



Economic Crimes

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Minneapolis, MN



Presenter

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Commission Resources



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§2B1.1

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



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Fraud 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



Scenario 1

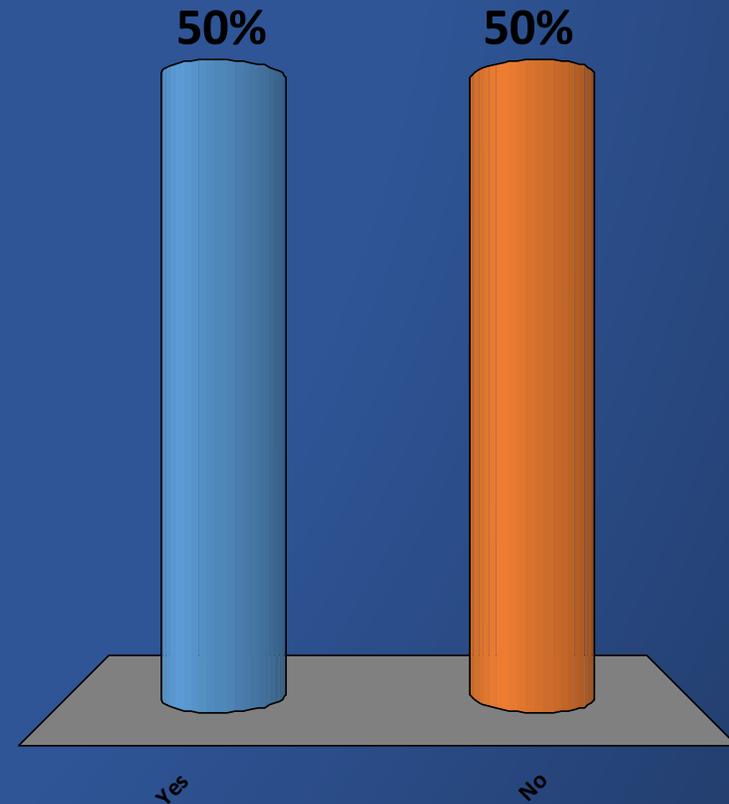
- Defendant convicted of 18 U.S.C. § 371 (Conspiracy) to commit a violation of 18 U.S.C. § 1343 (Wire Fraud)
- Per Appendix A, the applicable guideline for § 371 is §2X1.1 which references to §2B1.1
- The statutory maximum for § 371 is 5 years; the stat max for § 1343 is 20 years
- Which base offense level (BOL) applies at §2B1.1(a)?



Which base offense level
(BOL) applies at §2B1.1(a)?

A. BOL 7

B. BOL 6



Scenario 2

- Defendant convicted of 18 U.S.C. § 1956 (Money Laundering) which carries a 20 year stat max; applicable guideline §2S1.1
- Defendant was involved in a wire fraud scheme and was laundering proceeds from the wire fraud scheme



Scenario 2 (cont.)

