

# PRIMER



# ECONOMIC CRIME VICTIMS §2B1.1(b)(2)

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*Prepared by the Office of General Counsel, U.S. Sentencing Commission*

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## **I. INTRODUCTION**

This primer provides a general overview of some common issues regarding who may be considered a victim under USSG §2B1.1 (“Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud or Deceit; Forgery; offenses Involving Altered or counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States”). Although the primer identifies some applicable cases and concepts, it is not intended as a comprehensive analysis of issues relating to victims in economic crime cases.

## **II. GUIDELINE ENHANCEMENT FOR VICTIMS**

USSG §2B1.1 presently provides an enhancement based upon the number of victims of the offense. More specifically, the victims table, found at §2B1.1(b)(2), provides for an offense level enhancement for offenses involving ten or more victims:

- (2) (Apply the greatest) If the offense—
  - (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;
  - (B) involved 50 or more victims, increase by 4 levels; or
  - (C) involved 250 or more victims, increase by 6 levels.<sup>1</sup>

This framework, however, will change if the amendments promulgated by the Commission in 2015 are approved by Congress.<sup>2</sup> Although the 2-level enhancement will continue to apply based on the number of victims involved, the 4- and 6-level enhancements will apply only if a specified number of victims sustains a particular, qualitative level of harm. The 2-level enhancement will apply if the offense involved 10 or more victims, was committed through mass-marketing, or if any individual experienced “substantial financial harm” as a result of the offense. The 4-level enhancement will apply if at least five individuals experienced “substantial financial harm,” and the 6-level enhancement will apply if at least twenty-five individuals experienced “substantial financial harm.” The proposed amendment will also add a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial changes to employment; making substantial changes to living arrangements; or

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<sup>1</sup> USSG §2B1.1 (eff. Nov. 1, 2012).

<sup>2</sup> Amendment 3 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015).

suffering substantial harm to the victim's ability to obtain credit. Absent contrary action by Congress, these revisions will become effective on November 1, 2015.

### III. DEFINITION OF VICTIM UNDER §2B1.1

#### A. GENERAL DEFINITION

The guidelines define "victim" in the application notes to §2B1.1. With two notable exceptions, the term "victim" means either: "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense."<sup>3</sup> Because most case law addresses the first part of this definition, this primer does not address individuals who may be victims under §2B1.1 as a result of sustaining bodily injury.

"Person" as used in the definition of victim includes "individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."<sup>4</sup> A victim may also be a government or government agency.<sup>5</sup> For purposes of the victim enhancement, "actual loss," which is also defined in the commentary to §2B1.1, means the "reasonably foreseeable pecuniary harm that resulted from the offense."<sup>6</sup> "Pecuniary harm" is "harm that is monetary or that otherwise is readily measurable in money,"<sup>7</sup> and therefore does not include emotional distress, harm to reputation, or other non-economic harm.<sup>8</sup>

#### B. IDENTITY THEFT CASES

Effective November 1, 2009, the Commission amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving a means of

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<sup>3</sup> USSG §2B1.1, comment. (n.1).

<sup>4</sup> *Id.*

<sup>5</sup> *United States v. Cunningham*, 593 F.3d 726, 732 (8th Cir. 2010).

<sup>6</sup> USSG §2B1.1, comment. (n.3(A)(i)); *see also, e.g.*, *United States v. Massam*, 751 F.3d 1229, 1233 (11th Cir. 2014) (emphasizing that "victims" are implicated only if there is an actual loss and that, conversely, if only intended loss is at issue, there is no "victim" for purposes of the enhancement). For case law discussing loss in more detail, *see* the Commission's primer on *Loss Calculations under §2B1.1(b)(1)* at <http://www.ussc.gov/training/primers>.

<sup>7</sup> USSG §2B1.1, comment. (n.3(A)(iii)).

