



TELEMARKETING FRAUD WORKING GROUP

Report to the Commission

January 28, 1998

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TELEMARKETING FRAUD REPORT

I. INTRODUCTION

A. Purpose and Principal Findings of Report

Congress enacted, on September 14, 1994, a statutory enhancement providing additional five-and ten-year penalty increases for telemarketing fraud conduct. *See* Part IIA for a detailed description of this enhancement. Congress is likely to address this area again, as indicated by a spate of related legislative initiatives directing the Commission to add various guideline enhancements for telemarketing fraud conduct. In light of these developments, a staff working group was constituted to conduct a detailed study of telemarketing fraud offenses in conjunction with the Commission's multi-year comprehensive assessment of the fraud and related guidelines.

The working group has reviewed the current operation of the guidelines and determined that they presently take into account a number of harms and culpability concerns related to fraud offenses and elderly victims. The fraud guideline encompasses numerous fraud statutes and operates by assessing the seriousness of the harm caused by a fraud offense. The guideline rationalizes the sentencing of these fraud offenses so that fraudulent criminal conduct of comparable severity is sentenced similarly. The generally applicable vulnerable victim guideline responds to situations in which defendants knew or should have known of their victims' vulnerability, including vulnerability due to age. In addition, sentencing enhancements exist for factors such as causing harm to more than one victim and misrepresenting that the defendant was acting on behalf of a charitable organization. Moreover, courts are invited to depart and sentence higher than the guideline range in other circumstances that potentially could involve elderly victims.

The working group also conducted an empirical analysis of telemarketing fraud sentences and application of the statutory enhancement. Recognizing the inherent limitations on the current data assessment effort (*see infra* Part IVA), the following preliminary observations can be made:

- While information on victim age in sentencing documents was spotty, in general, telemarketing fraud victims are substantially older than the threshold age of 55 set by Congress 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 is inapplicable) appeared to be the most frequent explanation for this result.
- The limited available data indicate that median sentences for defendants who are assessed the statutory enhancement are 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 are substantially higher than described to Congress in testimony that appears, at least in part, to form the basis for legislation adopted by the House of Representatives that would require large increases in telemarketing fraud penalties.

B. Organization of the Report

Part II of this report provides an overview of the statutory penalty enhancements for telemarketing fraud and the legislative history leading to these enhanced penalties. Also discussed is subsequent congressional action on the issue, and the Commission response to the legislation. Part III assesses the application of current sentencing guidelines to telemarketing fraud offense conduct. Part IV examines the scope and nature of the telemarketing fraud problem and provides information about current telemarketing fraud prevention efforts. Part V explains the genesis of the recently published issues for comment at 63 *Fed. Reg.* 625-26 (1998), and Part VI concludes with recommendations for Commission consideration. In addition, appendices include a glossary of telemarketing fraud terminology, a detailed history of legislative activity and Commission consideration of telemarketing fraud issues, tables detailing the empirical analysis conducted by the Commission's working group, and the recently published issues for public comment.

II. STATUTORY ENHANCEMENTS, LEGISLATIVE HISTORY, AND COMMISSION RESPONSE

A. The Statutory Penalty Enhancement

Section 250002 of the Violent Crime Control and Law Enforcement Act of 1994,¹ established a new chapter in title 18, United States Code, entitled "Telemarketing Fraud." These provisions, popularly known as the Senior Citizens Against Marketing Scams ("SCAMS") Act, prescribe mandatory restitution and enhanced imprisonment penalties of up to five years when certain enumerated fraud offenses involve telemarketing conduct.² The enumerated offenses are 18 U.S.C. §§ 1028 (Fraud and related activity in connection with identification documents), 1029 (Fraud and related activity in connection with access devices), 1341 (Fraud and swindles), 1342 (Fictitious name or address), 1343 (Fraud by wire, radio, or television), and 1344 (Bank fraud).

¹Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²*See* 18 U.S.C. § 2326 (Enhanced penalties):

A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344 in connection with the conduct of telemarketing --

(1) may be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and

(2) in the case of an offense under any of those sections that --

(A) victimized ten or more persons over the age of 55; or

(B) targeted persons over the age of 55,

may be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

The new statutory provisions also provide a second tier of enhanced imprisonment penalties of up to ten years when a telemarketing offense victimizes ten or more victims over the age of 55 or targets persons over the age of 55.³ No specific directive to the Commission accompanied enactment of these new penalty enhancements.

Generally, telemarketing is defined in the statute as a plan, program, promotion, or campaign that is conducted to induce purchases of goods or services, or participation in a contest or sweepstakes, by use of one or more interstate telephone calls initiated either by: (1) a person who is conducting the plan, program, or campaign, or (2) a prospective purchaser or contest or sweepstakes participant. 18 U.S.C. § 2325.

