

Primer



Economic Crime Victims



Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of selected guideline issues related to victims of economic crime offenses sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. GUIDELINE ENHANCEMENT FOR VICTIMS

Section 2B1.1(b)(2) provides for sentencing enhancements based upon both the number and certain characteristics of the victims. Section 2B1.1(b)(2) provides:

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing;¹ 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.²

Application Note 4(F) provides a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship to a victim.³ These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial

¹ This primer discusses the application of §2B1.1(b)(2) as it relates to economic crime victims. For more information regarding application of the mass-marketing enhancement, see U.S. SENT’G COMM’N, PRIMER ON COMPUTER CRIMES 12 (2025), <https://www.uscg.gov/guidelines/primers/computer-crimes>.

² U.S. SENT’G COMM’N, GUIDELINES MANUAL §2B1.1(b)(2) (Nov. 2025) [hereinafter USSG].

³ In 2023, the Commission added a new adjustment at §4C1.1 (Adjustment for Certain Zero-Point Offenders), which provides for a decrease of two offense levels for defendants who do not have any criminal history points and meet other specified criteria, including that the “defendant did not personally cause substantial financial hardship.” USSG §4C1.1(a)(6). This adjustment was made retroactive. *See* USSG App. C, amend 825 (effective Nov. 1, 2023). Section 4C1.1(b)(3) instructs courts to “consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1” to determine whether the defendant’s conduct resulted in substantial financial hardship. USSG §4C1.1(b)(3). Although the same factors are considered, §4C1.1(a)(6) is a defendant-based provision (“defendant did not personally cause substantial financial hardship”), while §2B1.1(b)(2) is an offense-based provision (“offense . . . resulted in substantial financial hardship”). USSG §§4C1.1(a)(6), 2B1.1(b)(2); *see also* United States v. Hanson, 124 F.4th 1013, 1018 (6th Cir. 2025) (ineligibility for reduction under §4C1.1 can properly be “based on factors outside of the non-exhaustive list” in the application note).

changes to employment, such as postponing retirement plans; making substantial changes to living arrangements, such as relocating to a less expensive home; and suffering substantial harm to the victim’s ability to obtain credit.⁴

A. DEFINITION OF VICTIM UNDER §2B1.1

1. General Definitions

Application Note 1 to §2B1.1 defines “victim” as any person who sustained actual loss in the form of reasonably foreseeable pecuniary harm or any individual who sustained bodily injury as a result of the offense.⁵ Because most case law under §2B1.1 involves pecuniary harm, this primer does not cover bodily injury.

“Person” as used in the definition of victim includes “individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.”⁶ A victim also may be a government or government agency.⁷

“ ‘Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense.”⁸ “Pecuniary harm” is “harm that is monetary or that otherwise is readily measurable in money” and therefore does not include “emotional distress, harm to reputation, or other non-economic harm.”⁹ “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.”¹⁰

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

⁴ USSG §2B1.1, comment. (n.4(F)).

⁵ USSG §2B1.1, comment. (n.1).

⁶ *Id.*; *see, e.g.*, *United States v. Aderinoye*, 33 F.4th 751, 756–57 (5th Cir. 2022) (relying on the commentary to reject the defendant’s claim that a limited liability corporation could not be a victim under the guideline).

⁷ *See, e.g.*, *United States v. Herrera*, 974 F.3d 1040, 1049–50 (9th Cir. 2020) (state government agencies who suffer losses that are included in the actual loss calculation are considered as victims); *United States v. Cunningham*, 593 F.3d 726, 732 (8th Cir. 2010) (eight Iowa counties, the state of Iowa, the City of Des Moines, and the federal government all were properly counted as victims).

