

PROPOSED AMENDMENT #1: TELEMARKETING FRAUD AMENDMENT OPTIONS

The Telemarketing Fraud Prevention Act of 1998 directs the Commission in section 6(b), paragraph (1) to promulgate or amend existing guidelines (and policy statements, if appropriate) to provide for “substantially increased penalties” for persons convicted of offenses described in section 2326 of title 18, United States Code, in connection with the conduct of telemarketing fraud, and in paragraph (2) to submit to Congress an explanation of each action taken under paragraph (1) and any additional policy recommendations.

The directive provides a list of requirements in carrying out this section. In brief, these requirements are as follows:

- (1) ensure that the guidelines and policy statements promulgated pursuant to (b)(1) reflect the seriousness of telemarketing fraud offenses;
- (2) provide an additional sentencing enhancement if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States;
- (3) provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims over the age of 55, are affected by a fraudulent scheme(s);
- (4) ensure that any amendment promulgated or amended is reasonably consistent with other relevant statutory directives and with other guidelines;
- (5) account for any aggravating or mitigating circumstances that might justify upward or downward departures;
- (6) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in 18 U.S.C. § 3553(a)(2); and
- (7) take any other action the Commission considers necessary to carry out this section.

The proposed amendments to carry out these directives are organized as follows:

- I. For the directive to provide substantially increased penalties for persons convicted of 18 U.S.C. § 2326 offenses:

Option 1 - increase the mass marketing enhancement from 2 levels to 3 or 4 levels.

Option 2 - increase the mass marketing enhancement to 3 or 4 levels if the offense involved telemarketing fraud under 18 U.S.C. § 2325.

Option 3 - increase the mass marketing enhancement to 3 or 4 levels if the defendant is subject to an enhanced penalty under 18 U.S.C. § 2326.

II. For the directive to provide an additional appropriate sentencing enhancement if the offense involved sophisticated means:

Option 1 - broaden the sophisticated concealment enhancement to cover sophisticated means (do this by way of a specific offense characteristic).

Option 2 - broaden the sophisticated concealment enhancement to cover sophisticated means (do this by way of an application note).

III. For the directive to provide an additional appropriate enhancement for cases involving a large number of vulnerable victims:

Option 1 - amend the vulnerable victim guideline to provide an increase of 3 or 4 levels if the number of vulnerable victims is “ten or more” or “large”.

Option 2 - amend the vulnerable victim guideline to invite an upward departure if the offense involved a large number of vulnerable victims.

I. DIRECTIVE LANGUAGE: PROVIDE "SUBSTANTIALLY INCREASED PENALTIES" FOR PERSONS CONVICTED OF 18 U.S.C. § 2326 OFFENSES.

Option 1: Increase the magnitude of the mass-marketing enhancement submitted to Congress on May 1, 1998, from 2 levels to 3 or 4 levels.

Option 1 - Amendment Language:

[Please note that there is a technical amendment proposed in options 1-3. The amendment proposes to change subsection (b)(7) to subsection (b)(3) and redesignate the remaining subsections accordingly. Typically, the Commission places enhancements without floor offense levels before enhancements with floor offense levels. However, when the mass-marketing amendment was drafted, it was inserted as (b)(7), after the floor offense levels. This amendment changes that designation. The amendment also proposes a corresponding redesignation of the application note, from Note 20 to Note 3.]

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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~~(7)~~(3) If the offense was committed through mass-marketing, increase by ~~2~~ levels **[Option 1a: 3 levels] [Option 1b: 4 levels]**.

~~(3)~~(4) * * *

~~(4)~~(5) * * *

~~(5)~~(6) * * *

~~(6)~~(7) * * *

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Commentary

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Application Notes:

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~~20-3~~. "Mass-marketing," as used in subsection (b)(3), means a plan, program, promotion, or

campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

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Background:

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[Subsection (b)(3)(A) implements, in a broader form, the instruction to the Commission in Section 6(b)(1) of Public Law 105-184. Pursuant to the instruction, this subsection provides for substantially increased penalties for a defendant who engages in the conduct of telemarketing fraud, or in some other form of mass-marketed fraud.]

Option 1 - Characteristics:

- Penalties for all mass marketing offenses, including telemarketing fraud, are increased.
- Proportionality between similar offenses is maintained because the Commission treats telemarketing fraud as one among a variety of types of mass marketing fraud.
- Telemarketing Fraud Prevention Act only reflects concern with telemarketing fraud penalties. Promulgation of this option might still subject the Commission to criticism that the Commission needs to increase penalties for telemarketing fraud offenses above other offenses.

