

# PRIMER



# ECONOMIC CRIME VICTIMS §2B1.1(b)(2)

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## **I. INTRODUCTION**

This primer provides a general overview of selected guideline issues related to victims in offenses sentenced under §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 of the relevant cases and concepts, it is not intended as a comprehensive compilation of the cases or analysis related to these issues.

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

Effective November 1, 2015, the Commission revised §2B1.1(b)(2) to incorporate substantial financial hardship to victims as a sentencing factor.<sup>1</sup> Specifically, §2B1.1(b)(2) now provides:

- (2) (Apply the greatest) If the offense—
  - (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
  - (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
  - (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

The 2015 amendment also added at Application Note 4(F) 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 suffering substantial harm to the victim’s ability to obtain credit.<sup>2</sup>

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<sup>1</sup> USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015). As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, was also revised to refer to 10, rather than 50, victims.

<sup>2</sup> §2B1.1, comment. (n.4(F)).

Prior to November 1, 2015, the victims table at §2B1.1(b)(2) provided for an enhancement based only on the number of victims (and mass marketing):

- (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>3</sup>

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

### 1. GENERAL DEFINITION

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The application notes to §2B1.1 generally define “victim” to include any person who sustained actual loss in the form of reasonably foreseeable pecuniary harm as well as any individual who sustained bodily injury.<sup>4</sup> Because most case law under §2B1.1 involves pecuniary harm, this primer does not cover bodily injury.

For purposes of this enhancement, “actual loss” means the “reasonably foreseeable pecuniary harm that resulted from the offense.”<sup>5</sup> “Pecuniary harm” is “harm that is monetary or that otherwise is readily measurable in money,”<sup>6</sup> and therefore does not include emotional distress, harm to reputation, or other non-economic harm.<sup>7</sup> “Reasonably foreseeable pecuniary harm” is “pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.”<sup>8</sup> “Person” as used in the definition of victim includes “individuals, corporations, companies,

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<sup>3</sup> §2B1.1 (eff. Nov. 1, 2012).

<sup>4</sup> §2B1.1, comment. (n.1) (defining “victim” to mean “(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>5</sup> §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 <https://www.ussc.gov/guidelines/primers>.

<sup>6</sup> §2B1.1, comment. (n.3(A)(iii)).

<sup>7</sup> *Id.*

<sup>8</sup> §2B1.1, comment. (n.3(A)(iii)).

associations, firms, partnerships, societies, and joint stock companies.”<sup>9</sup> A victim may also be a government or government agency.<sup>10</sup>

A special definition of “victim” applies in offenses involving identity theft and theft of undelivered U.S. mail, each of which is discussed below.

## **2. IDENTITY THEFT CASES**

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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 identification.<sup>11</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>12</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>13</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

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<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Cunningham*, 593 F.3d 726, 732 (8th Cir. 2010).

<sup>11</sup> §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>12</sup> §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>13</sup> §2B1.1, comment. (n.1.).

- (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>14</sup> a company name that includes the victim’s true name;<sup>15</sup> forged signatures on fraudulent checks;<sup>16</sup> personal telephone numbers;<sup>17</sup> leases;<sup>18</sup> bank account numbers;<sup>19</sup> forged documents created with correct information;<sup>20</sup> police badges;<sup>21</sup> credit card numbers;<sup>22</sup> emails including personal information;<sup>23</sup> and e-Bay accounts.<sup>24</sup> However, courts have found that the production of fraudulent tax returns does not constitute “another means of identification” for purposes of the so-called breeding enhancement.<sup>25</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>26</sup> The mere acquisition and possession of a means of identification does not qualify as using that

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<sup>14</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>15</sup> United States v. Johnson, 261 F. App’x 611, 613-14 (4th Cir. 2008).

<sup>16</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>17</sup> United States v. Geeslin, 236 F. App’x 885, 886-87 (5th Cir. 2007).

<sup>18</sup> United States v. Samet, 200 F. App’x 15, 23 (2d Cir. 2006).

<sup>19</sup> United States v. Norton, 176 F. App’x 992, 995-96 (11th Cir. 2006); United States v. Suchowolski, 838 F.3d 530, 532 (5th Cir. 2016); *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>20</sup> United States v. Newsome, 439 F.3d 181, 184-85 (3d Cir. 2006).

<sup>21</sup> United States v. Sash, 396 F.3d 515, 523-24 (2d Cir. 2005).

<sup>22</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>23</sup> United States v. Yummi, 408 F. App’x 537, 540 (3d Cir. 2010).

<sup>24</sup> *Craig*, 343 F. App’x at 769-70.

<sup>25</sup> See United States v. Thomsen, 830 F.3d 1049, 1072 (9th Cir. 2016); see also United States v. White, 571 F. App’x. 20, 26 (2d Cir. 2014) (summary order) (holding that, where the defendant was convicted of using others’ identifications to file false tax returns and to receive refunds, the district court did not find that using others’ identifications to file a false return and receive a refund involved obtaining *another* means of identification within the meaning of §2B1.1(b)(11)(C)(i)).

