

UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING AND HEARING
Regarding Telemarketing Fraud

Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C.
Tuesday, February 10, 1998

10:04 a.m.

The public meeting was convened pursuant to notice, at 10:04 a.m.

MEMBERS PRESENT:

RICHARD P. CONABOY, Chair
MICHAEL S. GELACAK
MICHAEL GOLDSMITH
MARY F. HARKENRIDER, Ex Officio
MICHAEL J. GAINES, Ex Officio

ALSO PRESENT:

JOHN H. KRAMER, Staff Director

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P R O C E E D I N G S

CHAIRMAN CONABOY: We can move quickly to the hearing, and we have a number of people here who are going to join us and talk to us this morning on this telemarketing matter.

Telemarketing, you know, is one of the new words in our lexicon that have developed in the past few years with the advances in communications, and with the advances in any efforts in human endeavor, there also come advances in those people who would use whatever is new to commit crime, and telemarketing has become a very serious problem. It has been looked at by the legislature and others to determine whether or not there is a new means necessary to respond to the criminal conduct that has developed in this area.

The legislature has been looking at this, and over the past couple of years, there have been pieces of legislation passed, some of which have had directions to us or impact on the changes in the guideline structure, and we have been working on this. We made one report to the Congress, and we've been looking generally at telemarketing, and we have noted, among other things, that our work on changes in the fraud and loss guidelines would also impact this area, because at its very foundation, telemarketing is a fraudulent conduct, and there are some questions as to whether or not it's necessary to develop new responses to this type of fraudulent conduct aiming at, of course, the numbers of people involved and the ages of people involved and the widespread impact that this kind of fraud can have.

So, today, we have brought several people here in the course of our continuing efforts to learn about this problem and to determine from our standpoint as the Commission what reaction is necessary or would be advisable from the United States Sentencing Commission as far as changes in sentencing

methods or sentencing patterns or sentences themselves.

And we're hoping to gain more insight into that as we look at ways to address the problems, as I said, that we sometimes feel may be somewhat different than the normal fraud. Oftentimes, in telemarketing, as we know, the amounts involved are extreme amounts, and the numbers of victims are large, often, and sometimes, there's concern that this type of fraud is aimed at certain members of the population, particularly those who are considered elderly--like myself, anymore--and there are a lot of people who think we elderly people have to be treated more gingerly.

There's nothing like being carted away in an ambulance and then looking at your record later, and it says the patient was an elderly gentleman.

[Laughter.]

CHAIRMAN CONABOY: That's my life's description.

So, I'm very concerned about what you want to do about those of us who are almost at middle age.

And there are other concerns that we have been looking at, such as specific type of vulnerability, even other than age, and whether that should be considered in this area of fraud, and should those things enhance the sentencing? Should those things be considered separately, perhaps, from other types of fraudulent conduct? These are all matters that have come into play, especially, as I said, in this area of telemarketing.

So, we are glad to have all of you here today. We have Jonathan Rusch, who is chairman of the Telemarketing Fraud Working Group in the Department of Justice, and Jonathan has been with the Department a long time and has been serving as, among other things, as liaison to the National Association of Attorneys General, and we are happy to have you here this morning, Jonathan.

And then, Sarah Reznek is with the National Association of Attorneys General and director of the Telemarketing Fraud Enforcement Project; am I correct, Sarah?

MS. REZNEK: Absolutely.

CHAIRMAN CONABOY: And the National Association of Attorneys General, of course, as you can understand, has a deep interest in this and has made telemarketing fraud and elder issues a top priority in their work.

And then, Bridgette Small is here from another outfit that I've belonged to for a long time, Bridgette, the AARP. And, as we all know, the American Association of Retired Persons is interested in and does studies and work on all of these matters that affect that growing population in this country, and they have sponsored, as I understand it, a number of studies on telemarketing fraud.

And Lee Norrgard is here from AARP as well to bolster and assist in the presentation along with Bridgette Small and to bring us up to date as to the work that AARP has done and what your interest is in this whole area.

So, we welcome all of you today, and we would ask you to begin your statements, and then, we will, I'm sure, have some questions we want to ask each of you.

Jonathan, maybe since you're on one end, we'll start with you and then move right along.

MR. RUSCH: That would be fine, Judge.

Good morning, Mr. Chairman and members of the Commission. I'm Jonathan Rusch of the Justice Department. In the interests of the Commission's time, with your permission, I would like to submit the written statement that I've submitted and simply to summarize a number of the comments and provide some illustrations of some of the kinds of conduct that

we'd like to bring to your attention.

I'm pleased to appear before you this morning to present the Department's views concerning telemarketing fraud. In a report that we provided to the President and the Canadian Prime Minister just last October, the U.S.-Canada Working Group on Telemarketing Fraud said that telemarketing fraud has become one of the most pervasive and problematic forms of white-collar crime in both Canada and the United States, accounting for as much as 10 percent of the total volume of telemarketing, that's legitimate and illegitimate telemarketing, \$400 billion a year.

Although we're aware that the Commission has some familiarity with this issue, I want to focus my testimony this morning on the factors that make telemarketing fraud so problematic and so distinctive a form of fraud. At the outset, I should note that my testimony is based partly on my own experience in prosecuting these types of cases but primarily on my experience as chair of the telemarketing fraud working group. That working group consists of United States Attorneys' representatives, assistant U.S. Attorneys typically, from various districts; the FBI, Postal Inspection Service and other investigative agencies; regulatory agencies such as the FTC and the SEC and various representatives of state attorneys general working with the National Association of Attorneys General.

In this capacity, I have had frequent contacts with prosecutors and agents and investigators at all levels of government throughout the United States and have had the opportunity to review material from numerous telemarketing fraud cases that the Department of Justice has prosecuted since the 1980s.

Based on our experience in prosecuting more than 1,300 individuals in telemarketing cases just since 1993, the Department of Justice

urges the Commission to amend the Sentencing Guidelines to recognize the seriousness of this type of fraud. Telemarketing fraud is typified by a high level of culpability on the part of offenders and an extreme degree of disruption and harm to the lives of many victims.

The nature of this offense prompted Congress to single it out for enhanced penalties. In 1994, Congress provided that offenders convicted of certain fraud offenses in connection with telemarketing may be imprisoned for a term of up to 5 years in addition to any term imposed for the underlying offenses. Moreover, Congress provided that if that offense victimized 10 or more people over 55 or targeted people over 55, the offender may be imprisoned for up to 10 years in addition to the term for that underlying offense.

Despite this enhanced penalty provided by statute, the guidelines fail to recognize the seriousness of telemarketing fraud. Therefore, courts have departed upward from the applicable sentencing guideline range in order to provide an enhanced penalty. A category of crime that Congress has recognized as especially serious should be reflected in the sentencing guidelines themselves rather than through departure from the guidelines.

We would be happy to work with the Commission through Commissioner Harkenrider to develop appropriate guideline amendments for telemarketing fraud. Telemarketing fraud is a serious crime for a number of reasons; for example, telemarketers typically prey on older victims through various techniques they use to identify those older victims; often revictimize those who have already been defrauded; and also commonly work as part of a well-organized scheme that involves close coordination to carry out that defrauding of victims.

While these aggravating factors are important in assessing the

seriousness of telemarketing fraud, it is the essential nature of this offense in any form that makes it such a critical problem. In essence, telemarketing fraud in most cases is elaborate and sustained psychological warfare, waged through ongoing and extensive personal contact by those experienced at deceiving others for personal profit.

Their victims are people who have little experience or skill in recognizing or protecting themselves against such psychological manipulation and whose defenses are gradually worn down over time. One criminal telemarketer, not realizing he was talking to undercover agents, had a very striking way of describing what he did. He said when I'm talking to these people, two hands go through that telephone. With one hand, I'm painting a picture that is describing the wellbeing that will come to the person I'm talking to. With the other hand, I'm reaching into their checkbook and writing it out.

