
Report to the Congress:

TELEMARKETING FRAUD OFFENSES

Explanation of Recent Guideline Amendments

(as directed in section 6(b) of the Telemarketing Fraud
Prevention Act of 1998, Public Law 105-184)



UNITED STATES SENTENCING COMMISSION
October 1998

I. INTRODUCTION

This report is submitted pursuant to section 6(b)(2) of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 (the “Act”), which requires the United States Sentencing Commission (the “Commission”) to submit to Congress:

- A.** An explanation of each action taken under section 6(b)(1) of the Act to promulgate Federal sentencing guidelines or amend existing sentencing guidelines (and policy statements, if appropriate) to provide for substantially increased penalties for persons convicted of offenses described in section 2326 of title 18, United States Code, as amended by the Act, in connection with the conduct of telemarketing.
- B.** Any additional policy recommendations for combatting the offenses described in that section.

II. EXPLANATION OF GUIDELINE AMENDMENTS PROMULGATED FOR TELEMARKETING FRAUD OFFENSES

The actual text of the amendments promulgated by the Commission for telemarketing fraud offenses is set forth in Appendix A, attached. A summary of Commission initiatives on telemarketing fraud, which provided the substantive background information for Commission action with respect to these offenses, is contained in Appendix B, attached.

A. Amendments Submitted May 1, 1998

On May 1, 1998 (prior to the enactment of the Act), the Commission adopted and submitted to Congress two important guideline changes designed to enhance the punishment for telemarketing frauds and other similar offenses.

First, the Commission added a two-level enhancement (on average an approximate **25% sentence increase**) in the fraud guideline for offenses that are committed through mass-marketing. The Commission identified mass-marketing as a central component of telemarketing fraud, one which distinguished telemarketing fraud from other types of fraud. The Commission concluded it was often difficult to fully quantify the harm resulting from mass-marketing, due in part to the large numbers of victims. Arguably, because the fraud guideline structure relies heavily on monetary loss to determine offense seriousness, the guideline previously did not capture adequately the harm associated with this type of fraudulent conduct. Additionally, the Commission determined that there are fraudulent schemes perpetrated by other means (for example, Internet or mail fraud) that rely on mass-marketing to carry out the offense. The Commission therefore determined that a generally applicable specific offense characteristic in the fraud guideline, rather than an enhancement for telemarketing fraud only, better provides consistent and proportionate sentencing increases for similar types of fraud, while also ensuring increased sentences for persons who engage in telemarketing fraud.

Second, the Commission added a two-level enhancement (on average, an additional **25% sentence increase**) for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. That enhancement also contains a minimum offense level of level 12, which generally will necessitate some form of loss of liberty. (For example, an offender whose final offense level is that minimum level of 12 and who has little or no criminal history would be subject to a guideline range of 10 to 16 months imprisonment.) The enhancement contained three alternative provisions aimed at different forms of concealment conduct. The first two prongs address conduct that the Commission has been informed often relates directly to telemarketing fraud, although the conduct may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. The new enhancement specifically covered both types of conduct. The third prong provided a sentence increase for fraud offenses involving sophisticated concealment, including cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.

The Commission specified an effective date of November 1, 1998 for these amendments, barring congressional action to the contrary.

B. Emergency Amendments Submitted September 23, 1998

On September 23, 1998, pursuant to the “emergency guideline amendment authority” under section 6(d) of the Act, the Commission submitted additional amendments to enhance penalties for fraudulent telemarketing schemes and other similar offenses. **These amendments build on the May 1, 1998, Commission initiatives reflecting concern over the pernicious effects of telemarketing frauds, particularly as these offenses often impact large numbers of elderly, vulnerable victims.**

First, the Commission broadened the sophisticated concealment enhancement adopted on May 1, 1998, so that it covers more generally sophisticated means of executing or concealing a fraudulent offense. Second, the Commission augmented an existing guideline enhancement for vulnerable victims to provide heightened penalties (an additional two offense levels) if a large number of vulnerable victims are impacted. The Commission specified an effective date of November 1, 1998 for these amendments as well, barring congressional action to the contrary.¹

III. ESTIMATED IMPACT OF AMENDMENTS

¹All four voting commissioners serving as of September 23, 1998, supported these amendments that target increased penalties on the more culpable offenders. In accord with their views of the directive in section 6(b)(1) of the Act, Commissioners Goldsmith and Tacha also voted to increase the magnitude of the previously adopted “mass marketing enhancement.” Commissioners Conaboy and Gelacak did not favor such additional amendments.