<sup>8</sup> *Id.*

identification.<sup>9</sup> In such cases, a victim includes “any individual whose means of identification was used unlawfully or without authority,” regardless of whether the individual sustained a pecuniary loss.<sup>10</sup> The guidelines incorporate the statutory definition of “means of identification” from 18 U.S.C. § 1028(d)(7) but require that “such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).”<sup>11</sup>

“Means of identification” is defined in 18 U.S.C. § 1028(d)(7) as

any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any–

- (A) name, social security number, date of birth, official State or government issued driver’s license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
- (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- (C) unique electronic identification number, address, or routing code; or
- (D) telecommunication identifying information or access device (as defined in [18 U.S.C. § 1029])[.]

Various decisions provide additional examples of “means of identification”: mortgage loan numbers<sup>12</sup>; a company name that includes the victim’s true name<sup>13</sup>; forged signatures on

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<sup>9</sup> USSG §2B1.1, comment. (n.4(E)). The change was part of a multi-part amendment promulgated in response to a directive in the Identity Theft Enforcement and Restitution Act of 2008 to review guidelines applying to crimes involving identity theft. USSG, App. C, amend. 726 (eff. Nov. 1, 2009).

<sup>10</sup> USSG §2B1.1, comment. (n.4(E)); *see also* United States v. Ford, 784 F.3d 1386, 1397 (11th Cir. 2015) (holding that an enhancement for number of victims is appropriate even when indictment charges aggravated identity theft, so long as the enhancement based on number of victims is applied to counts other than the identity theft offenses).

<sup>11</sup> USSG §2B1.1, comment. (n.1.).

<sup>12</sup> United States v. Cooks, 589 F.3d 173, 185-86 (5th Cir. 2009); United States v. Macias, 345 F. App’x 272, 273 (9th Cir. 2009).

<sup>13</sup> United States v. Johnson, 261 F. App’x 611, 613-14 (4th Cir. 2008).

fraudulent checks<sup>14</sup>; personal telephone numbers<sup>15</sup>; leases<sup>16</sup>; bank account numbers<sup>17</sup>; forged documents created with correct information<sup>18</sup>; police badges<sup>19</sup>; credit card numbers<sup>20</sup>; emails including personal information<sup>21</sup>; and e-Bay accounts.<sup>22</sup>

In addition to determining what constitutes a “means of identification” in the context of identity theft cases, courts have also considered the scope of the definition of “victim” provided in Application Note 4(E)(ii) to §2B1.1. More specifically, courts have considered what is required for a defendant to have *used* the means of identification.<sup>23</sup> For example, the Eleventh Circuit held that a district court erred in applying a 4-level enhancement pursuant to §2B1.1(b)(2)(B) based on the fact that the defendant, a doctor’s office assistant, obtained and sold patients’ means of identification to a coconspirator. The district court held that the unlawful or unauthorized transfer or sale of the patients’ identifying information, without more, qualified as “use.” Accordingly, it applied the enhancement based on all 141 patients even though the government had only presented evidence that 12 patients’ information had been used to obtain fraudulent credit card accounts. The Eleventh Circuit reversed, holding that Application Note 4 did not permit application of the enhancement based on mere transfer:

The purpose of the conspiracy in this case was to obtain cash advances and purchase items by using fraudulent credit cards. [The defendant]’s sale of the unauthorized identifying information to her co-conspirators did not implement the purpose of the conspiracy. [The defendant]’s mere transfer of the personal identifying information, without more action, did not employ that information for the purpose for which the conspiracy was intended—the procurement of fraudulent credit cards and cash advances. The personal

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<sup>14</sup> *Id.*; see also *United States v. Blixt*, 548 F.3d 882, 886 (9th Cir. 2008) (holding that forging another’s signature constitutes use of that person’s name and qualifies as a means of identification under statute).

<sup>15</sup> *United States v. Geeslin*, 236 F. App’x 885, 886-87 (5th Cir. 2007).