Restitution is mandated for the designated fraud offenses (18 U.S.C. §§ 1028-29, 1341-44) when committed in connection with telemarketing conduct. Restitution is to be the “full amount of the victim’s losses,” meaning “all losses suffered by the victim as a proximate result of the offense.” 18 U.S.C. § 2327.

B. Legislative History and Commission Action⁴

Congress has held numerous hearings on fraud in connection with telemarketing during the past decade.⁵ Initially, Congress focused on strengthening the authority of the Federal Trade Commission (“FTC”) because the FTC “is uniquely situated to address these issues, with authority to conduct investigations, provide consumer redress, and seek injunctive relief.”⁶ In addition, the FTC is considered the principal federal agency charged with combating telemarketing fraud.⁷ Congress subsequently facilitated these civil and administrative remedies by

³*Id.*

⁴For a more detailed discussion of the legislative history and subsequent Commission response, see Appendix B.

⁵See, e.g., *Oversight Hearing on the FTC’s Enforcement of its Consumer Fraud Law Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1987), *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the Comm. on Government Operations*, 101st Cong., 1st Sess. (1990), and *Telemarketing Fraud and Consumer Abuse Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991).

⁶134 CONG. REC. S3041 (daily ed. Mar. 24, 1988) (statement of Sen. Gore).

⁷According to House Report 100-731 (100th Cong., 2d Sess. (1988)), “[s]everal federal agencies or entities enforce statutes that may cover particular telemarketing practices, including the Commodities Futures Trading Commission (‘CFTC’) (which enforces the Commodity Exchange Act), the United States Postal Service (which enforces the criminal law dealing with mail fraud), and the Secret Service (which enforces the criminal law dealing with fraud in

passing the Telemarketing and Consumer Fraud and Abuse Prevention Act.⁸ Shortly thereafter, Congress enacted a new federal statute providing enhanced penalties for telemarketing fraud.⁹ Congress concurrently required the Sentencing Commission to review and report on sentencing policy for fraud offenses involving older victims.¹⁰

In 1996, and again in 1997, the House of Representatives passed telemarketing fraud-related legislation requiring the Commission to provide an increase of at least four levels (about a 50% increase in penalty) if enumerated fraud offenses involved telemarketing conduct, and at least an eight-level increase (more than doubling the typical penalty) if the telemarketing-related offense victimized ten or more persons over the age of 55 or targeted persons over the age of 55. The legislation also would have required the Commission to increase the offense level for any fraud offense by at least two levels if the defendant conducted activities to further the fraud from a foreign country.¹¹

Although in 1996 the Senate had no comparable legislation before it¹² and did not act on the House-passed bill, it did act in 1997. On November 9, 1997, the Senate passed a substitute version of the House bill, which does not require specific enhancements in offense levels, but rather directs the Commission to provide for "substantially increased penalties" for telemarketing fraud offenses, and requires "appropriate sentencing enhancements" for sophisticated means and

connection with credit cards, access devices, and computers). However, the FTC is the principal federal agency charged with combating telemarketing fraud.”

⁸Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (1994).

⁹The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250002, 108 Stat. 1796 (1994).

¹⁰*Id.* at § 250003.

¹¹The 1997 House-passed legislation is substantially the same as the bill passed in the preceding Congress, with the addition of a directive to the Commission to “ensure that the sentences, guidelines, and policy statements for the specified offenders are appropriately severe and reasonably consistent with other relevant directives and other guidelines.” *See* H.R. 1847, 105th Cong. (1997).

¹²At one time, Senator Abraham circulated a “Dear Colleague” letter indicating his intent to introduce, and inviting cosponsors for, a bill directing the Commission to increase penalties for those who “purposefully defraud the vulnerable in our society and those who utilize international borders to evade prosecution.” Subsequently, Commission legislative staff met with Senator Abraham’s staff on this issue to explain how such conduct is currently handled under the guidelines. For reasons unknown to Commission staff, the bill never was introduced.

large numbers of vulnerable victims.¹³ The legislation also provides emergency authority for promulgation of amendments within 120 days of passage of the legislation, with an effective date for the amended guidelines not earlier than 30 days after their submission to Congress.

While the Commission has been criticized in some quarters for not responding adequately to the 1994 telemarketing fraud legislation, it did, in fact, comply with the specific congressional directive to review fraud offenses against elderly victims and report to Congress.¹⁴ In addition, the Commission clarified the commentary of the vulnerable victim guideline at USSG §3A1.1 to address an inter-circuit conflict and broaden its applicability.¹⁵ Moreover, consistent with its statutory mandate under the Sentencing Reform Act to periodically review and revise its guidelines,¹⁶ the Commission has been engaged in a comprehensive review of the fraud guidelines and has published on multiple occasions, proposed amendments and issues for comment regarding the appropriateness and adequacy of sentencing enhancements addressing telemarketing fraud. Most recently, a staff working group has been engaged in the compilation and analysis of sentencing data and related information for the Commission's consideration in determining the appropriateness of telemarketing fraud-related adjustments to the guidelines.