This form of fraud cannot be accomplished with conversation, often with numerous conversations with the victim and sustained and varied techniques of persuasion that depend on a variety of false and deceptive statements. In short, a criminal telemarketer weaves a web around the victim in a way not possible in typical mail fraud and other types of Federal fraud now addressed by the Guidelines. As I continue with the testimony, I will describe some of these techniques that are used by criminal telemarketers in greater detail.

Our knowledge of the practices of criminal telemarketers has been enhanced by two of our major undercover operations directed at telemarketing fraud: Operation Disconnect and Operation Senior Sentinel. In effect, although there is a more extensive description in my statement, I'll simply note that they involve extensive use of tape recording of conversations with fraudulent criminal telemarketers. These operations to date, including

operations which are conducted by state and local authorities as well as Federal authorities, have generated more than 10,000 tapes of such conversations with criminal telemarketers operating from the United States and from Canada.

Although I can't do complete justice to this body of evidence in the time available this morning, I'm going to refer to some of the evidence that we've gathered through various investigations as I proceed with the testimony.

Again, in the interests of time, let me just note that there is a wide range of schemes that are typically used, although there are many variations on these schemes that have been employed over time in different parts of the country. There are telemarketers who specifically focus on schemes that involve advanced fee loans or credit cards; people who are pitching foreign lotteries; people who are pitching different types of investment schemes of all sorts, ranging from things as unusual as ostrich farms to the most high-tech of technology developments such as wireless cable systems.

Business communities are not exempt from the outreach of telemarketing fraud, because office supply and toner schemes will also deliberately target small and medium-sized businesses in order to gain funds. Prize promotion schemes and charity schemes also reach out very extensively to bring in a wide range of victims, and last and certainly not least, I need to note something that I will come back to in the course of my testimony: the concept of reloading and the concept of recovery rooms and rip and tear schemes, and I'll just touch on those very briefly.

Reloading involves something that we do not see in typical, traditional fraud schemes. The typical, old-fashioned scheme might involve somebody making a presentation in a live, face-to-face situation. Many of these types of Ponzi schemes that you may have heard about or the traditional

advance fee schemes involve one approach only to a particular victim. The victim is defrauded, and the people who conducted the fraud simply try to cover their tracks as well as they can, and they move on.

Reloading is a deliberate business decision that is made by criminal telemarketers to keep going after and after and after the people that they have initially defrauded, through a variety of things that my statement, I think, will give a full description of. They use a variety of techniques to get people to believe that, in effect, if they have already spent some money for a particular prize, a particular product or a service, that they should spend more money for that particular item and then have a commensurate reward for that particular thing they're obtaining.

That is where much of the impact is truly felt by victims, where people are deliberately targeted and sought out time and again until their funds are literally exhausted. This, while I'm sure other speakers this morning can also testify to this--this is particularly the problem for older victims, and with deference to you, Judge, I should note at this time--

[Laughter.]

CHAIRMAN CONABOY: I need all the protection I can get.

MR. RUSCH: When we talk about older people, there have been undercover conversations with telemarketers who, when they're asked, you know, who are you looking for, they say 40 to 80. But we find many instances where the leads that telemarketers are using are deliberately focusing on an older population, particularly those who are sufficiently well-off; they have now basically paid off their houses; they have substantial nest egg; they may have substantial retirement funds available.

And when we talk about older victims, we are frequently talking about people who are in their seventies, eighties and even nineties. In one

boiler room that Federal authorities had raided and later prosecuted in California, Can-Do Worldwide Marketing, one of the largest schemes of this type, they found leads where people had birth dates going back to 1895 and 1897.

With your permission, I will just briefly play one segment of tape that was taken at another telemarketing boiler room in California to give you a quick feeling for what the leads look like and what these particular schemes work with in order to reach out to their victims.

[Tape played.]

MR. RUSCH: This is just a sample of one particular week's leads from one boiler room. The leads typically come from a wide variety of sources. They may be contests; they may be receipts from other telemarketers who have sold people for a certain amount of money.

I'll just pause here.

[Laughter.]

[Tape played.]

MR. RUSCH: You'll note that that particular victim has thoughtfully put in her birthdate of 1910.

I'll just fast forward through the rest of this.

Now, this is another facet of telemarketing that is important to understand about the intent and the objectives that criminal telemarketers have. One of the things that they understand when they reach out for the victims that they are targeting is that there are certain areas of the country that may be more problematic for them. There are, for example, things called do not call lists.

[Tape played.]

MR. RUSCH: I'll just add that--

CHAIRMAN CONABOY: What's all the noise in the background, Jonathan?

MR. RUSCH: That is a group of telemarketers.

CHAIRMAN CONABOY: Okay; I presumed that.

MR. RUSCH: I'll show you briefly, in a moment--

CHAIRMAN CONABOY: Okay.

MR. RUSCH: --just what size this particular operation is.

But just to give you an idea of how priorities shift, this is a boiler room that was raided in 1993, and the leaders and other critical people there were prosecuted successfully. After that time, as more and more enforcement activity came up at state and Federal levels, no call lists started to get longer. In one case that I prosecuted, Universal Publishers in Las Vegas, by 1995, the list of no-call states had expanded to 17.

COMMISSIONER KRAMER: What is a no-call state?

MR. RUSCH: A no-call state is simply one that you do not call the victim in. Even if your lead says, for example, that this person is located in Iowa, you check the no-call list, and if it says Iowa on that lead, you don't call in there.

COMMISSIONER KRAMER: But what is the source of the no-call concept?

MR. RUSCH: It literally comes from the telemarketers', particularly the owners' own experience with law enforcement and regulatory scrutiny.

COMMISSIONER KRAMER: I see.

MR. RUSCH: If they get too much what they call heat from the regulators or the state attorney general or the FBI in a particular area, they'll simply back away from it, because they know that there are so many other

people they can go to in other states.

COMMISSIONER GOLDSMITH: It's a discretionary decision on their part.

MR. RUSCH: Absolutely; there is nothing that mandates that they do this; this is just their evolving experience to figure out where they can target victims, where the least heat can be found. And I'll just note briefly that some of the states that are listed on here, for example, like Iowa, Nevada, New Mexico, Ohio, Oregon are among the states where state attorneys general have been, even going back several years, among the most vigorous in going after telemarketing fraud. But obviously, that leaves many other states they can go into.

Now, since you, Judge, had asked about this, let me just go back for a moment to the tape, and I'll give you a quick sampling of what one of the classic boiler rooms looked like.

[Tape played.]

MR. RUSCH: In deference to the Commission, I'm not playing this at the true volume at which this was recorded.

[Tape played.]

MR. RUSCH: All of these people are working off of the same script, working within the same larger organization to accomplish the same end in doing their prize promotion. Let me just fast forward this. This particular boiler room continues even farther back to show how many stalls there are for different telemarketers who are doing their business at Nationwide Marketing.

What I'd like to do at this point is just highlight a few of the things on which telemarketers consciously try to play in evoking the interest, sympathy and appeal of the prospective victims. One of the first things, as my statement notes, that many of these schemes try to do is to get people excited

at the very beginning of a particular conversation, to make them feel as though this is a real contest that they are being entered in and to make them feel that there is something that they really ought to be excited about. That, obviously, has some effect on their ability to start thinking calmly and rationally when somebody starts asking them for money.

This is one example of one of the tapes from Nationwide Marketing, and it is, I will emphasize, a short excerpt from a much longer tape. We know, for example, from the tapes we have listened to that it is not uncommon for telemarketers in one conversation to go 20 minutes, 25 minutes or longer to cajole, flatter and otherwise try to manipulate the victim into trying to save money.

[Tape played.]

MR. RUSCH: Now, there are a couple of things in this that I should just take note of. In the old days, I think there were probably a great many criminal telemarketers who were content to use simple, straightforward false statements, just telling people you've won the \$50,000 cash prize; an outright lie; people never get the prize; they may get some gimme gifts, as they're called in the trade.

