
PUBLIC COMMENT

2001 AMENDMENT CYCLE

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United States Sentencing Commission

January 2001

The Honorable Diane E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Re: Proposed Changes to Sentencing Guidelines for Counterfeiting Offenses

Dear Judge Murphy:

The Department of the Treasury would first like to thank the Commission for its attention throughout the amendment process to the challenges raised by new trends in counterfeit currency production. As we have expressed in our written submissions as well as in our presentation to the Commission, the exponential increase in digitally-based counterfeiting has resulted in a proliferation of guideline sentences that we believe do not properly reflect the seriousness of the offense and the threat it poses to the integrity of the United States currency worldwide. However, it is our opinion that the proposed amendments to Section 2B5.1 published in the Federal Register, 65 Fed. Reg. 66792 (Nov. 7, 2000), will serve to lower the guideline sentences even further in more than 90% of counterfeit manufacturing cases. Accordingly, we respectfully request that the Commission consider our comments on the proposed amendments set forth below.

Change to Commentary

As an initial matter, we support the Commission's decision to eliminate the "merely photocopy notes" language found in the commentary. This change more accurately reflects the capabilities of today's copiers to generate passable notes, and resolves a conflict in the district courts. More importantly, it also makes a much-needed change to remove any technology-specific references in the guidelines.

New Base Offense Level

We also believe that the Commission's decision to raise the base offense level to 10 is a positive step. However, we reiterate our position that a base offense level of 11 is warranted given the increase in digitally-generated notes. As these notes are generally produced and passed in small quantities, the total amount seized often does not register on the fraud loss table in §2F1.1, and these offenders receive a sentencing windfall for their ability to access counterfeit notes virtually "on demand."

Sophisticated Means Enhancement

We fully support the intent of this proposed enhancement but have concerns regarding its application. As we set forth in our presentation to the Commission, it is crucial to recognize that sophistication cannot be tied to any particular method of production. There are offset printers who use digital technology to create extremely high-quality notes, and there are producers who use digital technology to create very crude simulations. Accordingly, an enhanced penalty for individuals who go to great lengths to produce a more deceptive note should not be associated with any particular "means." Instead, such an enhanced penalty would be more properly applied to individuals who are able to simulate the unique security features incorporated in our currency. Enhancement

of a counterfeit note to include our currency's distinctive counterfeit deterrents would require more labor, more skill and a more studied effort to defraud which we believe would render the producer more culpable.

Should the Commission determine that a more sophisticated attack on the integrity of the currency merits a heightened penalty, we believe that 18 U.S.C. §474A, Deterrents to counterfeiting of obligations and securities, could provide an effective explanatory aid. That section defines "distinctive counterfeit deterrent" as including "any ink, watermark, seal, security thread, optically variable device, or other feature or device; (A) in which the United States has an exclusive property interest; or (B) which is not otherwise in commercial use or in the public domain and which the Secretary designates as being necessary in preventing the counterfeiting of obligations or other securities of the United States." 18 U.S.C. §474A(c)(2).

We, therefore, recommend applying such an enhancement in cases where a manufacturer has taken additional steps beyond capturing the front and back images of United States currency in an effort to simulate the distinctive counterfeit deterrents defined in 18 U.S.C. §474A(c)(2).

Finally, it has been our position throughout this process that any amendments to Section 2B5.1 should be technology neutral. Given the pace at which analog, digital and other electronic methods have evolved thus far, it is impossible to predict what future technologies may emerge in counterfeiting. Accordingly, we advise against referring to any particular forms of technology either in the guideline itself or in the commentary.

Adjusted Offense Level for Manufacturing

While the Commission has indicated that it shares our view of the seriousness of these offenses in its decision to raise the base offense level, the proposed amendments will actually result in lower sentences in 94% of manufacturing cases. We feel strongly that the elimination of the adjusted offense level of 15 for manufacturing, even when the two-level enhancement is added, will not provide a sufficient penalty for the expanding group of digitally-based counterfeiters.

