GUIDELINE SCENARIOS – ECONOMIC CRIMES

For the following scenarios, assume that the defendants were over 18 years old when they committed the offenses, and that they all accepted responsibility for their offenses. Additionally, use the information in Appendix A to answer the questions:

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 statutory maximum for § 1343 is 20 years. Which base offense level (BOL) applies at §2B1.1(a)?

Answer – B (BOL 6). It is a 2-part analysis. 18 U.S.C. §371 in Appendix A directs you to go to §2X1.1. The second part is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is only 5 years.

Scenario #2

Defendant convicted of 18 U.S.C. § 1343 (Wire Fraud) which carries a 20-year statutory maximum; applicable guideline §2B1.1. Defendant was involved in a Ponzi scheme in which he received funds and investments from the wire fraud scheme. Which base offense level (BOL) applies at §2B1.1(a)?

Answer – A (BOL 7). It is a 2-part analysis. 18 U.S.C. § 1343 in Appendix A directs you to §2B1.1 and in this case, the statutory maximum penalty for the aforementioned statute of conviction is 20 years or more.

Scenario #3

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

Answer – B (BOL 6). Again, it is a 2-part analysis. 18 U.S.C. §1956 in Appendix A directs you to §2S1.1, not §2B1.1, therefore the answer is as noted. The second part is whether the offense of conviction has a statutory maximum of 20 years or more – and in this case the statutory maximum is 20 years. But, because it does not meet both criteria, it is a BOL of 6.

Scenario #4

Defendant convicted of 18 U.S.C. § 371 - Conspiracy to Commit Mail Fraud. Over the course of several years, the defendant used her expertise at the Minnesota Department of Revenue to create false refunds for family members using false names and fictitious businesses. Using multiple schemes, the defendant embezzlement $1.9 million from the state of Minnesota. However, a search of bank records revealed approximately $500,000 in a savings account. What is the proper loss amount?

$1.9 million – Loss is defined at §2B1.1, App. Note 3(A)(i) as the reasonably foreseeable pecuniary harm that resulted from the offense.

GUIDELINE SCENARIOS – ECONOMIC CRIMES

Scenario #5

Defendant convicted of 18 U.S.C. § 371 - Conspiracy to Commit Mail Fraud. Over the course of several years, the defendant used her expertise at the Minnesota Department of Revenue to create false refunds for family members using false names and fictitious businesses. Using multiple schemes, the defendant defrauded the state of Minnesota of $1.9 million. However, a closer analysis of her multiple false refund schemes, investigators learned she had applied for more than $4 million in refunds. What is the loss amount?

$4 million. Intended loss is defined at §2B1.1 App. Note 3(A)(ii) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value). It appears the defendant intended to steal more than $4 million.

Scenario #6

Defendant orchestrated a fraudulent scheme in which he purported that he could turn coal byproducts into natural gas. Over the course of several years, the defendant raised approximately $57 million from more than 3,000 investors. Government records reveal approximately $30 million was used by the defendant in pursuit of his natural gas technology. However, the defendant reported he only earned $3.4 million from his failed enterprise. The technology never worked and the defendant was arrested and convicted of multiple counts of Mail Fraud, Wire Fraud, and Tax Evasion. What is the loss amount?

$57 million. Loss is defined at §2B1.1, App. Note 3(A)(i) as the reasonably foreseeable pecuniary harm that resulted from the offense. The defendant solicited investors for a scheme that was never viable or legitimate. Just because the defendant used the money to support his purported natural gas technology product, does not allow the loss figure to be reduced by that amount. As noted in the Eighth Circuit opinion -

The § 2B1.1 net loss analysis asks whether "the offender ... transfer[red] something of value to the victim," not whether the victims' total losses were affected by "legitimate market factors," such as market conditions that may have caused the failure of Bixby's corn-stove business. Walker cites no evidence that the defrauded Bixby investors received any pecuniary benefits from the company while it was under Walker's control. Rather, as the district court noted at sentencing, early victims were induced to invest by Walker's fraudulent misrepresentations and were then lulled into believing that their investments were sound by Walker's repeated fraudulent actions throughout Bixby's disastrous corn-stove and coal-gasification ventures. "For many, perhaps most fraud offenses, actual loss is properly and readily measured by the fair market value of property 'taken' from the victim." United States v. Markert, 774 F.3d 922, 926 (8th Cir.2014). The district court committed no clear error in reasonably estimating the actual loss resulting from Walker's fraud offenses as equaling the total amounts lost by Bixby investors who submitted Victim Impact Statements.