Commission research indicates that the combined effect of all the amendments described *supra* in section II will be to increase sentences for defendants convicted of telemarketing fraud offenses by at least 57 percent. Specifically, average sentences of imprisonment are projected to increase from 21 months under the current guidelines to an average of at least 33 months under the November 1, 1998, amended guidelines. See Table 1. These prison sentences, like all current federal sentences, are non-parolable. **Additionally, the number of defendants qualifying for a non-incarcerative sentence will be reduced substantially.**²

These amendments are in addition to current guideline adjustments that take into account a number of harms and culpability concerns related to fraud offenses and their impact on vulnerable victims. For example, the guidelines also contain a sentencing enhancement for misrepresenting that the defendant was acting on behalf of a charitable organization, as well as policy statements encouraging the court to depart and sentence above the guideline range in certain circumstances, such as extreme psychological injury to elderly victims as a result of a fraud offense. **The amendments, and the additional related guideline adjustments, are coordinated components in a guideline system that ensures a minimum base offense level for similar offenses, but that also provides more serious punishment (through sentencing enhancements and adjustments) for more serious offense conduct and more culpable offenders.**

²When the Commission's May 1, 1998 amendments were modeled on the study sample of telemarketing fraud defendants, **the percentage qualifying for a guideline sentence of probation was reduced from 31 percent to zero.**

TABLE 1
TELEMARKETING CASES * - SENTENCE COMPARISONS

Options	Average Sentence (Months)	Difference between Current Average and Amendment Average	Difference between September 1998 Average and May 1998 Amendment Average
		Percent	Percent
Current Guidelines	21	N/A	N/A
May 1998 Amendments **	28	33.3	N/A
September 1998 Amendments ***	33	57.1	17.8

* Of the fraud cases studied in the sample, 121 involved telemarketing behavior. All telemarketing sentences would change due to the proposed changes in the guidelines.

** The May 1998 amendments call for a two-level enhancement for mass marketing behavior and a two-level enhancement for sophisticated concealment.

*** The September 1998 amendments added a two-level enhancement for a large number of vulnerable victims, and broadened the sophisticated concealment enhancement to include sophisticated means generally. Because of limitations on information available in case files, these data probably understate the impact of the broader sophisticated means enhancement.

IV. REQUIREMENTS AND OBJECTIVES OF THE ACT

In section 6(c), the Act lists seven requirements for the Commission to meet in implementing the Act's overall directive to provide "substantially increased penalties" for telemarketing fraud offenses. Specifically, the Commission was required to:

- (1) Ensure that the guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) and any recommendations thereunder reflect the serious nature of the offenses.**

As indicated *supra*, the amendments adopted by the Commission address this objective by:

- Adding a two-level enhancement to the fraud guideline for cases involving mass marketing. The Commission focused the enhancement on mass marketing specifically because it is a basic component of telemarketing fraud

which, by virtue of the sheer volume of persons targeted, contributes greatly to the serious nature of telemarketing offenses.

- Increasing the vulnerable victim adjustment by two levels in cases where a large number of vulnerable victims are victimized. The Commission focused on a second common component of telemarketing fraud -- victimizing a large number of vulnerable victims -- because the conduct results in significant monetary and emotional damage to the victims, thus contributing to the serious nature of telemarketing offenses.

(2) 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.

As indicated *supra*, the amendments adopted by the Commission address this requirement by:

- Adding a two-level enhancement for fraud offenses that involved sophisticated means or sophisticated concealment.
- Ensuring a minimum base offense level of level 12 for such cases (an increase of six offense levels above the base offense level for fraud cases).

(3) Provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims described in section 2326(2) of title 18, United States Code, are affected by a fraudulent scheme or schemes.

As indicated *supra*, the amendments adopted by the Commission address this requirement by:

- Increasing the vulnerable victim adjustment by two offense levels in cases where a large number of vulnerable victims are victimized. The increased adjustment applies where the offense victimized a large number of persons who are vulnerable due to their age or other factors.

(4) Ensure that the guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) are reasonably consistent with other relevant statutory directives to the Commission and with other guidelines.

As indicated *supra*, the amendments adopted by the Commission address this objective by:

- Adding a two-level enhancement for mass marketing, rather than targeting only telemarketing fraud, so as to maintain consistency between the penalties for telemarketing fraud and other fraud cases that also involve mass marketing but may have been conducted through a medium other than the telephone.
- Increasing the vulnerable victim adjustment for all cases involving a large number of vulnerable victims, rather than only telemarketing fraud cases, thereby maintaining consistency between telemarketing fraud offenses and other similar offenses.