Option 1 - Sentencing Impact¹:

Option 1a (+3 mass mkt & +2 sophist conclmt):

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 31 months

Option 1b (+4 mass mkt & +2 sophist conclmt):

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 34 months

¹ All analyses report the average sentence length under the current guidelines, the May 1998 amendments, and the proposed options for the 121 telemarketing fraud cases. For additional information, refer to the *Analysis of Fraud Cases* section of this report.

I. DIRECTIVE LANGUAGE: PROVIDE "SUBSTANTIALLY INCREASED PENALTIES" FOR PERSONS CONVICTED OF 18 U.S.C. § 2326 OFFENSES.

Option 2: Increase the magnitude of the mass marketing enhancement to 3 or 4 levels if the offense involved telemarketing fraud within the meaning of 18 U.S.C. § 2325.

Option 2 - Amendment Language:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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~~(7)~~(3) If (A) the offense was committed through telemarketing, as defined in 18 U.S.C. § 2325, increase by **[Option 2a: 3 levels]** **[Option 2b: 4 levels]**; or (B) If the offense was committed through mass-marketing **other than telemarketing**, increase by 2 levels.

~~(3)~~(4) * * *

~~(4)~~(5) * * *

~~(5)~~(6) * * *

~~(6)~~(7) * * *

Commentary

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Application Notes:

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20.3. "Mass-marketing," as used in subsection (b)~~(7)~~(3)(B), means a plan, program, promotion, or campaign that is conducted through solicitation by ~~telephone~~, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a ~~telemarketing~~ **mailing** campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

Background:

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Subsection (b)(3)(A) implements, in a broader form, the instruction to the Commission in Section 6(b)(1) of Public Law 105-184. Pursuant to the instruction, this subsection provides for substantially increased penalties for a defendant who engages in the conduct of telemarketing fraud.

Subsection (b)(4)(B) implements the instruction to the Commission in Section 110512 of Public Law 103-322.

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Option 2 - Characteristics:

- Addresses more specifically the congressional directive by referencing 18 U.S.C. § 2325.
- Mass marketing definition is premised on the statutory definition of telemarketing, except that mass marketing can be conducted by using, for example, the mail. It is not clear that using the telephone to commit a fraud is significantly more serious than use of another medium such that it warrants an additional increase in sentence.
- Proportionality concerns both in limiting the enhancement to section 2325 offenses and in treating telemarketing fraud differently than mass marketing.
- Option 2b proposes in total a four-level increase for telemarketing fraud, which mimics the original House-passed version of the telemarketing fraud legislation. However, this version was not enacted.

Option 2 - Sentencing Impact:

**Option 2a (+3 telemkt or +2 mass mkt
+2 sophist conclmnt)**

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 31 months

**Option 2b (+4 telemkt or +2 mass mkt
+2 sophist conclmnt)**

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 34 months

I. DIRECTIVE LANGUAGE: PROVIDE "SUBSTANTIALLY INCREASED PENALTIES" FOR PERSONS CONVICTED OF 18 U.S.C. § 2326 OFFENSES.

Option 3: Increase the magnitude of the enhancement to 3 or 4 levels if the defendant is subject to an enhancement penalty under 18 U.S.C. § 2326.

Option 3 - Amendment Language:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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~~(7)~~(3) If (A) the defendant is subject to an enhanced penalty under 18 U.S.C. § 2326(2), increase by [Option 3a: 3 levels] [Option 3b: 4 levels]; or (B) if subdivision (A) does not apply, and the offense was committed through mass-marketing, increase by 2 levels.

~~(3)~~(4) * * *

~~(4)~~(5) * * *

~~(5)~~(6) * * *

~~(6)~~(7) * * *

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Commentary

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Application Notes:

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~~20~~3. Subsection (b)(3)(A) provides an additional penalty for cases in which (A) the defendant is convicted of an offense under 18 U.S.C. §§ 1028, 1029, 1341, 1342, 1343, or 1344 (or a conspiracy to commit such an offense), in connection with the conduct of telemarketing; and (B) that offense (i) victimized ten or more persons over the age of 55; or (ii) targeted persons over the age of 55. See 18 U.S.C. § 2326.

For purposes of subsection (b)(3)(A), “the defendant is subject to an enhanced penalty under 18 U.S.C. § 2326(2)” means that the statutory penalty applicable to the defendant includes an enhancement under 18 U.S.C. § 2326(2).

"Mass-marketing," as used in subsection (b)(7)(3)(B), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

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Background:

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Subsection (b)(3), together with an adjustment from §3A1.1(b) for vulnerable victim, implement, in a broader form, the instructions to the Commission in Sections 6(b)(1) and 6(c)(3) of Public Law 105-184. Subsection (b)(3) provides for substantially increased penalties for a defendant who engages in the conduct of telemarketing fraud, as well as for other fraud offenses that involve large numbers of victims. However, subsection (b)(3) does not address the factor of victim vulnerability. This factor is addressed by §3A1.1(b).