Telemarketers, over time, because of the contacts they've had with law enforcement, have gradually evolved their pitches. One of the things, for example, that I've heard from Federal prosecutors and state authorities is that the people who run these types of rooms consciously vary and revise their pitches all of the time. They're always looking for ways that they can either come up with some, to them, plausible justification for explaining this away to the authorities, so they won't even ask a question or, to some degree, to see if they can avoid the types of statements that they know from past experience could get them into hot water.

So, they don't say you have won the prize. They say, using the concept of social proof, everyone else who has been in your position always, always walks away with the \$25,000. These conversations are replete with all kinds of appeals of the sort, appealing to people's sense of altruism, to their sense of interest in something that's scarce but highly valuable and so on.

I won't play one tape here, although I think it has some interesting features to it. I will just describe to you from another case that we've prosecuted in Las Vegas, United Holdings.

COMMISSIONER GOLDSMITH: So, are you saying that person did not get the \$25,000?

[Laughter.]

MR. RUSCH: Well, more than that, Commissioner, this particular woman worked for the Iowa Attorney General's office and made a very extensive series of recordings of this and other telemarketers. The most that people routinely get are the gimme gifts. At United Holdings, for example, if you made your payment of \$1,500, you were, of course, assured that your money was being sent to, you know, wonderfully worthy causes. You would typically get something like this gold ring, but to underscore the legitimacy of the appearance of making contributions to a particular cause, people would also get this brass plaque, which says thank you for your caring contribution to Express Line Foundation. That says it's a nonprofit foundation that provides free transportation, food and clothing for the handicapped and those in need.

The only thing that's accurate about this is that this particular foundation was a nonprofit organization registered as a 501(c)(3) organization. It, however, was organized by former telemarketers. Only a small percentage of United Holdings' money went to Express Line Foundation, and the rest of it

basically went to the telemarketers themselves at United Holdings.

But I want to emphasize that this isn't just a matter of somebody getting some cheap trinkets and thinking that the thousands of dollars that they sent out the door justifies this small return. There is a very sustained effort to try to persuade people from the very first time a dialer calls you and contacts you through your contact with a front room salesperson to the contact with the verifier, who tries to manipulate you into making some false representations about whether or not you've been promised a particular prize and even beyond.

If, for example, you complain about a particular prize or gift you've gotten, then, you're given to customer service people. Customer service, however, means something very different in criminal telemarketing. This is also something from my Universal Publishers case. It's a one-page set of instructions from the owners to the people who ran the customer service department, and among other things, they are specifically told that, in effect, the main problem is that the consumer, the person who contacts you, realizing that they can contact the FTC or the Attorney General's office or somebody else--the big words are I was scammed--that's S-C-A-M-M-E-D.

They say most consumers are very greedy--and when they don't receive cash, automobiles, et cetera, et cetera, then, we have just scammed them. So, this goes on to explain to people, in effect, how you hang on to the money as long as possible. In effect, people learn in customer service how you minimize any returns of funds to a defrauded victim. If you have to knock \$100 off the price, but they've sent in several hundred or several thousand dollars, you do that.

If you send an extra gimme gift, to make them feel better about it, you do that. If you really have to do it, you send a partial refund. The only time that people get full refunds is when they've gone directly to the state

attorney general and have the attorney generals on the phone with them, or the FBI has come calling, where the owner, in short, knows that there's real heat to worry about.

Now, in the--

COMMISSIONER GELACAK: Jonathan?

MR. RUSCH: Yes, Commissioner?

COMMISSIONER GELACAK: Before you go on, this is all very interesting.

MR. RUSCH: Yes.

COMMISSIONER GELACAK: And I want to assure you that I find it offensive, but tell me or tell us why--what distinguishes it? Why should it be worthy of increased penalties? It's fraud; these are bad people. They're preying on vulnerable--but why is it any different than the guy who comes knocking on your door or the person who contacts you through a friend or has contacts in other ways? Why is it different than somebody who pitches some garbage on television?

Give us a reason for increased penalties, other than the fact that it's just a plain old fraud.

MR. RUSCH: That's a very fair question, Commissioner. Let me suggest a couple of things that I think truly are distinctive here. First, as I indicated, reloading is a feature that seems to be unique to telemarketing fraud. Even when you hear about scams that are committed through the Internet, the typical scam that involves somebody getting your credit card number and then sending through unauthorized charges typically is something of only limited duration. You know, once you see your statement, you see that there are unauthorized charges, and you can talk to your credit card company and try to deal with those.

This involves a deliberate course of conduct, where people set out to look for victims who have already been defrauded, ideally, for as much money as they can possibly be persuaded to send and to continue to go after those people. In a sense, for most of the schemes that I mentioned in passing, it literally doesn't matter what the scheme is. It could be an investment pitch; it could be prize promotion; it could be a charity scheme.

The concept is basically getting the person to--maybe putting it in these terms--digging themselves into a hole, and then, you basically entice that person to dig themselves deeper and deeper, because they know that some money has gone out the door, and they become more and more desperate.

COMMISSIONER GELACAK: Here's my problem, and it's-- maybe I just don't understand it. There was an instance recently in this area, in West Virginia, where contracting--it started with people who came into blacktop a driveway, and they were able to secure a certain amount of money from an individual. They passed that name on to other contractors who knocked on the door, and they came in, and eventually, they took all of the money that these folks had.

They didn't use the telephone. I don't know what telemarketing-- to be perfectly honest with you, I'm not sure I understand what telemarketing itself encompasses. I know it includes the use of the phone, but it could be other things, I guess. They didn't use telephones; they knocked on the door. And you would have us--and they accomplished the removal of that couple's life savings.

You would have us punish the people who do that by way of the telephone more than the people who did that by knocking on the door, as I understand it. And one of the Congressional--you know where I'm going--one of the Congressional mandates is proportionality. So, I mean, I feel a

tremendous empathy with elderly people.

[Laughter.]

COMMISSIONER GELACAK: Because I'm getting there, you know.

[Laughter.]

COMMISSIONER GELACAK: And I know that's outrageous conduct. But why does it justify a higher penalty than, for lack of a better term, than a run of the mill fraud? Because it is a run of the mill fraud; it's just aggravated in a lot of ways. And we can enhance it through that kind of stuff, and a lot of it's already in the guidelines. So, why different?

MR. RUSCH: Let me follow up on that for a moment, because I have a similar concern, although I am also, naturally, concerned about the type of activity that you brought to our attention. What distinguishes this from people who are in the mail order business? I know--I'm familiar with mail fraud cases, where someone sends out large-scale mailings, mass mailings, that are full of misrepresentations, and the people who respond are immediately identified as suckers, and followup mailings go to them, and the lists are sold to other people who are also in the mail fraud business.

I think that the argument could certainly be made that--well, I would guess, for example, that if the postal inspectors were here today that they might take issue with you and say that this is also a very serious problem in the context of mail fraud solicitation, where similar types of reloading might occur; it may be given a different name. So, I think that what Commissioner Gelacak is getting at here is that whatever we do needs to be--needs to treat similar people similarly and needs to have an adequate factual basis.

So, his question, I think, is a fair one, and it brought to mind the experiences of my former clients.

[Laughter.]

CHAIRMAN CONABOY: Jonathan, just before you respond to that, when you do respond, then, I'm going to move on to some of the other speakers, and we will come back to all of you. Part of my job up here as the old guy--

[Laughter.]

CHAIRMAN CONABOY: --is to watch the clock.

MR. RUSCH: Of course.

CHAIRMAN CONABOY: And when you get older, you watch the clock more carefully.

COMMISSIONER GOLDSMITH: We thought you'd forget, Judge.

[Laughter.]