Concern periodically has been expressed that guideline sentences for fraud defendants may be too low because the fraud guideline relies heavily on the amount of loss in determining penalty levels and the fraud loss table does not appear to generate sufficiently high sentences.¹⁷ In fact, because a defendant's guideline range is determined by many factors in addition to actual loss amounts (*e.g.*, criminal record, cooperation with the authorities, whether the defendant accepted responsibility, the defendant's role in the offense), sentences necessarily will vary according to individual circumstances. For example, of 115 recent telemarketing fraud cases analyzed by the staff working group (*see infra* Part IVA), the defendants in the 25 cases with losses less than

¹³The legislation also requires the Commission to: 1) ensure that the guidelines and policy statements submitted reflect the serious nature of the offenses, are reasonably consistent with other relevant statutory directives to the Commission and with other guidelines, account for any aggravating or mitigating circumstances that might justify upward or downward departures, adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; and 2) take any other action the Commission considers necessary.

¹⁴United States Sentencing Commission, *Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims*, March 1995.

¹⁵See USSG App. C, amendment 521.

¹⁶28 U.S.C. § 994(n).

¹⁷See, *e.g.*, H.R. 1499, *Consumer Fraud Prevention Act of 1995 Before the Subcomm. on Crime of the House Comm. on Judiciary*, 104th Cong. 48 (1996) (statement of Mitchell D. Dembin, Chief, General Crimes Section, U.S. Attorney's Office, S.D. Ca.) (stating that low dollar losses in telemarketing fraud offenses generally resulted in low sentences and that cases involving a loss of \$100,000 or more would result in a sentence of about one year's imprisonment). This testimony is described more fully at Appendix B-3.

\$100,000 all received sentences greater than one year. (Actual sentences ranged from 15 to 168 months, with three well above 60 months). Thus, actual sentencing experience to date in telemarketing fraud cases suggests that the guidelines currently are producing higher sentences than Congress may have presumed would result under the guidelines.

III. ASSESSMENT OF GUIDELINE APPLICATION ISSUES AFFECTED BY TELEMARKETING FRAUD ENHANCEMENTS

The sentencing guidelines presently contain multiple, related mechanisms designed to achieve appropriate punishment for fraud offenses, including frauds perpetrated against elderly victims. As discussed more fully below, these provisions include the fraud guideline (§2F1.1), a generally applicable vulnerable victim adjustment (§3A1.1), and related policy statements and commentary describing atypical circumstances that may warrant a sentence above the applicable guideline range (upward departure). Additionally, limited discretion is provided by the guideline range itself — the greater of 25 percent or six months between the lowest and highest sentences -- within which sentencing judges can take into account, among other factors, the nature of the victim.

A. Fraud Guideline

The Federal Criminal Code contains scores of fraud offenses that, while often overlapping in the criminal conduct encompassed, vary in their mode of perpetration (*e.g.*, by mail, telephone, computer, or other means invoking federal jurisdiction), types of affected victims, and penalty structure. To ensure greater sentencing uniformity for similar conduct regardless of the fraud statute charged, the Commission promulgated a single, generic fraud guideline. This guideline seeks to assess the seriousness of, and degree of harm caused by, the fraud offense by requiring the court to determine: (1) the amount of resulting or attempted loss, (2) the sophistication of the offense, (3) whether the perpetrator used the cloak of a specially trusted institution (*e.g.*, claimed to be acting on behalf of a charity or government agency), (4) whether the conduct violated a judicial or administrative order, and (5) whether serious bodily injury was risked. The “specific offense characteristics” incorporated into the fraud guideline do not provide enhanced punishment based on the nature of the victim. Rather, the guidelines treat that concern primarily through a generally applicable sentence enhancement for targeted vulnerable victims.

B. Vulnerable Victim Adjustment

Guideline §3A1.1 (Hate Crime Motivation and Vulnerable Victim) addresses predatory conduct relating to victim vulnerability. This general enhancement provides approximately a 25 percent increase if the defendant knew or should have known that the victim was unusually vulnerable or particularly susceptible to the defendant’s conduct. Under this guideline, either young or old age can provide the basis of vulnerability. This guideline also suggests courts should depart upward when a defendant’s criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim.

C. Upward Departures

Guideline §5K2.0 (Grounds for Departure) is a policy statement providing a general explanation of when, in the Commission’s view, circumstances may warrant a sentence outside the applicable guideline range, consistent with court departure authority under 18 U.S.C. § 3553(b). That statutory section provides, in pertinent part, that the sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”

In addition to the guidance provided in policy statement §5K2.0, the Commission has described its general approach to departures in Chapter One of the *Guidelines Manual*.¹⁸ Taken together, these sections indicate that the Commission envisions that applicable guideline provisions will result in a range of sentences appropriate for typical (“heartland”) cases of a particular offense type and offender category. However, significant unusual factors, in kind or degree, can warrant a departure from the guideline range. In commentary accompanying specific guidelines, and in Chapter Five, Parts H (Specific Offender Characteristics) and K (Departures), the Commission has provided more detailed guidance on the range of factors that it has or has not “adequately considered” in particular types of cases.