Subsection (b)(4)(B) implements the instruction to the Commission in Section 110512 of Public Law 103-322.

Option 3 - Characteristics:

- Implements specific requirements of the directive: provide substantially increased penalties and provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims over the age of 55, are affected by a fraudulent scheme.
- Application more dependent on prosecutorial charging and bargaining decisions.
- Potential double counting issue because section 2326(2) refers to more than one victim.
- Raises concern as mentioned above regarding whether telemarketing fraud is more serious than other mass marketing fraud.
- Use of phrase "subject to" not well understood by all. Proposed Application Note 3 addresses possible misunderstanding of the use of that phrase.

Option 3 - Sentencing Impact:

**Option 3a (+3 § 2326 or +2 mass mkt
+2 sophist conclmnt):**

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 28 months

**Option 3b (+4 § 2326 or +2 mass mkt
+2 sophist conclmnt):**

Current: 21 months
May 1998 USSC Amendment: 28 months
Proposed option: 28 months

II. DIRECTIVE LANGUAGE: "PROVIDE AN ADDITIONAL APPROPRIATE SENTENCING ENHANCEMENT IF THE OFFENSE INVOLVED SOPHISTICATED MEANS, INCLUDING BUT NOT LIMITED TO SOPHISTICATED CONCEALMENT EFFORTS SUCH AS PERPETRATING THE OFFENSE FROM OUTSIDE THE UNITED STATES."

Option: Broaden the sophisticated concealment enhancement submitted to Congress on May 1, 1998, to cover "sophisticated means." Define sophisticated means to include all the conduct that is now encompassed within the sophisticated concealment enhancement plus complex or intricate conduct comprising the offense itself. Add application notes to address overlap between (1) the sophisticated means enhancement and the enhancement for more than minimal planning in §2F1.1(b)(2); and (2) the sophisticated means enhancement and the obstruction adjustment in §3C1.1.

Option 1 implements the "sophisticated means" enhancement in the guideline itself rather than in the commentary, unlike the sophisticated means enhancement in the tax guidelines. The approach used in Option 2 is stylistically similar to the sophisticated means enhancement in the tax guidelines in that Option 2 spells out the enhancement in the commentary. Both options are meant to achieve the same result.

Option 1 - Amendment Language: Carries out the option in a specific offense characteristic

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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- (5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated ~~concealment~~ means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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14. For purposes of subsection (b)(5)(B), "United States " means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), "sophisticated ~~concealment~~means" means especially complex or especially intricate offense conduct *pertaining to the execution or concealment of an offense. For example, in a telemarketing fraud scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means.* ~~in which deliberate steps are taken to make the offense, or its extent, difficult to detect.~~ Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts *also* ordinarily ~~would indicate~~*indicate* sophisticated ~~concealment~~*means*.

In order to avoid unwarranted double-counting, do not apply an enhancement under subsection (b)(5) if (A) subsection (b)(2) applies; and (B) the only conduct that forms the basis for the application of (b)(5) is the same conduct which forms the basis for application of subsection (b)(2).

Similarly, do not apply §3C1.1 (Obstruction of Justice) if (A) subsection (b)(5) applies; and (B) the only conduct which is the basis for the application of §3C1.1 is the same conduct which is the basis for application of (b)(5).

Option 2 - Amendment Language: Carries out the option in an application note

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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- (b) Specific Offense Characteristics

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~~(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense [otherwise] involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

- (5) *If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.*

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Commentary

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Application Notes:

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~~14. For purposes of subsection (b)(5)(B), "United States " means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.~~

~~For purposes of subsection (b)(5)(C), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank account ordinarily indicates sophisticated concealment.~~

14. For purposes of subsection (b)(5), "sophisticated means" means the following:

(A) Especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts, or operating a fraudulent scheme from offices in multiple jurisdictions, ordinarily indicates sophisticated means.

(B) Committing a substantial part of a fraudulent scheme from outside the United States.

"United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(C) The defendant's relocating, or participating in relocating, of a fraudulent scheme to another jurisdiction in order to evade law enforcement or regulatory officials.

15. In order to avoid unwarranted double-counting, do not apply an enhancement under subsection (b)(5) if (A) subsection (b)(2) applies; and (B) the only conduct that forms the basis for the application of (b)(5) is the same conduct which forms the basis for application of subsection (b)(2).