⁸ USSG §2B1.1(b)(1)(Note C(i)); *see also* USSG App. C, amend 827 (effective Nov. 1, 2024) (creating Notes to the loss table at §2B1.1(b)(1) “to ensure consistent loss calculation across circuits”); *see also, e.g.*, *United States v. Massam*, 751 F.3d 1229, 1233 (11th Cir. 2014) (collecting cases and 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* U.S. SENT’G COMM’N, PRIMER ON LOSS CALCULATION UNDER §2B1.1 (2026), <https://www.ussc.gov/guidelines/primers/loss-calculation>.

⁹ USSG §2B1.1(b)(1)(Note C(iii)).

¹⁰ USSG §2B1.1(b)(1)(Note C(iv)).

2. Identity Theft Cases

In cases that involve a means of identification, the definition of a “victim” includes, in addition to the definition in Application Note 1 described above, “any individual whose means of identification was used unlawfully or without authority,” regardless of whether the individual sustained a pecuniary loss.¹¹ The guidelines incorporate the statutory definition of “means of identification” from 18 U.S.C. § 1028(d)(7) except 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).¹²

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

[A]ny 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(e)).¹³

Decisions from various circuits provide additional examples of “means of identification”: mortgage loan numbers;¹⁴ a company name that includes the victim’s true

¹¹ USSG §2B1.1, comment. (n.4(E)). The Commission added this guidance to, among other things, recognize victims whose identification was used but who were reimbursed by a third party. *See* USSG App. C, amend. 726 (effective Nov. 1, 2009) (“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.”).

¹² USSG §2B1.1, comment. (n.1); *see also* *United States v. Suchowolski*, 838 F.3d 530, 533 (5th Cir. 2016) (“actual individual” includes a deceased individual); *United States v. Philidor*, 717 F.3d 883, 886 (11th Cir. 2013) (*per curiam*) (same).

¹³ 18 U.S.C. § 1028(d)(7); *see also* 18 U.S.C. § 1029(e)(1) (defining “access device” to include “any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier”).

¹⁴ *United States v. Cooks*, 589 F.3d 173, 185–86 (5th Cir. 2009).

name;¹⁵ forged signatures on fraudulent checks;¹⁶ personal telephone numbers;¹⁷ bank account numbers;¹⁸ forged documents created with correct information;¹⁹ police badge numbers;²⁰ credit card numbers;²¹ e-Bay accounts;²² Medicare reimbursement claim numbers;²³ and debit-type Electronic Benefits Transfer (EBT) cards for food stamps.²⁴ However, the Ninth Circuit has found that the production of fraudulent tax returns does not constitute another “means of identification.”²⁵

In addition to determining what constitutes a “means of identification” in the context of identity theft cases, courts also have considered the scope of the definition of “victim” provided in Application Note 4(E)(ii) to §2B1.1: “any individual whose means of identification was used unlawfully or without authority.”²⁶ More specifically, courts have considered what is required for a defendant to have *used* an individual’s means of identification. Courts have held that the mere acquisition and possession of a means of identification does not qualify as using that means of identification for the purposes of

¹⁵ United States v. Weaver, 866 F.3d 882, 884 (8th Cir. 2017) (citing United States v. Johnson, 261 F. App’x 611, 613–14 (4th Cir. 2008)).

¹⁶ *Id.*; *see also* United States v. Porter, 745 F.3d 1035, 1042 (10th Cir. 2014) (forging another’s signature constitutes use of that person’s name and qualifies as a means of identification); United States v. Blixt, 548 F.3d 882, 886 (9th Cir. 2008) (same).

¹⁷ United States v. Wedd, 993 F.3d 104, 122–23 (2d Cir. 2021); *see also* United States v. Jesurum, 819 F.3d 667, 671 (2d Cir. 2016) (Mobile Station ID and Electronic Serial Numbers assigned to individuals by cell phone providers are “means of identification”).

¹⁸ United States v. Constantinescu, 147 F.4th 299, 315 (2d Cir. 2025) (debit card and PIN numbers).

¹⁹ *See, e.g.*, United States v. Gladden, 78 F.4th 1232, 1245–46 (11th Cir. 2023) (altered “already-signed prescription” is “means of identification”); United States v. Kleiner, 765 F.3d 155, 158–60 (2d Cir. 2014); United States v. Newsome, 439 F.3d 181, 184–87 (3d Cir. 2006).

