

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

T. Michael Andrews, Chair



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March 18, 2015

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Response to Request for Comments on 2015 Proposed Amendments

Chairman Saris and Members of the Commission:

The Commission has requested public comment for the proposed amendments. The Victims Advisory Group (VAG) is pleased to offer our recommendations as enumerated below. Preliminarily, the VAG incorporates by reference the attached written testimony and oral comments by VAG Chairman T. Michael Andrews who testified at the public hearing on *Economic Crime: Advisory and Advocacy Groups*, on March 12, 2015. As the Commission heard, the VAG strongly supports the increased sentencing discretion based on the different type of economic impact on victims.

The VAG would also like to address two specific issues that were raised during panel discussion. First, during testimony it was raised by the defense bar that Federal Prosecutors would not have the ability to adequately weigh the significance of the financial harm to victims during plea negotiations to assist in qualifying either life altering, substantial and significant. The simple answer is that under the Crime Victims' Rights Act, 18 U.S.C § 3771(5) victims have an absolute right to confer with the government prior to a plea offer. At that junction most Federal Prosecutor will have an idea of the financial impact on victims. Second, the VAG was disappointed to hear during the panel discussion from the Department of Justice representative they do not support the VAG's recommendation of adding a 3rd option for the Court because it would be confusing to Federal Prosecutors on the application of this option. VAG disagrees with this assertion; this confusion can easily be rectified with additional training and additional language in the commentary section in the Guidelines.

The VAG Recommends and Supports the Following Amendments and Comments:

I. The Victim’s Table Needs to Reflect the Hardship on Victims Based on their Economic Condition at the Time of the Crime.

Since 2010, fraud offenses were the third largest portion of the federal criminal docket, trailing only immigration and drug offenses.¹ Sentencing for such crimes presents complex issues – issues that often swirl around the economic impact of such crimes on victim’s lives. Courts traditionally determine the seriousness of fraud offenses by focusing on a specific dollar amount of losses to the victim. Traditionally, that dollar amount provides the Court with guidance on the appropriate sentence. As was discussed in a 2004 Court case, no one could seriously doubt that, “[a]ll else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment.”² However, rarely is all else equal with such crimes, particularly where the economic loss from a crime causes a victim significant, substantial or even life-altering harm. As a result, the VAG strongly believes that these important factors should be accounted for in the Sentencing Guidelines for such crimes.

The President’s Task Force on Victims of Crime concluded that “[a] judge cannot evaluate the seriousness of a defendant’s conduct without knowing how the crime has burdened the victim.”³ It is precisely for this reason that the American Bar Association has endorsed victim impact statements, explaining that “good decisions require good—and complete—information. . . . [I]t is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision-maker.”⁴ Federal law now clearly recognizes the right of crime victims to provide the sentencing judge with information about the impact of a crime, as this is one of the rights protected under the Crime Victims’ Rights Act (CVRA). *See* 18 U.S.C. § 3771(a).

A. The Commission Should Select New VAG Drafted Option 3 of the Amendments to § 2B1.1(b)(2)

Reflecting the reality that a crime can have different impacts on victims depending on their individual circumstances, the VAG urges the Commission to adopt a change to the Guidelines table that reflects this fact. The Commission has suggested two options – Option 1 and Option 2 – for making such a change to § 2B1.1. We would encourage the Commission to consider a third option – “Option 3.” This option recognizes that economic crimes can cause a broad range of hardships or harms to victims, which should be reflected in a broad range of punishments (consistent, of course, with the “25% percent rule” mandated by the Commission’s governing statute).

Our proposed Option 3 would be inserted in the Sentencing Guidelines at the same point where the Commission is proposing to insert either Option 1 or Option 2. Our proposed guideline would read as follows:

¹ US Sentencing Commission 2010 Source Book of Federal Sentencing Statistics

² *United States v. Emmenegger*, 329 F. Supp. 2nd 416, 428 (S.D.N.Y.) 2004)

³ PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 76–77.

⁴ A.B.A. *Guidelines for Fair Treatment of Crime Victims and Witnesses*, 1983 A.B.A. SEC. CRIM. JUST. 18, 21.

VAG Recommendation - Option 3

(A) If the offense resulted in life-altering financial or other hardship to one or more victims or a group of victims collectively, increase by 6 levels.

(B) If the offense resulted in substantial financial or other hardship to one or more victims, or a group of victims collectively, increase by 4 levels.

(C) If the offense resulted in significant financial or other hardship to one or more victims, or a group of victims collectively, increased by 2 levels.

If the degree of hardship is between that specified in subdivisions (A) and (B), add 5 levels.

If the degree of hardship is between that specified in subdivisions (B) and (C), add 3 levels.

The advantage of this proposal is that it recognizes the wide range of harmful effects that crimes can have on victims. A crime that causes no significant hardship on victims is one thing – but a crime causing life-altering financial or other hardship is another. Indeed, a crime causing life-altering hardship is so serious it ought to be punished by a 6 level increase in the base offense level.

The difficulty in defining the broad range of losses is coming up the appropriate nomenclature for capturing the different quality of different crimes. The VAG has tried to do that with the terms “significant,” “substantial,” and “life-altering.” To help clarify these different concepts, the VAG proposes the following commentary:

Commentary:

“Significant” hardship means noteworthy or important hardship above and beyond what would ordinarily be found in a financial offense. “Substantial” hardship means very noteworthy or very important hardship above and beyond what would ordinarily be found in a financial offense -- i.e., hardship above and beyond significant hardship such as defrauding the bank account or home of an individual. “Life Altering” hardship means defrauding the retirement income of an individual who has no other means to work and support themselves or their family.

