



Economic Crimes

May 1, 2017

Baltimore, MD



Presenter

Peter Madsen

Education and Sentencing Practice Specialist



Commission Resources



www.ussc.gov



helpline (202) 502-4545



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



pubaffairs@ussc.gov



§2B1.1

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



www.ussc.gov



(202) 502-4545



@theusscgov



pubaffairs@ussc.gov

Fraud Quick Notes

- The guideline is driven largely by “loss” – which includes “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
- Loss also includes uncharged and acquitted 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

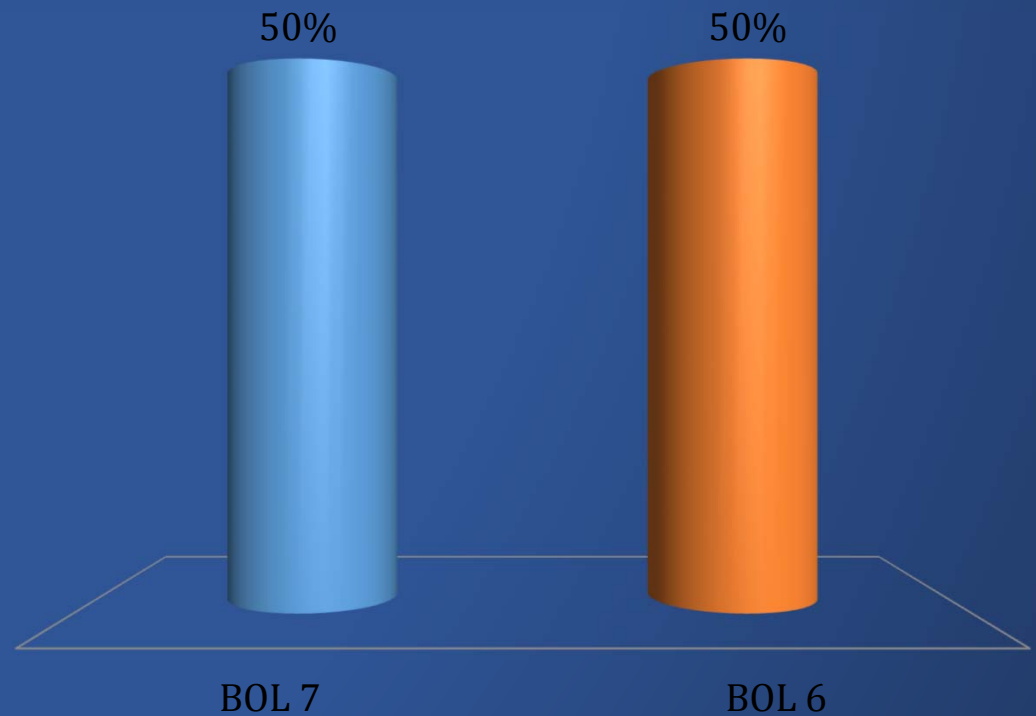
BOL 6, otherwise