CHAIRMAN CONABOY: If you remember those long questions, and I do think, and perhaps the others might bear that in mind, because what we talked about, and indeed, what you've mentioned as I was making some notes when you first started to talk is several of the very important points that we need to hear about is why this is so problematic as distinguished from other types of frauds and, secondly, why it should be treated differently. That's really the nub of the problem, so that each of you--and maybe, you want to respond to those questions; then, we move to Sarah, and we can do that.

MR. RUSCH: That would be fine, Judge.

Let me address it briefly this way. I am familiar with the situation you described, Commissioner. At least in my experience, the kind of situation involving that West Virginia group is something extraordinary. You don't usually hear about door-to-door repair schemes or driveway repair schemes as involving situations about coming back and back and back and taking hundreds

of thousands of dollars, in one particular case I know of, from that particular individual.

What I want to stress to the Commission is that telemarketing fraud, regardless of what area of the country you find it in and what scheme, reloading, targeting of older people, particularly those who are well over retirement age, is part of the norm that we find in these cases. I can hardly think of a case that I've worked on or that colleagues of mine have worked on where you have not found at least some indicia that they had deliberately gone after older people and had deliberately put in reloading as a component of their scheme to extract as much money as possible.

In short, if I look, for example, at some of the criteria that the Commission has indicated in one of the application notes, in Section 2.F.1.1 in the fraud guidelines, a number of the things that it talks about there as bases for upward departure are, in effect, part of the heartland that we look at all of the time in telemarketing cases: the severe impact on older people who lose their life savings; the extraordinary types of harm that these types of things cause as well as the severity of the conduct.

So, as a generalization, I would say telemarketing fraud is different because of the way that telemarketers have run their business. They have evolved to a point where they are literally premising their return of investment, if you will, realizing the greatest sort of profit from those who can least afford to suffer that kind of substantial harm. That is something that is really different from the traditional door-to-door schemes or face-to-face schemes.

With that, I'll be happy to answer other questions.

CHAIRMAN CONABOY: Thank you, and we'll come back to some other questions, but I want to give each of the panelists a chance to make

a statement.

So, Sarah, would you proceed, please?

MS. REZNEK: Thank you, sir.

My name is Sarah Reznik, and I've been working at the National Association of Attorneys General for a year. I'm on detail from the Federal Trade Commission, where I've prosecuted civilly telemarketing cases for over 8 years, but the main focus of my job at NAAG for the coming year is the organization, development and provision of telemarketing fraud criminal training to state and local investigators and prosecutors in the hope that additional, if you will, foot soldiers can be brought to bear to this problem of additional folks who will be dedicated to the problem, dedicated to redressing what the states have seen and what I have seen on the Federal level as an enormous amount of harm that's been visited upon, again, primarily elderly people throughout this country.

NAAG, too, has submitted a statement, and I would ask that it be accepted into the record, and I'd like firstly to address the question regarding West Virginia. In our statement, we noted that there are several aspects of telemarketing that really--and I don't think I've used this word since law school--but make it sui generis from the type of situation you're talking about. One is the far-ranging nature of it.

If you have somebody walking up somebody's newly-paved driveway who has just been told these folks are easy marks, going up to the front door and saying, you know, it looks like you need your brick work pointed, that takes a considerably longer time than it does for somebody with an auto-dial in a telemarketing phone room thousands of miles away to call up Mrs. McGilicuddy right next door and say you've won this fabulous prize; your ship has finally come in.

In addition, perhaps not unlike your situation, telemarketing fraud is fast-moving, whereas, you know, the only thing that a telemarketer really needs is a list of suckers or mooches, if you will, and a telephone. Once the heat is put on in, for example, the State of Maine--this was an example that the New Hampshire Assistant Attorney General gave last week when he was testifying on the Senate side--what the folks do is jump the state line, go into New Hampshire, set up again and start bilking people again throughout the country, but they're not necessarily violating an injunction that's been issued by a Maine judge; now, they're just across the border into New Hampshire, and they are, I think in the instance that he gave, 5 miles away.

It's also anonymous. I think there is a difference from the West Virginia situation and telemarketing in that, for example, a person half my age could call up, again, Mrs. McGilicuddy and say I'm the promotional manager; I'm the general manager; I'm the boss here; I'm the owner; I've just spoken to the owner, and he has assured me that you have won this prize this time or can call up and say I'm from the Federal Government, and I can assure you that we've recovered your money, and if you'll just pay the taxes on it, we'll have that money out to you right away.

Again, I think it's much more--if not more diabolical, certainly potentially more damaging.

COMMISSIONER GELACAK: Okay; I'll give you that. Tell me why it should receive a higher penalty. Does that stop telemarketing? Does it prevent the spread? Does it deter? Is it going to have any impact?

MS. REZNEK: I can tell you this from my experience, first at the FTC. When I first started at the FTC, the kinds of orders we would get against fraudulent telemarketers would be the type that would be called go forth and sin no more. They would be very narrow; they would say do you know what

you did in that particular instance? Don't do that again, okay?

Well, what would happen would be if they go off and do something just a tad different. The FTC, the types of orders that the FTC has obtained progressed from, in appropriate circumstances, when you have a recidivist, a ban on particular types of telemarketing or the requirement that a substantial, seven-figure bond be paid before the telemarketer could go back into business.

The FTC has now started cross-designating some of their folks as special assistant U.S. Attorneys to buttress Federal criminal efforts but also has started a project called Project Scofflaw, in which the FTC revisits some of the orders it's obtained previously when they find that the defendants are violating them. Hence, a logical, I would submit, and appropriate progression of relief and penalty and punishment for the violations of those orders and of the law.

I think the states are doing much the same thing. We're not quite up to where the Federal prosecutors are in the sense of the bringing of criminal telemarketing cases, but Jonathan is absolutely right: the States of Oregon, Iowa, Missouri, Ohio have been especially active in bringing criminal cases, and that's what we're hoping to accomplish through the training that we're providing.

And I think it is not only appropriate but also, in response to what we perceive, is a serious problem.

MS. REZNEK: I'm not so sure I disagree with what you want to do, but one of the problems I have with penalties in general is what they're intended to accomplish. And it occurs to me that this is a very lucrative business, much in the same way that drugs are a very lucrative business. And penalties don't necessarily impact other than individually specific, don't

necessarily impact the trade. They may impact--you catch individuals but--

MS. REZNEK: I don't know if that's necessarily the case, and I'll defer to Jonathan on this, but certainly, the Senior Sentinel operation, and there was a case in Chattanooga, and Las Vegas was a veritable snake pit. The very active, very aggressive prosecutor of telemarketers in Las Vegas really bore fruit, and I think the same thing could be said in Chattanooga, where it was a more confined area but an equally dangerous area for telemarketing fraud.

And I think if you bring the cases and get--certainly in the case of Chattanooga, I'm more familiar with the kinds of subsidies that were obtained there--you can really have an effect.

COMMISSIONER GELACAK: Do you put them out of business, or do they just move on and somebody else take their place?

MS. REZNEK: Well, I think that's the beauty of a criminal sentence: unless you're extraordinarily dastardly, you don't get at least as clear access to phones when you're in prison under the same ease of--

COMMISSIONER GELACAK: No, no; I understand the individual specifics.

MS. REZNEK: Right.

COMMISSIONER GELACAK: But does the operation--do you put the operation out of business?

MR. RUSCH: Yes.

COMMISSIONER GELACAK: Will higher penalties help you do that, I guess is what--

MR. RUSCH: We think so.

CHAIRMAN CONABOY: I think that's one of the things of this kind of question that's most important, and maybe phrasing it a little

differently, will punishing an individual who is accused of telemarketing fraud put his or her company out of business? Or will it just punish the individual? Are we looking for a way of punishment that is going to impact the business? I think that's what Commissioner Gelacak is talking about, because that's an important element.

MR. RUSCH: Certainly. Judge, let me make two brief comments in that regard. The first is this is a generalization over a lot of investigations, not one particular case that I can cite to you. But I think in recent years, we have seen, in a variety of areas of the country, people who were dedicated criminals in more violent forms of crime moving to telemarketing fraud basically because it presents the opportunity for great profit at far less personal risk.