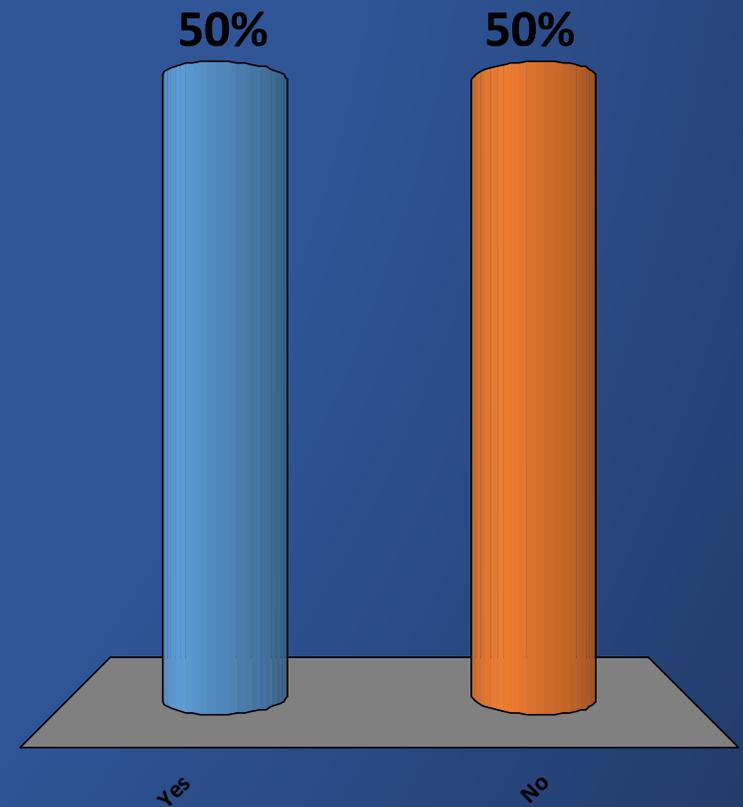
- §2S1.1(a)(1) directs the use of the offense level for the underlying offense from which the laundered funds were derived
- Which base offense level (BOL) applies at §2B1.1(a)?



Which base offense level
(BOL) applies at §2B1.1(a)?

A. BOL 7

B. BOL 6



Numerous Specific Offense Characteristics

Sample of §2B1.1(b) SOCs

- Loss: (b)(1)
- Number of victims, mass marketing, or substantial financial hardship: (b)(2)
- Federal health care offense: (b)(7)
- Sophisticated means: (b)(10)
- “Means of identification”: (b)(11)



“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)



2015 Amendment to §2B1.1

Definition of Intended Loss

Application Note 3

- Amended 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



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



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



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



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



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



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)



Scenario 3

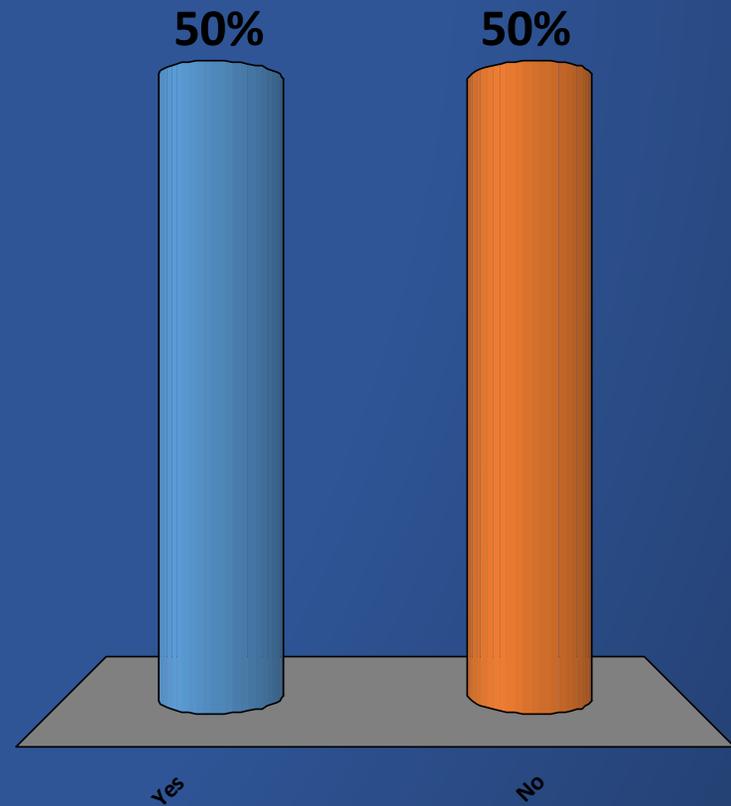
- Defendant is convicted of interstate theft
- Defendant stole a total of \$110,000 from 12 Walgreen stores
- Does the defendant receive an increase at §2B1.1(b)(2) for number of victims?