The incorporation into the guidelines of an enhancement for vulnerable victims indicates that the Commission has considered, in a broader way, the circumstance of elderly fraud victims. Hence, it would be arguably inconsistent with the section 3553(b) departure statute and the Commission’s amplification of it for courts to sentence above the guideline range solely on the basis that a fraud offense impacted an older victim. On the other hand, the guidelines do contemplate and specifically invite the possibility of upward departure in special circumstances that may involve defrauded older victims. For example, policy statement §5K2.3 (Extreme Psychological Injury) authorizes courts to depart upward if victims, perhaps including elderly fraud victims, suffer “psychological injury much more serious than that normally resulting from . . . the offense.” In a similar vein, commentary accompanying the fraud guideline invites upward departure when “the offense caused reasonably foreseeable . . . psychological harm or severe emotional trauma,” or the solvency of one or more victims was knowingly endangered and the increased punishment assessed for amount of fraud loss does not fully capture the seriousness of the harm perpetrated.¹⁹

D. Criminal Purpose Organization

In a case in which a convicted organization is found to exist primarily for the purpose of perpetrating telemarketing fraud, the guidelines provide the most severe penalty possible. Specifically, Chapter Eight of the sentencing guidelines, relating to organizational defendants,

¹⁸See USSG Ch. 1, Pt. A 4(b).

¹⁹USSG §2F1.1, comment. (n. 10).

requires that an organization operated primarily for a criminal purpose or by criminal means must be divested of all its net assets.²⁰

IV. SCOPE AND NATURE OF THE TELEMARKETING FRAUD PROBLEM

A. Commission Information

Currently, there is no specific sentencing guideline implementing the five- and ten-year enhancements available to sentencing judges under the SCAMS Act. While there has been no published decision on this issue, some district courts have found the SCAMS Act and its resulting statutory enhancement to be sufficient authority for granting an upward departure under 18 U.S.C. § 3553(b).²¹ Accordingly, one approach that the Commission may consider is to add language in the *Guidelines Manual* encouraging an upward departure for certain telemarketing fraud characteristics. As with all encouraged departure factors, such an invited departure would be discretionary with the court, and a court's refusal to increase the sentence via the mechanism of upward departure would not be reviewable on appeal.

Alternately, a cogent argument can be made in support of incorporating telemarketing fraud enhancements into the existing guidelines in order to have more uniform and proportional sentencing than would likely result from inviting upward departures. As with other enhancements that contribute to the determination of the guideline range, such enhancements are presumptively mandatory in that they must be applied by the court if the facts warrant and are reviewable on appeal. If the Commission were to adopt such an approach, it must necessarily determine whether the guideline language should mirror the SCAMS Act statutory enhancements and the appropriate amount of such increases.

In order to assist the Commission in its consideration of these policy issues, the working group has researched how the SCAMS Act enhancement is currently being implemented. The group also has analyzed recently sentenced telemarketing cases in order to determine if any sentencing trends are evident as a result of this three-year-old law.

Since the enactment of the SCAMS Act on September 14, 1994, prosecutors typically introduce the possibility of a sentencing enhancement for telemarketing fraud under 18 U.S.C. § 2326 by one of two methods. The first method is to include a reference to the penalty enhancement statute within the violation clause of the indictment. Such reference is typically brief and includes a statement to the effect of "by virtue of such activity the defendants are thereby subjected to the enhanced penalties of 18 U.S.C. § 2326." The second method occurs subsequent to indictment when the government elects to file a notice of its intention to seek the penalty enhancement. In support of its notice to seek the statutory enhancement, the government will generally move for an upward departure from the sentencing guideline range and submit supporting pleadings.

²⁰See USSG §8C1.1.

²¹See *United States v. Terrance Brown*, No. 1:96CR0050-003 (E.D. Tenn. Jan. 13, 1997), discussed *infra* Part IVA6.

In consideration of the current 2326 application process, the working group attempted to identify recently sentenced cases in which telemarketing characteristics were involved in order to determine the frequency and effect of section 2326 in the sentencing, particularly in relation to: (1) the age, number, and “targeting” of victims, and (2) the defendant’s role in the telemarketing scheme.²² Because the SCAMS Act contains a mandatory restitution provision at 18 U.S.C. § 2327, the working group also scrutinized the relationship between the amount of loss and amount of restitution ordered.

²²For 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, the 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. The offense conduct in these cases were analyzed in detail and the results of this analysis are described in the tables in Appendix C.

1. Applicability of the Section 2326 Enhancement

Of the 115 cases examined by the working group, substantially less than half (43 or 37.4%) were eligible for the statutory penalty enhancement of section 2326, in that some or all of the conduct of conviction occurred after the September 14, 1994, effective date of the SCAMS Act. Of those 43 cases, the section 2326 statutory enhancement was included in the violation clause of the indictment in only 20 cases.