<sup>16</sup> *United States v. Samet*, 200 F. App’x 15, 23 (2d Cir. 2006).

<sup>17</sup> *United States v. Norton*, 176 F. App’x 992, 995-96 (11th Cir. 2006); *cf.* *United States v. Hawes*, 523 F.3d 245, 253 (3d Cir. 2008) (finding that names and addresses on brokerage accounts were not “means of identification” in context of particular case because customers were primarily identified by account number rather than name and address).

<sup>18</sup> *United States v. Newsome*, 439 F.3d 181, 184-85 (3d Cir. 2006).

<sup>19</sup> *United States v. Sash*, 396 F.3d 515, 523-24 (2d Cir. 2005).

<sup>20</sup> *United States v. Oates*, 427 F.3d 1086, 1089-90 (8th Cir. 2005); *United States v. Craig*, 343 F. App’x 766, 770 (3d Cir. 2009).

<sup>21</sup> *United States v. Yummi*, 408 F. App’x 537, 540 (3d Cir. 2010).

<sup>22</sup> *Craig*, 343 F. App’x at 769-70.

<sup>23</sup> USSG §2B1.1, comment. (n.4(E)(ii)); see also USSG App. C, amend. 726 (eff. Nov. 1, 2009) (“This new category of ‘victim’ for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.”).

identifying information was not used, as that term is ordinarily understood, until [the defendant]’s co-conspirators secured the fraudulent credit cards. At that point, the 12 individuals whose personal information was compromised became victims for the §2B1.1(b)(2) enhancement.<sup>24</sup>

### C. UNDELIVERED UNITED STATES MAIL

The guidelines also include a special definition of victim applicable when “undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail.”<sup>25</sup> In such a case, victim means “(I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.”<sup>26</sup>

## IV. ESTIMATING THE NUMBER OF VICTIMS

If the government seeks a sentencing enhancement based on the number of victims, it must prove the number by a preponderance of the evidence.<sup>27</sup> There is no specific manner in which a district court must make this determination.<sup>28</sup> However, “[t]he

<sup>24</sup> United States v. Hall, 704 F.3d 1317, 1322 (11th Cir. 2013); *see also* United States v. Adejumo, 772 F.3d 513, 527-28 (8th Cir. 2014) (affirming use of enhancement when government presented evidence that more than 500 individuals’ “identifying information had been used to create fraudulent driver’s licenses, open fraudulent bank accounts, or withdraw funds from those accounts”); United States v. Lopez, 549 F. App’x 909, 911-12 (11th Cir. 2013) (applying *Hall*; holding that “mere theft or possession of” personal information is not sufficient to “make someone a victim,” if that information is not “used”).

<sup>25</sup> USSG §2B1.1, comment. (n.4(C)(i)(I)).

<sup>26</sup> *Id.* The Ninth Circuit rejected a claim that this definition was inconsistent with §2B1.1 overall and declined to construe “victim” in this context to require pecuniary loss. United States v. Gonzalez-Becerra, 784 F.3d 514, 519 (9th Cir. 2015) (summarizing case law on this issue); *see also* United States v. Alcantara, 436 F. App’x 105, 109-10 (3d Cir. 2011) (finding that all individuals whose mail was taken qualified as victims); United States v. Valdez, 392 F. App’x 662, 664-65 (10th Cir. 2010) (holding that enhancement was properly applied based on testimony and other evidence regarding conduct by postal employee); United States v. Bradford, 480 F. App’x 214, 215 (4th Cir. 2012) (holding that the term victim includes individuals who were deprived of their mail as a result of the defendant’s actions even if the defendant did not steal the mail). *Senders* of stolen mail, though, do not generally qualify as victims under this provision. United States v. Leach, 417 F.3d 1099, 1106-07 (10th Cir. 2005) (holding that donors whose checks were stolen but not cashed were not victims under §2B1.1 without evidence of replacement costs to donors to resend checks).