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

A. BOL 7

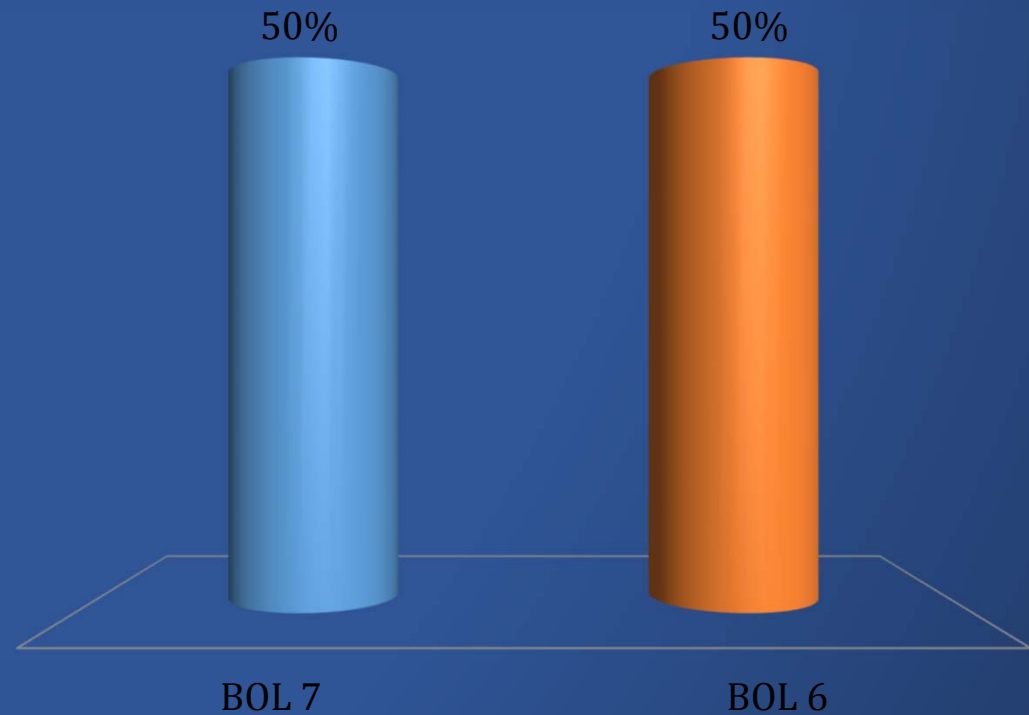
B. BOL 6



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

A. BOL 7

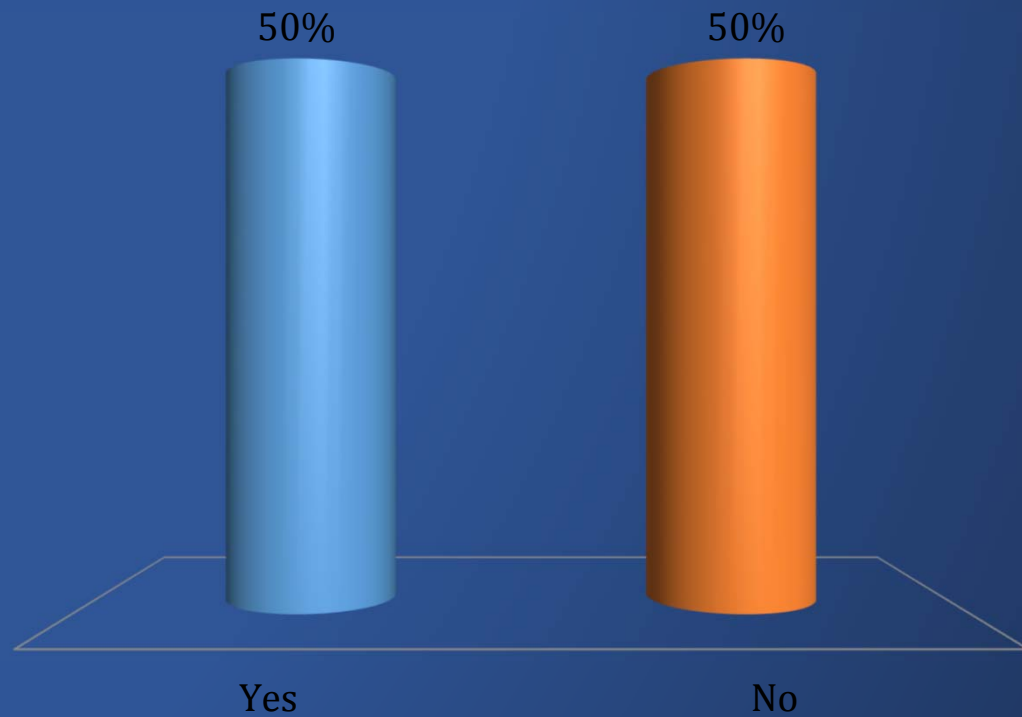
B. BOL 6



3. 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) SOC's

- 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)

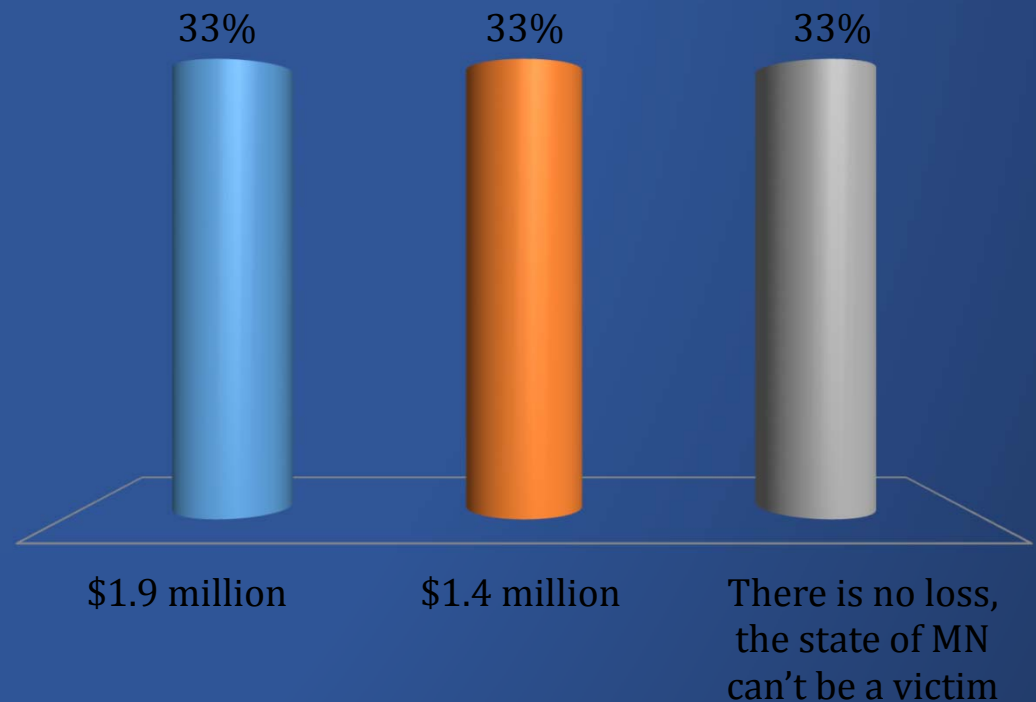
Reasonably foreseeable pecuniary harm
that resulted from the offense

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



4. What is the loss amount?

- A. \$1.9 million
- B. \$1.4 million
- C. There is no loss, the state of MN can't be a victim



“Intended Loss”

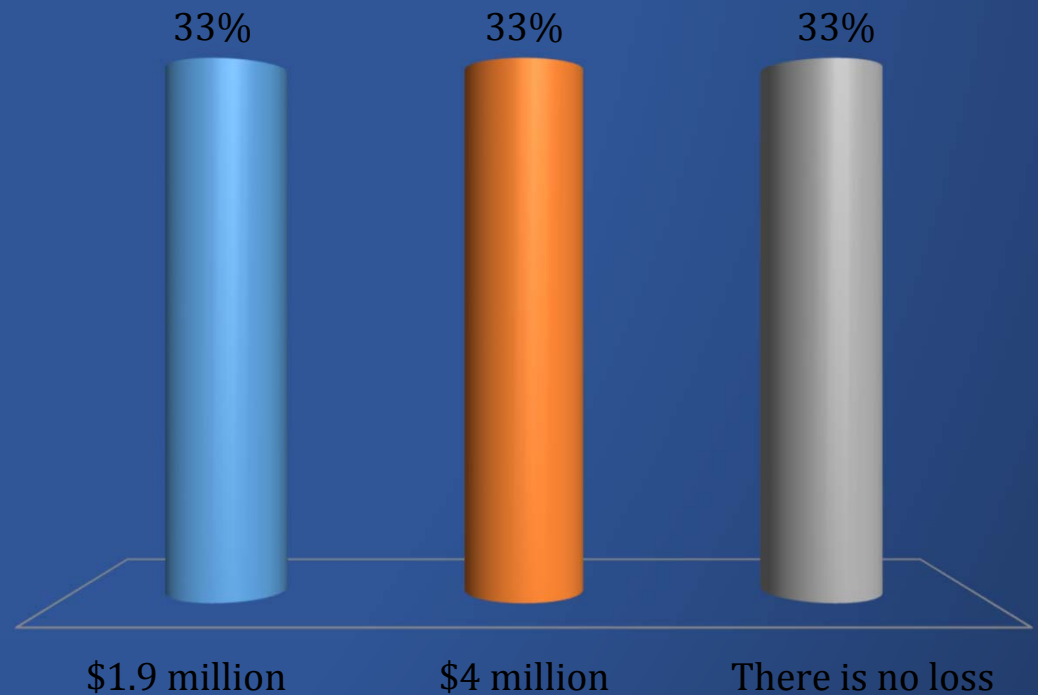
Application Note 3(A)(ii)

