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

RE: Request for public comment regarding the amendments to § 2B1.1.

Dear Chairman Saris and Members of the Commission:

I am a third year student at the University of Utah, S.J. Quinney College of Law, with an interest in the rights of crime victims. I appreciate the opportunity to submit a public comment to the Commission in response to the proposed amendments to address the economic impact of victims under the victim's table portions of § 2B1.1. To better align the Sentencing Guidelines (Guidelines) with harm to victims of economic crime, I propose the Commission adopt Option 1 with modifications to § 2B1.1 Application Note 5, as proposed by the Victims Advisory Group (VAG).

In 2010, the National White Collar Crime Center reported that nearly one household in four in the United States was victimized by white collar crime within the past year.[1] Economic crime represents 13.3% of the federal criminal docket, trailing only immigration and drug-related offenses.[2] Economic crimes are wide ranging and include anything from multi-billion dollar Ponzi schemes to petty credit card fraud. The breadth and variety of economic crime require a sentencing structure that is flexible and diverse in order to adequately address the harms caused.

The Commission's proposed amendments suggest two options that provide for an enhancement to economic sentences if the economic crime causes "substantial [financial] hardship" to a victim.[3] Option 1 provides for an enhancement of [2], [3], or [4] if one or more victims suffer "substantial [financial] hardship," with a total §§ 2B.1(b)(2) and (3) enhancement not to exceed [6] levels. Conversely, Option 2 provides for a three-tiered enhancement based on the number of victims that suffer "substantial [financial] hardship." First, if there is at least one

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[1] *The 2010 National Public Survey on White Collar Crime*, NATIONAL WHITE COLLAR CRIME CENTER, 22 (Dec. 2010), http://www.nw3c.org/docs/publications/2010-national-public-survey-on-white-collar-crime.pdf?sfvrsn=8.
[2] *See* U.S. SENTENCING COMM'N, 2013 ANNUAL REPORT, A-35, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/annual-report-2013.
[3] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, 80 Fed. Reg. 2570, 2588 (Jan. 16, 2015).

victim, the enhancement is [1][2] levels. Second, if there are at least five victims, the enhancement is [2][4] levels. Finally, if there are at least twenty-five victims, the enhancement is [3][6] levels. Option 2, like Option 1, caps the total enhancements of §§ 2B.1(b)(2) and (3) at [6]. The Commission's proposals rely on a number of factors to determine when "substantial [financial] hardship" has occurred. These factors are enumerated in proposed § 2B1.1 Application Note 5 (Note 5) and include:

> (A) becoming insolvent; (B) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code); (C) suffering substantial loss of a retirement, education, or other savings or investment fund; (D) making substantial changes to his or her employment, such as postponing his or her retirement plans; (E) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; (F) suffering substantial harm to his or her reputation or credit record, or a substantial inconvenience related to repairing his or her reputation or a damaged credit record; (G) being erroneously arrested or denied a job because an arrest record has been made in his or her name; (H) having his or her identity assumed by someone else.

Note 5, as it is written, is limited to financial harm. The VAG has recommended that the amendments provide for enhancement if the victim suffers substantial harm, regardless of pecuniary loss.[4] The VAG proposed that the Commission add to Note 5, "(I) suffering uncommon psychological trauma or distress or harm to health."

I propose two recommendations for the Commission to consider. First, the Commission should adopt the VAG's proposal and expand its definition of victim harm by including non-economic factors. Second, the Commission should adopt Option 1, which shies away from a mechanical application of the Guidelines and focuses on harm to any victim rather than the harm to a specified number of victims.

I. The Commission should amend the Guidelines to reflect both substantial economic and noneconomic harm.

The Commission should adopt the VAG's addition to Note 5 to better reflect the broad range of harms felt by the victims of economic crime. The VAG propounds that "economic crimes can cause a broad range of hardships . . . to victims," which must be reflected in a "broad range of punishments."[5] The VAG has proposed that the Commission recognize substantial harm to victims, regardless of pecuniary loss. Specifically, the VAG has proposed the Commission add the following factor to Note 5.