<sup>27</sup> *See, e.g.*, United States v. Arnaout, 431 F.3d 994, 999 (7th Cir. 2005).

<sup>28</sup> *See, e.g.*, United States v. Norman, 776 F.3d 67, 80-81 (2d Cir. 2015) (concluding that district court properly imposed enhancement for involvement of at least fifty victims based on defendant’s “explicit testimony at trial”).

Guidelines do not . . . allow a district court to estimate the number of victims to enhance a sentence under §2B1.1(b)(2).”<sup>29</sup>

For example, in a case involving a conspiracy to commit fraud through a false charity, the Seventh Circuit required some proof that the donations attributable to the appealing defendant could be traced to over 50 victims.<sup>30</sup> The Court noted that, while the overarching offense involved \$17 million worth of donations from over 17,000 donors, there was insufficient evidence to demonstrate that at least 50 donors contributed the amount attributed to the defendant.<sup>31</sup> Similarly, the Ninth Circuit remanded for resentencing a case in which the sentencing enhancement was not supported by evidence showing that 50 or more persons suffered actual loss in the form of pecuniary harm.<sup>32</sup> In contrast, the District of Columbia Circuit found that a district court properly applied an enhancement for 250 or more victims in a foreign aid fraud based on reports of interviews with Liberian town leaders.<sup>33</sup> Each interview “contained references to more than 100 people who performed work but did not receive food.”<sup>34</sup> This was sufficient to establish the requisite numbers for the enhancement.<sup>35</sup>

Undelivered United States mail is subject to a “special rule” that potentially affects the number of persons who will qualify as victims under the referenced definition. Pursuant to the current version of this rule, a case that involves “a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.”<sup>36</sup> The amendments promulgated in 2015 will, if approved by Congress, change the special rule to create a presumption of the involvement of “at least 10 victims” rather than 50 victims.<sup>37</sup> In a case involving “a housing unit cluster

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<sup>29</sup> United States v. Showalter, 569 F.3d 1150, 1160 (9th Cir. 2009) (citation, internal punctuation omitted). *But see* United States v. Naranjo, 634 F.3d 1198, 1214 (11th Cir. 2011) (affirming district court’s calculation of a reasonable estimate of victims based on bank records).

<sup>30</sup> *See Arnaout*, 431 F.3d at 999; *but see* United States v. Gonzales, 647 F.3d 41, 63 (2d Cir. 2011) (distinguishing *Arnaout* and stating that there is no suggestion in the guidelines that victims must be linked with specific losses).

<sup>31</sup> *Arnaout*, 431 F.3d at 999.

<sup>32</sup> United States v. Pham, 545 F.3d 712, 720-21 (9th Cir. 2008).

<sup>33</sup> United States v. Fahnbullah, 752 F.3d 470 (D.D.C. 2014).

<sup>34</sup> *Id.* at 481.

<sup>35</sup> *Id.* at 482.

<sup>36</sup> USSG §2B1.1, comment. (n.4(C)(ii)(I)); *see* United States v. Moore, 733 F.3d 161, 167 (5th Cir. 2013) (holding that application note 4(C)(ii)(I) permits only a single presumption of 50 or more victims, even if mail is stolen from more than one qualifying receptacle); United States v. Akinsuroju, 166 F. App’x 748, 751 (5th Cir. 2006) (upholding victim enhancement based on theft from a United States Postal Service delivery vehicle); United States v. Armour, 154 F. App’x 830, 832 (11th Cir. 2005) (same).