Of these 20 “indictment violation clause” cases, the presentence report prepared by the probation officer referenced the possibility of an increased statutory penalty for the court’s consideration in only seven instances (the “PSR consideration” group). In none of these seven instances did the probation officer recommend an upward departure from the guideline range. Nor did the government file objections to the presentence report in any of these seven cases. Consequently, none of these cases resulted in an upward departure. Supplemental information provided by the Department of Justice indicates that the government unsuccessfully sought upward departures in two of the seven cases and did not seek upward departures for the remaining five defendants.²³

Even though the courts did not employ upward departures to impose higher sentences, the defendants in the “PSR consideration group” received sentences that were 2.4 times greater than the 72 defendants who, because their conduct occurred prior to enactment of the statutory enhancement, were ineligible for the enhancement (the “non-2326 eligible” group). Additionally, sentences for the defendants in the “PSR consideration group” average 2.0 times greater than those for the 23 defendants who were eligible for the 2326 enhancement but whose indictments did not reference the enhancement (the “2326 eligible” group²⁴). *See* Table 1 at Appendix C. These higher sentences may reflect a lower departure rate for such defendants, as well as the fact that these particular defendants were more likely to be convicted after trial (71.4% guilty plea rate

²³In two other instances, the probation officer presented the following information to the court but indicated that it did not necessarily constitute a recommendation for a departure. “Although not specifically targeted due to their age, many of the victims were senior citizens (over the age of 55) and considered more vulnerable to telemarketing fraud as reflected in the 1994 SCAMS Act, which resulted in enhanced penalties under 18 U.S.C. § 2336. If the court finds that loss amount does not fully capture the harmfulness or seriousness of the offense, particularly to these victims, then the court may depart per Application Note 10 to U.S.S.G. §2F1.1.”

²⁴Ten of these section “2326 eligibility ” cases resulted in guilty pleas only to 18 U.S.C. § 371 conspiracy counts, thus rendering inapplicable any of the statutory penalty enhancements. Twenty-one of the 23 cases involved ten or more victims or involved victims who were either 55 years of age or older (or who were described as “elderly”) and thus conceivably could have been eligible for the ten year statutory penalty enhancement had the offense of conviction been one that is enumerated in section 2326.

compared to 86.1% for the “non-2326 eligible” defendants and 100% for the “2326 eligible” defendants).²⁵

Turning to the “indictment clause only” group, the Commission’s data reflect that in 13 cases, all of which were disposed of by guilty plea, there was no consideration of the section 2326 penalty enhancement by the time conviction had occurred and the presentence report was prepared for the sentencing judge’s consideration. This is understandable for eight of the 13 cases because they resulted in convictions of only 18 U.S.C. § 371 conspiracy counts, thereby rendering the penalty enhancement of section 2326 inapplicable.²⁶ For the remaining five cases in this “indictment clause only” group, where it appeared the defendants continued to be statutorily eligible after conviction for the section 2326 enhancement, the sentencing data suggest no explanation for why the enhancement was not brought to the court’s attention in the presentence report and applied at sentencing.

2. Victim Age

The SCAMS Act is intended to punish more harshly those defendants who target victims over the age of 55, and defendants who victimize more than ten individuals over the age of 55. However, the age of victims was not evident in the sentencing documents in 27 percent of the cases examined by the working group. In an additional 46 percent of the cases, victim age information was limited to such generic descriptions as “elderly” or “retirement age.” Therefore, based on the available sentencing documentation, it is problematic to provide empirically sound observations about whether telemarketing offenses involve elderly victims (whether defined as those over age 55 or some higher threshold) more than any other distinct age group.

To the limited extent that such information was presented in the documentation examined by the working group (only 33% of the cases), it appears that elderly victims are generally the

²⁵As a preliminary fact-finding mission, staff initially reviewed 43 cases involving telemarketing fraud which were sentenced in FY 1996. In 14 of these cases, the statutory enhancement of section 2326 was considered in the presentence report submitted to the judge. Preliminary assessment indicated that the defendants in these 14 cases received sentences which were 3.8 times higher than the remainder of the sample (median of 67.5 months, compared to a median of 18.0 months). The higher sentences were reflective of higher monetary loss and less substantial assistance downward departures for the section “2326 PSR consideration” group. Controlling for substantial assistance, the section “2326 PSR consideration” group received sentences 3.2 times higher than the remaining cases (median of 67.5 months, compared to a median of 21.0 months). The Working Group elected not to aggregate these results of the first coding effort with the 1997 cases because the two category of cases were not selected in the same manner. Thus it was not possible to make comparisons between precisely the same categories of defendants; *e.g.*, the Group was unable for the data that remains from the first sample to distinguish between the section 2326 eligible and non-eligible groups.

