

PROPOSED AMENDMENT 2 (Repromulgation of Temporary, Emergency Telemarketing Fraud Amendment): PUBLISHED VERSION

Synopsis of Proposed Amendment: *This amendment proposes to re-promulgate as a permanent amendment the emergency telemarketing fraud amendment adopted by the Commission on September 23, 1998. It implements the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 (the “Act”), but in a somewhat broader form than that required by the directives.*

The Act directs the Commission to provide for “substantially increased penalties” for telemarketing fraud offenses. It also more specifically requires that the guidelines 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,” and “an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes.”

This amendment responds to the directives by building upon the amendments to the fraud guideline, §2F1.1, that were submitted to Congress on May 1, 1998. (See Amendment 577 in USSC Guidelines Manual, Appendix C Supplement.) The May 1, 1998 amendments added a specific offense characteristic for “mass-marketing.” Under that amendment, the definition of “mass-marketing” would include, but not be limited to, telemarketing fraud. The May 1, 1998 amendments also added a specific offense characteristic for sophisticated concealment.

This amendment broadens the “sophisticated concealment” enhancement to cover “sophisticated means” of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under the vulnerable victim guideline, §3A1.1, for offenses that impact a large number of vulnerable victims.

In designing enhancements that may apply more broadly than the Act’s above-stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g., section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (e.g., 28 U.S.C. § 991(b)(1)(B) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)).

Proposed Amendment:

Amendment 587 (See USSC Guidelines Manual, App. C Supplement; see also 63 Fed. Reg. 55912 (1998)) is re-promulgated without change as follows:

§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 (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise 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

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 accounts ordinarily indicates sophisticated concealment.~~

15. 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 means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. 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 sophisticated means.

The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

Background:

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Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.

§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.~~

- (b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.
- (2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

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Commentary

Application Notes:

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2. For purposes of subsection (b), ~~“victim” includes any person~~ “vulnerable victim” means 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, 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 offense guideline specifically incorporates this factor factor that makes the person a vulnerable victim is incorporated in the offense guideline. 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.

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Background:

Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.

Proposed Telemarketing Technical and Conforming Amendments: Subsection 2F1.1(b), as amended by amendment 577, is further amended by striking subdivision (7); by redesignating subdivisions (3), (4),

and (6) as subdivisions (4), (6), and (7), respectively; and by inserting the following as subdivision (3):

"(3) If the offense was committed through mass-marketing, increase by 2 levels."

[Subdivision (3) previously was subdivision (7)]

The Commentary to §2F1.1 captioned "Application Notes", as amended by amendment 577, is further amended by striking Note 20; and by redesignating Notes 15 (pertaining to financial institutions) through 19 as Notes 16 through 20, respectively.

The Commentary to §2F1.1 captioned "Application Notes", as amended by amendment 577, is further amended by redesignating Notes 3 through 13, as Notes 4 through 14, respectively; and by inserting after Note 2 the following as Note 3:

"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."

[Note 3 previously was Note 20.]

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 1 by striking "§2F1.1(b)(3)" and inserting "§2F1.1(b)(4)"; in redesignated Note 5 (formerly Note 4), by striking "(b)(3)(A)" and inserting "(b)(4)(A)"; and in redesignated Note 6 (formerly Note 5), by striking "(b)(3)(B)" and inserting "(b)(4)(B)".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 1 by inserting "United States" before "Virgin Islands".