<sup>37</sup> Amendment 3 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015).



box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.”<sup>38</sup> In such cases, the government must still offer proof supporting the enhancement, but it need not prove the victims’ identities. Additionally, the enhancement will apply unless the defendant rebuts the presumption with specific proof.<sup>39</sup> Although the construction will not change, the amendments promulgated in 2015 will, if approved, change the language in the enhancement

## V. REIMBURSEMENT AND VICTIMS

As noted, unless the special rules regarding identify theft or mailboxes are implicated, a victim must sustain actual loss or bodily injury for the enhancement at §2B1.1(b)(2) to apply.<sup>40</sup> In some fraud schemes, though, the victims may be reimbursed by a bank, insurer, or other third party. Courts have issued divergent rulings as to whether such individuals have sustained an actual loss and thus meet the guideline definition of victim. In such situations, the applicability of the victim enhancement depends on the specific facts and the circuit in which the case is brought.

The issue was first considered by the Sixth Circuit in *United States v. Yagar*, which held that the victim enhancement does not apply when individuals are reimbursed.<sup>41</sup> The defendant in *Yagar* stole checks and bank account information from unsuspecting individuals, deposited the checks in various accounts, and then withdrew portions of the deposited funds for her own use.<sup>42</sup> The owners of the stolen checks only temporarily lost funds and were ultimately reimbursed by their banks.<sup>43</sup> The Sixth Circuit determined that the reimbursed account holders were not victims under the guidelines because they were fully reimbursed for their temporary financial losses.<sup>44</sup> The court stated that “the monetary loss [was] short-lived and immediately covered by a third-party [and thus there has not]

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<sup>38</sup> USSG §2B1.1, comment. (n.4(C)(ii)(II)I)); *see also* *United States v. Niewald*, 185 F. App’x 839, 840-41 (11th Cir. 2006) (applying the presumption in note 4(C)(ii)(II) regarding the number of actual residents served by a “housing unit cluster box” to support determination that offense involved 250 or more victims ).

<sup>39</sup> *See Niewald*, 185 F. App’x at 841; *United States v. Telles*, 272 F. App’x 415, 418 (5th Cir. 2008).

<sup>40</sup> As previously noted, the 2009 amendment broadened the definition of victim to include any individual whose means of identification was used unlawfully or without authority. *See* Part A(2), *supra*.

<sup>41</sup> 404 F.3d 967 (6th Cir. 2005).

<sup>42</sup> *Id.* at 968.

<sup>43</sup> *Id.* at 971.

<sup>44</sup> *Id.*

been ‘actual loss’ or ‘pecuniary harm.’”<sup>45</sup> The court additionally explained, “the account holders here suffered no adverse effect as a practical matter from [the defendant’s] conduct.”<sup>46</sup> *Yagar*’s holding has been followed by the Third, Fifth, and Eighth Circuits.<sup>47</sup>

Notably, *Yagar* left open the possibility that, in some situations, a person who is ultimately reimbursed could nonetheless be a victim. The court did not speculate on what facts might qualify.<sup>48</sup> In the wake of *Yagar*, various other courts have addressed this issue. For example, in 2014, the Third Circuit explicitly adopted and clarified the so-called *Yagar* carve-out and held that “one example of cognizable pecuniary harm is the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts.”<sup>49</sup> It explained that “[t]his interpretation of ‘actual loss’ and ‘victim’ comports with both the Guidelines and the conclusions of coordinate appellate courts, not to mention the common sense proposition that an account holder who must spend time and resources to dispute fraudulent activity, recoup stolen funds, and repair his or her credit and financial security has suffered a monetizable loss is a reasonably foreseeable and direct consequence of the defendant’s theft or fraud.”<sup>50</sup> Accordingly, even though the time itself could not qualify as an “actual loss,” the “account holders suffered monetizable harm in their efforts to regain the funds taken from their accounts, efforts that necessarily included reporting the fraud to their respective banks and disputing the unauthorized activity in the first instance.”<sup>51</sup> The court specifically concluded that *Yagar*’s reasoning did not require “appreciable or substantial” expenditures of time or money to qualify as an “actual loss.”<sup>52</sup>