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

[4] Victims Advisory Group to the United States Sentencing Commission, Written Testimony for the Response to Economic Crime: Advisory and Advocacy Groups Panel, Public Hearing on Proposed 2015 Amendments to the Federal Sentencing Guidelines, 3–4 (Mar. 3, 2015).
[5] *Id*. at 2.

The VAG's proposal is necessary for two reasons. First, the Commission's current Note 5 proposal is underinclusive because it fails to account for the broad range of harms caused by economic crime. Second, without the VAG's modifications, Note 5 treats victims differently based on wealth, regardless of the harm actually caused. The Commission's proposal should treat victims as victims, regardless of the victim's ability to financially mitigate harm.

a. The Commission's proposed amendments are underinclusive because they fail to address the nonfinancial harms experienced by victims of economic crime.

Victims of economic crime suffer much more than financial loss. Victims of fraud have been shown to experience anger, hopelessness, depression, anxiety, fear, nightmares, shock, and emotional despair and devastation.[6] Some commentators have found victims of fraud exhibit similar signs of those suffering with post-traumatic stress disorder, or PTSD.[7] Often, to a victim of economic crime, emotional trauma can be more overpowering that monetary loss. For example, infamous fraudster Bernard Madoff's victims reported that Madoff's crimes caused "emotional, spiritual, and psychological devastation" that was "indescribable."[8] Madoff's victims alleged that Madoff's fraud "compromised [their] health, both mentally and physically."[9] Some of Madoff victims were so emotionally and physically distraught by Madoff's crimes that they were driven to suicide. William Foxton, decorated British soldier, committed suicide after facing bankruptcy when he lost everything in Madoff's scam.[10] Rene-Thierry Magon de la Villehuchet, a professional investor, lost $1.4 billion of his and his clients' money to Madoff's scheme.[11] Mr. de la Villehuchet felt personally responsible for the money his investors had lost and eventually succumbed to depression, ending his own life.[12]

The Commission's definition of "substantial [financial] harm" is also underinclusive because it fails to encapsulate special harms caused by certain economic crimes. For example, economic crimes, like affinity fraud, present distinctive types of harm to victims—much of these harms are not financial. Affinity fraud refers to investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups. Affinity fraud is particularly prevalent in my home state of Utah. In 2010, it was estimated that Utahans were victims of Ponzi and affinity fraud related schemes to the tune of $1.4 billion in losses or $500 for every Utahan.[13] Nationally, affinity fraud is listed as one of the most

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[6] David Goldstein, et al., *Fraud Trauma Syndrome: The Victims of the Bernard Madoff Scandal*, J. OF FORENSIC STUD. IN ACCT. AND BUS. Summer 2010, at 6.
[7] *Id*.
[8] Victim Impact Statements, United States v. Bernard L. Madoff, No. 09 Cr. 213 (DC) (S.D.N.Y. Jun. 12, 2009).
[9] *Id*.
[10] Mary Jordan, *British Family Blames Madoff for Suicide*, THE WASHINGTON POST (Feb. 15, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/14/AR2009021401640.html.
[11] Alex Berenson, *Madoff Investor's Suicide Leaves Questions*, THE NEW YORK TIMES (Jan. 1, 2009), http://www.nytimes.com/2009/01/02/business/02madoff.html?ref=weekinreview&_r=0.
[12] *Id*.
[13] *Fleecing the Flock: The Big Business of Swindling People Who Trust You*, THE ECONOMIST (Jan 28, 2012), http://www.economist.com/node/21543526. Sixty percent of Utah's population belongs to the Church of Jesus Christ of Latter-day Saints (LDS). Tom Harvey, *FBI Agent Has Seen Utah Through Flood of Fraud*, THE SALT LAKE TRIB. (June 24, 2012), http://www.sltrib.com/sltrib/money/54326272-79/malpede-fraud-utah-fbi.html.csp?page=1. Members of the LDS faith are very trusting and community oriented, which facilitates a

"prevalent types of securities and commodities fraud."[14] Affinity fraud preys on the trust and fiduciary relationships found in religious organizations and other closely-knit groups. When a person is victimized as the result of affinity fraud, he or she experiences extreme distrust and, in some cases, a loss of faith. By focusing only on financial harm, the Commission's proposal fails to capture this particularly devastating type of harm. Arguably, a loss of religious faith is not compensable or reparable, whereas a bankruptcy can be overcome.