²⁰ United States v. Sash, 396 F.3d 515, 523–24 (2d Cir. 2005).

²¹ United States v. Oates, 427 F.3d 1086, 1089–90 (8th Cir. 2005) (credit card account number issued in the name of a fictitious business but tied to an actual individual’s credit report and social security number).

²² United States v. Craig, 343 F. App’x 766, 770 (3d Cir. 2009).

²³ United States v. Ramirez, 979 F.3d 276, 282 (5th Cir. 2020) (citing United States v. Kalu, 936 F.3d 678, 681 (5th Cir. 2019)) (Medicare information and unique Medicare health care claim number created from fraudulent health claims); *see also* United States v. Moparty, 11 F.4th 280, 300–01 (5th Cir. 2021) (same conclusion regarding private insurance health care claims).

²⁴ United States v. Barrogo, 59 F.4th 440, 445 (9th Cir. 2023) (EBT card is an access device used as a means of identification).

²⁵ United States v. Thomsen, 830 F.3d 1049, 1072 (9th Cir. 2016). *But see* United States v. Johnson, 658 F. App’x 244, 247 (6th Cir. 2016) (court did not plainly err in applying enhancement because, similar to the creation of unique health claim numbers in offenses involving fraudulent health claims, filing of fraudulent tax returns causes the production of “tax returns with document locator numbers”).

²⁶ USSG §2B1.1, comment. (n.4(E)(ii)); *see also* USSG App. C, amend. 726 (effective 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.”).

§2B1.1.²⁷ “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.’ ”²⁸

For example, the Eleventh Circuit held that a district court erred in applying a 4-level enhancement involving the number of victims pursuant to §2B1.1(b)(2)(B) based on the fact that the defendant, a doctor’s office assistant, obtained and sold 141 patients’ means of identification to a co-conspirator.²⁹ The district court found that the unlawful or unauthorized transfer or sale of the patients’ identifying information, without more, qualified as “use.”³⁰ Accordingly, it applied the enhancement based on all 141 patients even though the government presented evidence that 12 patients’ information had been used to obtain fraudulent credit card accounts.³¹ The Eleventh Circuit reversed, holding that Application Note 4 did not permit application of the enhancement based on “mere transfer” of identifying information:

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.³²

In identity theft cases, an individual “should be considered a ‘victim’ for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend

²⁷ See *United States v. Rabiou*, 721 F.3d 467, 473–74 (7th Cir. 2013).

²⁸ *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)); see also, e.g., *Moparty*, 11 F.4th at 300–01 (defendant used means of identification of patients to generate fraudulent health care claims).

²⁹ *United States v. Hall*, 704 F.3d 1317, 1319–23 (11th Cir. 2013) (citing USSG §2B1.1(b)(2)).

³⁰ *Id.* at 1319–20.

³¹ *Id.* at 1320.

³² *Id.* at 1322; see also *United States v. Corbett*, 921 F.3d 1032, 1040 (11th Cir. 2019) (applying *Hall*; “the district court erred when it counted every individual whose information was illegally downloaded as a ‘victim,’ regardless of whether that individual’s information was ever fraudulently ‘used’ for any purpose to which it was adapted as a means of identification”); *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”).

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.”³³

3. Cases Involving Undelivered United States Mail

The guidelines also include a special definition of “victim” in cases where “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.”³⁴ 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.”³⁵

B. NUMBER OF VICTIMS

1. In General

The government must prove the number of victims by a preponderance of the evidence.³⁶ The district court may consider a variety of types of evidence to determine the number of victims.³⁷ That said, the Ninth Circuit has held “[t]he Guidelines do not . . . allow a district court to ‘estimate’ the number of victims to enhance a sentence under

³³ USSG App. C, amend. 726 (effective Nov. 1, 2009); *see also* USSG §2B1.1, comment. (n.4(E)); *United States v. Sandoval*, 668 F.3d 865, 869–70 (7th Cir. 2011) (“victims” include those who spent time talking to credit card issuer about fraudulent charges).