Other jurisdictions, however, have rejected *Yagar*’s approach altogether. In *United States v. Lee*,<sup>53</sup> the Eleventh Circuit disagreed with the Sixth Circuit’s reasoning and distinguished *Yagar* on its facts. The *Lee* court suggested that the Sixth Circuit had failed to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *United States v. Kennedy*, 554 F.3d 415, 419-23 (3d Cir. 2009) (holding that, because account holders were reimbursed and the government offered no proof that they even knew their funds had been stolen, account holders did not qualify as victims); *United States v. Norman*, 465 Fed. Appx. 110, 121 (3d Cir. 2012) (citing *Kennedy*); *United States v. Conner*, 537 F.3d 480 (5th Cir. 2008) (holding, based on a “a plain reading” of the Application Notes, that credit account holders whose account numbers were used to make fraudulent purchases but who were promptly reimbursed for charges by credit card companies were not victims); *United States v. Icaza*, 492 F.3d 967, 970 (8th Cir. 2007) (holding that when corporate parent “sustained the actual loss,” it was improper to count as a victim each of the 407 retail stores from which the defendants had stolen).

<sup>48</sup> *Yagar*, 404 F.3d at 971.

<sup>49</sup> *United States v. Smith*, 751 F.3d 107, 118 (3d Cir. 2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 120.

<sup>52</sup> *Id.* at 121.

<sup>53</sup> 427 F.3d 881 (11th Cir. 2005).

read the “actual loss” provision in §2B1.1, Application Note 3(A)(I), together with Application Note 3(E), which discusses credits against loss.<sup>54</sup> According to the Eleventh Circuit, Application Note 3(E) inherently acknowledges that, in such situations, “there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods.”<sup>55</sup> Thus, the court held that individuals who “suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party” were victims under the guidelines.<sup>56</sup> The First, Second, Seventh, and Ninth Circuits joined the Eleventh in this interpretation of §2B1.1(b)(2).<sup>57</sup> Even among these courts, however, there appears to be some tension as to whether an “immediate” reimbursement by a third party would prevent a party from being considered a “victim,” as a recent Seventh Circuit decision acknowledges.<sup>58</sup>

As noted above, in 2009, the Commission partially resolved this circuit conflict for identity theft cases.<sup>59</sup> In expanding the definition of victim in identity theft cases, the Commission “determined that such an individual should be considered a ‘victim’ for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines.”<sup>60</sup>

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<sup>54</sup> *Id.* at 895.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *see also* United States v. Andrulonis, 476 Fed. Appx. 379, 383 (11th Cir. 2012).

<sup>57</sup> *See* United States v. Stepanian, 570 F.3d 51, 55-56 (1st Cir. 2009) (holding that “the most natural reading of the phrase ‘sustain any part of’ in the application notes’ definition of ‘victim’ does not have a temporal limit or otherwise indicate that losses must be permanent”; finding defrauded card holders to be victims even though their losses were reimbursed); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008) (stating that both *Yagar* and *Lee* held “that individuals who are ultimately reimbursed by their banks or credit card companies can be considered ‘victims’ of a theft or fraud offense for purposes of U.S.S.G. § 2B1.1(b)(2) if—as a practical matter—they suffered (1) an adverse effect (2) as a result of the defendant’s conduct that (3) can be measured in monetary terms”; finding that government failed to establish that credit card holders in question were “victims”); United States v. Panice, 598 F.3d 426, 433 (7th Cir. 2010) (declining to follow and distinguishing *Yagar* because the definition of victim in § 2B1.1 “contains no temporal restriction; nor does it state that the loss must be permanent,” and “the fact that the victims were eventually reimbursed does not negate their victim status”); United States v. Pham, 545 F.3d 712, 718 (9th Cir. 2008) (holding that “where a bank fraud offense results in initial losses by bank account holders of the funds in their accounts and a more permanent loss of those same funds by banks or other financial institutions when those institutions reimburse the account holders, both the account holders and the banks have suffered harms that are ‘pecuniary’ and ‘reasonably foreseeable’ for purposes of the Guidelines’ definition of ‘actual loss’”).