- 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)



5. What is the amount of loss?

- A. \$1.9 million
- B. \$4 million
- C. There is no loss



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

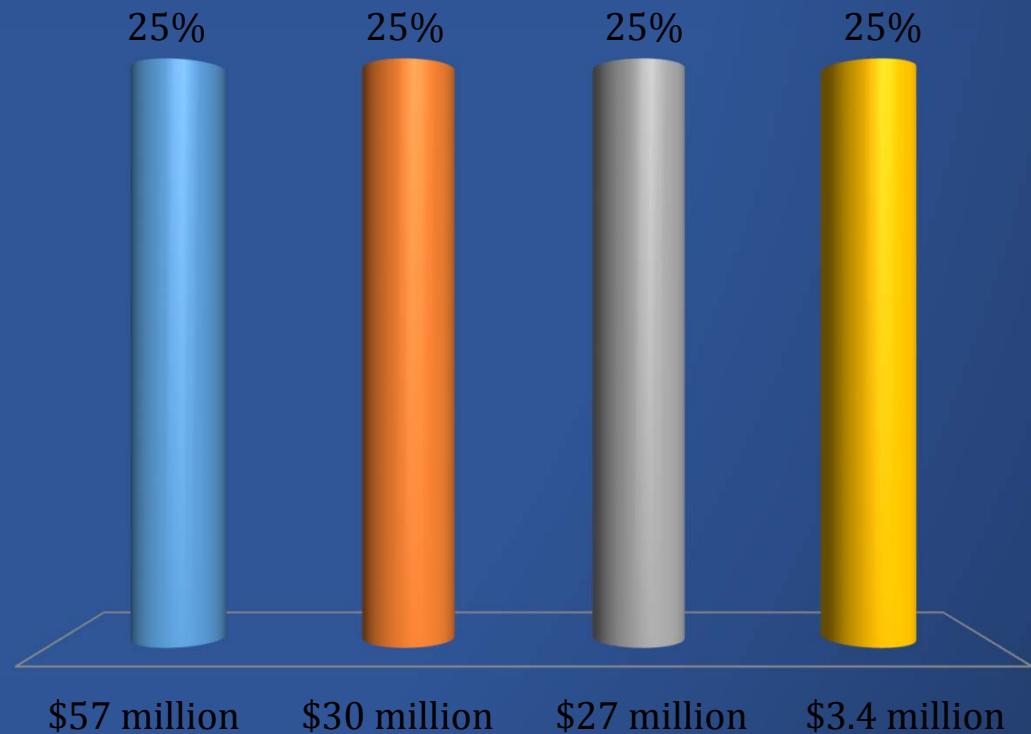
§2B1.1, Application Note 3(C)

- 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



6. What is the amount of loss?

- A. \$57 million
- B. \$30 million
- C. \$27 million
- D. \$3.4 million



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

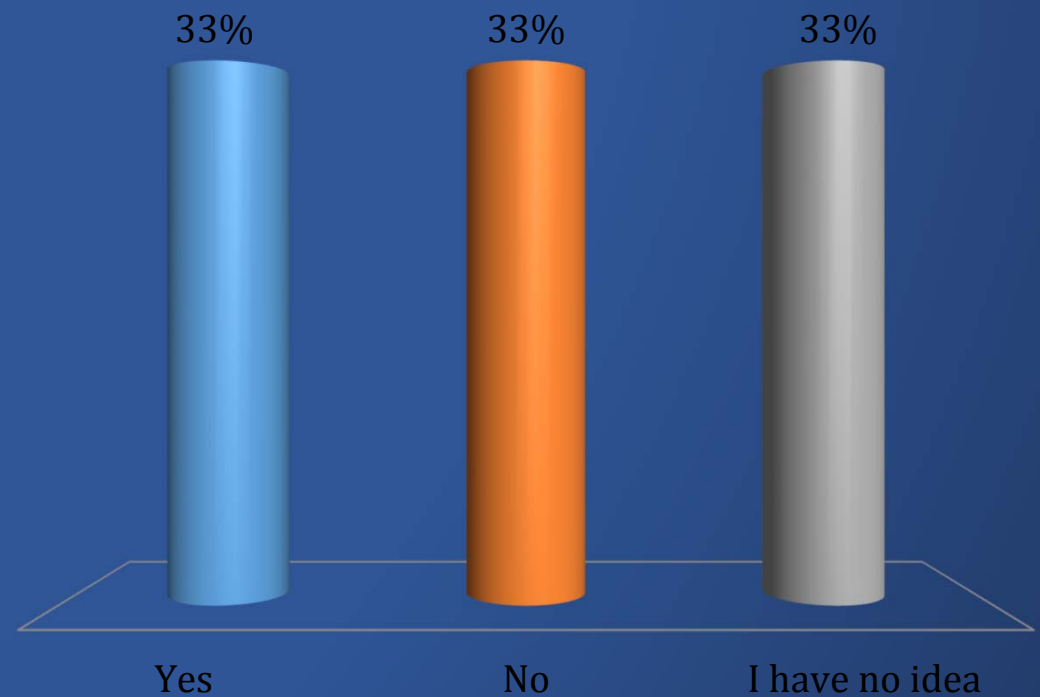


7. Can these additional losses be included in the total loss determination?

A. Yes

B. No

C. I have no idea



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)