³⁴ USSG §2B1.1, comment. (n.4(C)(i)).

³⁵ *Id.* The Ninth Circuit rejected a claim that this definition was inconsistent with the text of §2B1.1 and declined to construe “victim” in this context to require pecuniary loss. *See United States v. Gonzalez Becerra*, 784 F.3d 514, 518–19 (9th Cir. 2015) (summarizing case law on this issue); *see also United States v. Bradford*, 480 F. App’x 214, 215 (4th Cir. 2012) (per curiam) (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); *United States v. Alcantara*, 436 F. App’x 105, 109–10 (3d Cir. 2011) (all individuals whose mail was taken qualified as victims); *United States v. Valdez*, 392 F. App’x 662, 664 (10th Cir. 2010) (enhancement was properly applied based on testimony and other evidence regarding conduct by postal employee). Courts have held that *senders* of mail that is later stolen, however, generally do not qualify as victims under this provision. *See, e.g., United States v. Leach*, 417 F.3d 1099, 1106–07 (10th Cir. 2005) (donors whose checks were stolen but not cashed were not “victims” for purposes of §2B1.1(b)(2) because loss was not part of actual loss determined by court without evidence of type and amount of loss to donors).

³⁶ *See, e.g., United States v. Page*, 163 F.4th 385, 402 (6th Cir. 2025); *United States v. Ford*, 784 F.3d 1386, 1397–98 (11th Cir. 2015) (total number of victims had been proven by a preponderance of the evidence); *United States v. Pham*, 545 F.3d 712, 720 (9th Cir. 2008); *United States v. Arnaout*, 431 F.3d 994, 999 (7th Cir. 2005) (court could not find “proof by a preponderance of the evidence” that at least 50 donors accounted for the loss attributed to the defendant).

³⁷ *See, e.g., Page*, 163 F.4th at 402 (affirming enhancement for ten or more victims where government presented evidence of more than 18,000 individuals who donated to fraudulent organization and a sample of six who testified that they were misled by organizer); *Ford*, 784 F.3d at 1397–98 (using government summary charts and IRS agent’s testimony to determine number of victims); *United States v. Norman*, 776 F.3d 67, 81 (2d Cir. 2015) (district court properly imposed enhancement for involvement of at least 50 victims based on defendant’s “explicit testimony at trial”).

§2B1.1(b)(2).”³⁸ For example, the Ninth Circuit remanded for resentencing a case in which the enhancement was not supported by evidence showing that 50 or more persons suffered actual loss in the form of pecuniary harm.³⁹

The Seventh Circuit follows the same standard. For example, in a case involving a conspiracy to commit fraud through a false charity, the Seventh Circuit required some proof that the stolen donations attributable to the defendant could be traced to over 50 victims.⁴⁰ The court noted that, while the offense involved \$17 million of stolen donations from over 17,000 donors, there was insufficient evidence to demonstrate that at least 50 donors accounted for the amount attributed to the defendant.⁴¹

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 three interviews with Liberian town leaders.⁴² Each interview “contained references to more than 100 people who performed work but did not receive food.”⁴³ The court held that this evidence was sufficient to establish the requisite numbers for the enhancement.⁴⁴

2. Number of Victims in Cases Involving Undelivered United States Mail

Cases involving undelivered United States mail are subject to a “special rule” regarding the number of victims based on the receptacle involved.⁴⁵ Pursuant to Application Note 4(C)(ii)(I), a case that involves “a United States Postal Service relay box,

³⁸ *United States v. Showalter*, 569 F.3d 1150, 1160 (9th Cir. 2009) (“The Guidelines provide that a sentence enhancement under §2B1.1(b)(1) (enhancement for ‘monetary loss’), may be based on an ‘estimate’ of the monetary loss. The Guidelines do not, however, allow a district court to ‘estimate’ the number of victims to enhance a sentence under §2B1.1(b)(2).” (citations omitted)).