<sup>58</sup> *Compare* United States v. Loffredi, 718 F.3d 991, 993 (7th Cir. 2013) (holding that Application Note 1’s reference to losses that are “sustained” does not imply that a party must suffer the loss for “some definite duration” to become a victim), *with* United States v. Armstead, 552 F.3d 769, 782 (9th Cir. 2008) (“[A] loss that is reimbursed immediately does not amount to a pecuniary harm because the loss cannot be measured in monetary terms.”).

<sup>59</sup> USSG §2B1.1, comment. (n.4); USSG App. C, amend. 726 (eff. Nov. 1, 2009).

<sup>60</sup> *Id.* The significance of this change is illustrated by the fact that courts have found *ex post facto* violations when the revised definition of “victim” was applied to conduct occurring before the amendment.

## VI. COURT'S LOSS CALCULATION AND VICTIMS

In cases involving the general definition of victim, not only must an individual sustain actual loss (*i.e.*, reasonably foreseeable pecuniary harm) in order to be considered a victim, but that loss must also have been included in the court's loss calculation under the guidelines.<sup>61</sup> For example, in a mail fraud case in which checks made out to a charitable organization were stolen (but not cashed), the Tenth Circuit held that, although "the cost of sending in replacement checks was a reasonably foreseeable pecuniary harm of Defendant's conduct," the individual donors who wrote the checks were nonetheless not victims because "this harm was not included as part of the actual loss 'determined [by the court] under subsection (b)(1).'"<sup>62</sup> Similarly, the Ninth Circuit has held that "financial costs to bank account holders that are incurred in the course of resolving damage done to those accounts by a fraud scheme may be included in the calculation of actual loss under § 2B1.1(b)(1) and may qualify the individuals who incurred those costs as 'victims' of the offense under § 2B1.1(b)(2)."<sup>63</sup>

However, where such losses are not included in part of the actual loss amount determined under §2B1.1(b)(1), the individual account holders cannot be considered victims.<sup>64</sup> It follows that if the total loss calculation is zero, there are no victims for purposes of applying the enhancement at §2B1.1(b)(2).<sup>65</sup>

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*See, e.g., United States v. Myers*, 772 F.3d 213, 219-20 (5th Cir. 2014) (finding *ex post facto* violation when defendant received six-level enhancement for using identities of nursing home residents to file fraudulent tax returns and receive refunds; explaining that, pre-amendment, individuals would not have qualified as "victims" because they suffered no pecuniary harm).

<sup>61</sup> *See, e.g., United States v. Brown*, 771 F.3d 1149, 1162 (9th Cir. 2014) (reversing application of enhancement for more than 250 victims when 148 alleged victims were "not included in the loss calculation").

<sup>62</sup> *Leach*, 417 F.3d at 1106-07; *see also United States v. Skys*, 637 F.3d 146, 155 (2d Cir. 2011) (emphasizing district court's lack of findings; stating that trial court could estimate losses but could not similarly estimate victims); *Abiodun*, 536 F.3d at 169 (finding error when trial court considered lost time in counting victims but did not include monetary cost of such time in loss calculation); *United States v. Armstead*, 552 F.3d 769, 783 (9th Cir. 2008) (finding error when trial court counted fifty victims for purpose of enhancement but only considered losses of sixteen of those individuals in loss determination).

<sup>63</sup> *Pham*, 545 F.3d at 721.

<sup>64</sup> *Id.* at 722.

<sup>65</sup> *See, e.g., United States v. Miller*, 588 F.3d 560, 567-68 (8th Cir. 2009) ("We have already determined that the district court did not clearly err in determining that the government failed to prove any actual loss in this case. It necessarily follows that there were no "victims" within the meaning of USSG § 2B1.1(b)(2)(A)(i).").