GUIDELINE SCENARIOS – ECONOMIC CRIMES

Scenario #7

Defendant orchestrated a fraudulent scheme in which he purported that he could turn coal byproducts into natural gas. Over the course of several years, the defendant raised approximately $57 million from more than 3,000 investors. Government records reveal approximately $30 million was used by the defendant in pursuit of his natural gas technology. However, the defendant reported he only earned $3.4 million from his failed enterprise. In addition, numerous victims submitted victim impact statements that included additional losses stemming from unpaid interest, embarrassment, and added stress due to their now precarious financial predicament. Can these additional losses be included in the total loss determination?

No. Pursuant to §2B1.1, App. Note 3(D) - Loss shall not include the following: (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs; (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

Scenario #8

Could you have a mortgage fraud case with $0 loss determination?

Yes. Pursuant to §2B1.1, App. Note 3(E)(i) - Credits Against Loss.—Loss shall be reduced by the following: (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

There have been cases in which the collateral or the fair market value of a property or properties has been sufficient to cover any purported losses – although rare – it can and has happened.

Scenario #9 and #10

Defendant is a medical equipment company owner. Convicted on multiple counts of health care fraud and conspiracy. Indictment stated defendant submitted $350,000 in fraudulent bills for power wheelchairs from July 2013 through July 2015. Defendant has records indicating $200,000 of the $350,000 billed was for legitimate services/wheelchairs. PSR also noted defendant submitted additional $150,000 in fraudulent healthcare bills in 2012. What is the loss amount? What is the restitution amount?

Answer – C ($300,000). In this case, we use a little math. We have $350,000 in fraudulent bills, but it appears the defendant has rebutted and can show that $200,000 were not fraudulent. §2B1.1, App. Note 3(F)(viii). Ok, so loss appears to be $150,000. However, based upon expanded relevant conduct, as §2B1.1 is one of those offenses at §3D1.2 for which you can use expanded relevant conduct, you can add an additional $150,000. Therefore, the total loss is $300,000.

Answer – C ($150,000). As to restitution, you can only look to the offense of conviction – you cannot add the relevant conduct portion to the loss. So, as noted above, we have $350,000 in fraudulent bills, but it appears the defendant has rebutted and can show that $200,000 were not fraudulent. §2B1.1, App. Note 3(F)(viii). So, restitution appears to be $150,000.

Scenario #11

Defendant is convicted of Mail and Wire Fraud. Defendant defrauded customers of a travel agency and airlines through a scheme in which he collected payment for airline reservations that he canceled without his customers' knowledge. Because the customers had paper tickets in hand, many were not aware the tickets were void until they arrived at the airport. In some instances, customers were forced to purchase last-minute replacement tickets or forego their travel. In others, the airlines allowed the customers to travel on the voided tickets and received no compensation. All told, approximately 372 customers lost money through the City Travel scheme: five lost more than $7,000 apiece, 14 lost over $5,000, and 172 lost more than $1,000. Will the increase for substantial financial hardship apply?

Yes. Pursuant to §2B1.1, App. Note 3(F) - Substantial Financial Hardship. —In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

(i) becoming insolvent;
(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
(vi) suffering substantial harm to his or her ability to obtain credit.

There are some cases in which the defendant's monetary losses are relatively small, but to them, it was substantial. As long as the record is clear and the court makes a determination based upon factors noted in the application note, an increase for substantial financial hardship may be appropriate.