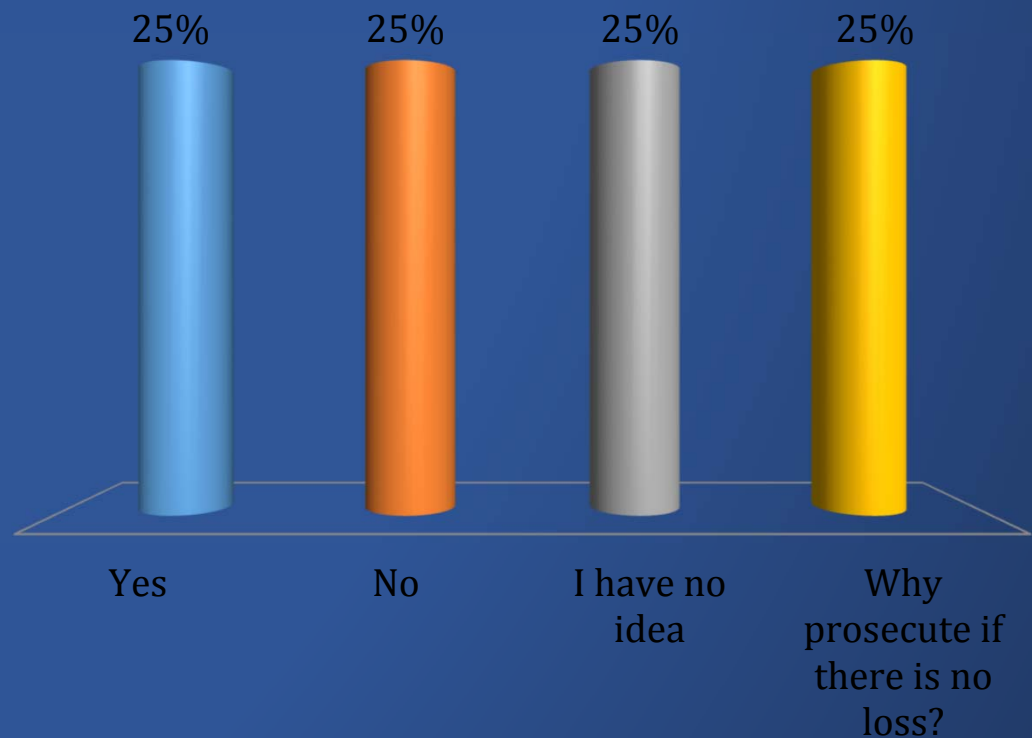


- Provides a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of plea is the fair market value



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

- A. Yes
- B. No
- C. I have no idea
- D. Why prosecute if there is no loss?



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)