³⁹ *Pham*, 545 F.3d at 719–22 (spreadsheet itemizing banks’ losses did not include information about “costs suffered by individual bank account holders” and “cannot serve as the basis” for including the holders as victims).

⁴⁰ *See Arnaout*, 431 F.3d at 999. 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), with 10, 50, and 250 victims representing breakpoints for increasing the offense level. *See* U.S. SENT’G COMM’N, GUIDELINES MANUAL §2B1.1 (Nov. 2012).

⁴¹ *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 “[a] donor whose charitable contribution was included in the district court’s finding of actual loss under §2B1.1(b)(1) is . . . by definition[] a victim within the meaning of §2B1.1(b)(2)” because “[t]here is no suggestion in this definition or any other part of the Guidelines that the victim must be linked with a specific part of the loss”).

⁴² *United States v. Fahnbulleh*, 752 F.3d 470, 481–82 (D.C. Cir. 2014).

⁴³ *Id.* at 481.

⁴⁴ *Id.* at 482; *see also* *United States v. Lacerda*, 958 F.3d 196, 214 (3d Cir. 2020) (“Victim statements are reliable when they ‘involve[] matters within the knowledge of each declarant and were made in the course of interviews by one or more law enforcement officials.’ ” (quoting *United States v. Smith*, 751 F.3d 107, 116 (3d Cir. 2014))).

⁴⁵ USSG §2B1.1, comment. (n.4(C)(ii)).

collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.”⁴⁶ Pursuant to Application Note 4(C)(ii)(II), a case involving a receptacle that contains multiple mailboxes, such as a housing unit cluster box, “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” receptacle or cluster box.⁴⁷ Circuit courts have reached different conclusions about when the special rule applies. Some courts have held that the special rule applies unless the defendant rebuts the presumption with specific proof.⁴⁸ However, at least one court has concluded that the phrase “shall be considered” in Application Note 4(C)(ii)(I) operates as a rule and does not create a rebuttable presumption.⁴⁹ Another circuit concluded that while Application Note 4(C)(ii)(I) created a presumption, “some credible proof is required to go beyond the presumption” because “each provision directs the sentencing court to draw a different presumption regarding the number of victims.”⁵⁰

⁴⁶ USSG §2B1.1, comment. (n.4(C)(ii)(I)).

⁴⁷ USSG §2B1.1, comment. (n.4(C)(ii)(II)); *see also* United States v. Niewald, 185 F. App’x 839, 840–41 (11th Cir. 2006) (per curiam) (applying the presumption in Application 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).

⁴⁸ *See* United States v. Telles, 272 F. App’x 415, 418 (5th Cir. 2008) (per curiam) (“The burden was on [the defendant] to prove a lower number of victims, and the district court did not clearly err in finding that [the defendant] failed to do so.”); *Niewald*, 185 F. App’x at 841 (“Defendant’s protestations to the contrary notwithstanding, reference to the postal inspector’s testimony provides no rebuttal of the presumption set out in the special rule.”); *see also* United States v. Tejas, 868 F.3d 1242, 1245–46 (11th Cir. 2017) (per curiam) (“[W]e conclude that application of the commentary’s special rule in this case is inconsistent with the plain text of the number-of-victims enhancement, and is thus not authoritative. As the district court recognized, the evidence in this case was clear that [the defendant] came into contact with a single piece of undelivered mail—the package he took from the front seat of the delivery vehicle. So the offense involved at most two victims—the mail carrier and the addressee on the package (assuming the addressee was not in fact [the defendant]). Because the evidence and the court’s own findings are clear that the offense involved fewer than ten victims, such that §2B1.1(b)(2)(A)(i) by its own terms does not apply, application of the special rule’s mandate of ten victims is inconsistent with the plain text of the guideline. We recognize that application of the special rule may be reasonable in cases where there is any doubt as to the number of victims involved in the offense. But the rule can produce erroneous and contrary results when the number of victims is readily determined, as it is here.” (citation omitted)).

