

8. PROPOSED AMENDMENT:

ECONOMIC CRIME

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s multi-year study of §2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines, including examination of the loss table, the definition of loss, role in the offense, and offenses involving fraud on the market. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014).*

The proposed amendment contains four parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. They are as follows:

Part A *revises the definition of “intended loss” at §2B1.1, comment. (n.3(A)(ii)). Two options are presented, one of which would reflect certain principles discussed in the Tenth Circuit’s decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). Issues for comment on intended loss are also provided.*

Part B *addresses the impact of the victims table in §2B1.1(b)(2). It proposes to establish a new enhancement for cases where one or more victims suffered substantial [financial] hardship and to reduce the levels of enhancement that apply based solely on the number of victims. Two options are provided. It includes issues for comment on the victims table and other provisions relating to victims.*

Part C *revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways. An issue for comment is also included.*

Part D *addresses offenses involving fraud on the market and related offenses. Issues for comment are also included.*

(A) Intended Loss

Synopsis of Proposed Amendment: *This part of the proposed amendment revises the definition of “intended loss” at §2B1.1, comment. (n.3(A)(ii)). While the current definition for intended loss was added as part of the Economic Crime Package in 2001, see USSG App. C, amend. 617 (eff. Nov. 1, 2001), the concept of intended loss has been included in the fraud and theft guidelines since the inception of the guidelines, see USSG §2F1.1, comment. (n.7) (1987). Note 3(A)(ii) states that “intended loss”—*

(I) means the pecuniary harm that was intended to result from the offense; 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).

The Commission has received comment expressing concern regarding the operation of intended loss, including suggestions that the Commission consider certain revisions to better reflect a defendant’s culpability. In addition to these comments, the Commission has observed some disagreement in the case law regarding whether intended loss requires a subjective or objective inquiry. In United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011), the Tenth Circuit held that a subjective inquiry is required, which is similar to holdings in the Second, Third and Fifth Circuits. See United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had “proven a subjective intent to cause a loss of less than the aggregate amount” of fraudulent loans); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim); United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this determination, we look to the defendant’s subjective expectation, not to the risk of loss to which he may have exposed his victims.”); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) (“our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level”). On the other hand, the First and the Seventh Circuits have issued decisions that support a more objective inquiry. See United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (“we focus our loss inquiry for purposes of determining a defendant’s offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes”); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct”).

The Commission is publishing this proposed amendment and issues for comment to inform the Commission’s consideration of these issues. Two options are bracketed for comment. They are as follows:

Option 1 *would state that intended loss means the pecuniary harm “that the defendant purposely sought to inflict” and that the defendant’s purpose may be inferred from all available facts. This would reflect certain principles discussed in the Tenth Circuit’s decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). In Manatau, the defendant was convicted of bank fraud and aggravated identity theft. The district court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was “both possible and potentially contemplated by the defendant’s scheme.” 647 F.3d at 1049-1050. On appeal, the Tenth Circuit reversed, holding that “intended*

loss” contemplates “a loss the defendant purposely sought to inflict,” and that the appropriate standard was one of “subjective intent to cause the loss.” 647 F.3d at 1055. Such an intent, the court held, may be based on making “reasonable inferences about the defendant’s mental state from the available facts.” 647 F.3d at 1056.

Option 2 is similar to Option 1, but would also encompass the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant.

Issues for comment on intended loss are also provided.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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Commentary

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Application Notes:

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3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

[Option 1: (ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that ~~was intended to result from the offense~~ 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).

The defendant’s purpose may be inferred from all available facts, including the defendant’s actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.]

[Option 2: (ii) Intended Loss.—“Intended loss” (I) means (a) the pecuniary harm that ~~was intended to result from the offense~~ the defendant purposely sought to inflict and (b) the pecuniary harm that any other participant purposely sought to inflict, if

the defendant was accountable under §1B1.3(a)(1)(A) for the other participant; 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).

An individual's purpose may be inferred from all available facts, including the individual's actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.]

- (iii) *Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.*
- (iv) *Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.*

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Issues for Comment:

1. *The Commission seeks comment on whether the definition of “intended loss” should be revised or refined, in the manner contemplated by the proposed amendment or in some other manner, to clarify or simplify guideline operation or for other reasons consistent with the purposes of sentencing. What changes, if any, should the Commission make to the definition of “intended loss”?*

How should the definition of “intended loss” interact with other parts of the guidelines? For example:

- (A) *Should intended loss be limited to the amount the defendant personally intended, or should it also include amounts intended by other participants, such as participants (i) that the defendant aided and abetted, and/or (ii) that were in a jointly undertaken criminal activity with the defendant?*
 - (B) *How should intended loss interact with the commentary relating to partially completed offenses in §2B1.1, Application Note 18 (providing that, in the case of a partially completed offense, the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy))?*
2. *Section 2B1.1 provides that for the determination of loss under subsection (b)(1), the court shall use the greater of “actual loss” or “intended loss.” Should intended loss be limited in some manner?*