Does the defendant receive an increase at 2B1.1(b)(2) for number of victims?

A. Yes

B. No



Number of Victims or Mass Marketing Specific Offense Characteristic

§2B1.1(b)(2)

- 10 or more victims, mass-marketing, or substantial financial hardship for one or more victims +2



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



“Means of Identification”

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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”



Scenario 4 – Sophisticated Means

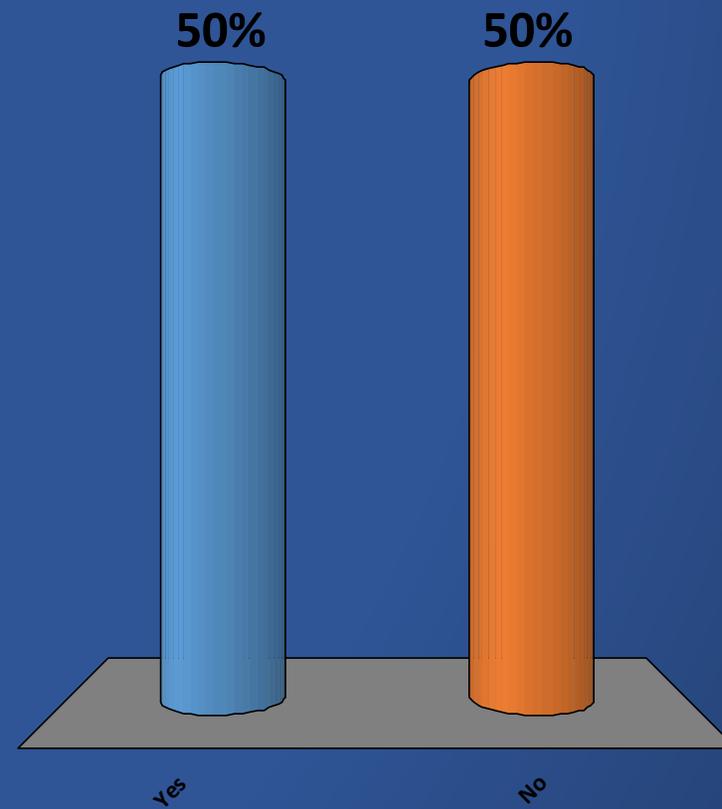
- Defendant convicted of bank fraud under 18 U.S.C. § 1344.
- Defendant used forged checks and a stolen identity to attempt bank fraud.
- Should the defendant receive an enhancement for sophisticated means?



Should the defendant
receive an enhancement
for sophisticated means?

A. Yes

B. No



Departure Provisions

§2B1.1, App. Note 20

- List 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



Aggravated Identity Theft

§2B1.6

- 18 U.S.C. § 1028A requires a mandatory consecutive two-year sentence
- An SOC for transfer, possession, or use of a means of identification for an “underlying offense” will not be applied
 - *E.g.*, §2B1.1(b)(11) at the Fraud guideline



Means of Identification SOC & Aggravated Identity Theft

Count 1: §2B1.1

Fraud

$$7 + 12 + \cancel{2} = 19$$

(BOL + loss + ~~ID SOC~~)

Offense Level = 19

Count 2: §2B1.6

Aggravated ID Theft

18 USC § 1028A

24 mos. consecutive



Count 2
Consecutive to Count 1



§ 1028A PLUS the Application of the SOC at §2B1.1(b)(11)

§2B1.6, App. Note 2 and §2B1.1(b)(11)

Issue: If an offense involves *both* a means of identification, addressed by §2B1.1(b)(11)(C), *and* other factors addressed by (b)(11) (*e.g.*, device-making equipment at (b)(11)(A)), can *both* the consecutive sentence under § 1028A, *and* the (b)(11) SOC apply?



§ 1028A PLUS Application of
the SOC at §2B1.1(b)(11) (cont.)