(5) Account for any aggravating or mitigating circumstances that might justify upward or downward departures.

- The Commission did not provide additional bases for departure in the amendments it adopted because already existing policy statements and commentary invite departures for many factors, not incorporated in the offense guidelines themselves, that might occur in some telemarketing fraud cases. For example, the commentary in the fraud guideline invites an upward departure if the offense caused reasonably foreseeable physical or psychological harm or severe emotional trauma.

(6) Ensure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The amendments adopted by the Commission adequately meet the purposes of sentencing listed in section 3553(a)(2) of title 18, United States Code, in the following manner:

- The amendments were promulgated specifically to address the seriousness of telemarketing frauds and similar offenses and to provide adequate punishment for these offenses.
- The increase in penalties for these offenses, as provided by the amendments, should enhance deterrence.
- The increase in penalties for telemarketing fraud offenses, as provided by the amendments, also should better protect the public from further crimes committed by telemarketers due to the increased deterrent and incapacitative effects of the enhanced penalties.

(7) Take any other action the Commission considers necessary to carry out this section.

In carrying out the directives in the Act, the Commission considered it appropriate to:

- Expand application of the enhancements to a broader spectrum of cases than required by the directives in order to further the fundamental guideline objective of treating similar offenses in a similar manner.
- Assess the likely impact of the amendments by modeling them using a representative sample of previously sentenced cases.

V. ADDITIONAL POLICY RECOMMENDATIONS

Section 6(b)(2) of the Act invites the Commission to include in this report “any additional policy recommendations for combatting [telemarketing fraud] offenses.”

In correspondence dated February 18, 1998, the Commission recommended to the leadership of the House and Senate Judiciary Committees “that Congress amend 18 U.S.C. § 2326 (Enhanced penalties for telemarketing fraud) to (1) provide a simpler statutory enhancement, (2) cover conspiracy offenses, and (3) clarify the mandatory restitution provisions for these offenses.” In its final form, the Act does in fact extend coverage of the statutory enhancement to conspiracy offenses that violate the fraud provisions enumerated in section 2326, and it also clarifies the restitution requirements along the lines the Commission and the Department of Justice recommended. These statutory amendments should substantially aid efforts to combat telemarketing fraud offenses.

In light of these recent statutory improvements and the guideline amendments discussed herein that are scheduled to take effect on November 1 of this year, the Commission principally recommends a period of monitoring and oversight, by the Commission itself and the Congress.

A. Monitoring by the Commission

As part of its basic mission, the Commission receives a report from the district court on each sentence imposed under the Sentencing Reform Act. Data gleaned from these reports are systematically coded, entered into a constantly expanding database, and periodically analyzed by the Commission. The evolving body of sentencing guideline case law and a variety of other information also are regularly sifted and analyzed by Commission staff to assist in the Commission's ongoing assessment of guideline operation. Any time new enhancements are added to the Guidelines Manual, or existing enhancements are substantially modified, both of which will occur as a result of these guideline amendments, a period of learning, settling in, litigation, and adjustment can be expected. In accordance with its standard practices, the Commission has directed its staff to assist judges, probation officers, and attorneys in understanding and properly applying the new or modified

enhancements. As feedback is received, the Commission will need to further evaluate the provisions to ensure that they operate as intended.

There are two related areas in which the Commission particularly will want to assess the application of these new enhancements. These areas involve the Commission's considered decisions to hinge both the new mass marketing enhancement and the additional vulnerable victim enhancement on impact to "a large number" of persons. Use of this flexible criterion reflects a deliberate Commission decision to leave to the discretion and good judgment of sentencing judges—at least for now—a determination of what constitutes "a large number" of affected persons in a given case. Over time, the Commission expects to assess and learn from judges' decisions in applying this flexible criterion. This approach obviously preserves the option for a future Commission to employ a more definite standard, should that become desirable to avoid unwarranted disparity, or for other reasons.

B. Oversight by Congress

The Commission suggests that the House and Senate Judiciary Committees also may wish to conduct oversight of the amended statutory and guideline provisions after a reasonable period of use. Through its own study of telemarketing fraud offenses, the Commission learned that the nature and salient characteristics of these offenses continue to evolve. Criminals no doubt will continue to employ their "creative genius" to find new and dangerous ways of defrauding innocent victims. This, in turn, necessitates appropriate congressional oversight to ensure that federal criminal law remains appropriate and effective.