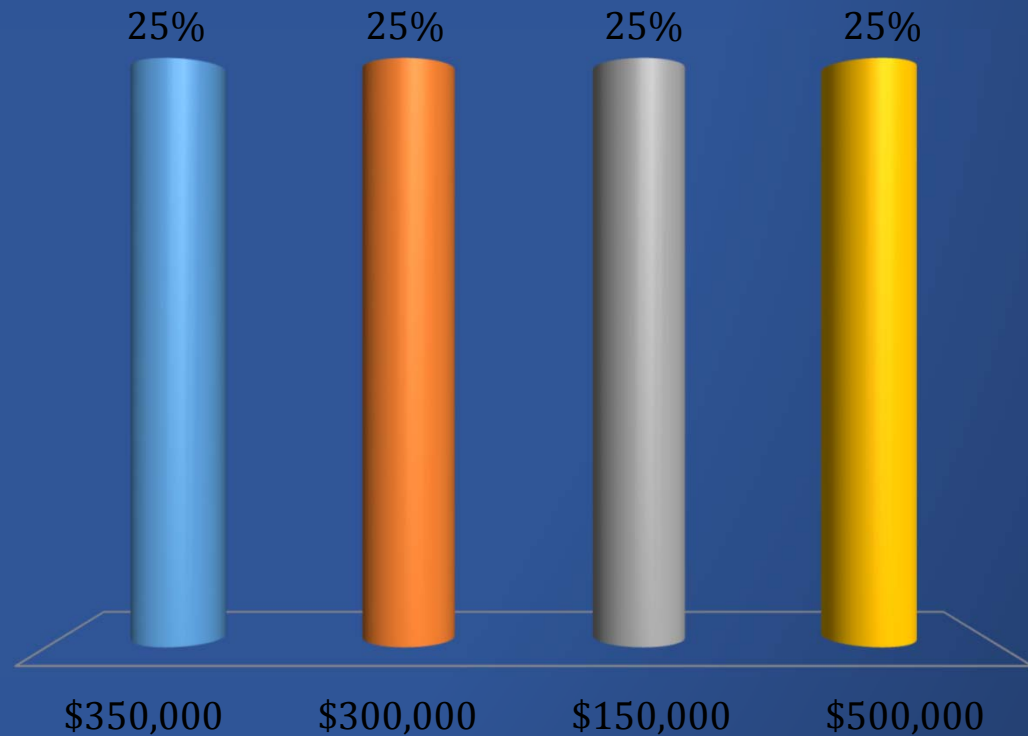
27

- 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



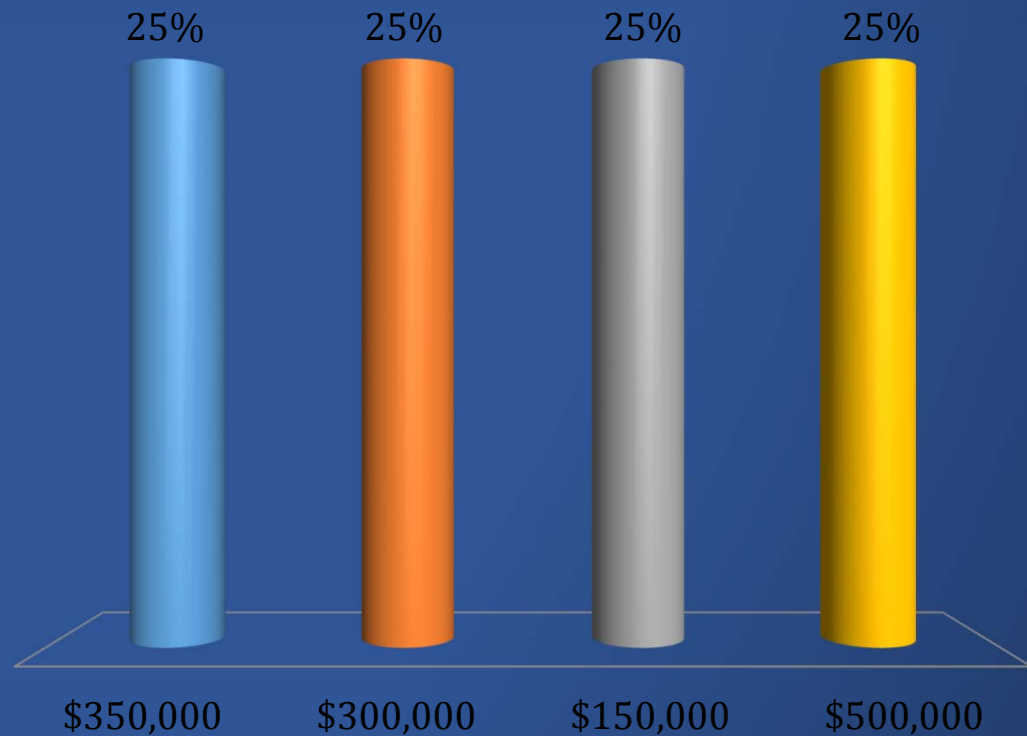
9. What is the loss amount?

