

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699



May 11, 2016

The Honorable Charles Grassley, Chairman
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

On behalf of the United States Sentencing Commission ("Commission"), I am writing in response to your letter dated April 19, 2016. The Commission shares your goal of ensuring appropriate punishment for offenders convicted of fraud offenses, particularly when the victims are vulnerable, like the elderly.

One of the purposes underlying the enactment of the Sentencing Reform Act of 1984 was a concern that sentences for certain types of economic crimes, such as fraud, and embezzlement, were too lenient, particularly when compared to sentences imposed with the substantially equivalent crime of larceny. Consistent with that legislative intent, the Commission has made economic crimes a high priority. As part of a multi-year study on fraud crimes, the Commission held an Economic Crimes Symposium in 2013 where Commissioners engaged in substantive discussions on the fraud guidelines with a wide range of experts and practitioners.

The Commission has long-emphasized the harm to the victims in setting penalties for offenders sentenced under the economic crime guideline. We believe that persons who specifically commit serious fraud offenses against multiple, vulnerable victims should receive more serious sentences that account for the seriousness of the offense. In doing so, the Commission has ensured that the federal sentencing guidelines allow for enhanced sentences both in cases involving multiple, vulnerable victims suffering substantial financial harm as well as cases involving multiple victims who were vulnerable due to age or other factors, even if there was no substantial financial harm.

As background, the multi-tiered victim enhancement at §2B1.1 was first added to the guidelines in 2001 as part of a comprehensive overhaul of the economic crime guideline. Focusing on the harm to the victims in sentencing economic crime offenders, the Commission added a 4-level sentencing enhancement. *See* USSG App. C, amend. 617 (eff. Nov. 1, 2001). The Commission subsequently added a 6-level federal sentencing enhancement two years later during the 2003 amendment cycle. *See* USSG App. C, amend. 647 (eff. Jan. 25, 2003). The

Commission also sought to ensure that sentence enhancements for fraud offenses against multiple seniors were thoroughly punished. The Commission first determined that the initial 2-level adjustment under §3A1.1(b)(1) should continue to apply in any case involving vulnerable victims including the elderly. It also decided that the application of this 2-level adjustment for vulnerable victim results in sufficient punishment where the offender received the higher tiers of the victim enhancement from §2B1.1.

Since that time, the Commission has remained focused on the seriousness of these offenses, especially cases involving multiple, vulnerable victims. Just last year, the Commission revised the victims table in §2B1.1(b)(2) to specifically incorporate “substantial financial hardship” to even one victim as a factor in sentencing economic crime offenders. Prior to this amendment, there was no enhancement unless the offense involved 10 or more victims. This revision reflects the Commission’s perspective that the guideline should place greater emphasis on the severity of harm that even one victim suffers as a result of the offense. Consistent with the Commission’s overall goal to ensure that the federal sentencing guidelines adequately account for victim harm and offender culpability, the recent change ensures that an offense that results in any victim suffering substantial financial harm will be eligible for a greater sentencing length.

As you know, there are various mechanisms within the guidelines to address these types of cases. Defendants are currently subject to an increased sentence based upon the number and nature of the harm to victims under §2B1.1(b)(2). With respect to elderly victims, under §3A1.1(b)(1), the guidelines provide for a separate 2-level increase in the federal sentencing range “if the defendant knew or should have known that a victim of the offense was a vulnerable victim.” This 2-level adjustment applies cumulatively with the victim enhancement found at §2B1.1. An additional 2-level adjustment is also available at §3A1.1(b)(2) where (1) the defendant received the 2-level vulnerable victim adjustment at §3A1.1(b)(1); and (2) the offense involved a large number of vulnerable victims. However, if defendant already received an increase for multiple victims under §2B1.1(b)(2), he will not receive an additional increase under §3A1.1(b)(2). While these provisions are complex, they provide that fraudsters who prey on the elderly will have an enhanced sentence and that the guidelines are both proportional and appropriate where multiple victims are involved.

In response to your letter, the Commission examined data from fiscal year 2015, the most recent full year of Commission data, in order to determine which offenders *might have been eligible* for the additional 2-level enhancement at §3A1.1(b)(2) for an offense involving a large number of vulnerable victims. Due to limitations in the data provided to the Commission, we cannot determine the actual number of victims in each case. However, we do know that in Fiscal Year 2015 a total of 59 offenders received:

- 1) a 4- or 6-level increase under §2B1.1(b)(2) for offenses involving 50 or more, or 250 or more victims, respectively, and
- 2) an additional 2-levels under §3A1.1(b)(1) because the defendant knew or should have known that a victim of the offense was a vulnerable victim.

These 59 offenders accounted for less than one percent (0.8%) of all offenders sentenced under §2B1.1 (Theft, Property Destruction, and Fraud) in 2015. Nearly equal proportions of these

offenders were sentenced within the guideline range (30.5%), below the range with a government sponsored departure (35.6%), or to a non-government sponsored below range sentence (33.9%). None of these 59 offenders received an above range sentence. The Commission, however, does not collect data regarding the extent to which motions for departures or variances are sought but not granted, and therefore cannot state how often, if at all, the government sought sentences above the range in these cases.

For those sentenced within the guideline range, the average sentence was 157 months. The average sentence for these 59 offenders was 93 months, which is nearly twice as long as the average sentence of 50 months for offenders with 4- or 6-level increases under subsection §2B1.1(b)(2). Overall, the average sentence for all offenders sentenced under §2B1.1(b)(1) was 24 months.

We thank you for your continued leadership and input to strengthen the Guidelines and the work of the Commission. The Commission has a long tradition of working with the Senate Judiciary Committee on policy proposals relating to the guidelines, and we recognize the central role of the Judiciary Committee in both oversight and enacting federal criminal law. If you have any questions, please do not hesitate to contact me or the Commission's Director of Legislative and Public Affairs, Christine Leonard, at (202) 502-4519 or cleonard@ussc.gov.

Sincerely,

A handwritten signature in black ink that reads "Patti B. Saris". The signature is written in a cursive, flowing style. The first letter "P" is large and loops around the first part of the name. The "B" is also large and loops around the "S". The "Saris" part is written in a more fluid, connected cursive.

Patti B. Saris
Chair