Sentencing Impact of Amendment Options - Telemarketing Fraud Cases

The Policy Team investigated a sample of fraud cases in order to assess the effects of the mass marketing and sophisticated concealment amendments to the guidelines submitted to Congress on May 1. First, a previous working group selected 326 fiscal year 1997 fraud cases received at the Commission by June 1, 1997, in which the vulnerable victim enhancement was applied. Of these 326 cases, 115 were identified as involving telemarketing behavior[1]. Also, during fiscal year 1997, there were 1,266 cases in which the offenders were convicted of either 18 U.S.C. §1341 (Fraud and Swindle) or 1342 (Fictitious Name or Address), which are the prevailing mail fraud statutes, and 715 cases that were convicted of 18 U.S.C. § 1343 (Fraud by wire, radio or television). A five percent sample (n=95) of these cases was investigated for telemarketing and mass marketing behavior. Therefore, a total of 210 cases were analyzed to assess the effects of the various amendment options.

There are multiple options available to the Commission in order to address the congressional directives in the Telemarketing Fraud Prevention Act. Table 1 is a summary of the effects on sentences of these options on the telemarketing cases in the sample. Table 2 shows the effect on the final offense level of these options on the telemarketing cases in the sample.

Current (Guidelines prior to May 1998 Amendments)

The 210 fraud cases contained 121 cases where the offenders exhibited telemarketing behavior. The telemarketing cases in the sample had an average sentence of 21 months, with sentences ranging from non-prison (38 cases, 31.4 percent) to 168 months (two cases). Two cases were at the statutory maximum (60 months for both cases).

May 1998 Commission Amendments (Two-level Mass Marketing and Two-level Sophisticated Concealment Enhancements)

The estimated average sentence for the 121 telemarketing fraud cases after applying the enhancements adopted by the Commission is 28 months, an increase of 7 months (or 33.3 percent) over the current sentence of the offenders. Under this option, none of the telemarketing cases would receive a non-prison sentence. The low sentence would be 4 months and the high would be 210 months. Five of the telemarketing cases would be at the applicable statutory maximuma (four at 60 months, one at 120 months).

Only 25 (20.7 percent) of the 121 telemarketing fraud cases were judged to involve "sophisticated concealment" under the new enhancement. Seven (28 percent) of the 25 cases with sophisticated concealment behavior involved offenders relocating, or participating in

---

[1] Subsequent to the June 1, 1997 data, an additional 102 fraud cases involving the vulnerable victim enhancement were received by the Commission. It is expected that 36 of these cases would involve telemarketing behavior. Thus the 115 cases are considered a sample of telemarketing cases.

relocating a fraudulent scheme to another jurisdiction to evade law enforcement, one (4.0 percent) case committed a substantial part of a scheme outside the United States, and 17 (68.0 percent) cases involved using other means of sophisticated concealment (such as hiding assets or transactions through fictitious entities, corporate shells or offshore bank accounts).

Because the Commission's May 1998 mass marketing amendment is broader than telemarketing fraud, an additional nine cases were found to be subject to the mass marketing enhancement. Although the most common mass marketing technique was via telemarketing, other methods included the use of the mail, magazines, television, newspapers and trade shows. Because the vast majority of mass marketing cases have telemarketing behavior (121 of 130 or 93.1 percent), this report will only give the effect of the proposed amendments on telemarketing cases. It is estimated that 180 cases of mass marketing not including telemarketing in the fiscal year 1997 data file would be affected by the mass marketing amendments[2]. However, at this time, there is not sufficient information available to analyze the effect on these cases.

Directive I, Option 1 (Three or Four-level Mass Marketing and Two-level Sophisticated Concealment Enhancements)

Option 1a: Three-Level Mass Marketing and Two-Level Sophisticated Concealment Enhancements:

The average sentence for the 121 telemarketing cases under this sub-option (listed as Directive I, Option 1a in Table 1) is 31 months, an increase of 10 months (47.6 percent) over the current average and 3 months (10.7 percent) over the May 1998 Commission amendments.

Option 1b: Four-Level Mass Marketing and Two-Level Sophisticated Concealment Enhancements:

The average sentence for the telemarketing cases under this sub-option (listed as Directive I, Option 1b in Table 1) is 34 months. This is an increase of 13 months (61.9 percent) over the current sentence and 6 months (21.4 percent) over the May 1998 Commission amendments.

Directive I, Option 2 (Three or Four-level Telemarketing/Two-level Mass Marketing and Two-level Sophisticated Concealment Enhancements)

Option 2a: Three-Level Telemarketing/Two-Level Mass Marketing and Two-Level Sophisticated Concealment Enhancements:

---

[2] This figure is estimated by extrapolating the findings of the five percent random sample to the entire population of cases. It is also estimated that 149 telemarketing cases would be affected by extrapolating the telemarketing sample to the entire 1997 fiscal year.

The average sentence for the 121 telemarketing cases under the first sub-option of this option (listed as Directive I, Option 2a in Table 1) is 31 months, an increase of 10 months (47.6 percent) over the current average and 3 months (10.7 percent) over the May 1998 Commission amendments.

Option 2b: Four-Level Telemarketing/Two-Level Mass Marketing and Two-Level Sophisticated Concealment Enhancements:

The average sentence for the telemarketing cases under the second sub-option of this option (listed as Directive I, Option 2b in Tables 1-4) is 34 months. This is an increase of 13 months (61.9 percent) over the current sentence and 6 months (21.4 percent) over the May 1998 Commission amendments.