We know of instances where people affiliated with motorcycle gangs, traditional organized crime and so on.

CHAIRMAN CONABOY: The crime business is really not much different from any other business in that regard. They are going to try to get the highest amount of profit with the least amount of risk. That's what crime is all about, just like most businesses.

And so, I think what we're talking about is how do you impact that profit element? And is that done by sentencing individuals?

MR. RUSCH: We think so.

CHAIRMAN CONABOY: If it is? We don't know.

MR. RUSCH: I think there are a couple of things that will just address your comment specifically, Judge. We noted, when we did the takedown and the public announcement of Operation Senior Sentinel in 1995 and the subsequent prosecutions that in addition to those who were being prosecuted, many of the people, for example, in Las Vegas simply got out of

the business. They just stopped; they closed their doors; they realized this is too much heat for us.

What we have also seen, however, is, if you will, people who have moved to the margins; that is, people who are engaging in even more abusive contact, people who aren't even pretending to offer these kinds of gimme gifts. Now, they are literally saying I'm Special Agent So-and-so with the FBI. We have your money for you. You just need to send in the taxes, and we'll get the money right back to you.

They will say we're working with the Federal court in Buffalo. They will say anything it takes to work on victims of previous schemes to get them to send still more money. That's the recovery room or the rip and tear operation. And for those people, frankly, many of those people who have been in the criminal telemarketing business for a very long time, they're not neophytes; they know exactly what they're doing. And frankly, we think that substantial sentences may be the only way that we can have a lasting impact on this area.

Criminal telemarketing, as we've seen it in recent years, did not exist back in the 1970s or even the first part of the 1980s. This is a criminal phenomenon that has grown and grown and grown through the 1980s and up into, now, the late 1990s. We think we're starting to have a major impact. States are very active; Federal authorities all over are very active. But we think that there are still many people out there who are willing to take the risk and insulate themselves from, maybe, their underlings who will go to prison if they're picked up on a tape, but if we don't have substantial sentences, a lot of those same people will continue to do the same sort of thing until they're stopped.

CHAIRMAN CONABOY: Let me get back to Sarah here.

COMMISSIONER GOLDSMITH: If I might just interject my thoughts for a moment, we're trying to distinguish in part--among the things we're trying to do is to distinguish telemarketing fraud from other types of fraud, and it strikes me--and just tell me if you agree with this--that one possible basis for distinguishing between the two is that the nature of the come-on in the context of a telemarketing situation as opposed to a mail fraud situation. After all, you can simply throw away your mail and view it as junk mail, and that's it. On the other hand, it's more difficult to get off the phone with some of these folks, and they sort of have you in a psychological stranglehold to a certain degree.

So, in my view, that's an arguable basis for distinguishing between the two. Would you agree with that?

MS. REZNEK: Oh, I think that's absolutely right. I think what distinguishes telemarketing fraud is the telephone. It's much easier to reach out and bilk someone, if you will, if you've got two hands coming through the phone. We've brought--the Commission and certainly all of the states have brought cases that are mail fraud cases, and I think there are a lot more of those today, maybe in response to the telemarketing sales rule and the more active prosecution of fraudulent telemarketers.

When I mean straight, pure mail fraud case, that would be one in which the phone isn't used. You are mailed a solicitation; it says you've won; mail us \$5 or \$5.95 or whatever the amount is. Almost invariably, the amount of money that's lost is smaller, and you're absolutely right: the pressure that's brought to bear is much, much less. I would submit it takes a whole lot more thought on the part of a consumer to sit down, read the thing, write a check, stick a stamp on the letter and send it back in.

COMMISSIONER GOLDSMITH: If you're polite, it's hard to get

off the phone. I have a hard time getting off the phone on a solicitation for a new credit card. I'm not interested, but thank you; I just can't hang up. And so, I've got lots of credit cards.

[Laughter.]

COMMISSIONER GOLDSMITH: I don't use them, but I've got them.

Mr. Rusch, if I could just ask you for a moment, it strikes me also, however, that, while I'm overall quite sympathetic to the notion to increase the penalties in this context that at least in a few of the examples you've given that there are other tools potentially available to law enforcement; for example, the RICO statute, which has increased penalties available to it and also has a forfeiture component to it, and Judge Conaboy has been asking about taking these folks out of business. Certainly, if you bring an attending forfeiture count aimed at the assets which--at the profits which they have acquired or at the assets of the business itself, that is one way of knocking off the enterprise, the business, very effectively. And so, to that degree, it strikes me that there may already be existing remedies available at law.

CHAIRMAN CONABOY: After this question, I'm going to ask our side of the table to withhold questions--

COMMISSIONER GOLDSMITH: Fair enough.

CHAIRMAN CONABOY: --so we can hear from all of our guests, okay?

MR. RUSCH: I'll keep it brief, Judge.

Commissioner, certainly, we want to make use of every tool that's available to us to try to get back as much money as possible to victims. We do increasingly use criminal forfeiture in these types of cases. The difficulty is, in contrast with the traditional organized crime situation where there might be

substantial outside assets that we can go after, there is typically very little left. A lot of this goes in, you might say, conspicuous consumption for items that are illegal substances.

We know of many instances where people are using this money just for living the high life; so, even the mid-level or upper-level telemarketers may have relatively little other than maybe a couple of expensive automobiles and a house. If you run a \$20 million or a \$40 million scheme, that is going to give you the smallest of fractions as something to go after.

The reality is also that even in many of the civil prosecutions that have been done in the past, if it's a \$50,000 or even a \$100,000 civil penalty that's levied against them, for people who are running schemes of that magnitude, that is part of the cost of doing business. Only a serious sentence in many of these cases will be enough to have a serious general deterrent effect.

COMMISSIONER GOLDSMITH: Doesn't RICO give you that? RICO provides for as many as 20 years of imprisonment.

MR. RUSCH: It can, but I don't think we want to bring RICO cases in every single situation that involves telemarketing.

COMMISSIONER GOLDSMITH: No, you certainly don't in every one, but what I'm saying is that--I'm violating the Judge's rule here, I realize.

CHAIRMAN CONABOY: That's normal.

[Laughter.]

COMMISSIONER GOLDSMITH: It's normal for me.

CHAIRMAN CONABOY: I'm going to have to move along, though, really, because I want to give our other panelists a little bit of time.

COMMISSIONER GOLDSMITH: I'm just saying that in the

egregious cases that you've used as examples, arguably, RICO could be reserved for those. There may be a separate problem with the RICO guidelines; I'll grant you that.

COMMISSIONER HARKENRIDER: Well, the problem is not in the statutory max, because Congress has taken care of that. It's in the Guidelines, isn't it?

MR. RUSCH: Yes; I mean, that's the problem here. If you get a RICO conviction, that's fine, and people have, in fact, brought a number of these RICO cases against telemarketers. But for many of the traditional sorts of telemarketing schemes where you need only conspiracy, mail fraud and wire fraud to make a perfectly adequate case, we are bound by the guidelines.

COMMISSIONER GOLDSMITH: Right.

MR. RUSCH: And it creates a problem for judges to say I think this conduct is really egregious, but in order to do anything to address this really egregious conduct, I must upward depart.

COMMISSIONER GOLDSMITH: Yes.

CHAIRMAN CONABOY: Let me move back to Sarah. Do you want to conclude your remarks for us?

MS. REZNEK: If I could turn it over to Ms. Small, I'd be very happy to.

CHAIRMAN CONABOY: I know we've mixed you up a little bit.

MS. REZNEK: That's fine.

CHAIRMAN CONABOY: Bridgette, do you want to proceed, then?

MS. SMALL: Good morning.

CHAIRMAN CONABOY: We'll try not to confuse you too much.

MS. SMALL: Thank you; I appreciate that.