<sup>26</sup> §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.”).

means of identification for the purposes of §2B1.1.<sup>27</sup> A defendant only “uses” another person’s means of identification if the defendant “actively employ[s]” that person’s identification in the furtherance of some “criminal goal.”<sup>28</sup>

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 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>29</sup>

### **3. UNDELIVERED UNITED STATES MAIL**

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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,

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<sup>27</sup> See *United States v. Cardenas*, 598 F. App’x. 264,268 (5th Cir. 2015).

<sup>28</sup> *United States v. Minor*, 831, F.3d 601,605 (5th Cir. 2016) (quoting *United States v. Cardenas*, 598 F. App’x. 264,269 (5th Cir. 2015)).

<sup>29</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”).

transmitted, or possessed was undelivered United States mail.”<sup>30</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>31</sup>

## B. SUBSTANTIAL FINANCIAL HARDSHIP

Courts have generally applied a subjective standard to the determination of whether a victim has suffered “substantial financial hardship.”<sup>32</sup> The Seventh Circuit has provided the most extensive discussion of the enhancement thus far.<sup>33</sup> In *United States v. Minhas*, the court held that the fact that the hardship must be “substantial” introduces a relativity requirement as “the same dollar harm to one victim may result in a substantial financial hardship, while for another it may be only a minor hiccup.”<sup>34</sup>

While noting that simply dividing loss amount by number of victims would not be sufficiently individualized, the court did not go so far as to require specific evidence as to the loss and circumstance of each victim.<sup>35</sup> Rather, the court held that a district court could draw reasonable inferences about the substantiality of a loss for individuals “by virtue of [their] membership in a particular group . . . so long as a district court has reason to believe that the victims are in similar economic circumstances.”<sup>36</sup>

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<sup>30</sup> §2B1.1, comment. (n.4(C)(i)(I)). As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, was also revised effective November 1, 2015, to refer to 10, rather than 50, victims. See USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015).

<sup>31</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>32</sup> See e.g., *United States v. Poulson*, 871 F.3d 261, 267-68 (“We agree with the observation by our sister circuits that the determination of ‘substantial financial hardship’ is subject to the usual – and significant – degree of discretion afforded a district court during sentencing...[and] that discretion is crucial as §2B1.1’s increased emphasis on individual harm means that ‘substantial financial hardship’ is measured on a sliding scale that is also fairly subjective.”).

<sup>33</sup> See generally *United States v. Minhas*, 850 F.3d 873 (7th Cir. 2017).

<sup>34</sup> *Id.* at 877-78.

<sup>35</sup> *Id.* at 878.

<sup>36</sup> *Id.*



The issue of causation has also been the subject of disputes. The causation question has concerned both the level of evidence needed to establish causation<sup>37</sup> and how direct the causation must be.<sup>38</sup> Courts have declined to read a “reasonable foreseeability” standard into the provisions of §2B1.1(b)(2).<sup>39</sup>

### III. 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>40</sup> There is no specific manner in which a district court must make this determination.<sup>41</sup> However, “[t]he Guidelines do not . . . allow a district court to estimate the number of victims to enhance a sentence under §2B1.1(b)(2).”<sup>42</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>43</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>44</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>45</sup> In

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<sup>37</sup> See *United States v. Brandriet*, 840 F.3d 558 (8th Cir. 2016) (considering whether court clearly erred in finding sufficient evidence established defendant’s fraud caused victim’s inability to afford living expenses).

<sup>38</sup> *United States v. Davis*, No. 15-CR-0247(1) (PJS/SER), 2017 U.S. Dist. LEXIS 61325 (D. Minn. Apr. 21, 2017) (holding that enhancement did not apply where evidence did not establish fraud as “direct” cause of company’s hardships).

<sup>39</sup> See *United States v. Stewart*, 728 F. App’x 651, 654 (9th Cir. 2018) (“Nothing in the plain language of either §2B1.1(b)(2) itself or the accompanying commentary requires a district court to make a finding that the loss must be reasonably foreseeable. If the Sentencing Commission had intended for this to be a requirement, it would have said so explicitly.”)

<sup>40</sup> See, e.g., *United States v. Arnaout*, 431 F.3d 994, 999 (7th Cir. 2005).

<sup>41</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”).

<sup>42</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>43</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>44</sup> *Arnaout*, 431 F.3d at 999.

<sup>45</sup> *United States v. Pham*, 545 F.3d 712, 720-21 (9th Cir. 2008).

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>46</sup> Each interview “contained references to more than 100 people who performed work but did not receive food.”<sup>47</sup> This was sufficient to establish the requisite numbers for the enhancement.<sup>48</sup> Some circuits courts have held that a married couple holding an investment jointly may be counted as two individual victims.<sup>49</sup>

Undelivered United States mail is subject to a “special rule” that potentially affects the number of persons who will qualify as victims. Pursuant to the pre-November 1, 2015, 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>50</sup> The amendments promulgated in 2015 changed the special rule to create a presumption of the involvement of “at least 10 victims” rather than 50 victims.<sup>51</sup> In a case involving “a housing unit cluster 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>52</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>53</sup> Although the construction will not change, the amendments promulgated in 2015 changed the language in the enhancement.