⁴⁹ *See* United States v. Cornejo, 650 F. App’x 379, 380 (9th Cir. 2016) (stating that the text of Application Note 4(C)(ii)(I) did not support the defendant’s “contention that it is *merely* a rebuttable presumption to be used when the actual number of victims is unknown” (emphasis added)).

⁵⁰ United States v. Moore, 733 F.3d 161, 164–67 (5th Cir. 2013) (“[W]e conclude that the plain language of Application Note 4(C)(ii)(I) specifies a *presumption* of at least 50 victims in a *case* that involves any number—whether one or more—of the specific types of Postal Service receptacles listed in that note. Proof of more than 50 victims is permitted, but the Note does not authorize the *presumption* of more.”).

C. SUBSTANTIAL FINANCIAL HARDSHIP

Courts generally have applied a subjective standard to the determination of whether a victim has suffered “substantial financial hardship.”⁵¹ For example, the Ninth Circuit held that §2B1.1(b)(2) “requires the sentencing court to determine whether the victims suffered a loss that was significant in light of their individual financial circumstances.”⁵²

The Seventh Circuit has held that the fact that the hardship must be “substantial” introduces a relativity requirement, as “[t]he same dollar harm to one victim may result in a substantial financial hardship, while for another it may be only a minor hiccup.”⁵³ 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 circumstances of each victim.⁵⁴ Rather, the Seventh Circuit 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.”⁵⁵

Questions of causation often arise when assessing financial hardship. In this context, courts have considered both the amount of evidence needed to establish causation⁵⁶ and

⁵¹ See *e.g.*, *United States v. Day*, 117 F.4th 622, 626 (5th Cir. 2024) (because list of factors in guideline is not exhaustive, “substantial financial hardship” can “be demonstrated another way, as long as the government shows that the loss ‘significantly impacts the victim’s resources’ ”); *United States v. Poulson*, 871 F.3d 261, 268 (3d Cir. 2017) (“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] [t]hat 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.”); see also *United States v. Aderinoye*, 33 F.4th 751, 757 (5th Cir. 2022) (affirming a “substantial financial hardship” enhancement where a company’s “six-month setback” “was not ruinous” but “not minor or inconsequential, either”). Additionally, in the context of §4C1.1, courts have applied similar subjective standards. See *supra* note 3.

⁵² *United States v. George*, 949 F.3d 1181, 1184, 1186 (9th Cir. 2020) (fees of between \$1,000–\$3,000 were “not an insubstantial sum” for distressed homeowner-victims of a fraudulent loan-modification program); see also *United States v. Iwanyawu*, 69 F.4th 17, 25 (1st Cir. 2023) (using an individualized approach to determine that the victim suffered substantial financial hardship); *United States v. Skouteris*, 51 F.4th 658, 672 (6th Cir. 2022) (enhancement “requires a showing that the loss was ‘more than minimal or trivial’ as gauged by the victim’s specific financial circumstances” (citation omitted)); *United States v. Castaneda-Pozo*, 877 F.3d 1249, 1252 (11th Cir. 2017) (per curiam) (“[T]he inquiry is specific to each victim.”).

⁵³ *United States v. Minhas*, 850 F.3d 873, 876–77 (7th Cir. 2017) (also finding that working class victims suffered more than \$2,000 in losses “that would take years to recover”).

⁵⁴ *Id.* at 878.

