

**Conforming Theft, Fraud, Tax Amendments Involving Deletion
of More-than-Minimal Planning Enhancement; Addition of
Sophisticated Concealment; Avoidance of Double Counting in
Large-Scale Financial Institution Offenses**

The following amendments address issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal (MMP) enhancement.

I. Deletion of More-than-Minimal-Planning (MMP) Enhancement

Deletion of the MMP enhancement involves the following issues and guideline modifications:

A. Removal from §1B1.1 (Application Instructions) of certain commentary describing features of MMP that are no longer applicable in view of the proposed amendments to the theft and fraud loss tables.

The language to be deleted is principally that which describes the "repeated acts" and "concealment" prongs of MMP. The definitional commentary for the "planning" prong of MMP needs to be retained because a MMP enhancement will continue to be a specific offense characteristic under the Aggravated Assault and Burglary guidelines. The example in the last sentence of Application Note 4, which currently refers to the cumulative application of the MMP adjustment from the fraud guideline and an aggravating role adjustment, could be replaced with a similar illustration from, *e.g.*, the Burglary guideline, or the sentence could be deleted entirely. The amendment language shown below deletes the sentence.

Proposed Amendment

§1B1.1 (Application Instructions),

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Commentary

Application Notes:

1. * * *

(f) *"More than minimal planning" means more planning than is typical for commission of the offense in a simple form. ~~"More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies.~~*

~~"More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.~~

~~In an assault, for example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.~~

~~In a commercial burglary, for example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.~~

~~In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.~~

~~In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.~~

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4. ~~The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.~~

~~Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (Aggravating Role) are applied cumulatively.~~

B. Removal of the MMP enhancement from the Theft and Property Destruction guidelines,* with conforming commentary changes.

The two-level MMP enhancement exists in the Theft guideline (§2B1.1) as an alternative to a four-level enhancement for being in the business of receiving and selling stolen property. The latter enhancement is assumed to incorporate MMP. Hence, when the two-level MMP factor is deleted (and incorporated into the loss table), the remaining enhancement for fencing stolen property needs to be adjusted from a four-level to a two-level enhancement. This particular specific offense characteristic (SOC) was applied in 57 (1.8%) of the 1996 theft cases and 40 (1.2%) of the 1995 theft cases.

The amendment language is as follows:

Proposed Amendment

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(b) Specific Offense Characteristics

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- (4) (A) ~~If the offense involved more than minimal planning, increase by 2 levels; or~~
- (B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by ~~2~~ 4 levels.

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Commentary

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Application Notes:

1. ~~“More than minimal planning,”~~ “Firearm,” and “destructive device” are defined in the Commentary to §1B1.1 (Application Instructions).

* A separate proposal in the Referring Guidelines materials will propose a consolidation of the Theft and Property Destruction guidelines.

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13. ~~If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

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Background: ~~The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.~~

~~The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.~~

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§2B1.3. Property Damage or Destruction

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(b) Specific Offense Characteristics

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~~(3) — If the offense involved more than minimal planning, increase by 2 levels.~~

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Commentary

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Application Notes:

1. ~~"More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).~~

2. ~~Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~

~~3.2.~~ * * *

~~4.3.~~ * * *

C. Removal of the MMP enhancement from the Fraud guideline, with conforming commentary changes in §2F1.1 and the Multiple Count guidelines.

The MMP enhancement in the Fraud guideline currently exists as an alternative to a comparable, two-level enhancement for "a scheme to defraud more than one victim." In carrying through the decision to delete a separate MMP enhancement and fold it into the loss table, the Commission conceivably could elect to retain the enhancement for multiple victims. According to our Intensive Study Sample (ISS) assessment, an estimated 10 percent of all fraud cases involve more than one victim. However, because victim information currently is not well identified in the sentencing documents the Commission customarily receives, it is likely that the actual number of multiple victim cases is substantially higher. Thus, retention of the multiple victim enhancement may effectively retain the MMP enhancement in a substantial number of cases. Accordingly, deletion of the entire MMP/multiple victim SOC was proposed in the compromise package before the Commission last Spring as best comporting with the Commission's decision to fold MMP into the loss table. While the amendment shown below follows last year's model, the Commission, of course, is free to propose or solicit an alternative approach during the public comment period.

The background commentary also is modified to reflect the Commission's current view that loss is a better measure of offense seriousness than whether the offense involved minimal or greater planning. The "Reason for the Amendment" (not shown here) will further explain the Commission's policy decision to fold the MMP enhancement into the loss tables.