§2B1.6, App. Note 2 and §2B1.1(b)(11)

- Can apply both
 - *U.S. v. Cruz*, 713 F.3d 600 (11th Cir. 2013)
 - *U.S. v. Taylor*, 2016 WL 1179745 (11th Cir. 2016)

In an unpublished opinion, the 4th Circuit said you cannot apply both





Fraud Scenarios

§2B1.1



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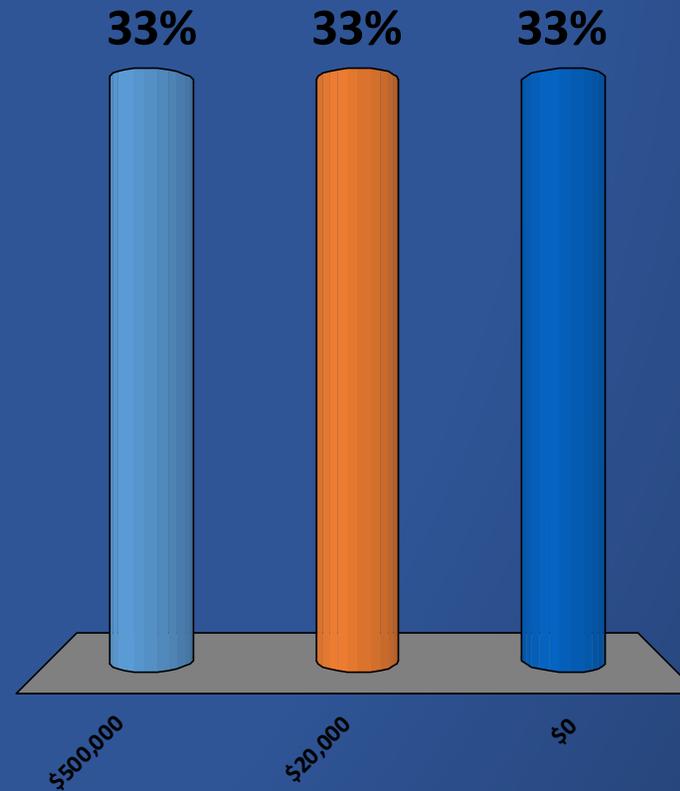
Scenario 5

- A and B were convicted of Conspiracy to Defraud the United States with Respect to Claims - §2B1.1
 - A steals personal identifying information from a local business and shares them with B.
 - B files the vast majority of the false tax returns listing her address for the refunds. She collects over \$500,000.
 - A files a handful of tax return and collects \$20,000.



What amount of loss should Defendant A be held accountable for?

- A. \$500,000
- B. \$20,000
- C. \$0



3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking



Determining Scope in a Conspiracy

§1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy



Determining Scope in a Conspiracy (cont.)

“Bright Line Rule” of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.