I'm Bridgette Small. I'm the leader of AARP's anti-telemarketing fraud strategic initiative. Thank you for the opportunity to come and talk to you today about the victims of telemarketing fraud. With me is my predecessor as team leader and a senior member of the team, Lee Norrgard, who will also be available for questions.

I'd like to say at the outset that, as you understand, AARP's expertise does not, you know, address many of the questions that you're asking, and we're going to restrict our comments to the research that we've done and to the victims and their experiences.

AARP's members are a principal focus of telemarketing fraud. The FBI has described the targeting of older Americans as a cornerstone of illegal telemarketing. So, in 1996, AARP began this strategic initiative against telemarketing fraud. This is a multi-year nationwide effort to combat the fraud aimed at older adults. We hope to foster behavior changes among the victims and the potential victims through public education, national events, community-level workshops and partnerships with law enforcement and consumer protection folks, the people sitting here at the table with us.

Our research over the course of the last couple of years has shown us that to assist victims, we generally need to--there are three important things we need to address, questions that consumers have. First, is this call that I'm getting a fraudulent call? You know, this call that I'm getting right now. And second, if it's fraudulent, this call that I'm getting right now, is it illegal?

If I respond to this, am I just making a bad business deal? Or is this actually a crime that's happening to me? And third, okay, if I understand that this is an illegal event that's happening to me, what am I going to do about it? How do I respond? What do I do when these people call and will not let

me get off the telephone and want to keep pitching me with a credit card?

So, AARP has conducted quantitative and qualitative research to look at the victims' behavior and their perceptions, victims and nonvictims alike. We use the research to shape our activities, and we hope that just a general overview of this research will be useful to you folks.

In 1996, AARP conducted the first nationwide survey of telemarketing fraud victims. We surveyed nearly 800 consumers, aged 50 and older, whose names were on state or Federal prosecutors' lists of actual victims of consumer fraud. The victims were demographically and geographically diverse, and they had been involved in a variety of schemes: prize offers, recovery rooms, business opportunities, vacation and time share resales. Their individual losses ranged from \$150 to \$530,000.

Older consumers were disproportionately represented among these victims. More than half of the victims on the lists, which were not arranged by age; just a general list--more than half, 56 percent, were persons over the age of 50, although, at the time, only 36 percent of the population was in that age range. Fourteen percent of the victims on the list but only 7 percent of the population was aged 75 or older.

The survey revealed a victim profile that contrasted sharply with the anecdotal view. The prevailing picture of the older victim has been of a socially-isolated, ill-informed, confused individual, frequently an older woman living alone, but, in fact, the older victims were relatively affluent; they were well-educated and informed. Eighty percent were reading the newspaper and watching CNN regularly. They were men and women who were active in their communities, with extensive networks of family or friends, and they were more likely to be in the work force than other adults aged 50 and older.

These older victims said it was hard to detect telemarketing fraud

when it was happening, and they seemed to lack the skills to end the call when they felt that pressure coming from the other end of the line. Victims reported that even after they tried to end a call, or they said can I have some more time to consider this, they often ended up sending money to the telemarketer on that same call, even though they were worried at the time about the amount of money that they were sending.

The researchers found that these victims continued to be targeted by the telemarketers up to 3 years after the original victimization. At the time we reached them, almost all of them--82 percent--had been contacted to participate in an apparently fraudulent sweepstakes in the 6 months before the call, and almost half had been contacted the week that the surveyors called them.

The danger to victims created by their difficulty in recognizing the fraud and finding strategies to deal with it is aggravated by their reluctance to seek help. Almost half, 47 percent, reported that they never ask family or friends for advice or help with their problems.

AARP's research concluded that the older victims, particularly those who cannot end the call quickly, need help to develop skills to respond. Satisfying this need is particularly critical in light of the conclusion of the cross-border group that the consumers at the highest risk of being victimized are those who have already been victimized.

Additional AARP focus group research confirmed older consumers need clarification of telemarketing fraud as a crime. Many participants said they thought it was wrong, but they weren't sure it was illegal. At the same time, these focus group participants were resistant to being identified as incapable of self-protection. The participants, consumers aged 50 and over, victims and nonvictims, were offended by messages which

suggested that they were gullible or unable to watch out for themselves. They resented messages that directed them to act or just hang up without telling them why to do it.

Researchers concluded that public education messages have to emphasize the universal danger of telemarketing fraud and avoid the images suggesting that only gullible people are at risk, and AARP has learned recently that there is a critical difference between victims and nonvictims. More than four in five, 80 percent of the nonvictims, always handled the call from an unfamiliar organization the same way, with a predetermined, if somewhat unconscious plan.

Typically, they will say I am not interested; they will hang up; they will say no thank you. And our public education campaign has moved in this direction, urging consumers to adopt this method of some sort and end the call quickly.

Throughout the last year, AARP has provided forums for victims to speak about their experiences as part of public education and special events, most recently at a Victims Voices forum in Baltimore, many of the familiar financial and psychological effects of telemarketing fraud are detailed in the cross-border report: the loss of life savings, homes, comfort, dignity. Older consumers retired from full-time employment are often unable to recoup their losses. The loss of even a small sum can be devastating for an older person with reduced income. Others hesitate to report their losses, due to issues about competency.

AARP policy encourages the development of a national white collar crime prevention and fraud deterrence policies and increased enforcement against fraudulent activity, particularly directed against older persons. We support victims' ability to participate in the criminal justice

process in a meaningful fashion and be compensated.

AARP is looking forward to continue partnerships with law enforcement and consumer protection agencies, and we hope to contribute to implementing the recommendations of the cross-border group for improved education of consumers.

Thank you for hearing us, and if there are any questions I can answer--

CHAIRMAN CONABOY: Is that survey of years available?

MS. SMALL: Absolutely.

CHAIRMAN CONABOY: Could we request copies of it?

MS. SMALL: The survey and the focus group; sure. We'll send copies.

CHAIRMAN CONABOY: Lee, do you want to supplement or add anything to that?

MR. NORRGARD: Only if there are any questions, Judge, in the interests of time.

CHAIRMAN CONABOY: Thank you.

COMMISSIONER GELACAK: Mary Harkenrider is not going to believe I'm asking this question, but I'm going to ask it anyway--and thank John Kramer for the information. It occurs to me, when I listen to you all, that what you're concerned about is targeting; what you're concerned about is reloading; what you're concerned about is certain elements of this that are more likely to be part of a fraudulent scheme, in a telemarketing scheme, than some other type of fraud.

But it could be part of other types of frauds as well. So, why are you limiting your requests to increasing penalties just for telemarketing? Why aren't you trying to target the activity and say to us you should increase

penalties for people who engage in what you term reloading? Or you should increase penalties for people who target specifically the elderly population?

Forget telemarketing; it could be any kind of a scheme; it doesn't have to be a telemarketing scheme. It could be that guy out in West Virginia, and I only bring that up because I saw it on--I think I saw it on the nightly news or something. But shouldn't you be asking for increased penalties for the activity rather than just saying telemarketing is bad? It is, and I know you're all focused on telemarketing, but shouldn't you expand your universe and say this type of fraudulent activity is what you're really after, and that's what you ought to be selling here?

It's hard for me to say that, because I don't say that much about increasing penalties very often.

COMMISSIONER GOLDSMITH: Maybe this panel knows that we have pending some amendments that we're considering that will raise penalties across the board in broad areas, so they felt it necessary to comment.

COMMISSIONER GELACAK: But shouldn't we target the activity as opposed to telemarketing?

CHAIRMAN CONABOY: Does anybody want to address that?

MR. RUSCH: I'll address it briefly, although I'm sure the Department will want to take a more sustained crack at answering that question more fully. It seems to me that in essence, telemarketing has given us an enormous amount of empirical evidence, where we know that this type of activity goes on. Is it theoretically possible that some other type of fraud in the future or, as with this West Virginia scam, where it's face-to-face, but it's somewhat similar methods of manipulation and influence to get people to give away their life savings; it's just that we don't have anywhere near the type of empirical base for other types of fraud.

