TESTIMONY OF THE VICTIMS ADVISORY GROUP
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BEFORE THE UNITED STATES SENTENCING COMMISSION
PANEL II. FRAUD OFFENSES
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The Victims Advisory Group (VAG) is pleased to appear before you this morning to address proposed amendments to the Sentencing Guidelines. The VAG was established by the U.S. Sentencing Commission to assist the Commission in carrying out its statutory duties, to provide the Commission with its views on the Commission's activities as they relate to victims of crime, to disseminate information to crime victims and victim advocacy organizations, and to perform other functions as the Commission requests.

The proposed amendments under consideration result from the Dodd-Frank Wall Street Reform and Protection Act, and its directive to the U.S. Sentencing Commission to reexamine guidelines that would apply to securities fraud, bank fraud, and mortgage fraud. The Commission specifically asked whether the current guidelines adequately address the issues in the Dodd-Frank bill, and whether a more comprehensive review of Guideline §2B1.1 is warranted. We urge the Commission to undertake a broad review of §2B1.1, not only with an eye to the Dodd-Frank Act, but to reconsider sentencing for serious property offenses. The VAG is concerned that the current guideline regarding theft, embezzlement, fraud and other property offenses is based primarily on the amount of money lost (§2B1.1(b)(1)). This emphasis fails to take into account the true extent of the harm to victims.

The offense of securities fraud illustrates this issue. Many victims of securities fraud are elderly, and the proportion of victims who are elderly is expected to grow. This is largely because, as a group, they hold the most assets and thus are targeted most frequently.[1] However, because of their age—specifically, because these victims are beyond their prime earning years—the extent of the harm cannot be captured by the monetary value of the loss alone. A reading of the victim impact statements of the victims of Bernie Madoff reveals the scope of harm his victims suffered.[2] Victim after victim testified about the way in which the loss of their nest eggs—carefully accumulated retirement funds, funds realized after the sale of longtime residences, profits after selling businesses after a lifetime of labor and investment—impacted their financial security, their mental and emotional state, their ability to live independently and with dignity, and even their

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[1] Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach, and Kevin B. Moore, "Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances," Federal Reserve Bulletin (February 2009): A19, Table 6. Family holdings of financial assets, by selected characteristics of families and type of asset, 2004 and 2007 surveys.

[2] Available online from CBS News at http://www.cbsnews.com/htdocs/pdf/Madoff--Victim_Impact_Statements.pdf [accessed February 13, 2011].

physical health. In many cases of securities fraud, perpetrators know their victims personally and understand well the potential harm inherent in their crimes.

Mortgage fraud, too, can involve substantial, life-altering loss to the victims. While the crime takes many forms, it can include foreclosure rescue schemes, which take advantage of desperate people facing the loss of their home; reverse mortgage schemes, which often target seniors; and identity theft involving mortgages, which can strip people of their homes or equity with no involvement of the victim.

Other fraud offenses can also cause more extensive harm than the mere loss of dollars. The FBI recently reported a rise in market manipulation cases involving computer intrusion.[3] In such cases, perpetrators hack into victims' personal online brokerage accounts and use the accounts to purchase shares of a penny stock to drive up its price. Once the price of the stock has risen to a certain point, the perpetrators dump their shares to take their profit. Victims are harmed not only by the theft, which itself may have ramifications beyond the mere loss of money, but are left with a fear of conducting investment activities online. Because use of the Internet to conduct investing is on the rise,[4] victims who are reluctant to use this tool are at a disadvantage.

A recent study by the Bureau of Justice Statistics (BJS) noted the impact of identify theft. Over a quarter of victims spent more than a month trying to clear up problems relating to an identity theft. The BJS study also found that identity theft takes an emotional toll: about 11 percent of victims of credit card misuse and about 30 percent of victims who experienced the fraudulent misuse of their personal information described their experience as "severely distressing."[5]

It is true that the guideline takes into account other harms, including the numbers of victims harmed (§2B1.1(2)), and the effect of the financial loss (§2B1.1(14)). However, those elements currently operate as additional enhancing factors, rather than determinants of the base of the sentence.

The VAG agrees that reconsideration of §2B1.1 and related guidelines should involve a more comprehensive review. As part of that review, we would encourage the Commission to look broadly at the treatment of cyber crime, with an eye to creating a degree of uniformity. Use of the Internet, computers, and other technology is not only an issue under §2B1.1, but constitutes an enhancement under other guidelines, including those involving sexual abuse (§2a3.1–2A3.4) and interception of communications (§2H3.1). Special treatment of computer-enhanced crimes is warranted because such crimes can be easier to commit, more difficult to detect and prove, and impair the ability

[3] Testimony of Kevin L. Perkins, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, before the Senate Judiciary Committee, December 9, 2009. Available online at http://www.fbi.gov/news/testimony/mortgage-fraud-securities-fraud-and-the-financial-meltdown-prosecuting-those-responsible [accessed February 11, 2011].
[4] Bucks et al, supra note 1, A13, Table C, "Use of the Internet for financial information or financial services, by age of head, 2007."
[5] Lynn Langton and Michael Planty, "National Crime Victimization Survey Supplement: Victims of Identity Theft, 2008" Bureau of Justice Statistics: Washington, DC (2010).

of individuals to conduct their “online” lives. We recognize that such an examination could not be completed within the current review period.

Thank you for giving the VAG the opportunity to express our views this morning. We stand ready to offer our assistance as you move forward in reviewing amendments related to securities fraud, mortgage fraud, banking fraud, and related offenses.