The amendment language is as follows:

Proposed Amendment

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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(2) ~~If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.~~

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Commentary

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Application Notes:

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2. ~~“More than minimal planning” (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~
3. ~~“Scheme to defraud more than one victim,” as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, “victim” refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.~~

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18. ~~If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved “more than minimal planning.”~~

Background:

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~~Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.~~

~~The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.~~

The Commission has determined that, ordinarily, the sentences of defendants convicted of fraud offenses should reflect the nature and magnitude of the economic harm caused by their crimes. Accordingly, the amount of loss caused by an offense is a principal factor in determining the offense level under this guideline.

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

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Commentary

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Application Notes:

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3. *When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (e.g., theft and fraud), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved, the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome. ~~In addition, the adjustment for "more than minimal planning" frequently will apply to multiple count convictions for property offenses.~~*

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§3D1.5. Determining the Total Punishment

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Commentary

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Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

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2. Defendant B was convicted on the following seven counts: (1) theft of a ~~\$2,000~~**\$3,000** check; (2) uttering the same ~~\$2,000~~**\$3,000** check; (3) possession of a stolen \$1,200 check; (4) forgery of a \$600 check; (5) possession of a stolen \$1,000 check; (6) forgery of the same \$1,000 check; (7) uttering the same \$1,000 check. Counts 1, 3 and 5 involve offenses under Part B (Theft), while Counts 2, 4, 6 and 7 involve offenses under Part F (Fraud and Deceit). For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is ~~\$4,800~~**\$5,800**. The fraud guideline is applied, because it produces an offense level that is as high as or higher than the theft guideline. The base offense level is ~~6~~**7** ~~level is~~ and **[Option 1: 2 levels][Option 2: 4 levels]** are added because of the value of the property (§2F1.1(b)(1)); ~~and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A))~~. The resulting offense level is ~~9~~. **[Option 1: 8][Option 2: 10]**.

II. Sophisticated Concealment Enhancement

The April 1997 compromise package added an enhancement in the fraud and theft guidelines similar to the existing "sophisticated means" enhancement in the tax guidelines. The package also entailed some modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a "floor" offense level of 12 to both the new and existing enhancements. These provisions are set forth below, with several suggested modifications.

A. Addition of "Sophisticated Concealment" enhancement to Theft and Fraud guidelines.

In its December 3, 1996, annual report to the Commission, the Department of Justice (DOJ) recommended a number of changes in the theft, fraud, and tax guidelines, including adding the sophisticated means enhancement (of the tax guidelines) to the fraud and theft guidelines. DOJ explained that "[t]he proposed new factor for the fraud guideline is not meant to replace 'more than minimal planning,' but rather to apply to offenses that reflect a greater level of planning than 'more than minimal' and a form of planning that relates to concealment of the offense." DOJ also recommended that this SOC carry a floor offense level of 12, which is identical to the current fraud SOC for the use of foreign bank accounts or transactions to conceal the nature or extent of the fraudulent conduct.

According to sentencing monitoring data, of cases sentenced under §2F1.1, the existing SOC for the use of foreign bank accounts or transactions to conceal the nature or extent of the fraudulent conduct was applied in 4 (.1%) FY 96 cases and 12 (.2%) FY 95 cases. The very limited application of this enhancement is probably attributable more to the structure of the current SOC (under which the enhancement only comes into play if the offense level is less than level 12) than to infrequency of the conduct embodied in the SOC. The amendment would change the structure of the SOC to require a two-level increase, irrespective of the offense level.

In evaluating the DOJ recommendation, Commission staff recommended that the new enhancement for the theft and fraud guidelines be focused more precisely on "sophisticated concealment" conduct. It was felt that a more narrowly targeted amendment would be less likely to duplicate the deleted MMP enhancement and would better effectuate the apparent goals of providing greater, deterrence-based penalties for harder-to-detect offenses.

Meanwhile, on a related front, the U.S. House of Representatives has passed legislation (H.R. 1847) directing the Commission to add an enhancement of at least two levels for any fraud offense "if the defendant conducted activities to further the fraud from a foreign country." An amended version of this bill, recently approved by the Senate Judiciary Committee, directs the Commission to add an appropriate enhancement "if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States." It is expected that the Senate version will be accepted by the House and enacted into law, probably in this session of Congress.

In response to these developments, staff has developed two options for an enhancement in the fraud guideline. Option 1 treats "committing the offense from outside the United States" as a separate and alternative enhancement to other forms of sophisticated concealment. Option 2 treats "committing the offense from outside the United States" as one form of sophisticated concealment.

Please note that the draft language for the theft guideline does not include a reference to whether the offense was committed from outside the United States. At this time, we are unsure whether there is a likelihood that a theft offense would be perpetrated from outside the United States to avoid detection or prosecution.

