 7, if

- Stat. max. of 20 years or more
- AND**
- Referenced by Appendix A or §2X1.1

BOL 6, otherwise



Numerous Specific Offense Characteristics

Sample of §2B1.1(b) SOC's

- Loss: (b)(1)
- Number of victims or mass marketing: (b)(2)
- Sophisticated means: (b)(10)
- “Access device” or “means of identification”: (b)(11)



Loss Table

§2B1.1(b)(1)

(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



Proposed 2015 Amendment to §2B1.1

Inflationary Adjustments

- Adjusts monetary tables in the guidelines to account for inflation
 - **§2B1.1 (Fraud/Theft)**
 - §2B2.1 (Burglary)
 - §2B3.1 (Robbery)
 - §2R1.1 (Bid-Rigging)
 - §2T4.1 (Tax Table)
 - §5E1.2 (Fines for Individual Defendants)
 - §8C2.4 (Base Fine)



Loss Table as Adjusted for Inflation

§2B1.1(b)(1)

(A) \$5,000 \$6,500 or less	no increase
(B) More than \$5,000 \$6,500	add 2
(C) More than \$10,000 \$15,000	add 4
(D) More than \$30,000 \$40,000	add 6
(E) More than \$70,000 \$95,000	add 8
(F) More than \$120,000 \$150,000	add 10
(G) More than \$200,000 \$250,000	add 12
(H) More than \$400,000 \$550,000	add 14



Loss Table as Adjusted for Inflation (cont.)

§2B1.1(b)(1)

(I) More than \$1,000,000 \$1,500,000	add 16
(J) More than \$2,500,000 \$3,500,000	add 18
(K) More than \$7,000,000 \$9,500,000	add 20
(L) More than \$20,000,000 \$25,000,000	add 22
(M) More than \$50,000,000 \$65,000,000	add 24
(N) More than \$100,000,000 \$150,000,000	add 26
(O) More than \$200,000,000 \$250,000,00	add 28
(P) More than \$400,000,000 \$550,000,000	add 30



“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)



Proposed 2015 Amendment to §2B1.1

Definition of Intended Loss

Application Note 3

- Amends the definition to better reflect a defendant's culpability
 - “(I) means the pecuniary harm that ~~was intended to result from the offense~~ **the defendant purposefully sought to inflict** and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur”



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

Sample of Rules; Application Note 3(F)

- Stolen/counterfeit credit cards
- Government benefits fraud
- Investment schemes (*e.g.*, Ponzi schemes)
- Federal health care offenses



**Special Rules in the
Determination of Loss (cont.)**
Application Note 3(F)(viii)

- Federal Health Care Offenses Involving Government Health Care Programs:
 - The aggregate amount of fraudulent bills submitted to the government health care program is prima facie evidence of the amount of intended loss, if not rebutted



Proposed 2015 Amendment to §2B1.1

Fraud on the Market

Application Note 3(F)(ix)

- Revises special rule for determining loss in “fraud on the market” offenses
- Removes the rebuttable presumption requirement from the method listed in the application note
- Provides that the court may use any method that is appropriate and practicable under the circumstances



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, App. Note 3(E)(iii)

- Provides 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



Number of Victims or Mass Marketing Specific Offense Characteristic

§2B1.1(b)(2)

- 10 or more victims or mass-marketing +2
- 50 or more victims +4
- 250 or more victims +6



General Definition of “Victim” for §2B1.1

§2B1.1, App. 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

§2B1.1(b)(2), App. 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”

§2B1.1, App. 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)



Proposed 2015 Amendment to §2B1.1

Victims Table

§2B1.1(b)(2)

- Revises the table to incorporate substantial financial hardship to victims
 - As revised, enhancement will apply if even one victim suffers a financial hardship
- Less emphasis on the number of victims
 - Eliminated 4- and 6- level enhancements based solely on the number of victims; now based on financial hardship