The VAG's proposal addresses these concerns by adding subsection "(I)" which will allow the judge to find substantial harm if the economic crime causes "suffering uncommon psychological trauma or distress or harm to health." If a victim suffers from severe depression or other physical and psychological trauma as a result of an economic crime, the judge is given discretion to address this harm by enhancing the defendant's sentence.

b. The Commission's proposal should treat victims as victims, regardless of ability to financially mitigate harm.

By only acknowledging financial hardship, the Commission's current proposal treats victims differently based on their economic status. As proposed, Note 5 focuses on a victim's ability to financially survive fraud, including solvency, bankruptcy status, retirement funding, educational funding, financial creditworthiness, etc. The Commission's proposal suggests that if a victim is wealthy enough to financially mitigate an economic crime, the fraudster is less worthy of punishment. The Commission's proposal is inapposite. As described above, economic crimes cause a wide range of harms including physical and psychological trauma. The size of a victim's wallet does not mitigate the tangible physical and emotional harms suffered by victims of economic crime. For example, consider a well-diversified investor who loses twenty percent of his portfolio to a member of his local church in an affinity fraud based scheme. The investor does not go bankrupt, lose his educational savings, or become insolvent; however, he becomes severely depressed due to the betrayal of a trusted ecclesiastical friend. Under the Commission's current proposal, the fraudster would not receive an enhancement because the diversified investor did not suffer financial ruin. The Commission should adopt the VAG's proposal to ensure that these types of harms are addressed at sentencing.

The VAG proposal echoes the concerns of the Probation Officers Advisory Group that an enhancement tailored only to financial adversity could be "unfairly construed as such that a victim who continues to be wealthy despite said loss has not suffered a hardship."[15] Similarly, the DOJ commented that it would be "bad sentencing policy for crimes causing significant,

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breeding ground for affinity fraudsters who prey on the trust and beliefs of LDS members. *Id*. Additionally, non-LDS members are not immune to this type of fraud in Utah. In 1995, Robert Fain was indicted for fraudulently obtaining $230,000 from members of the Assembly of God Church in Ogden, Utah. Zack Van Eyck, *Ogden Man Faces 63 Fraud Counts*, DESERET NEWS (Nov. 22, 1995), http://www.deseretnews.com/article/452368/OGDEN-MAN-FACES-63-FRAUD-COUNTS.html?pg=all. Fain lured victims to the scheme claiming God had spoken to him and that God wanted them to invest so that they could have financial success. *Id*.

[14] *Financial Crimes Report to the Public, Fiscal Years 2010-2011*, FBI, http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011 (last visited Mar. 14, 2015) (listing affinity fraud amount the "most prevalent types of securities and commodities fraud").

[15] Probation Officers Advisory Group to the United States Sentencing Commission, Written Testimony, Economic Crime: Advisory and Advocacy Groups, Public Hearing on Proposed 2015 Amendments to the Federal Sentencing Guidelines, 6 (Mar. 3, 2015).

widespread harms to many victims not to receive the highest level of victims' enhancement simply because the victims did not become insolvent or otherwise suffer catastrophic financial loss."[16] The VAG's proposal addresses these concerns by allowing judges discretion to address the psychological and physical trauma that accompany economic crime—regardless of whether the victim has suffered financial ruin. For example, consider a victim that suffers substantial anxiety and depression as a result of fraud. The VAG's proposal would provide for an upward enhancement regardless of the victim's financial status.

II. The Commission should adopt Option 1, which provides for the most judicial discretion to ensure proper punishment is tailored to the offense.