Proposed Amendment

“Sophisticated concealment” in the theft guideline:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

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(b) Specific Offense Characteristics

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(5) If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

~~(5)~~(6) * * *

~~(6)~~(7) * * *

Commentary

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Application Notes:

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15. For purposes of subsection (b)(5), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate “sophisticated concealment.”

(Note: “Complex” means “a whole made up of complicated or interrelated parts”; “intricate” means “having many complexly interrelating parts or elements.” For purposes of sophisticated concealment, offense conduct that is intricate will always be complex, but offense conduct that is complex will not necessarily be intricate. By using both words in the definition, the enhancement reaches a wider spectrum of sophisticated conduct.)

“Sophisticated concealment” in the fraud guideline:

Option 1: “Committing the offense from outside the United States” as a separate and alternative enhancement to sophisticated concealment.

§2F1.1. **Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

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b) Specific Offense Characteristics

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- (5) ~~If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level~~ **If (A) any part of the offense was committed from outside the United States, or (B) the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

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Commentary

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Application Notes:

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19. *For purposes of subsection (b)(5)(A), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.*

For purposes of subsection (b)(5)(B), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate “sophisticated concealment.”

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Option 2: “Committing the offense from outside the United States” as a form of “sophisticated concealment.”

§2F1.1. **Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

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b) Specific Offense Characteristics

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- (5) ~~If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

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Commentary

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Application Notes:

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19. *For purposes of subsection (b)(5), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, commission of the offense from outside the United States, or the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate “sophisticated concealment.”*

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B. Modification of "Sophisticated Means" enhancement in tax guidelines.

The April 18 compromise package included language modifying the tax guidelines' sophisticated means SOC. The modifications were designed to provide a floor offense level of 12, enhance the precision of the language, and address a circuit

conflict. The conflict involved the issue of whether the sophisticated means enhancement applies based on the personal conduct of the defendant (*see United States v. Kraig*, 99 F.3d 1361 (6th Cir. 1996)), or the overall offense conduct for which the defendant is accountable (*see United States v. Lewis*, 93 F.3d 1075 (2d Cir. 1996)). The compromise language recommended the latter view as being more consistent with the usual relevant conduct attribution rules.

The sophisticated means enhancement was applied in 103 (16.6%) tax evasion (§2T1.1) cases sentenced in FY 1996 and 82 (16.1%) of such cases sentenced in FY 1995. The identical enhancement in the other two tax guidelines (§§2T1.4, 2T3.1) was not applied in FY 1995 or FY 1996.

Two options are presented. Option 1 is substantially similar to the April 18 compromise, with minor, non-substantive modifications in the commentary. Option 2 eliminates the element of “greater planning than a routine tax-evasion case” and generally conforms the SOC to the “sophisticated concealment” language prepared for the theft and fraud guidelines. However, the definition of “sophisticated concealment” does not include “committing the offense from outside the United States” because it seems unlikely that a tax offense would be perpetrated from outside the United States to avoid detection or prosecution. Under this option, the planning concept is deleted because that element arguably would be built into the offense level if the Commission adopts one of the proposed loss table amendments, both of which propose using a tax loss table that is the same as, or substantially similar to, the fraud loss table that is amended to phase in more than minimal planning. Without the planning element, the “harm” that is sought to be captured is the complex scheme designed to make the offense difficult to detect. Finally, consistent with the April 18 compromise proposal, Option 2 retains the floor offense level of 12.

Proposed Amendment

Option 1:
§2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

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(b) Specific Offense Characteristics

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- (2) If sophisticated means were used to impede discovery of the ~~existence~~offense or its extent ~~of the offense~~, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

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Commentary

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Application Notes:

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4. "Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~**The** enhancement would ~~be applied~~**apply**, for example, ~~where the defendant used offshore~~ **if the offense involved the use of foreign bank accounts or foreign transactions**, or transactions through corporate shells or fictitious entities, **to conceal the offense or its extent.**

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§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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- (b) Specific Offense Characteristics

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- (2) If sophisticated means were used to impede discovery of the ~~existence~~offense or its extent ~~of the offense~~, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

Commentary

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Application Notes:

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3. "Sophisticated means," as used in ~~§2T1.4(b)(2)~~ **subsection (b)(2)**, includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~**The**

enhancement would ~~be applied~~ apply, for example, ~~where the defendant used offshore~~ if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.

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§2T3.1. **Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property**

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(b) Specific Offense Characteristic

- (1) If sophisticated means were used to impede discovery of the ~~nature or existence of the offense~~ offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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3. *"Sophisticated means," as used in subsection (b)(1), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine duty-evasion case. The enhancement would apply, for example, if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.*

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Option 2:

§2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

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(b) Specific Offense Characteristics

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- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels. If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

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Commentary

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Application Notes:

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4. ~~"Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(2), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."