Similarly, do not apply §3C1.1 (Obstruction of Justice) if (A) subsection (b)(5) applies; and (B) the only conduct which is the basis for the application of §3C1.1 is the same conduct which is the basis for application of (b)(5).

Characteristics of Both Options:

- Proposed amendment option tracks the directive's language by using the term "means" instead of "concealment"
- Captures common behavior of telemarketing fraud defendants who do not relocate their scheme but establish their scheme in multiple jurisdictions.
- Potentially addresses the DOJ view of sophisticated means as it relates to planning.
- After adding the new enhancement for sophisticated concealment in the fraud guideline, the Commission conformed the definition in the tax guidelines. Will we now similarly conform the definition in the tax guidelines to the broadened enhancement in the fraud guideline?
- Overlaps with more than minimal planning.

Sentencing Impact of Both Options:

This covers a broader spectrum of conduct which currently is not reliably documented in the PSR offense conduct. Consequently, no estimate of the impact of this can be determined with confidence.

III. DIRECTIVE LANGUAGE: "PROVIDE AN ADDITIONAL APPROPRIATE ENHANCEMENT FOR CASES IN WHICH A LARGE NUMBER OF VULNERABLE VICTIMS, INCLUDING BUT NOT LIMITED TO VICTIMS DESCRIBED IN [18 U.S.C. § 2326(2)] ARE AFFECTED BY A FRAUDULENT SCHEME OR SCHEMES."

Option 1: Amend §3A1.1(b) to provide an increase of 3 or 4 levels if the number of vulnerable victims is "10 or more" or "large".

Option 1 - Amendment Language:

§3A1.1. Hate Crime Motivation or Vulnerable Victim

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(b) (1) If the defendant knew or should have known that a victim of the offense was a **vulnerable victim**, ~~unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct,~~ increase by **2** levels.

(2) If (A) subsection (b)(1) applies, and (B) the offense involved [ten or more] [a large number of] vulnerable victims, increase the offense level determined in subsection (b)(1) by [**Option 1a: 1** additional level] [**Option 1b: 2** additional levels].

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Commentary

Application Notes:

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2. For purposes of subsection (b), "**vulnerable victim**" ~~includes~~ **means any a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age [(including a victim of a telemarketing fraud scheme who is over the age of 55 years)], physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.**

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case ~~wherein which~~ the defendant marketed an ineffective cancer cure or in a robbery ~~wherein which~~ the defendant selected a handicapped victim. But it would not apply in a case ~~wherein which~~ the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the factor which makes the person a vulnerable victim is incorporated in the offense guideline. offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age. An enhancement under §2F1.1(b)(3)(A) (relating to telemarketing fraud) shall not be construed to specifically incorporate victim vulnerability. [PLEASE NOTE: This last sentence is necessary only in conjunction with options I.2 and I.3 (pertaining to the directive to increase substantially the penalties for telemarketing fraud).]

Option 1 - Characteristics:

- The “ten or more” language tracks section 2326. However, the “ten or more” language in section 2326 refers to “ten or more persons over 55 years of age”, which is different from ten vulnerable victims. Raises question of whether emergency authority is sufficiently broad to permit such an enhancement.
- The directive uses the language “a large number.” What is “a large number”? Disparity concerns vs. court discretion.
- Proposed Application Note provides an option stating that vulnerability due to age includes victim of telemarketing scheme over the age of 55. This assumes that all telemarketing victims over 55 years old are inherently vulnerable. Some courts may interpret this to suggest that, for any offense, all victims over 55 years old are inherently vulnerable. This appears inconsistent with the philosophy underlying §3A1.1.

Option 1 - Sentencing Impact:

Option 1a (+3 vuln vic +2 mass mkt +2 sophist conclmnt):

Current: 21 months
 May 1998 USSC Amendment: 28 months
 Proposed option: 31 months

Option 1b (+4 vuln vic + 2mass mkt +2 sophist conclmnt):

Current: 21 months
 May 1998 USSC Amendment: 28 months
 Proposed option: 33 months

Option 2: Amend §3A1.1 to add commentary inviting an upward departure if the offense involved a large number of vulnerable victims.

Option 2 - Amendment Language:

§3A1.1. Hate Crime Motivation or Vulnerable Victim

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- (b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by **2** levels.

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Commentary

Application Notes:

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5. *If [the defendant knew or should have known that] the offense involved a large number of vulnerable victims, an upward departure may be warranted.*

Option 2 - Characteristics:

- Gives the court departure language to hang its hat on.
- The court already has ability to depart based on this factor.
- An encouraged upward departure may not meet the directive requirement to provide “an additional appropriate enhancement.”

Option 2 - Sentencing Impact:

Whether sentencing court will depart can not be assessed.