I mean, it seems to me that telemarketing fraud involves issues not just of degree but of kind.

COMMISSIONER GELACAK: I'm sorry; maybe I wasn't--I understand that you want us to do this for telemarketing, and I think I can even get there.

MR. RUSCH: Yes.

COMMISSIONER GELACAK: But what you really want us to do is to do it so that in the case, in the instance where that guy does that stuff in West Virginia, he gets penalized as much as the person who does it over the telephone. You want it to extend beyond telemarketing, I think.

COMMISSIONER HARKENRIDER: Commissioner, if I could take a crack at this, I think you're right, but I think what you're dealing with here is the Federal Guidelines and the heartland concept, and I think the fraud in West Virginia, which was awful, is basically a local matter, and hopefully, they will sentence that person very, very stringently for the harm that he has done.

What we are talking about here, though, is the heartland, and the heartland, as Jonathan Rusch has indicated, in telemarketing, includes these factors, and the question is should we have to prove each and every factor for each and every sentencing? And the question is also in the other frauds, absolutely, we think those frauds should be sentenced more stringently. Is it part of the heartland, though? Or is it something that we should have specific fence characteristics? Or is it something, in some cases, that its so rare that it's really a matter of the judge saying that this fraud was done in a different manner than the heartland of this type of fraud, and I'm going to depart upwards?

So, I think it's those issues that you're addressing and that the

Commission has to address as they go forward.

CHAIRMAN CONABOY: Some of the things that, you know, you're inclined to--when we talk about matters like this, we all are apt to mix a lot of things into it. We happen to be a Sentencing Commission, as you know; so, our focus is on the concept of sentencing, although we are delighted always to hear about concepts like education and training, because that, perhaps, is, at least in the eyes of some people, is more important at getting at the heart of the problem than sentencing individuals.

We are inclined to think in this country that the more people we put in jail, the less crime we have and that certainly, those people in jail won't be committing crime while they're there. But there's very little evidence in the history of humanity to say that the more we put in jail, the less crime there is. There's very little evidence of that, because there are always more people out there willing to commit a crime.

But the--I think it's very important for us to remember that there are other things that can be done, and we should expend our efforts and our time and our money to try to do that. But when we get to sentencing, here, what I like to do when I'm listening to all of this, including all of the questions, is there seems to be certain things that run through all of these comments, and maybe some of you might want to comment on that. But some of the more, for instance, the number of victims, the broad aspect of this kind of conduct as opposed to the one person, one-on-one walking up to somebody else.

The second, in addition to the number of victims, is the large amount of money that sometimes gets involved. The third issue that we seem to be talking about is, I suppose you could categorize it, as we do somewhat in the guidelines, the vulnerability of the victims. Should we concentrate on age? Is that an appropriate thing to have in a sentencing pattern, that the age of a

victim would be something that would enhance the sentence? It seems to me that those are about the four areas that we're talking about here.

If that's true, can we or cannot we incorporate some of those thoughts into the guideline sentencing patterns that we now have? For instance, we are now talking about changes in the fraud and loss guidelines, and we are, indeed, if we get to agree on this, we will be proposing, for instance, larger penalties at the higher end of the scale as far as the volume, the amount of money that is concerned. I suppose some of the things maybe you're suggesting to us; I think, that is, should we talk about the age of victims? Should that be--should we talk about the number of victims? And should we talk about the breadth of the conduct itself? Am I correct that those are the areas that--

MR. RUSCH: Yes; I think all three of those are legitimate concerns, Judge. Let me just speak to those issues. First, the issue of age: I mean, I think part of what's at work in the minds of criminal telemarketers is not that they view every person over the age of 50 as being automatically weak-willed or manipulative, but the reality is that the older their victim pool is, the, to put it in blunt terms, the less time they have to talk to the authorities; the less time they're available to testify at trial.

CHAIRMAN CONABOY: The more money they have.

MR. RUSCH: And the more money they have, and the less time they have to recoup.

CHAIRMAN CONABOY: I think that comes out; I didn't hear them mention that, but, as I understand it, in these surveys, one thing that seems to be accurate is that when you reach a certain age, you finally have some money that you think you can use maybe to make more money with. Greed doesn't end at a certain age, and if you have more money, your person is

going to be a more likely target.

MR. RUSCH: And the difficulty is that if you have that nest egg, you finally have asked; you've paid off your house; you have fewer of the day-to-day expenses; in some ways, perversely, you are at greater risk in the long run, because, if in one of these investment schemes, for example, the pitch is roll over your IRA into this particular investment I'm offering you, that's it; that's your entire retirement fund. And, even at the age of 65 or 70, if you're healthy and hearty, you're still not going to, if you've retired, have any realistic opportunity to make back even a fraction of that to sustain your lifestyle.

We certainly know of instances where people in their seventies--

CHAIRMAN CONABOY: But the problem, and I don't mean to interrupt--

MR. RUSCH: Sure.

CHAIRMAN CONABOY: The problem is this, it seems to me. From a sentencing standpoint, I don't think we could ever design an enhancement in penalties by saying we're going to punish the defendant who is smart enough to pick better targets worse than we punish the defendant who isn't quite that smart. I think we have to concentrate--and I may be wrong on this, and this is what I'm asking about--we have to concentrate on practical things like the amount of money involved.

We can say if you steal more than \$10,000, the penalty is enhanced, and if you steal more than \$50,000, it's enhanced; or, we can say if you deliberately target--and this is a concern I have--if you deliberately target victims over a certain age, I suppose we could enhance the penalty for that. We've talked about vulnerable victims, which would encompass, of course, more than age by necessity, which would include age. But we wonder is that a more appropriate thing than simply saying age?

COMMISSIONER HARKENRIDER: Well, AARP would say that these people really aren't vulnerable per se other than because of the tactics used; isn't that sort of what your research showed? It's not that these people are vulnerable due to diminished capacity or the other types of things that we typically see in the guideline. It's more the other side, the psychological tactics being used that somehow--

CHAIRMAN CONABOY: Well, are you saying that the argument would be that it is a legitimate thing to say that age alone would be enough to enhance penalties?

COMMISSIONER HARKENRIDER: I'm suggesting, Judge, that saying vulnerable victims might be much too narrow, because these people really aren't what we usually think of as vulnerable victims, and it's more the activity of the defendant.

CHAIRMAN CONABOY: How do you describe them? That's what I'm questioning. I agree with that part.

MR. RUSCH: I guess there are two levels, if I can interject for a moment. You deal with a situation where, as Commissioner Harkenrider is indicating, you have people who may be really sharp mentally; they're fine; they're still capable of making great decisions, but they are being sought out in the first instance because of the age bracket that they're in and their probable nest egg, their probable level of savings that can be tapped into.

Now, several courts have noted under the vulnerable victim enhancement right now, people who have been defrauded before and, therefore, may be somewhat more worried about trying to recoup their money may be deemed to be especially susceptible to reloading pitches, and that is what, in some cases, courts have allowed is a basis for some increase in penalty.

But I think we're looking at a situation where the intensity of the targeting that focuses on an distinctly older population, even if they had never been victimized but especially those instances where some of these rubes go out and buy leads by the hundreds, knowing that these people are in a specific age bracket; they can ask for all people who are retired; widows and widowers, you know, any characteristic that is going to bring out those people who are most likely to have that money, those people are necessarily in a certain age bracket.

So, age, in some respect, may be an appropriate criterion independent of what happens with--

CHAIRMAN CONABOY: I think those are the kinds of questions we have to look at, it seems to me, if we are going to fit this into the guideline sentencing scheme: how do we develop enhancements? We were kind of thinking about that in relation to the bill, which just says, you know, 5 years with one group and 10 years with another. Is there a better way to provide for a higher maximum penalty, certainly, but within that maximum, to develop levels that would be reasonable in the guideline system? And you have pointed out somewhere, I think, and one is the numbers of victims, and the second one is the magnitude of the offense, and this third one that we're talking about, the age, targeting, how do we describe that target group in a way that's appropriate?