²⁶Section 2326 does not provide for the penalty enhancement to be applied to conspiracy convictions, although recent legislative proposals support its inclusion as a predicate for the section 2326 statutory enhancement. *See* Appendix B.

object of telemarketing schemes, although the definition of “elderly” is a fluid one. For example, in only one of the seven “PSR consideration cases” did victim information appear, and that information pertained to only one of the defendant’s victims (84 years old). In the group of 13 “indictment clause only” cases which resulted in guilty pleas to conspiracy counts, victim age information was furnished for only six of the cases, and reflected a median age of 68.0 years. For the 95 cases in which section 2326 was not contained in the indictment violation clause, the median victim age was 78.0 years. At most, these results suggest that there is no present correlation between the age of the victims and the use of the section 2326 penalty enhancement.

3. Number of Victims

In contrast to information about the age of the telemarketing fraud victims, the number of victims was provided in most of the cases examined by the working group. As with the information about victim age, however, the Commission’s data indicate that there is no present correlation between the number of victims and use of the section 2326 penalty enhancement. The median number of reported victims was between 52 and 54 for the 13 “indictment clause only” group of defendants. The median number of reported victims was almost a third less (16) for the seven defendants who received PSR consideration of the section 2326 statutory enhancement. Finally, the median number of victims dropped to between 12 and 14 for the remaining 95 “eligible and non-eligible section 2326” defendants.

4. Defendant’s Role

Similarly, there is no particular congruence between the defendant’s role in the telemarketing scheme and the potential application of the SCAMS Act in the cases examined by the Working Group. For example, of the seven “PSR consideration” cases, five involved defendants who were “reloaders” (those who place calls to victims who have previously purchased products - *see* Appendix A), while one was a manager and one a “front loader” (salesperson). In cases in which the section 2326 enhancement appeared in the indictment but was no longer applicable at sentencing due to plea negotiations, there were three owners, one manager, two “front loaders,” one administrator, and one “closer.”

5. Mandatory Restitution

Finally, because the SCAMS Act also mandated restitution for telemarketing fraud offenses, the working group attempted to assess the statute’s effect on recently sentenced cases. It was found that within the 43 cases comprising the “PSR consideration” group, the “indictment clause only” group, and the section “2326 eligible” group, the court ordered restitution in all but two cases. In one case, restitution was not ordered “because of the economic circumstances of the defendant,” and in the other case no reason was provided. Within the “non-2326 eligible” group, restitution was not imposed in 15 of the 72 cases, with information missing in five additional cases. Finally, it can be observed that there is a fairly high correlation between the amount of restitution ordered and the amount of loss caused by the defendant in the cases in which section 2326 was considered in the presentence report. There is not a similar correlation for the other categories of cases. *See* Table C-1 at Appendix C.

6. Review of Sample Pleadings, Sentencing Transcripts

In order to present the broadest possible picture of telemarketing fraud sentences for the Commission's consideration, the working group also obtained pleadings from the Department of Justice for recently prosecuted telemarketing fraud cases in order to illustrate how the upward departure may be applied in these types of cases. For example, in sentencing a telemarketing fraud defendant in January 1997, the judge observed that "the [SCAMS] statute [for enhanced penalties] is itself authorization for a sentence above the sentencing guidelines in this case." *United States v. Terrance Daniel Brown*, No. 1:96CR00050-003 (E.D. Tenn. Jan. 13, 1997).²⁷ The judge then determined that characteristics of the telemarketing fraud operation put the "case outside of the "heartland" of guidelines cases," and granted the government's motion for a significant upward departure to 120 months from the 78 to 97 month guideline range.

A similar approach to enhancing the sentence of a telemarketing fraud defendant was taken in another jurisdiction a year earlier. After noting that Guideline §2F1.1 does not consider "the age of the victims, the fact that the victims are infirm, defenseless, as a bird with a broken wing, and subject to predators such as the defendants," the sentencing judge concluded that an upward departure from the 30 to 37 guideline to a 57-month incarceration period was warranted.

The district court stated:

[T]his [case] is clearly atypical to the situation as contemplated by the offenses . . . 2F1.1 is loss driven, not victim driven, it does not consider the victims This is . . . a typical case in which the guideline linguistically applies, but where the conduct differs from the normal fraud or deceit in a very specific and significant manner. . . . [The defendants] knew these people were weak, were defenseless, were susceptible to their promotion, to their scheme, and not only did they continue to defraud them, but they put them on a list as re-calls so that they could be defrauded again next month. [T]he conduct under the circumstances in this Court's opinion was despicable and is not encompassed in the offense conduct set forth in the guidelines.

Transcript of Sentencing Hearing at 1272-1275, *United States v. Benjamin Smith*, No. 95-CR-448 (D. Co. May 10, 1996), *aff'd.*, 1997 WL 796417 (10th Cir. Dec. 31, 1997).²⁸ Other judges, however, when confronted with similar efforts by the prosecution to obtain upward departures in telemarketing fraud cases, have denied such motions. *See, e.g., United States v. Randall, et al.*, CR 5-95-525-WBS (E.D. Cal.); *United States v. Garcia*, CR95-19995-J (S.D. Cal. June 17, 1997).

