

funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

Subsections (a)(2) and (a)(3) provide "fallback" offense levels that will apply primarily in cases in which the offense level for the underlying conduct cannot be determined. Subsection (a)(3), designed to apply when the funds were not known or believed to be derived from drug trafficking, provides a minimum base offense level of eight. This number corresponds to the base offense level of six provided in § 2F1.1 plus two levels for more than minimal planning. Guideline 2F1.1 is used as a point of reference because subsection (a)(3) would typically be expected to apply in cases involving funds from economic crimes which are, in turn, typically sentenced by reference to § 2F1.1. The base offense in subsection (a)(3) assumes that heartland cases would involve more than minimal planning. Subsection (a)(2) provides a minimum base offense level of 12 for cases in which the defendant knew or believed the funds were from drug trafficking. This approach is consistent with the current guideline structure which generally treats drug-related offenses as at least four levels more serious than typical economic offenses (e.g., fraud).

The base offense levels provided for in subsections (a)(2) and (a)(3) have been bracketed to signal the Commission's interest in receiving comment on possible modifications to these numbers suggested by representatives of the defense bar and the Department of Justice. Defense bar representatives have recommended that the base offense level in subsection (a)(3) not assume that more than minimal planning was involved in the underlying conduct and, accordingly, that level 6 rather than level 8 should be used. The Justice Department has recommended that the Commission consider setting base offense levels in (a)(2) and (a)(3) four levels higher (i.e., level 16 and 12, respectively). In addition, the bracketed text in subsection (a)(2) reflects a request by the Department of Justice that the Commission invite comment on whether the list of offenses under this subsection should be expanded beyond offenses involving controlled substances.

*Proposed Amendment:* Sections 2S1.1 and 2S1.2 are deleted in their entirety and the following is inserted in lieu thereof:

"§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary

Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under § 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) [12] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]; or

(3) [8] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. 'Value of the funds' means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant

deposited \$50,000 derived from a bribe together with \$25,000 of legitimately derived funds, the value of the funds is \$50,000, not \$75,000.

Criminally derived funds are any funds that are derived from a criminal offense; e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for \$200,000 that is worth \$120,000 and deposits the \$200,000 in a bank; the value of the criminally derived funds is \$200,000, but the loss is \$80,000). If the defendant is able to establish that the loss, as defined in § 2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve actual money laundering, i.e., efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.

5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the 'layering' of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate.

Background: The statutes covered by this guideline were enacted as part of the Anti-Drug Abuse Act of 1986. These statutes cover a wide range of conduct.