MS. SMALL: I think from AARP's perspective, I have to say that we have two different things going on, which I just want to make sure to distinguish. One is that we understand through research that older victims-- that the victims are disproportionately older persons. At the same time, the position of AARP, our policy, is that age is not a proxy for vulnerability and that we take no position on the question of enhanced penalties based solely on

age.

So, age alone is not a proxy for vulnerability.

CHAIRMAN CONABOY: How do we describe that group, then, if we don't say they're vulnerable, or if we don't describe them by age.

MS. SMALL: I'm trying to draw the distinction. Indeed, our research shows that these older consumers are disproportionately affected and, in fact, targeted.

CHAIRMAN CONABOY: How do we describe it? I'm trying to think of it practically. If I don't describe them by age, and I don't say they're vulnerable, how do I describe it?

MS. SMALL: It's certainly accurate to say they are a certain age, but we don't want to offer the age alone as a proxy that says click, you know, once they reach the age they are, therefore, enter it into the vulnerable. We understand that we need to assist these people who are targeted but at the same time--

COMMISSIONER HARKENRIDER: You wouldn't want to change the definition of vulnerable victim to include anybody over the age of 45. That is basically what you're saying.

CHAIRMAN CONABOY: We have a for instance here in our own research. We don't even get the age of victims on the presentence report, for instance. That's always been something that really wasn't considered as an important factor in relation to the sentences being imposed necessarily. So, we might even have to change our practical research here on the record keeping if we are to develop something like this as a method of determining, is that a factor in itself?

MR. RUSCH: But, Judge, the problem there is the magnitude of this kind of activity. The guidelines currently speak, for example, to an

enhancement where there is a scheme to defraud more than one victim.

CHAIRMAN CONABOY: That was the one--

MR. RUSCH: We routinely deal with situations where there are thousands, even tens of thousands of victims. Imagine the impact on the typical Federal District Court if that court and probation office is told go out and contact 27,000 victims, which is exactly what happened--

CHAIRMAN CONABOY: So that that might be a factor, you say, the number of victims.

MR. RUSCH: The sheer volume--

CHAIRMAN CONABOY: Yes.

MR. RUSCH: --of business that they're generating.

CHAIRMAN CONABOY: Right.

MR. RUSCH: The nature of the scheme itself requires reaching out as widely as possible. We are certainly doing more in our Federal prosecutions to extract from the records we get when we search these types of rooms and other sources, try to develop a profile of what victims' ages and backgrounds are. But it takes a considerable effort to do that.

COMMISSIONER GELACAK: This is the last question I'm going to ask, and anyone just jump in here, anyone who feels like you want to answer it. What is it specifically that you would have us do? What do you want to be the result here at the Sentencing Commission? What do you want?

MR. RUSCH: I can only frame this in general terms for the moment, Commissioner, because I think, especially given the fact that the Commission has now put out proposed guidelines that would more extensively revise the whole area of fraud, it's hard to know exactly how you fit some of these factors into the general terms.

CHAIRMAN CONABOY: That's what I was talking about.

MR. RUSCH: I think, certainly, in our efforts to try to assist the Commission in this regard, we are likely to focus heavily on the issue of age. Even though I fully understand AARP's position that age does not necessarily equal vulnerability, we do see a disproportionate effort to go after older people as a group, and we certainly see disproportionate impact on older people who are repeatedly victimized. That's one consideration.

We also see many, many cases where people are defrauded of large amounts of money. And so, it's not just an issue of do you have a scheme to defraud more than one victim or whether one victim has suffered a substantial loss but literally substantial losses by substantial numbers of people, well in excess of the traditional, old-fashioned face-to-face con game-- and lastly, this issue of reloading as a concept and the issue of the rip-and-tear schemes.

One of the things that candidly concerns me as a prosecutor is that when we cite some of these examples to you about some of the big, big boiler rooms in the past, like the one that you saw in the videotape, that have dozens and dozens of people, there are still rooms like that, but there are also a lot more people who have stripped down their operations who will now destroy records rather than leave them around for FBI law enforcement, and if we focus just on the current structure of the sentencing guidelines, since the guidelines for fraud are primarily driven by losses, we may only be able to prove perhaps \$500,000 of loss for a particular scheme, even though that same person may run multiple operations, and each generate money, but they're widely separated, and they run at a much more systematic fashion to avoid law enforcement scrutiny and make it that much harder for us.

It's fine for us to point to sentences historically where we can get lots of time for owners who run the massive boiler rooms, but part of our

response to you is going to have to take into account the fact that we have people who are long-time telemarketers, dedicated to being absolutely ruthless and ripping people off and not even offering a pretense of return for all of the money that they send in. But if you look just at the loss tables, they don't look so bad.

So, I think to some degree, it's offender characteristics we have to identify for you in a way that would be helpful and look at victim characteristics as well in a way that makes sense. And that's as much as I can tell you at this point.

CHAIRMAN CONABOY: And I think that's what we're all talking about generally, and you do identify, as I said before, at least from my hearing, certain of those things and age for whatever it's there, the number of victims involved, the amount of money involved and repetitious conduct, and those are things that sometimes, we can incorporate in a variety of ways into the guidelines.

Any other? Mary?

COMMISSIONER HARKENRIDER: One thing that hasn't been touched on here, and I think that it, to some extent, shows that, you know, the FTC, the state AGs, et cetera, have been doing a good job, but it's my understanding that as enforcement has become stronger, et cetera, there has been a move, sort of, across the border, and is that also a consideration that you think the Commission should be looking at in terms of these telemarketing schemes, et cetera, coming from other countries or the--are there other factors that become more difficult for law enforcement in enforcing or investigating these operations from abroad?

MR. RUSCH: Maybe I'll start and then ask Sarah to intervene as well, because I know that NAAG has also been very interested in this issue of

cross-border fraud. In a nutshell, we've seen a number of Canadian telemarketing operations in major metropolitan areas like Montreal, Toronto and Vancouver that, in part, because Canadian authorities have been successful at educating Canadian citizens now target primarily or exclusively U.S. residents.

They know that the international border gives them even more of a cushion, even more of a basis for making things difficult for law enforcement in this country when they know that it takes us a lot of time and effort to use our mutual legal assistance process to get documents and then to extradite can take several years before you can get somebody here. And when we have, in some of our early cases that involve Canadian telemarketing, spoken directly with people who have been indicted and their attorneys, they are quite candid in saying it's going to take you 2 or 3 years.

One was even brazen enough to say we know by the time you get my guy over the border, your witnesses are going to be dead. That's the mentality that pervades some of the career telemarketers, the ones who do this as a criminal business over a long period of time, not just some kid out of college who's dabbling in this because it's easy money. So, that's a real consideration for us.

Sarah, do you want to add anything?

MS. REZNEK: No, I would echo what John had said. I don't know if the research shows that the folks who are calling from Canada to the United States are American or Canadian citizens. I don't know how the Sentencing Commission or how Federal sentences could affect those folks, although you do have the people who provide the premiums, who provide the gifts, who collect the mail and such stateside.

COMMISSIONER HARKENRIDER: Well, if we extradite them.

CHAIRMAN CONABOY: Well, if there are no more questions, we want to express our thanks again to you and say, as you can see, even when you started to discuss this yourself, you begin to run into your own problems as to how to resolve it. The problems are sometimes easy to delineate, and what to do about them is the harder part. And we're struggling with this as we look at the whole fraud concept in the guidelines, and we certainly appreciate your taking the time to come here and helping us out today.

Thank you very much.

MR. RUSCH: Thank you very much.

CHAIRMAN CONABOY: And with that, the meeting is adjourned.

[Whereupon, at 11:28 a.m., the meeting was concluded.]

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