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§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

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- (b) Specific Offense Characteristics

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- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels. If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

Commentary

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Application Notes:

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3. ~~"Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(1), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."

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§2T3.1. **Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property**

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(b) Specific Offense Characteristic

- (1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels. **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

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Commentary

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Application Notes:

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3. *For purposes of subsection (b)(1), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."*

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III. Financial Institution, Personal Profit Enhancement

The compromise package before the Commission last Spring would have modified an enhancement for defendants who personally and substantially profit from financial institution fraud. This enhancement is contained in the theft, commercial/bank bribery, and fraud guidelines. In view of the substantial increases in the loss table for large-scale offenses, it was proposed to adhere somewhat more closely to the minimum dictates of this congressionally-directed enhancement, which requires a minimum offense level of 24 (approximately a five-year sentence) for defendants who derive more than \$1 million in "gross receipts" from specified financial institution offenses. Thus, the amendment would delete the four-level increase currently required under the enhancement while retaining the minimum offense level of 24. This would avoid unwarranted double counting for offenses involving loss amounts in excess of \$2.5 million (equivalent to level 24 under the new loss table options). Although the effect of the enhancement would be moderated somewhat, it would continue to apply to a broader spectrum of cases than required under the congressional directive.

The amendment also addresses significant interpretive problems regarding the meaning of the current guideline phrase "affected a financial institution and the defendant derived more than \$1 million in gross receipts from the offense." The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted).

The amended commentary would address the confusion about the meaning of the phrase "affected a financial institution" by deleting that problematic language. The new language would make clear that the enhancement applies when the offense is perpetrated against, and the money is derived from, one or more financial institutions. (In this regard, the draft language has been simplified to address DOJ concerns that the previous version, shown at the October meeting, could have introduced unnecessary proof complications.)

Additionally, the definition for "gross receipts" would be amended to clarify that "gross receipts from the offense" includes property under the control of, or in the custody of, the financial institution for a second party, *e.g.*, a depositor. The background commentary would also be amended to reflect the Commission's intent to implement the congressional directive in a broader fashion than required.

Because this SOC exists in the alternative to another SOC (regarding causing or threatening the institution's solvency), it is not possible to ascertain from the monitoring data exactly how frequently it has been applied. However, the data indicate that one or the other SOC was applied in 8 (.2%) FY 1995 theft cases, and 12 (.4%) of FY 1996 theft cases; with respect to fraud cases, the SOC was applied in 38 (.6%) of FY 1995 cases and in 50 (.8%) of FY 1996 cases. The SOC was not applied in any commercial/bank bribery cases during either fiscal year.

The amendment language is as follows:

Proposed Amendment

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transmitting, or Possessing Stolen Property

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(b) Specific Offense Characteristics

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(6) If the offense=

(A) substantially jeopardized the safety and soundness of a financial institution; ~~or~~

~~(B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense;~~

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(7) If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.

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Commentary

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Application Notes:

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11. *For purposes of subsection (b)(7), “gross receipts” means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. “The defendant derived more than \$1,000,000 in gross receipts from the offense,” as used in subsection (b)(~~6~~)(7), generally means that the gross receipts to the defendant*

individually, rather than to all participants, exceeded \$1,000,000. ~~“Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~

* * *

Background:

* * *

Subsections (b)(6)(A) and (b)(7) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

~~Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.~~

* * *

§2F1.1. Fraud and Deceit: Forgery: Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense=

(A) substantially jeopardized the safety and soundness of a financial institution; or

~~(B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense;~~

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(7) If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level 24.

Commentary

* * *

Application Notes:

* * *

16. *For purposes of subsection (b)(7), “gross receipts” means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. “The defendant derived more than \$1,000,000 in gross receipts from the offense,” as used in subsection (b)(6)(B)(7), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. “Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

* * *

Background:

* * *

Subsections (b)(6)(A) and (b)(7) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense=

(A) substantially jeopardized the safety and soundness of a financial institution; ~~or~~

(B) ~~affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense;~~

increase by 4 levels. If the resulting offense level is less than level **24**, increase to level **24**.

(3) *If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level **24**, increase to level **24**.*

* * *

Commentary

* * *

Application Notes:

5. *For purposes of subsection (b)(3), “gross receipts” means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. “The defendant derived more than \$1,000,000 in gross receipts from the offense,” as used in subsection (b)(2)(B)(3), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. “Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

* * *

Background:

* * *

Subsections (b)(2)(A) and (b)(3) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.