One issue that the Commission has asked for assistance in considering is whether hardship should be limited to a purely financial character. *See* Proposed Amendments to the Sentencing Guidelines, Jan. 16, 2015, at 80 (“Should the new enhancement encompass non-monetary harms?”). The VAG firmly believes that hardship should be assessed along other dimensions such as psychological or physical harm. As the Commission is aware, some financial crimes, while perhaps lacking in financial significance, have tremendous psychological significance to the victim. For example, a victim may be swindled out of educational savings, leading to an inability to pursue a college degree or other educational opportunity. Or an elderly victim may lose retirement funds, requiring additional employment at a time in life when medical circumstances might advise retirement. These factors should simply be included in the guidelines without forcing district judges to debate whether or not these losses are “financial” losses. These are obviously

serious losses that ought to be considered at sentencing, regardless of whether they have a financial character to them.

To make clear that psychological and health trauma are relevant factors, the VAG recommends that the Commission add to the list of factors to be considered something directly addressing the point, specifically item (I) at the end of the current (proposed) list:

(I) suffering uncommon psychological trauma or distress or harm to health.

The Justice Department has alerted the Commission to the possibility that if psychological harms are a factor at sentencing, then victims may face intrusive discovery from defendants. This is something that the Commission should certainly consider. But the concern can be easily addressed if district judges do not allow such discovery. There is no right to discovery on these sentencing issues, so intrusive questioning should be limited to those rare situations where the trial judge believes that an evidentiary hearing of some sort is required to make an appropriate determination. To further emphasize the need to protect victims, the VAG would recommend that the Commission add, either as a guideline or commentary, the following note:

Victim Protection

In making these determinations, the Court shall avoid any invasion of the victims' privacy, including privacy of financial information that the victim chooses not to disclose and personal history information (including medical and psychological history) that the victim chooses not to disclose.

(b) The VAG Recommends Option 2 under “Intended Loss” at 2B1.1.

The VAG supports option 2 under the definition of “intended loss” as it captures the essence that others often participate in fraud schemes. Option 2 allows other participants who support the actions of the criminal an option for the sentencing judge for an increased sentence.

II. Issue for Comment Flavored Drugs

The VAG supports the Commission's comment with regard to vulnerable victims and the proposed adjustment under subsection (b) of 3A1.1 (Hate Crime Motivation or Vulnerable Victim) The VAG agrees that a specific instruction at 2D1.1(2) stating that if a specific objective of the offense was to manufacture a controlled substance for the marketing to or use by minors an adjustment under 3A1.1(b) should apply.

Conclusion

We ask the Commission to consider these issues in the next amendment cycle. We look forward to working with the Commission to insure that the needs and concerns of crime victims are fully reflected in the sentencing guidelines.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
March 2015

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To the United States Sentencing Commission

T. Michael Andrews, Chair



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March 3, 2015

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Written Testimony for the Response to Economic Crime: Advisory and Advocacy Groups Panel

Dear Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide oral testimony to the Commission in response to the proposed amendments to address the economic impact on victims under the victim's table portion in 2B1.1 in the United Sentencing Guidelines. The VAG urges the Commission to adopt changes to the table that focus on the victims of these offenses, as we describe in greater detail below.

I. The Victim's Table Needs to Reflect the Hardship on Victims Based on their Economic Condition at the Time of the Crime.

Since 2010, fraud offenses were the third largest portion of the federal criminal docket, trailing only immigration and drug offenses.¹ Sentencing for such crimes presents complex issues – issues that often swirl around the economic impact of such crimes on victim's lives. Courts traditionally determine the seriousness of fraud offenses by focusing on a specific dollar amount of losses to the victim. Traditionally, that dollar amount, provides the Court with guidance on the appropriate sentence. As was discussed in a 2004 Court case, no one could seriously doubt that, “[a]ll else being equal, large thefts damage society more than small ones,

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create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment.”² However, rarely is all else equal with such crimes, particularly where the economic loss from a crime causes a victim significant, substantial or even life-altering harm. As a result, the VAG strongly believes that these important factors should be accounted for in the Sentencing Guidelines for such crimes.

The President’s Task Force on Victims of Crime concluded that “[a] judge cannot evaluate the seriousness of a defendant’s conduct without knowing how the crime has burdened the victim.”³ It is precisely for this reason that the American Bar Association has endorsed victim impact statements, explaining that “good decisions require good—and complete—information. . . . [I]t is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision-maker.”⁴ Federal law now clearly recognizes the right of crime victims to provide the sentencing judge with information about the impact of a crime, as this is one of the right protected under the Crime Victims’ Rights Act (CVRA). *See* 18 U.S.C. § 3771(a).

A. The Commission Should Select New VAG Drafted Option 3 of the Amendments to § 2B1.1

Reflecting the reality that a crime can have different impacts on victims depending on their individual circumstances, the VAG urges the Commission to adopt a change to the Guidelines table that reflects this fact. The Commission has suggested two options – Option 1 and Option 2 – for making such a change to § 2B1.1. We would encourage the Commission to consider a third option – “Option 3.” This option recognizes that economic crimes can cause a broad range of hardships or harms to victims, which should be reflected in a broad range of punishments (consistent, of course, with the “25% percent rule” mandated by the Commission’s governing statute).

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Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of economic loss to victims. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
March 2015