- A. \$350,000
- B. \$300,000
- C. \$150,000
- D. \$500,000



10. What is the amount of restitution?

- A. \$350,000
- B. \$300,000
- C. \$150,000
- D. \$500,000



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

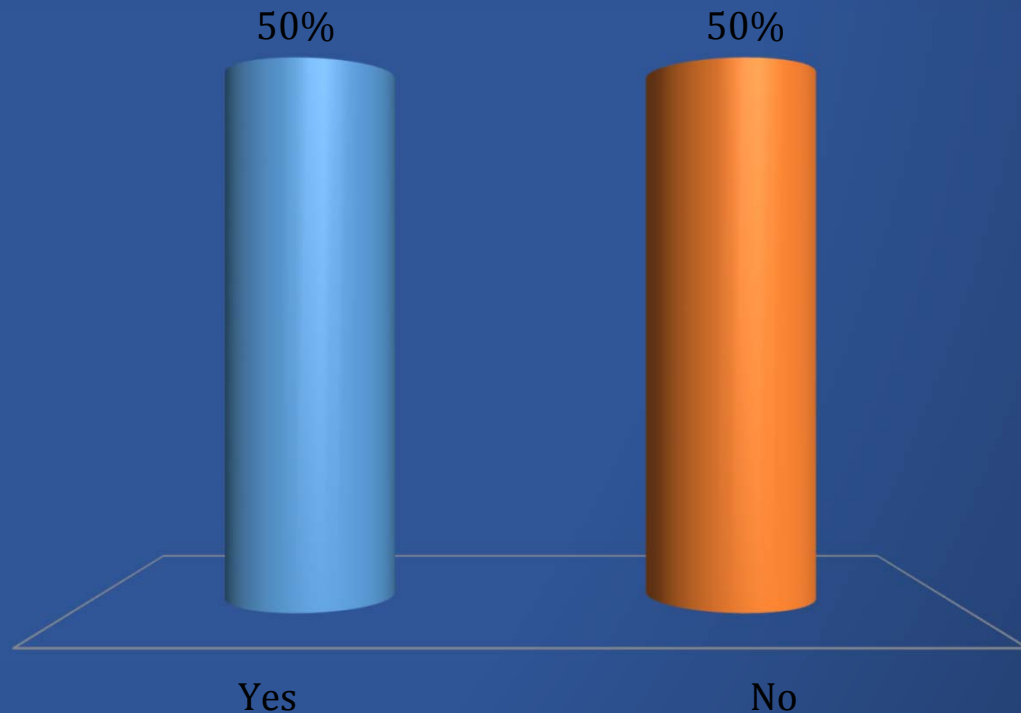
§2B1.1, App. Note 1

- 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



11. Did the victims suffer a substantial financial hardship?

- A. Yes
- B. No



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



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

§2B1.1, App. Note 1

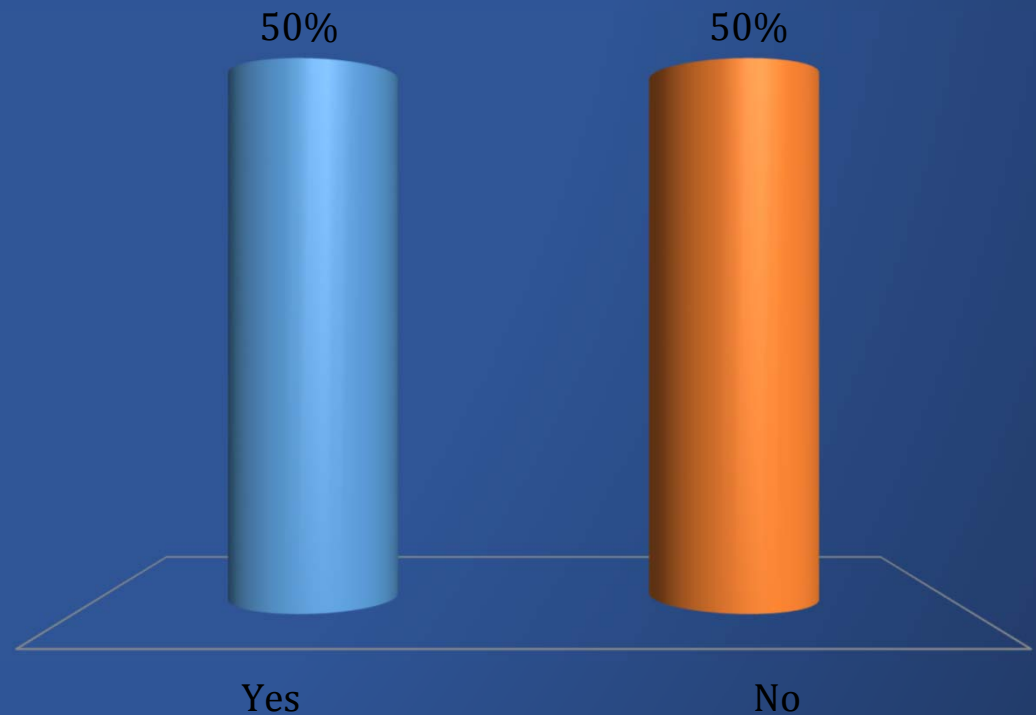
- Any person who sustained any part of the *actual loss* determined under subsection (b)(1)
- Any individual who sustained bodily injury as a result of the offense



12. 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



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)



2015 Amendment to §2B1.1

Sophisticated Means

§2B1.1(b)(10)

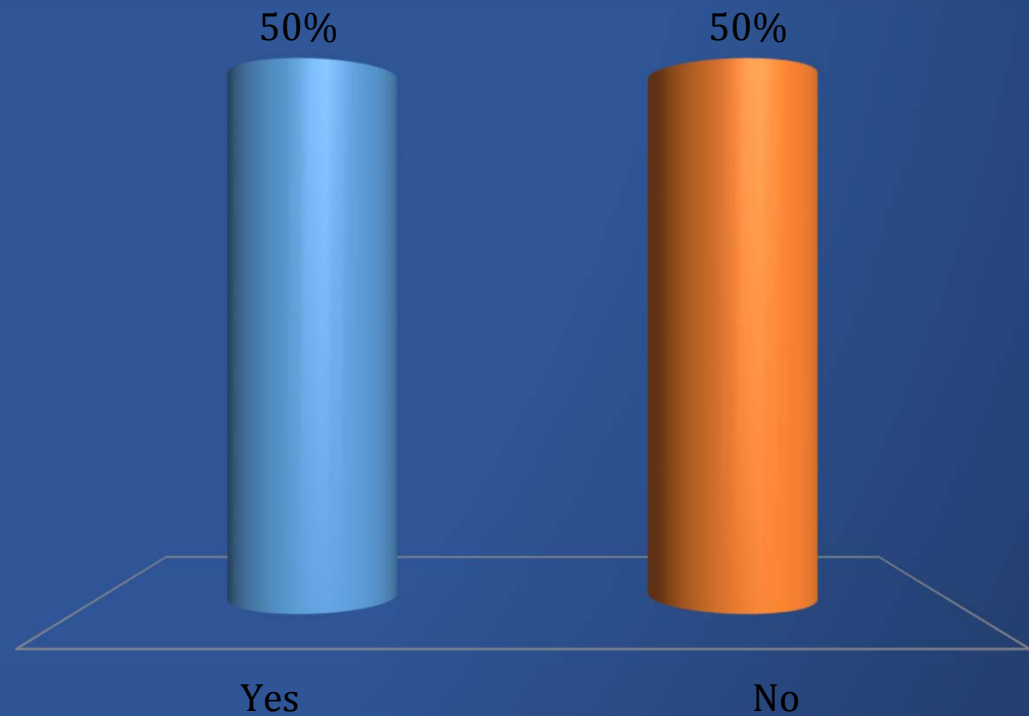
- Narrows the scope of the SOC to be more defendant-specific
- “(C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means”



13. 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)

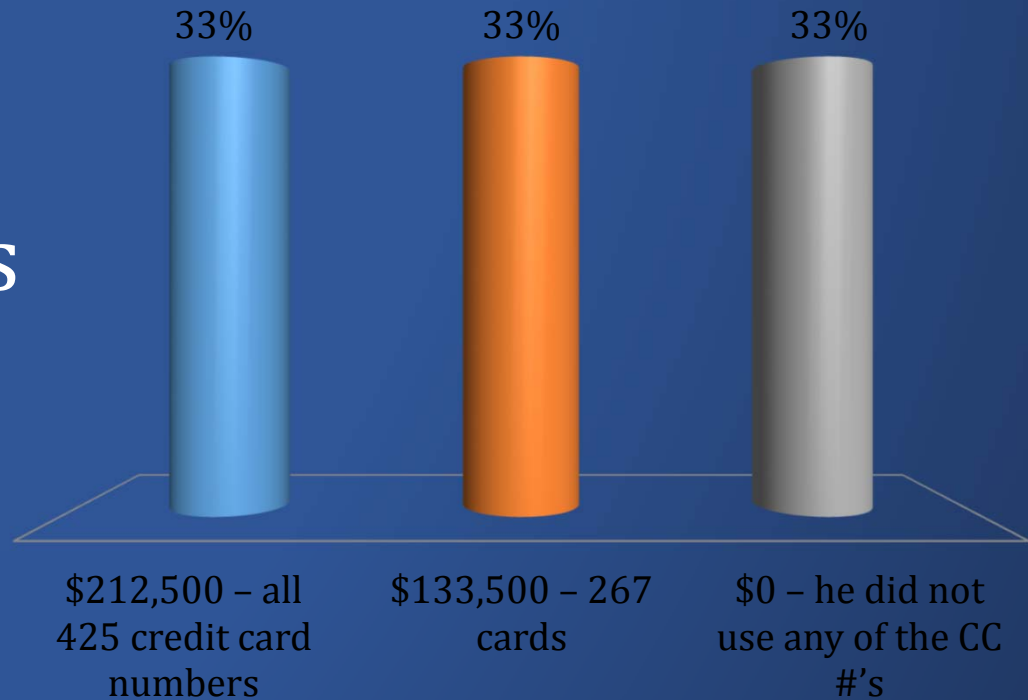
- Can apply both
 - *U.S. v. Cruz*, 713 F.3d 600 (11th Cir. 2013)
 - *U.S. v. Taylor*, 2016 WL 1179745 (11th Cir. 2016)