Proposed 2015 Amendment to §2B1.1

Victims Table

- §2B1.1(b)(2)
 - a) 10 or more victims; mass-marketing; **or**
resulted in substantial financial hardship
to one or more victims +2
 - b) **Resulted in substantial financial hardship**
to five or more victims +4
 - c) **Resulted in substantial financial hardship**
to 25 or more victims +6



Proposed 2015 Amendment to §2B1.1

“Substantial Financial Hardship”

Application Note 4(F)

- The court shall consider whether the offense resulted in the victim:
 - Becoming insolvent
 - Filing for bankruptcy
 - Suffering substantial loss of a retirement, education, or other savings or investment fund
 - Making substantial changes to employment
 - Making substantial changes to living arrangements
 - Suffering substantial harm to their ability to obtain credit



Proposed 2015 Amendment to §2B1.1

Sophisticated Means

§2B1.1(b)(10)

- Narrows the scope of the SOC to be more defendant-specific
- “(C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means”



Sophisticated Means

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



Departure Provisions

§2B1.1, App. Note 20

- Lists a number of factors a court may consider in determining whether an upward departure is warranted, *e.g.*,
 - Offense caused substantial non-monetary harm
 - Substantial amount of interest
- Downward departure provision
 - Offense level substantially overstates the seriousness of the offense





§2B1.6

Aggravated Identity Theft



www.ussc.gov



(202) 502-4545



@theusscgov



pubaffairs@ussc.gov

Aggravated Identity Theft

18 USC § 1028A

- § 1028A requires a mandatory consecutive two-year sentence
- The court has the discretion to sentence multiple counts of § 1028A to run concurrently in whole or part *with each other*



Aggravated Identity Theft

§2B1.6 and App. Note 2

- In the application of a guideline for an “underlying offense,” “...do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification...”
 - *E.g.*, the Fraud guideline SOC at §2B1.1(b)(11)



Example

- Defendant convicted of
 - Wire Fraud, 18 USC § 1343; §2B1.1
 - Aggravated Identity Theft, 18 USC § 1028A; §2B1.6
- The § 1028A offense is relevant conduct of the wire fraud
- The §2B1.1(b)(11) SOC for “means of identification” is not to be applied



Aggravated Identity Theft & Means of Identification SOC

Count 1: §2B1.1
Fraud
 $7 + 12 + \cancel{2} = 19$
(BOL + loss + ~~ID SOC~~)

Offense Level = 19

Count 2: §2B1.6
Aggravated Identity Theft
18 USC § 1028A
24 mos. consecutive



Count 2
Consecutive to Count 1



Issue in the Application of the §2B1.1(b)(11) SOC

§2B1.6, App. Note 2 & §2B1.1(b)(11)

- §2B1.6 directs “do not apply any specific offense characteristic for ...*a means of identification*” in the application of a guideline for an “underlying offense”
- SOC §2B1.1(b)(11) addresses *means of identification* at subsection (C), but also addresses *access devices* at subsections (A) and (B)



“Access Device” or “Means of Identification” SOC

§2B1.1(b)(11)(A)-(C), App. Note 9

- 2-level increase, with a floor of offense level 12
- If the offense involved:
 - (A) Possession/use of device-making equipment or authentication feature, or
 - (B) Production/trafficking of unauthorized/counterfeit access device or authentication feature, or
 - (C) Transfer/use means of identification to produce/obtain other means of ID; possession of 5 or more means of ID produced/obtained by other means of ID



Issue in the Application of the §2B1.1(b)(11) SOC (cont.)

§2B1.6, App. Note 2 & §2B1.1(b)(11)

- Can BOTH §2B1.6 AND §2B1.1(b)(11)(A) or (B) be applied?