Statistics from Fiscal Year (FY) 2000 indicate that 99% of domestic plant suppressions conducted by the Secret Service involved digitally-based manufacturing. See attached Chart A. Under the proposed amendment, manufacturers who produce less than \$10,000 worth of counterfeit, and such manufacturers constituted 94% of FY 2000's plant suppressions (see Chart B), will score out with a lower offense level than they would have with the adjusted offense level of 15 currently in place.

This downward move is particularly problematic at the lowest dollar amounts. Because of the difficulties inherent in connecting digitally-based counterfeit to its point of origin, most offenders will be held responsible solely for whatever amount of inventory they have in their possession at the time of the suppression. When that inventory stays low, so does the guideline range. If a manufacturer is charged with producing less than \$2,000, which was the case in 80% of FY 2000 domestic plant suppressions, the adjusted offense level will be 12 under the proposal. This reduction for the group of manufacturers expanding at the fastest rate will only encourage digital counterfeiters to "print and print often."

As a general matter, we agree with the Commission that guideline sentences should reflect the degree of economic harm inflicted. In the case of digitally-based counterfeit, however, the issue is complicated by the inherent difficulty in ascertaining exactly how

much counterfeit has been produced. In these cases, economic harm is not always fully measured by the amount seized at the plant suppression. In order to forward the goal of proportionality in this context, we would ask that the Commission consider either:

1. Implementing our original proposal of a two-level enhancement for cases involving over \$70,000 while retaining the 15 adjusted offense level. As we suggested initially, this would do much to eliminate the windfall created by the cap currently in place.
2. Applying a four-level enhancement for all manufacturing cases rather than the proposed two-level enhancement. If the Commission prefers a "sliding scale" approach to reflect the amount of currency produced, we would recommend a consistent four-level enhancement for manufacturing. Manufacturing is a much more serious offense than passing and even a low-dollar manufacturer requires more than an adjusted offense level of 12 to meet the goals of punishment and deterrence. Under our proposal, a manufacturer who is charged with producing \$2,000 or less, which was the case in 80% of all domestic plant suppressions in FY 2000, will receive an adjusted offense level of 14, one point less than under the current scheme. A manufacturer who produces more than \$2,000, but less than \$5,000 (another 8% in FY 2000) would score out at 15, just as he would under the current guideline.

Either of these options would enhance proportionality as well as better reflect the seriousness of the offense.

Should the Commission reject the above proposals, we would ask that you merely retain the existing structure, at least for this year. While the current guideline does not address the windfall for manufacturers who produce over \$70,000, it is our position that the elimination of the 15 adjusted offense level poses a more serious threat to the goal of proportionality.

We recognize that the Commission was concerned with the lack of proportionality in the existing cap. This inequity was one of our primary concerns when we first began to consider seeking amendments to Section 2B5.1, and it informed our recommendation to add a two-level enhancement for high-volume manufacturers. However, the cap currently affects only a very small number of offenders. Fiscal year 2000 statistics reveal that only three plant suppressions involved more than \$70,000. These three represent less than 1% of the year's suppressions. The elimination of the adjusted offense level of 15 will result in lower sentences for 94% of manufacturers. If the choice is to reduce the penalty for more than 90% of manufacturers or provide a windfall for fewer than 1%, we would better accept the latter.

The above recommendations reflect the experience of the Secret Service in investigating digitally-based counterfeit manufacturing. Should the Commission determine that any of our comments or suggestions require more thorough discussion or the presentation of additional evidence, we would be pleased to participate in another briefing or to prepare supplemental documentary submissions before this issue moves on to Congress. We appreciate the Commission's attention to this matter and hope that our comments on the proposals will assist the Commission in its deliberations on this important issue.

Sincerely,

Elisabeth A. Bresee
Acting Under Secretary (Enforcement)

Attachments