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



14. What amount of loss?

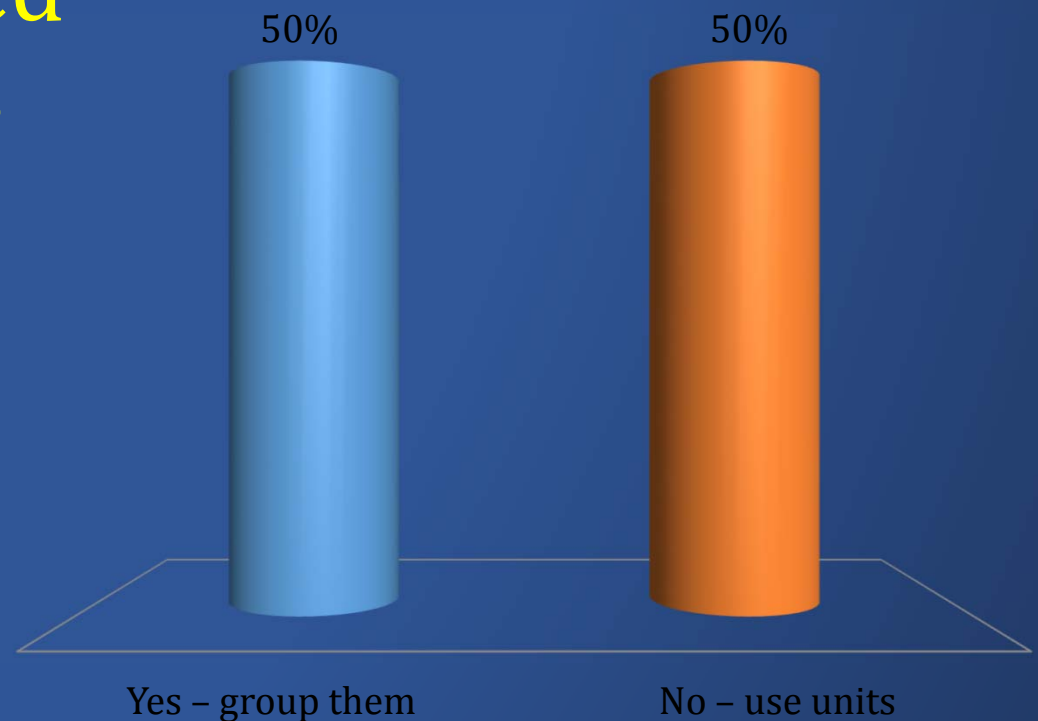
- A. \$212,500 – all 425 credit card numbers
- B. \$133,500 – 267 cards
- C. \$0 – he did not use any of the CC #'s