As stated above, the Commission has proposed two options to apply sentencing enhancements when victims suffer "substantial [financial] harm" as the result of economic crime. Option 1 provides for upward departures if any victim suffers substantial financial harm, regardless of the number of victims. Option 2 provides for a three-tiered system that provides for more upward deviations with the increase in the number of victims. The Commission should adopt Option 1 for two reasons. First, Option 2 is inappropriate because it cabins judicial discretion by arbitrarily emphasizing the number of victims harmed. Second, if the commission maintains § 2B1.1(2), an additional emphasis on the number of victims harmed could result in double counting.

a. The Commission should adopt Option 1, because Option 1 focuses on the harm caused by the criminal conduct rather than the one-shoe-fits-all arithmetic application of the Guidelines based on the number of victims.

The Guidelines have consistently been criticized for relying too much on arbitrary arithmetic factors such as loss amount and the number of victims.[17] Some critics have described the Guidelines reliance on loss and the number of victims as "draconian"[18] and an "utter travesty of justice."[19] Option 1 provides judges flexibility in determining impact to victims, while preventing an arithmetic, unworkable application based on the number of victims substantially harmed. If a judge encounters one victim who suffers particularly egregious harm, Option 1 gives the judge latitude to adjust the sentence upward as necessary to accurately reflect the harm. Similarly, if there are multiple victims that have suffered substantially, the judge is free to apply a similar sentence, regardless of the number of victims.

For example, consider four victims of a Ponzi scheme lose their retirement, become insolvent, and are forced to re-enter the workforce at an advanced age. Under Option 2, the judge

[16] DOJ, Office of Policy and Legislation, Written Testimony, Economic Crime: Practitioners, Public Hearing on Proposed 2015 Amendments to the Federal Sentencing Guidelines (Mar. 9, 2015).
[17] *See e.g.*, Derick R. Vollrath, *Losing the Loss Calculation: Toward a more Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1021 (2010) (stating, the "Guidelines place undue emphasis on the loss calculation, an imprecise measure that fails to accurately correlate with a defendant's culpability").
[18] *United States v. Parris*, 573 F. Supp. 2d 744, 750, 753 (E.D.N.Y. 2008) (critiquing the "one-shoe-fits-all" application of the number of victims to sentencing enhancements).
[19] *United States v. Adelson*, 441 F. Supp. 2d 506, 513 (S.D.N.Y. 2006) ("What this exposed, more broadly, was the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.").

would be confined to an upward deviation of [1] or [2] without being able to account for the seriousness of the harm felt by the four victims. Conversely, if five victims of a Ponzi scheme suffer bankruptcy, Option 2, would at minimum, be required to enhance by [2]. Option 2's mechanical approach denies the judge the flexibility to tailor the punishment to the harm. Option 1 provides broad discretion to trial judges to examine the harm felt by the victims, regardless of the number of victims, and tailor sentences that are commensurate with the crime.

b. The Commission should adopt Option 1 because Option 2 is overinclusive and will result in double counting.

Option 2 is overinclusive in relation to § 2B1.1(b)(2), even if the Commission's proposed changes are adopted. Section 2B1.1(b)(2) provides for sentencing enhancement based on the number of victims harmed. If proposed § 2B1.1(b)(2) and Option 2 are applied together, a judge runs the risk of double counting. For example, if a defendant causes substantial harm to ten victims, the Guidelines count the number of victims against the defendant twice. First, proposed §2B1.1(b)(2) will provide for an increase of [1] to account for an offense involving "10 or more victims." Second, Option 2 will enhance the defendant's sentence by either [2] or [4] to account for "substantial [financial] hardship" to "[five] or more victims." Conversely, if the Commission adopts the more flexible Option 1, the judge can account for the substantial harm suffered by the victims and make adjustments based on the enhancement already reflected in §2B1.1(b)(2). The Commission's proposal creates one limiting principle by capping total enhancements of §§ 2B.1(b)(2) and (3) to [6]. However, this cap does not mitigate the possibility that a defendant could receive double enhancements based on the number of victims harmed.

III. Conclusion

In sum, to better align the Guidelines with harm to victims of economic crime, I propose the Commission adopt the VAG's addition to Note 5 and Option 1 of the proposed amendments. These recommendations will ensure that the Guidelines accurately reflect the breadth of harm suffered by victims of economic crime.

Respectfully,

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