Directive I, Option 3 (Three or four-level for Statutorily Enhanced Telemarketing/Two-level for Mass Marketing and Two-level for Sophisticated Concealment Enhancements)

The sentencing impact for these options (which are listed under Directive I Option 3a and Directive I, Option 3b in Table 1) is not determinable. There was only one case in the sample in which the offender was subject to the statutory enhancements under 18 U.S.C. § 2326. The statutory enhancements were often charged, but were not pled to in these cases (see the Telemarketing Fraud Working Group Report, 10-11 (January, 1998)). It can be assumed, however, that if this is the option that the Commission chooses to adopt, more cases could be affected by this option in the future.

Directive III, Option 1 (Additional One or Two-levels for More than Ten Vulnerable Victims, Two-level Mass Marketing and Two-level Sophisticated Concealment Enhancements).

Option 1a: Three-Levels for More than Ten Vulnerable Victims, a Two-Level Mass Marketing Enhancement, and a Two-Level Sophisticated Concealment Enhancement:

The average sentence for the 121 telemarketing cases under the first sub-option of this option (listed as Directive III, Option 1a in Table 1) is 31 months, an increase of 10 months (47.6 percent) over the current average and 3 months (10.7 percent) over the May 1998 Commission amendments

Option 2a: Four-Levels for More than Ten Vulnerable Victims, a Two-Level Mass Marketing Enhancement, and a Two-Level Sophisticated Concealment Enhancement:

The average sentence for the telemarketing cases under the second sub-option of this option (listed as Directive III, Option 1b in Table 1) is 33 months. This is an increase of 12 months (57.1 percent) over the current sentence and 5 months (17.8 percent) over the May 1998 Commission amendments.

Table 1

Telemarketing Cases [1] - Sentence Comparisons

Options	Average Sentence (Months)	Difference of New Option Average and Current Average		Difference of New Option Average and Commission Option Average	
		Months	Percent	Months	Percent
Current Guidelines	21	N/A	N/A	N/A	N/A
May 1998 Amendments [2]	28	7	33.3	N/A	N/A
Directive I: Option 1a [3]	31	10	47.6	3	10.7
Option 1b [4]	34	13	61.9	6	21.4
Directive I: Option 2a [5]	31	10	47.6	3	10.7
Option 2b [6]	34	13	61.9	6	21.4
Directive I: Option 3a [7]	28	7	33.3	0	0.0
Option 3b [8]	28	7	33.3	0	0.0
Directive III: Option 1a [9]	31	10	47.6	3	10.7
Option 1b [10]	33	12	57.1	5	17.8

[1] Of the 210 cases in the sample, 121 involved telemarketing behavior. All telemarketing cases' sentences would change due to the proposed changes in the guidelines.
[2] May 1998 Amendments submitted to Congress May 1 call for a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[3] Directive I Option 1a is for a three level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[4] Directive I Option 1b is for a four level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[5] Directive I Option 2a is for a three level enhancement for telemarketing behavior or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[6] Directive I Option 2b is for a four level enhancement for telemarketing behavior or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[7] Directive I Option 3a is for a three level enhancement for offenders subjected to 18 U.S.C. § 2326 or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[8] Directive I Option 3b is for a four level enhancement for offenders subjected to 18 U.S.C. § 2326 or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[9] Directive III Option 1a is for a one level enhancement for more than 10 vulnerable victims, a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[10] Directive III Option 1b is for a two level enhancement for more than 10 vulnerable victims, a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.

Table 2

Telemarketing Cases [1] - Offense Level Comparisons

Options	Average Offense Level	Difference of New Option Average and Current Average		Difference of New Option Average and Commission Option Average	
		Levels	Percent	Levels	Percent
Current Guidelines	16	N/A	N/A	N/A	N/A
May 1998 Amendments [2]	18	2	12.5	N/A	N/A
Directive I: Option 1a [3]	19	3	18.8	1	5.6
Option 1b [4]	20	4	25.0	2	11.1
Directive I: Option 2a [5]	19	3	18.8	1	5.6
Option 2b [6]	20	4	25.0	2	11.1
Directive I: Option 3a [7]	18	2	12.5	0	0.0
Option 3b [8]	18	2	12.5	0	0.0
Directive III: Option 1a [9]	19	3	18.8	1	5.6
Option 1b [10]	20	4	25.0	2	11.1

[1] Of the 210 cases in the sample, 121 involved telemarketing behavior. All telemarketing cases' sentences would change due to the proposed changes in the guidelines.
[2] May 1998 Amendments submitted to Congress May 1 call for a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[3] Directive I Option 1a is for a three level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[4] Directive I Option 1b is for a four level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[5] Directive I Option 2a is for a three level enhancement for telemarketing behavior or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[6] Directive I Option 2b is for a four level enhancement for telemarketing behavior or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[7] Directive I Option 3a is for a three level enhancement for offenders subjected to 18 U.S.C. § 2326 or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[8] Directive I Option 3b is for a four level enhancement for offenders subjected to 18 U.S.C. § 2326 or a two level enhancement for mass marketing behavior, and a two level enhancement for sophisticated concealment.
[9] Directive III Option 1a is for a one level enhancement for more than 10 vulnerable victims, a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.
[10] Directive III Option 1b is for a two level enhancement for more than 10 vulnerable victims, a two level enhancement for mass marketing behavior and a two level enhancement for sophisticated concealment.