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

A. Yes – group them

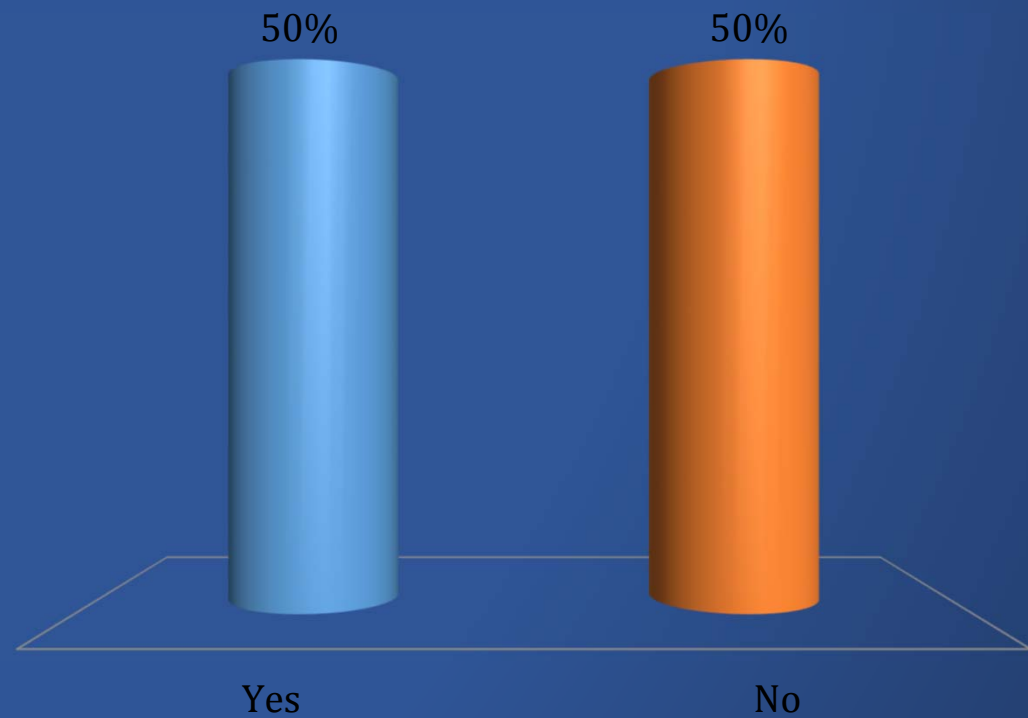
B. No – use units



16. Was the court's loss calculation correct?

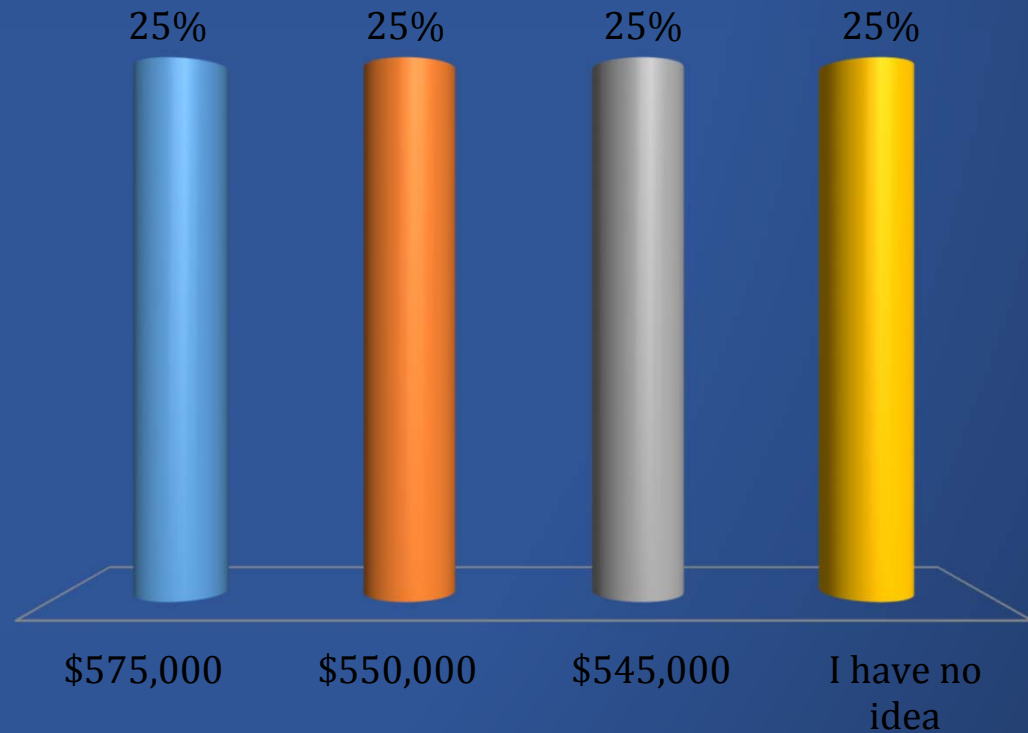
A. Yes

B. No



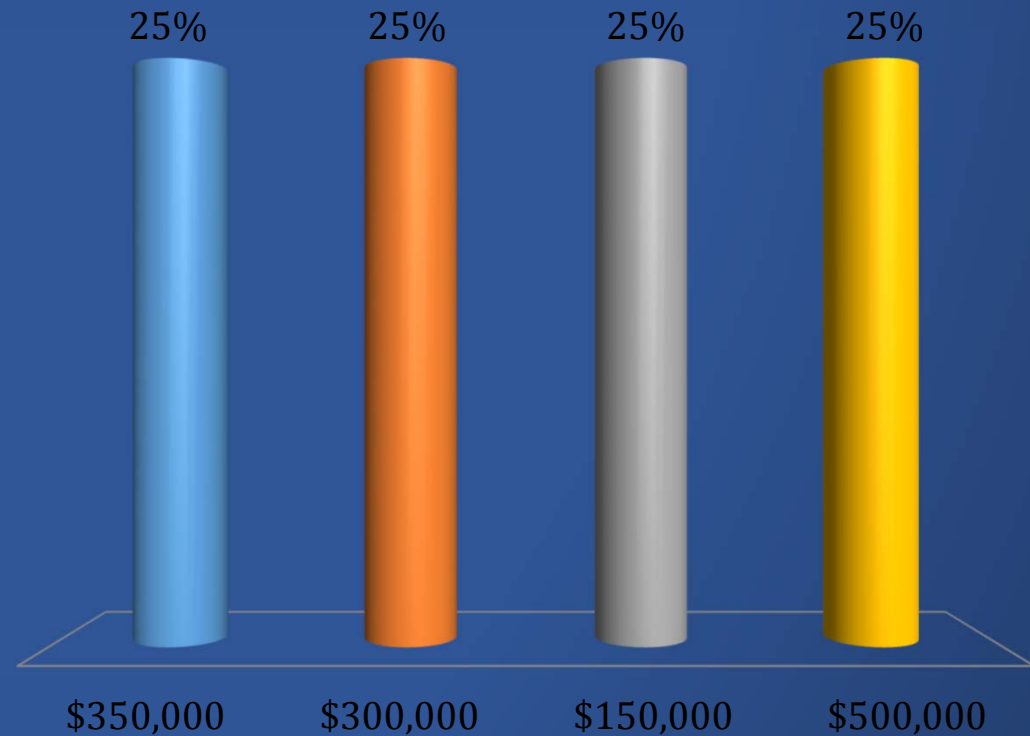
17. What is the loss amount?

- A. \$575,000
- B. \$550,000
- C. \$545,000
- D. I have no idea



18. What is amount of restitution?

- A. \$575,000
- B. \$550,000
- C. \$545,000
- D. I have no idea





Thank you



Questions?



www.ussc.gov



(202) 502-4545



@theusscgov



pubaffairs@ussc.gov