⁵⁵ *Id.*

⁵⁶ See, *e.g.*, *United States v. Brandriet*, 840 F.3d 558, 561–62 (8th Cir. 2016) (per curiam) (concluding that the district court did not clearly err in finding sufficient evidence established defendant’s fraud caused victim’s inability to afford living expenses).

how direct the causation must be.⁵⁷ Some courts have declined to read a “reasonable foreseeability” standard into the provisions of §2B1.1(b)(2).⁵⁸

III. REIMBURSEMENT AND VICTIMS

As noted above, in identity theft cases, an individual can be counted as a victim even if reimbursed.⁵⁹ Some circuits have addressed whether the victim enhancement applies more generally in cases where the victim has been reimbursed by a bank, insurer, or other third party. The Sixth Circuit concluded that a defendant’s argument that “the district court wrongly included individuals whose losses were reimbursed when it counted the victims” was “legally meritless,” noting that “even an individual who has been reimbursed” can be considered a victim for the purposes of §2B1.1(b)(2).⁶⁰ The Third Circuit also has held that “one example of cognizable pecuniary harm is the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts.”⁶¹

IV. 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 also must have been included in the court’s loss calculation under the guidelines.⁶² For example, in a case involving operation of a Ponzi scheme where a number

⁵⁷ See, *e.g.*, *United States v. Piper*, No. 20-1867, 2021 WL 5088709, at *3 (6th Cir. Nov. 2, 2021) (“[W]hile [the defendant] may not be directly responsible for the state of [the victim’s] finances, the financial health of the business in conjunction with the harm caused by [the defendant] bears directly on the applicability of the enhancement.”); *United States v. Davis*, No. 15-CR-0247(1), 2017 WL 1423178, at *2–3 (D. Minn. Apr. 21, 2017) (enhancement did not apply where evidence did not establish fraud as “direct” cause of company’s hardships).

⁵⁸ See, *e.g.*, *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.”). *But see* *United States v. Skouteris*, 51 F.4th 658, 673 (6th Cir. 2022) (enhancement requires a showing of both proximate and but-for cause); *United States v. George*, 949 F.3d 1181, 1187 (9th Cir. 2020) (“The government suggests that section 2B1.1(b)(2) does not require foreseeability, but proximate cause is a well-established principle of the common-law, and we presume that the Sentencing Commission did not mean to dispense with it without saying so.”).

⁵⁹ See *supra* Section II.A.2 and note 33.

⁶⁰ *United States v. Igboba*, 964 F.3d 501, 512–13 (6th Cir. 2020) (citing USSG App. C, amend. 726 (effective Nov. 1, 2009)).

⁶¹ *United States v. Smith*, 751 F.3d 107, 119 (3d Cir. 2014); see also *United States v. Stepanian*, 570 F.3d 51, 55 (1st Cir. 2009) (there is no “temporal limit” to “indicate losses must be permanent” because although reimbursed, “card holders bore first part of the total losses before funds were restored” and “the immediate unavailability of [the funds] is ‘reasonably foreseeable pecuniary harm’”).

⁶² See USSG §2B1.1, comment. (n.1) (“‘Victim’ means . . . any person who sustained any part of the actual loss determined under subsection (b)(1) . . .”); see also, *e.g.*, *United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020) (“counting as victims only those whose losses are included in the loss calculation” (citing

of victims had “at least some communication or contact with [one of the defendants],” the Ninth Circuit held that, “because these additional . . . victims were not included in the loss calculation under §2B1.1(b)(1), they cannot increase his total number of victims under §2B1.1(b)(2)(C).”⁶³

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).”⁶⁴ However, the court held, where such costs are not included in part of the actual loss amount determined under §2B1.1(b)(1), the individual account holders cannot be considered victims.⁶⁵ 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).⁶⁶

The guideline enhancements for loss and victims serve different purposes than the restitution statute. Courts have held that the guidelines do not require that victims come forward to claim restitution to be counted under §2B1.1(b)(2).⁶⁷

V. CORPORATE LOSSES, AGGREGATED FUNDS, AND JOINT ACCOUNT HOLDERS

Once actual loss has been established, the number of victims still may be at issue when the case involves corporate or organizational losses or jointly held funds. For example, 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

United States v. Brown, 771 F.3d 1149, 1162 (9th Cir. 2014)). *But see Smith*, 751 F.3d at 119 n.10 (“[The defendant] contends that the account holders cannot be victims because their monetary losses were not specifically calculated and counted as part of the District Court’s loss calculation. The Second, Ninth, and Tenth Circuits have all found that a party may be considered a victim only if the party’s loss was included in the court’s overall loss estimate . . . Here, [the defendant] fails to satisfy [the plain error] standard because he has not established an error that was plain. We note that, unlike the Second, Ninth, and Tenth Circuits, we have not spoken as to how district courts must account for the number of victims in the loss calculation, and we decline to do so here.”).