Case Law on the Issue

- §2B1.6 *does not* preclude application of the §2B1.1(b)(11)(A)(i) enhancement for possession of device-making equipment
 - *U.S. v. Sharapka*, 526 F.3d 58 (1st Cir. 2008)
 - *U.S. v. Jenkins-Watts*, 574 F.3d 950 (8th Cir. 2009)
 - *U.S. v. Cruz*, 713 F.3d 600 (11th Cir. 2013)
- *But see:*
 - *U.S. v. Giannone*, 360 Fed. Appx. 473 (4th Cir. 2010)





Loss & Victim Scenarios



www.ussc.gov



(202) 502-4545



[@theusscgov](https://twitter.com/theusscgov)



pubaffairs@ussc.gov

Scenario #1

- Defendant convicted of wire fraud, 18 U.S.C. § 1343
- The scheme involved the defendant obtaining ten mortgage loans from the same bank for unqualified borrowers by use of fraudulent information
- It has been established that the defendant did not intend that there would be defaults on the loans



Scenario #1 (cont.)

- Each of the ten loans was in the amount of \$200,000 on property valued at \$250,000
 - A total of \$2 million in loans on a total property value of \$2,500,000
- Most of the borrowers had no knowledge that their loans were obtained by fraud, and six of the borrowers remain in their homes and are current with their mortgages payments



Scenario #1 (cont.)

- Four of the loans resulted in foreclosures with the bank selling each home for \$160,000, a \$40,000 deficit for each of the four loans
 - A total of \$640,000 in sales, a \$160,000 total deficit
- Additionally for these four homes, while living in the homes each borrower paid \$12,000 in mortgage payments (excluding taxes and insurance), with \$4000 to principal and \$8,000 to interest
 - A total of \$48,000 in mortgage payments, with \$16,000 to principal and \$32,000 to interest



Scenario #1 (cont.)

- What is the amount of “actual loss”?
 - The total \$2 million obtained in the fraudulent loans?
 - The \$160,000 total deficit following the sale of the four homes in default?
 - Will the loss amount be reduced by the mortgage payments for the four homes in default: \$48,000 total in mortgage payments (\$16,000 principal; \$32,000 interest)?
- What is the amount of “intended loss”?



Scenario #2

- Defendant convicted of a Ponzi scheme
- Defendant solicited \$1,000 each from 100 different investors with a promise to double their money
 - A total of \$100,000 was obtained from 100 investors
- Defendant paid ten investors \$2,000 each but the other 90 received no money, not even their original investment
 - A total of \$20,000 paid out to ten investors



Scenario #2 (cont.)

- What is the amount of “actual loss”?
 - The total \$100,000 obtained from the 100 investors?
 - Will the loss amount be reduced by the \$20,000 paid to the 10 investors (\$2,000 to each) who had each invested \$1,000?
- What is the amount of “intended loss”?
- How many victims under §2B1.1?



Scenario #3

- Defendant bought a used computer from which the contents had not been cleared
- The computer's contents included a personnel roster with the social security numbers and other information of 80 employees
- Defendant used each of the social security numbers to obtain a credit card from one of four major banks, 20 cards from each bank



Scenario #3 (cont.)

- In obtaining each credit card, the defendant had requested and was given a \$10,000 credit limit
 - 80 credit cards at \$10,000 limit each: \$800,000
- None of the cards were used prior to the defendant's arrest



Scenario #3 (cont.)

- What is the amount of “actual loss”? “Intended loss”?
- Are the four banks who issued the cards “victims” if none of the cards were ever used?
- Are the 80 employees whose social security numbers were used to obtain the cards “victims” if none of the cards were ever used?




Scenario #3 - Variation

- Defendant “maxed out” the credit limit of \$10,000 each on 50 cards (\$500,000) (some from each of the four banks), but had not used the other 30 cards at the time of arrest
- What is the amount of “actual loss”? “Intended loss?”
- What is the total number of “victims”?





Commission Resources

-  **www.ussc.gov**
-  **helpline (202) 502-4545**
-  **[@theusscgov](https://twitter.com/theusscgov)**
-  **pubaffairs@ussc.gov**