The Committees also may want to assess the continued usefulness of the five- and ten-year statutory penalty enhancements under 18 U.S.C. § 2326, particularly in light of these guideline amendments. Preliminary Commission analysis suggests that, even now, those statutory enhancements are used in a very small percentage of cases involving telemarketing fraud. The analysis also suggests that a primary reason why federal prosecutors may have sought to invoke the statutory enhancements was to encourage the court to sentence above the existing guideline range (which prosecutors may have thought was inadequate). Now that the guidelines have been amended to provide specific enhancements for telemarketing fraud and related conduct, there may be less need for the statutory penalty enhancements. That is because the statutory penalties that are applicable to the underlying fraud conduct, without the statutory penalty enhancements, may already be high enough to accommodate the increased guideline penalties produced by the amendments. In addition, the increased guideline penalties most likely will be accommodated by the fact that such conduct usually can be readily charged as multiple offenses, the statutory penalty ranges for which can be added if necessary to accommodate the guideline sentence.

Commission sentencing data can substantially assist Congress in conducting these kinds of review. The Commission stands ready to cooperate in any such future efforts to assess the changing characteristics of telemarketing fraud offenses and the appropriateness of applicable statutory and guideline penalties.

C. Increased Coordination of Congressional and Commission Action

The Commission strongly believes that the federal sentencing guideline system provides an excellent, workable format for effectuating congressional intent on sentencing issues. This is particularly the case when the Commission works closely with the Congress and the Congress provides the Commission with sufficient flexibility to carry out expressed congressional intent unencumbered by mandatory minimum sentences of imprisonment or specific directives on the extent of sentencing increases.

A major goal of the Commission, especially in the past few years, has been to expand its capacity to work closely with the Congress so that the Commission might fully appreciate and effectuate congressional intent on sentencing issues and, conversely, so that the Commission might meaningfully inform the Congress on those issues. **Accordingly, the Commission continues to look for avenues to increase communication, cooperation, and coordination between the Commission and the Congress, ultimately in order to effect sound, just federal sentencing policy.**

APPENDIX A: TELEMARKETING FRAUD AMENDMENTS
(Showing the Net Effect on the Guidelines of Amendments Submitted to
Congress on May 1, 1998 and September 23, 1998)

Synopsis of Amendment: *This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 (the “Act”).*

The Act directs the Commission to provide for “substantially increased penalties” for telemarketing frauds. 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 #2, 63 F.R. 28202, 28203 (May 21, 1998)) Those amendments added a specific offense characteristic for “mass-marketing,” which is defined to include telemarketing, and 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.

This amendment also makes a conforming amendment to §2B5.1 in the definition of “United States”.

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)).

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

* * *

(b) Specific Offense Characteristics

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

(34) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

~~(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.~~

~~(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above 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.

(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(67) If the offense --

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

Commentary

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Application Notes:

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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.*

[Notes 3 through 13 are redesignated as Notes 4 through 14, respectively.]

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.

[Notes 14 through 18 are redesignated as Notes 16 through 20, respectively.]

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.

Subsection (b)(~~4~~6)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(~~6~~7)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(~~6~~7)(B) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.

* * *

§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 who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).~~

For purposes of subsection (b), "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 ~~where~~**in which** the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case ~~where~~**in 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:

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

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

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Commentary

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Application Notes:

1. *For purposes of this guideline, "United States" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the **United States** Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.*

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APPENDIX B: COMMISSION INITIATIVES ON TELEMARKETING FRAUD OFFENSES

The Commission's 1997 and 1998 initiatives with respect to telemarketing fraud offenses provided the substantive basis for much of the Commission's actions in promulgating the amendments described in section II of the report. Those initiatives may be summarized as follows:

A. Initiatives Prior to the Enactment of the Act

In light of concerns expressed by Congress, the Department of Justice, and others regarding the need to strengthen sentencing policy for telemarketing fraud, the Commission initiated a detailed study of telemarketing fraud offenses in the Fall of 1997. This study was conducted in conjunction with the Commission's ongoing comprehensive assessment of the fraud and related guidelines. The Commission's pre-enactment initiatives with respect to telemarketing fraud involved the following:

- Examination of the characteristics of telemarketing fraud, the statutory enhancement for telemarketing fraud (18 U.S.C. § 2326), and whether current adjustments in guidelines 2F1.1 (Fraud) and 3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in §5K2.0-§5K2.18 (Other Grounds for Departures), provide adequate punishment for defendants convicted of telemarketing fraud offenses.
- Empirical analyses of telemarketing fraud sentences and application of the statutory enhancement, resulting in a staff report on telemarketing fraud in January 1998.
 - Methodology: For this effort, fiscal year 1997 cases that were received at the Commission by June 1, 1997, were used as the population from which cases were selected. To identify cases that involved telemarketing offense conduct, a staff working group reviewed fraud cases in which the guidelines' vulnerable victim enhancement was applied. Of the 326 cases that fulfilled these criteria from the designated time period, 115 cases were determined to involve telemarketing fraud.
 - Principal Findings: With the caution that this data assessment had a number of limitations, the following preliminary observations were made:
 - While information on victim age in sentencing documents was spotty, in general, telemarketing fraud victims were substantially older than the threshold age of 55 set by Congress in 18 U.S.C. § 2326 as the basis for the most severe telemarketing fraud penalties.
 - In the majority of cases in which the timing and nature of the offense conduct appeared to warrant application of the statutory

enhancement, the enhancement nevertheless was not assessed. Plea bargaining practices, including dismissal of substantive fraud counts in favor of a guilty plea to a conspiracy count under 18 U.S.C. § 371 (to which the statutory enhancement was then inapplicable), appeared to be the most frequent explanation for this result.

- Median sentences for defendants who were assessed the statutory enhancement were at least twice as great as those for defendants in telemarketing fraud cases to which the statutory enhancement was not assessed.
- Due to the operation of a variety of guideline factors in addition to the fraud loss table, sentences imposed in telemarketing fraud cases under the existing guidelines were substantially higher than described to the House Crime Subcommittee in testimony that appears, at least in part, to have formed the basis for legislation adopted by the House of Representatives that would have required large increases in telemarketing fraud penalties. The sophistication of the guidelines through this variety of factors is illustrated in Appendix C by a telemarketing fraud conspiracy scheme operated in New York state.
- Consideration of the staff report on telemarketing fraud in January 1998 and its submission to interested members of Congress. This report provided an overview of the statutory penalty enhancements for telemarketing fraud, including legislative history and Commission responses, an assessment of how the sentencing guidelines apply to telemarketing fraud conduct, an examination of the scope and nature of the telemarketing fraud problem, and information about current telemarketing fraud prevention efforts.
- Solicitation of public comment (*See 63 Fed. Reg.* 625-26) on telemarketing fraud generally, the impact on multiple victims, the problem of revictimization, use of sophisticated means, guideline departures, and other factors. The Commission received written comment from the following: Citizens for the Rehabilitation of Errants, the Commission's Practitioners' Advisory Group, Visa USA, the Federal Trade Commission, the Federal Public and Community Defenders, and the Department of Justice.
- Conducting a public hearing in February 1998 on federal sentencing issues related to telemarketing fraud offenses. Witnesses included representatives from the Department of Justice, National Association of Attorneys General, and the American Association of Retired Persons.
- Submission of recommendations to Congress in February 1998 suggesting several

statutory changes. Specific recommendations included a simplified statutory enhancement, ensuring that conspiracies to commit enumerate fraud offenses were eligible for the statutory enhancement, clarification of the interaction of statutory mandatory restitution provisions, and flexibility in congressional directives to the Commission.

- Adoption of sentencing guideline amendments in May 1998, discussed in section IIA of the report.

B. Initiatives After the Enactment of the Act

After the enactment of the Act, the Commission developed and evaluated possible responses to the directives contained therein. The Commission's post-enactment initiatives with respect to telemarketing fraud involved the following:

- Assessment of the potential impact of the May amendments, discussed in section III of the report.
- Conducting meetings with key congressional staff to (1) inform them of the Commission's recent actions regarding telemarketing fraud, (2) describe the Commission's process of evaluating the impact of the May 1998 amendments and the directives in the Act, and (3) seek feedback concerning the congressional expectation of possible further Commission amendment action in response to the Act.
- Solicitation of additional public comment (*See 63 Fed. Reg. 44941-42*) as to how the Commission should respond to the Act's directives and, specifically, the degree to which the Commission's May 1998 amendments addressed the directives. The Commission received comment from its Practitioners' Advisory Group and the Federal Public and Community Defenders.
- The promulgation of additional amendments in September 1998, discussed in section IIB of the report.