⁶³ *Brown*, 771 F.3d at 1155, 1162 (citing *United States v. Armstead*, 552 F.3d 769, 780–81 (9th Cir. 2008)); *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).

⁶⁴ *United States v. Pham*, 545 F.3d 712, 721 (9th Cir. 2008).

⁶⁵ *Id.* at 722.

⁶⁶ *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).”).

⁶⁷ *See United States v. Binkholder*, 832 F.3d 923, 929 (8th Cir. 2016) (detailing differences between sentencing and restitution); *United States v. Gossi*, 608 F.3d 574, 580–82 (9th Cir. 2010) (same); *see also United States v. Rodriguez*, 751 F.3d 1244, 1257–58 (11th Cir. 2014) (rejecting argument that number of victims for purposes of enhancement should have been limited to lenders that were to receive restitution).

§2B1.1(b)(2).⁶⁸ A company representative testified that, even though the thefts took place at individual Walgreens store locations, the corporation sustained the actual loss because Walgreens' corporate structure did not give individual stores ownership of a pro rata share of corporate assets.⁶⁹ Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).⁷⁰

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."⁷¹ 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.⁷² 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.⁷³

⁶⁸ United States v. Icaza, 492 F.3d 967, 969–70 (8th Cir. 2007); *see also* United States v. Stubblefield, 682 F.3d 502, 511 (6th Cir. 2012) (theft from multiple Walmart stores ultimately was passed to the corporation).

⁶⁹ *Icaza*, 492 F.3d at 970.

⁷⁰ *Id.*

⁷¹ United States v. Ryan, 806 F.3d 691, 694 (2d Cir. 2015); *see also* United States v. Poulson, 871 F.3d 261, 270 n.8 (3d Cir. 2017) (explaining that the district court could have counted married couples as separate victims where losses came from joint accounts); United States v. Harris, 718 F.3d 698, 703 (7th Cir. 2013) (married couple holding an investment jointly may be counted as two individual victims).

⁷² United States v. Ellisor, 522 F.3d 1255, 1275 (11th Cir. 2008); *see also* United States v. Barson, 845 F.3d 159, 167 (5th Cir. 2016) (per curiam) (district court did not err in counting Medicare beneficiaries in addition to patients because "Application Note 4(E) of U.S.S.G. §2B1.1 defines 'victim' in a way that encompasses the Medicare beneficiaries"); United States v. Iovino, 777 F.3d 578, 581 (2d Cir. 2015) (per curiam) (counting individual tenants of a defrauded condominium association as victims because each member had to pay higher common charges to make up association losses).

⁷³ United States v. Beacham, 774 F.3d 267, 276–77 (5th Cir. 2014) ("When the bank is acting as a trustee, the real victim is not the bank, but the beneficiary of the trust.").

VI. LATE-COMING CONSPIRATORS

In general, a defendant is responsible for harm only to those individuals who are defrauded *after* the defendant joined the conspiracy.⁷⁴ 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.⁷⁵

⁷⁴ See, e.g., *United States v. Verdeza*, 69 F.4th 780, 787 (11th Cir. 2023) (defendant, who joined the conspiracy after it began, was responsible for a lower total loss amount).

⁷⁵ See *United States v. Setser*, 568 F.3d 482, 497 (5th Cir. 2009) (“[T]he rationale for counting the victims a second time is that a new offense occurred when the investors’ money was plowed back into the conspiracy[.]”).