²⁷This case was received by the Commission after the cut-off date for the sample used by the Working Group.

²⁸This case preceded the dates of the sample examined by the working group. *See* discussion of recently-issued appellate court decision at Part IVB.

B. Case Law

In the first reported appellate case addressing section 2326, the Eleventh Circuit rejected the government's efforts to obtain an upward departure under the SCAMS Act based solely on the age and number of the victims in a telemarketing scheme. See *United States v. White*, 118 F.3d 739 (11th Cir.1997). In that case, the defendant plead guilty to ten counts of 18 U.S.C. § 2314 (Interstate transportation of stolen property and moneys), which is not one of the enumerated statutes eligible for an enhanced penalty under the SCAMS Act. The guideline calculation, including the two-level vulnerable victim adjustment of §3A1.1(b) and criminal history category of IV, resulted in an applicable guideline range of 37 to 46 months.

The government, however, argued successfully before the district court that an upward departure to 72 months was warranted because “Congress had by oversight omitted to include 18 U.S.C. § 2314 within the provisions of the SCAMS Act, and the Sentencing Commission had not adequately considered the concerns expressed by Congress in the SCAMS Act regarding the age and number of victims.” The Eleventh Circuit, in refusing to allow the district court to “rewrite 18 U.S.C. § 2326 to permit such an enhancement for all telemarketing schemes” regardless of the statute of conviction, implicitly recognized that the vulnerable victim enhancement of the sentencing guidelines had adequately considered the penalties for such conduct.

The Tenth Circuit, however, in the context of a four-level upward departure based on the SCAMS Act, has just considered the relationship between the SCAMS Act and the Sentencing Guidelines and specifically stated that “the absence of action by the Sentencing Commission [in providing guideline enhancements for telemarketing fraud] should not be read as a conclusive statement on the adequacy of the guidelines or as having a preclusive effect on discretionary departures by the district court.” *United States v. Smith*, 1997 WL 796417 (10th Cir. Dec. 31, 1997).

The Tenth Circuit also assessed the defendant's argument that the aggravating aspect of the telemarketing offenses addressed by the SCAMS Act — characterize as “mass victimization” — was already taken into account by two separate sentencing guidelines, the vulnerable victim guideline of §3A1.1(b) and the multiple victim guideline of §2F1.1(B)(2)(B). According to the court's analysis, the SCAMS Act focuses on telemarketing conduct directed at a class of individuals, statutorily defined as those over the age of 55, and requires that the offense target the elderly as a class. In contrast, the vulnerable victim enhancement is predicated on particularized findings of vulnerability of the individual victim and not the class to which the victim belonged. Because a single vulnerable victim is sufficient to support application of section 3A1.1(b), there is no double counting when an upward departure based on the SCAMS Act is imposed in addition to an enhancement based on the vulnerable victim guideline.

The court did not find a similar distinction between the multiple victim enhancement of section 2F1.1(b)(2)(B) and the SCAMS Act, but ultimately upheld the four-level upward departure because the district court (1) had not relied on the SCAMS Act as the sole basis for the upward departure, and (2) had found that circumstances of the case (extreme conduct, the psychological, emotional, and financial devastation of the victims) were outside the heartland of the offenses for which the defendant was sentenced.

Finally, review of more than a dozen reported cases from late 1994 to the present where the vulnerable victim enhancement was considered in the context of telemarketing schemes leads to the following observations. In four instances that enhancement was applied because the telemarketer “reloaded” the customer (*i.e.*, repeatedly solicited those elderly victims who had already been persuaded to “invest” in the scheme). In these instances, the courts seemed to require some demonstration of vulnerability on the part of the victims.

In the majority of these cases, however, the courts generally seemed to have no difficulty in applying the vulnerable victim enhancement solely on the basis of a description of the victims as “elderly” and “senior citizens.” Significantly, all of the cases involved challenges by defendants to the vulnerable victim enhancement; staff has not identified any reported cases in which the government challenged a court’s refusal to apply the two-level enhancement of section 3A1.1(b).

C. Commission HelpLine

A search of the Commission’s HelpLine databases reflected nine calls relating to telemarketing fraud and 18 U.S.C. § 2326. Three issues were presented.

The majority of calls (five) dealt with the interaction of section 2326 and the guidelines. Some callers were concerned that the guidelines seem to limit this statutory enhancement because no specific offense characteristics, other guideline adjustments, or departure language specifically refer to the statutory enhancement. Additionally, one caller wanted to know if the statutory penalty mandated a consecutive sentence.