In considering this issue, however, courts have held that the guidelines do not require that victims come forward to claim restitution to be counted under §2B1.1(b)(2) as the guideline enhancements serve different purposes than does the restitution statute.<sup>66</sup>

## VII. CORPORATE LOSSES, AGGREGATED FUNDS, AND JOINT ACCOUNT HOLDERS

Once actual loss has been established, the number of victims may still be at issue in the case of corporate or organizational losses or jointly held funds. For example, in *United States v. Icaza*,<sup>67</sup> the Eighth Circuit rejected the government’s argument that, when a defendant steals from multiple retail stores in the same chain, each store is a victim for purposes of §2B1.1(b)(2).<sup>68</sup> A company representative testified that, even though the thefts took place at individual Walgreens store locations, the corporation sustained the actual loss because the Walgreens’ corporate structure did not give individual stores ownership of a pro rata share of corporate assets.<sup>69</sup> Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).<sup>70</sup> In so holding, the court addressed an unpublished Eleventh Circuit opinion holding that individual members of an employee benefit plan could each be counted as victims.<sup>71</sup> That case was distinguishable, the Eighth Circuit determined, because each member of the benefit plan “owned a *pro rata* share of the plan assets and held them jointly and severally.”<sup>72</sup>

In terms of jointly held accounts, courts have held that when a husband and wife are co-owners of a bank account, they each may be counted separately as victims “because both sustain a ‘part of the actual loss.’”<sup>73</sup> Likewise, where money belonging to multiple individuals has been aggregated but each individual maintains his or her interest, each individual may be counted as a victim. Thus, in a case where thousands of parents and students each paid money for tickets to a sham Christmas pageant, it did not matter that

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<sup>66</sup> See *United States v. Bernadel*, 490 F. App’x 22, 29 (9th Cir. 2012); see also *United States v. Rodriguez*, 751 F.3d 1244, 1258 (11th Cir. 2014) (rejecting argument that number of victims for purposes of enhancement should have been limited to lenders that were to receive restitution).

<sup>67</sup> 492 F.3d 967 (8th Cir. 2007).

<sup>68</sup> *Id.* at 969; see also *United States v. Stubblefield*, 682 F.3d 502, 511-13 (6th Cir. 2012) (finding that theft from multiple Walmart stores was ultimately passed to the corporation).

<sup>69</sup> *Icaza*, 492 F.2d at 970.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (citing *United States v. Longo*, 184 F. App’x 910 (11th Cir. 2006)).

<sup>72</sup> *Id.* (quoting *Longo*, 184 F. App’x at 912).

<sup>73</sup> *United States v. Densmore*, 210 F. App’x 965, 971 (11th Cir. 2006) (quoting USSG §2B1.1, comment. (n.1)).

the schools had aggregated the money; each child or parent who had paid was a victim.<sup>74</sup> Finally, in at least one case, a court has held that a bank may be counted as a victim more than once if it is harmed both in its own capacity and in its role as a trustee for another.<sup>75</sup>

## **VIII. LATE-COMING CONSPIRATORS AND VICTIMS**

In general, an offender is only responsible for harm to individuals who become victims after the conspirator joined the conspiracy. In the case of a Ponzi scheme, however, an individual who invested in the scheme before a conspirator joined the scheme, and then reinvested after, may be counted as a victim in determining the late-coming conspirator's sentence.<sup>76</sup>

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<sup>74</sup> *United States v. Ellisor*, 522 F.3d 1255, 1275 (11th Cir. 2008); *see also* *United States v. Iovino*, 777 F.3d 578, 581 (2d Cir. 2015) (counting each member of a defrauded condominium association as a “victim” because each member had to pay higher common charges to make up association losses).

<sup>75</sup> *United States v. Beacham*, 774 F.3d 267, 276-77 (5th Cir. 2014).

<sup>76</sup> *See* *United States v. Setser*, 568 F.3d 482, 497 (5th Cir. 2009).