

ISSUES FOR COMMENT - TELEMARKETING FRAUD

The Commission is examining the characteristics of telemarketing fraud offenses, the statutory enhancement for telemarketing fraud at 18 U.S.C. § 2326, and whether current adjustments in §2F1.1 (Fraud), §3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in §5K2.0 - §5K2.18 (Other Grounds for Departures) provide adequate punishment for defendants convicted of telemarketing fraud offenses.

In conjunction with its examination, the Commission invites comment on the following issues:

1. **Telemarketing fraud generally.** Should telemarketing fraud offenses be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss? What types of harms unique to telemarketing fraud are not adequately addressed by the guidelines? Should §2F1.1 be amended to provide an increase of [2-8] levels to correspond to the application of the statutory enhancement in 18 U.S.C. § 2326?

2. **Multiple victims.** Do the guidelines adequately address fraud offenses that impact large numbers of victims? If not, how should they be amended to address this concern? Should, for example, the fraud guideline include a table providing tiered offense level increases that correspond to the number of victims involved in the offense? If so, what are the appropriate offense level increases and corresponding ranges of number of victims? Should such an enhancement be based on the total number of victims or the number of vulnerable victims? If the enhancement is based on vulnerability, is it more appropriate to amend §3A1.1 to reflect multiple victims?

3. **Revictimization.** Commission analysis indicates that telemarketing fraud often involves repeat victimization of persons previously victimized, typically through “reloading” (a process in which a telemarketing offender targets victims whose names are included on lists of individuals previously contacted and victimized) or “recovery services” schemes (a process in which an offender poses as a government agent or other individual in a position to help the victim recover, for a fee, the losses incurred as a result of the initial telemarketing scheme). Commission analysis further indicates that district courts often enhance the sentence under §3A1.1 (Vulnerable Victim) in these cases. Does §3A1.1 adequately address revictimization concerns? To ensure consistent application of this enhancement, should the Commission amend the guideline or commentary to ensure that §3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization? Alternatively, should the Commission promulgate additional specific offense characteristics addressing this aspect of telemarketing fraud?

4. **Departures.** Currently, Application Note 10 of §2F1.1 encourages upward departures when monetary loss inadequately measures the harm and seriousness of fraudulent conduct. Should some of the listed departure factors be converted into specific offense characteristics? For example, should the fact that “the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma” (subsection (c)), or “the offense involved the knowing endangerment of the solvency of one or more victims”(subsection (f)), or other factors be made into specific enhancements under the fraud guideline? If so, what offense level weight

should be assigned to these factor(s)? In addition, should the Commission promulgate any currently specified grounds for departure listed in Chapter 5K as specific offense characteristics? If so, what weight should be given these factor(s)?

5. **Sophisticated means.** Elsewhere in these proposed amendments, the Commission has (1) included, on a phased-in basis, an enhancement for more-than-minimal planning in proposed revisions of the loss table applicable for fraud offenses, and (2) proposed a new enhancement for “sophisticated concealment” conduct (defined to include perpetrating an offense from outside U.S. borders). In this regard, the Senate-passed version of a telemarketing fraud bill (H.R. 1847, 105th Cong., 1st Sess.) directs the Commission to “provide an additional appropriate sentencing enhancement if [sic] offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.” The Commission invites comment on whether the proposed amendments adequately address concerns expressed in the congressional directive. If not, how should the enhancement be augmented to most effectively implement such a potential directive?

6. **Other factors.** Are there additional factors that the Commission should address, either by specific offense characteristics, guideline commentary, or departure provisions, to provide appropriate punishment for telemarketing offenses?