Scenario #12

Defendant is convicted of identity theft. The defendant stole names, Social Security numbers and security clearance levels of roughly 400 members of his former Army unit and sold the information of 98 people to others so they could create false IDs for militia members in case they "ever wanted to disappear and become someone else." The defendant believed he was selling the information to Utah-based militia members, but in reality, they were undercover FBI agents. Would the defendant be subject to an increase for number of victims?

No. Pursuant to §2B1.1, App. Note 1, "Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of

the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

But also –

Pursuant to §2B1.1, App. Note 4(E) - Cases Involving Means of Identification.—For purposes of 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.

In this case, none of the victims' identification was ever used nor did the victims' suffer any financial loss.

Scenario #13

Defendant convicted of bank fraud under 18 U.S.C. § 1344. Defendant used forged checks and a stolen identity to attempt bank fraud. In the process, he also used several phishing e-mails to gather information including on-line e-mail addresses and passwords, which then allowed him greater access to additional accounts with which he could continue to perpetrate his scheme. Should the defendant receive an enhancement for sophisticated means?

Answer – A (Yes). §2B1.1, App. Note 9(B). If you had additional information such as where the defendant obtained the forged checks, where the ID's came from, whether the defendant was a data miner, whether the information was from a phishing (e-mail or acct access) or smishing (text or SMS msg) scam. Did the defendant create numerous false documents? You need to look at the conduct as a whole, not necessarily the pieces, when determining if this SOC applies.

Scenario #14

Defendant possessed 425 credit card numbers. However, he only sent 267 of those cards to a co-defendant to reencode the stolen credit card information onto professional looking counterfeit credit cards. What is the loss?

$212,500 – all 425 credit card numbers. Pursuant to §2B1.1, App. Note 3(F)(i) - Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).

GUIDELINE SCENARIOS – ECONOMIC CRIMES

Scenario #15

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

Answer – B (No). In this case the two tables for each of the counts of conviction are different. §2B1.1 loss table represents the total loss amount. On the other hand, in §2T1.1 cases, you are directed to use the tax loss from the table in §2T4.1. They are not the same and should not be grouped.

Scenario 16, 17, and 18

Defendant, an investment advisor, defrauded a developmentally disabled woman. The defendant had been the investment advisor of the woman's father, and was introduced to the victim as "the person she could trust to manage her money after her father would no longer be able to do so." After the father passed away, the victim inherited her father's assets and the estate's executor spoke with the defendant several times about the importance of ensuring that her funds last as long as possible. Over the next two years, the defendant took nearly all the victim's money. He sold the holdings in the IRA account that was worth $164,000 and convinced the victim to write checks to him to invest in various ventures. He caused the victim to sell her condo and convinced her to move into a much smaller apartment in a more dangerous neighborhood. The defendant pled guilty to mail fraud, wire fraud, and money laundering and was sentenced to sixty months' imprisonment and restitution.

At sentencing, the court determined the loss at §2B1.1 was $575,000, based on the money stolen and various checks he cashed, which also included $24,000 in early distribution tax penalties, $1,000 in wire transfer fees and real estate fees of $5,000 in the loss calculation. At sentencing, the court included a 14-level increase for loss exceeding $550,000 and then also ordered restitution in the same amount of $575,000. Was the court's loss ruling correct? Why or why not?

No - The order was not correct. While the amount of restitution often will equal the actual loss amount at §2B1.1, there are cases where the amounts will be different. Specifically, §2B1.1, Application Note 3(D) excludes interest of any kind, finance charges, late fees, penalties… or similar costs from the loss calculation, the restitution statutes do not contain the same exclusion. Finance charges and late fees can be included in a restitution award. *See e.g.*, *U.S. v. Morgan*, 376 F.3d 1002 (9th Cir. 2002).

Therefore, the loss amount should be reduced from $575,000 to $545,000, which would then, according to the loss table, result in a +12 level increase.

Note: While interest is not included in this scenario, interest is another example of where loss and restitution might be different. *See, e.g.*, *U.S. v. Perry*, 714 F.3d 570 (9th Cir. 2013).