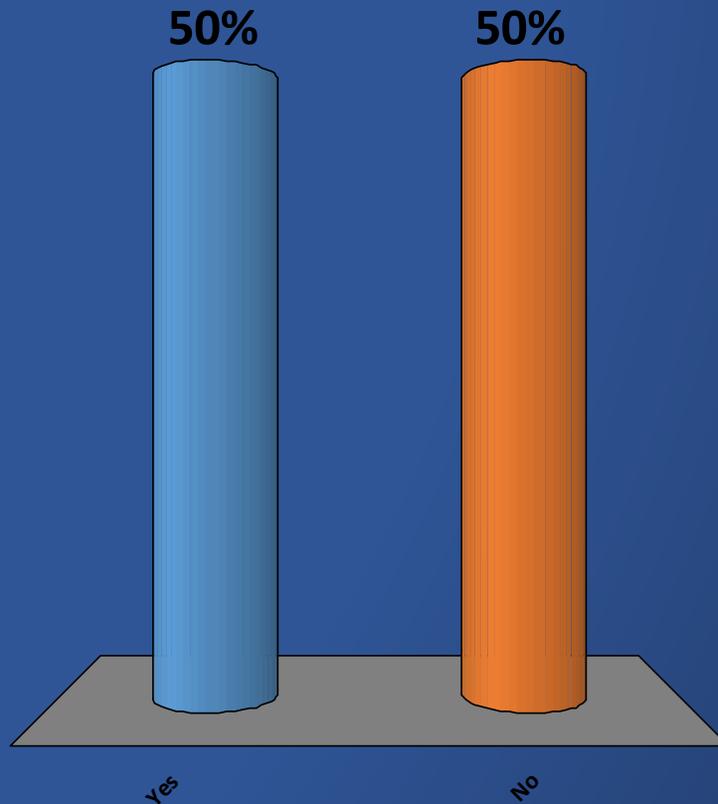
Scenario 6

- Defendant pled guilty to Securities Fraud (§2B1.1) and Tax Evasion (2T1.1).
- The defendant was an investment advisor and over the course of 4 years, the defendant used \$41 million of investor money for his own person use. He then also failed to report all of his income to the IRS, resulting in an outstanding tax obligation of \$75,000.



Should these two offenses be grouped together and the loss amounts aggregated or are they calculated separately and units assigned?

- A. Yes – group them
- B. No – use units



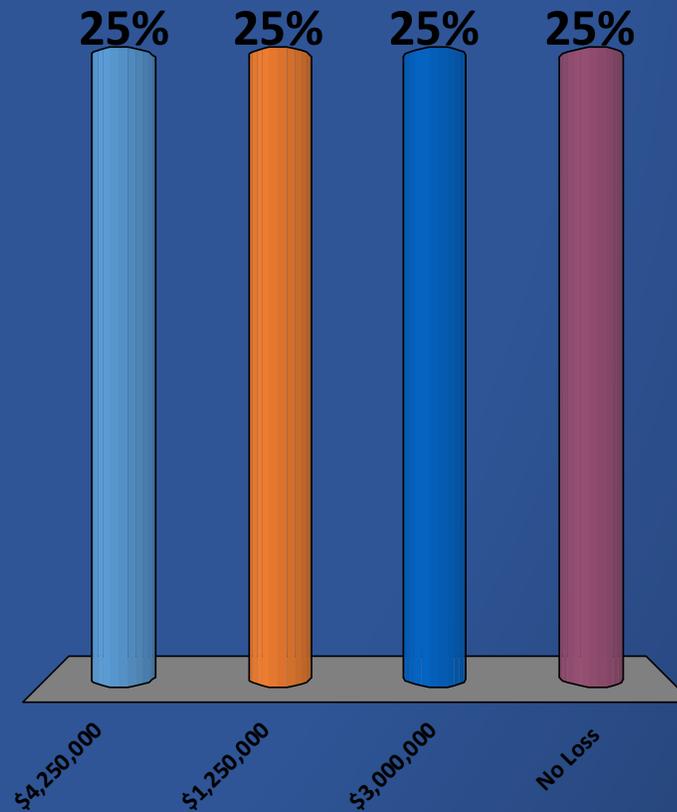
Scenario 7

- Defendant convicted of a False Claims Conspiracy - §2B1.1
 - The defendant filed numerous false tax returns using stolen or fraudulently obtained identification information. Over the course of 4 years she made false claims of \$4,250,000, but only received \$1,250,000 from the IRS.



What is the amount of loss?

- A. \$4,250,000
- B. \$1,250,000
- C. \$3,000,000
- D. No Loss



“Loss”

Application Note 3(A)

Use greater of:

“actual” or “intended” loss



2015 Guideline Definition §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”



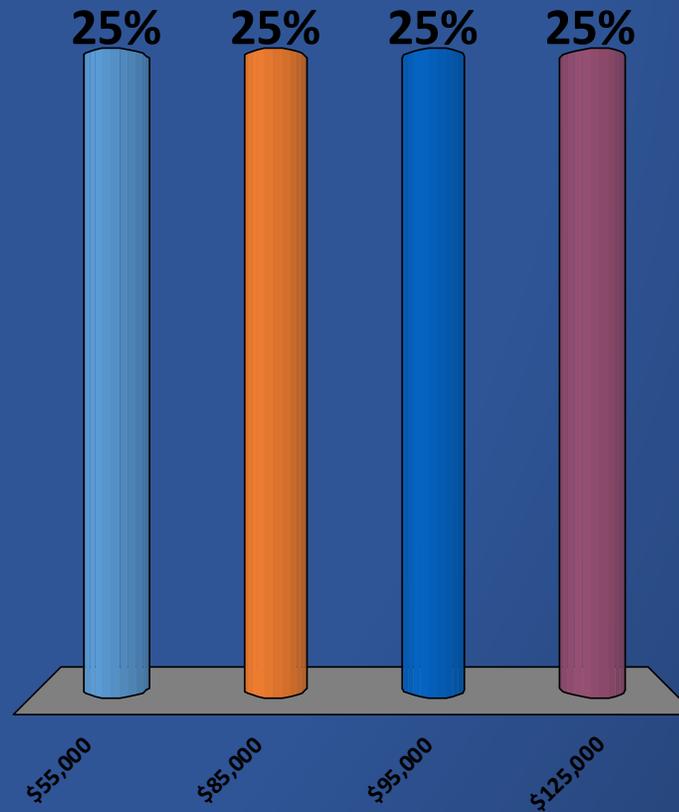
Scenario 8

- Defendant is a home health care nurse who pled guilty to healthcare fraud
- Indictment states that the defendant submitted \$85,000 in fraudulent bills from May 2013 – June 2014
- Defendant has records to show that \$30,000 of the \$85,000 billed were for legitimate services.
- PSI reveals that the defendant, in 2011 and 2012, submitted \$40,000 in fraudulent healthcare bills



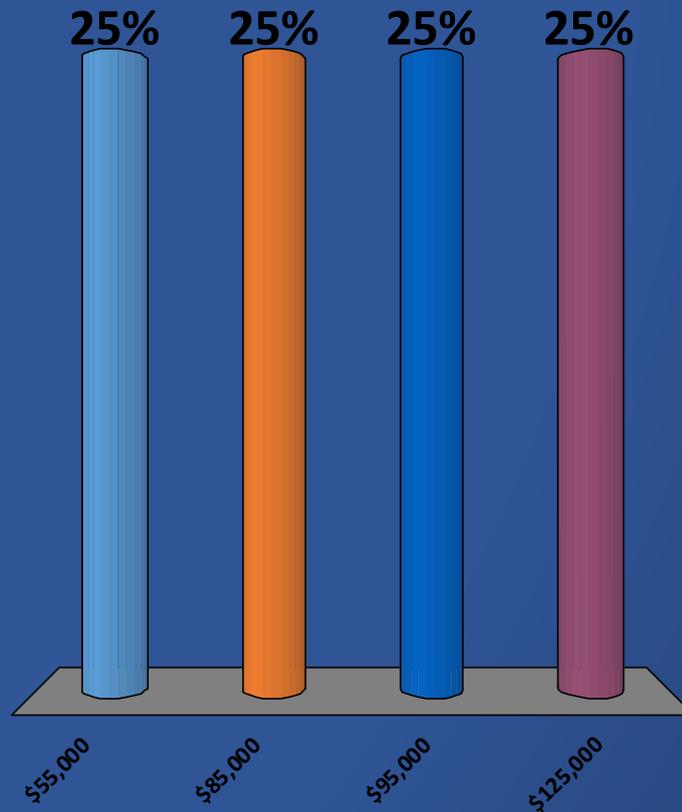
What is the loss amount?

- A. \$55,000
- B. \$85,000
- C. \$95,000
- D. \$125,000



What is the amount of restitution?

- A. \$55,000
- B. \$85,000
- C. \$95,000
- D. \$125,000



“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”



Special Rules in the Determination of Loss

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