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<sup>46</sup> *United States v. Fahnbullah*, 752 F.3d 470 (D.D.C. 2014).

<sup>47</sup> *Id.* at 481.

<sup>48</sup> *Id.* at 482.

<sup>49</sup> *See, e.g., United States v. Ryan*, 806 F.3d 691 (2d Cir. 2015); *United States v. Harris*, 718 F.3d 698 (7th Cir. 2013); *United States v. Densmore*, 210 F. App’x 965 (11th Cir. 2006) (unpub).

<sup>50</sup> §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>51</sup> USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015).

<sup>52</sup> §2B1.1, comment. (n.4(C)(ii)(II)); *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>53</sup> *See Niewald*, 185 F. App’x at 841; *United States v. Telles*, 272 F. App’x 415, 418 (5th Cir. 2008).

#### IV. REIMBURSEMENT AND VICTIMS

Several circuits have addressed whether the victim enhancement applies in cases in which the victim of a fraud scheme has been reimbursed by a bank, insurer or other third party. Because the circuits are split on this issue, whether an individual has sustained an actual loss and met the guideline definition of victim depends on the circuit and the specific facts of each case.

In 2009, the Commission partially resolved the circuit conflict on reimbursement, discussed *infra*, by expanding the definition of victim in identity theft cases.<sup>54</sup> Specifically, the Commission determined that an individual who has been reimbursed in an identity theft case “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>55</sup>

The issue of reimbursement 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>56</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>57</sup> The owners of the stolen checks only temporarily lost funds and were ultimately reimbursed by their banks.<sup>58</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>59</sup> The court stated that “the monetary loss [was] short-lived and immediately covered by a third-party [and thus there has not] been ‘actual loss’ or ‘pecuniary harm.’”<sup>60</sup> The court additionally explained, “the account holders here suffered no adverse effect as a practical matter from

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<sup>54</sup> §2B1.1, comment. (n.4); USSG App. C, amend. 726 (eff. Nov. 1, 2009).

<sup>55</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. *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>56</sup> 404 F.3d 967 (6th Cir. 2005).

<sup>57</sup> *Id.* at 968.

<sup>58</sup> *Id.* at 971.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

[the defendant's] conduct.”<sup>61</sup> *Yagar*'s holding has been followed by the Third, Fifth, and Eighth Circuits.<sup>62</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>63</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>64</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>65</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>66</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>67</sup>

Other jurisdictions, however, have rejected *Yagar*'s approach altogether. In *United States v. Lee*,<sup>68</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 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>69</sup> According to the Eleventh

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<sup>61</sup> *Id.*

<sup>62</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 F. App'x 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>63</sup> *Yagar*, 404 F.3d at 971.

<sup>64</sup> *United States v. Smith*, 751 F.3d 107, 118 (3d Cir. 2014).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 120.

<sup>67</sup> *Id.* at 121.

<sup>68</sup> 427 F.3d 881 (11th Cir. 2005).

<sup>69</sup> *Id.* at 895.

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>70</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>71</sup> The First, Second, Seventh, and Ninth Circuits joined the Eleventh in this interpretation of §2B1.1(b)(2).<sup>72</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>73</sup>

## V. 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>74</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

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

<sup>71</sup> *Id.*; *see also* United States v. Andrulonis, 476 F. App’x 379, 383 (11th Cir. 2012).

<sup>72</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>73</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>74</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”).

court] under subsection (b)(1).”<sup>75</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>76</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>77</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>78</sup>

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>79</sup>

## VI. 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>80</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>81</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

<sup>75</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>76</sup> *Pham*, 545 F.3d at 721.

<sup>77</sup> *Id.* at 722.

<sup>78</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 §2B1.1(b)(2)(A)(I).”).

<sup>79</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); *United States v. Binkholder*, 832 F.3d 923 (8th Cir. 2016) (holding that “the CVRA is intended to protect the rights of crime victims and ensure that they receive proper restitution for their injuries, the Guidelines are meant to assess the culpability of the defendant.”).

<sup>80</sup> 492 F.3d 967 (8th Cir. 2007).

<sup>81</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).



pro rata share of corporate assets.<sup>82</sup> Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).<sup>83</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>84</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>85</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>86</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 the schools had aggregated the money; each child or parent who had paid was a victim.<sup>87</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>88</sup>

## VII. 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>89</sup>

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<sup>82</sup> *Icaza*, 492 F.2d at 970.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing *United States v. Longo*, 184 F. App’x 910 (11th Cir. 2006)).

<sup>85</sup> *Id.* (quoting *Longo*, 184 F. App’x at 912).

<sup>86</sup> *United States v. Densmore*, 210 F. App’x 965, 971 (11th Cir. 2006) (quoting §2B1.1, comment. (n.1)).

<sup>87</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>88</sup> *United States v. Beacham*, 774 F.3d 267, 276-77 (5th Cir. 2014).

<sup>89</sup> *See United States v. Setser*, 568 F.3d 482, 497 (5th Cir. 2009).