Three calls inquired about the calculation of loss in a telemarketing fraud case. Specifically, in calculating the loss for these types of crimes, if the telemarketing fraud involves merchandise or prizes worth less than what the victims paid to obtain them, is the loss: (1) the amount the victims paid to receive the merchandise (gross loss), or (2) the amount the victims paid to receive the merchandise minus the value of the merchandise (net loss)?

Finally, one question was raised relating to the grouping of a telemarketing fraud count (§2F1.1) with a money laundering count (§2S1.1) under §3D1.2(b).

D. Department of Justice

1. Public Comment

In early 1995, the Commission sought public comment on whether the current victim-related adjustments were adequate to address telemarketing fraud cases and whether the provisions concerning vulnerable victims should be different for telemarketing fraud than other types of fraud.²⁹ In response, the Department of Justice (“DOJ”) submitted comment stating that Guideline §2F1.1 did not adequately address telemarketing fraud and suggested the following changes: (1) an additional two-to-four level enhancement under section 2F1.1(b) where the offense involved a scheme to defraud large numbers of victims (*e.g.*, 100 or more); (2) a separate

²⁹See 60 *Fed. Reg.* 2442 (1995).

two-to-four level enhancement for an offense that involves a scheme to defraud the same victim or victims more than once; and (3) taking into account whether an offense caused substantial financial hardship to one or more victims. As part of its overall fraud guideline package this past amendment cycle, DOJ commented that the Commission should provide appropriate increases in the fraud guideline to reflect the congressional judgment that telemarketing fraud is more serious than many other frauds.

Further, in April 1996, DOJ submitted comment to the House Subcommittee on Crime regarding proposed telemarketing legislation.³⁰ Regarding the required two-level vulnerable victim guideline increase, DOJ stated that it “would be preferable for the Sentencing Commission to study the sufficiency of sentences involving vulnerable victims to determine if further enhancements are needed.”³¹ With regard to the enhancement for impeding prosecution, DOJ testified in support of the concept, but raised a concern about the government having to establish, and the court having to find, that the defendant conducted his affairs beyond the U.S. borders specifically to impede prosecution for the fraud. Instead, the Department recommended that the “Sentencing Commission amend its commentary under the obstruction of justice enhancement provision of the guidelines, section 3C1.1. This amendment would make clear that the two-point enhancement could be applied if the facts were sufficient to prove that the defendant had endeavored to obstruct the investigation or prosecution of a fraud offense by operating his fraudulent business from outside the United States.”³²

2. Telemarketing Fraud Working Group

Within the federal law enforcement community, a Telemarketing Fraud Working Group has been constituted to coordinate information among the DOJ, FBI, U.S. Postal Service, Secret Service, and other federal agencies and serve as a liaison to the states through the National Association of Attorneys General. In addition, telemarketing task forces exist in areas where telemarketing fraud is most prominent (*e.g.*, San Diego, Phoenix, Buffalo, and Las Vegas) and are typically chaired by the United States Attorney in that jurisdiction. These task forces coordinate federal, state, and local law enforcement resources.

On September 24, 1997, Commission staff met with representatives of the DOJ, including the head of the Telemarketing Fraud Working Group. DOJ explained that it considers the lack of sentencing guidelines implementing the statutory enhancements of 18 U.S.C. § 2326 problematic

³⁰H.R. 1499, relating to telemarketing fraud, directed the Commission to increase the vulnerable victim guideline by two levels and provide for a two level increase for any fraud offense if the defendant conducted activities to further the fraud from a foreign country in order to impede prosecution of the offense.

³¹*H.R. 1499, Consumer Fraud Prevention Act of 1995 Before the Subcomm. on Crime of the House Comm. on Judiciary*, 104th Cong. (1996) at 61.

³²*Id.* at 62.

at the sentencing stage.³³ This situation has resulted in prosecutors necessarily seeking an upward departure based on the position that section 2326 is the most authoritative explanation of congressional policy with respect to telemarketing fraud.

Of ten recent telemarketing fraud convictions involving DOJ's Telemarketing Fraud Working Group, prosecutors sought and obtained upward departures in five cases. In one other case, the court *sua sponte* imposed an upward departure, and in four cases, the prosecution's request for an upward departure was not granted. The government typically sought four-level upward departures by analogy to what the government's pleadings describe as the "Commission's proposed amendments to Section 2F1.1 for telemarketing fraud offenses" (citing to 62 *Fed. Reg.* 152, 159 of January 2, 1997).³⁴ The upward departures actually granted ranged from two to eight levels,³⁵ and involved defendants with functional roles in the telemarketing scheme as owners, salespersons, and reloaders.

3. Federal Bureau of Investigation

On April 18, 1996, Charles L. Owens, section chief, Financial Crimes Section, Federal Bureau of Investigation, testified before the House Subcommittee on Crime that telemarketing fraud is one of the FBI's top investigative priorities in its White Collar Crime Program.

E. International Initiatives

In response to a directive issued jointly by President Clinton and Canadian Prime Minister Chretien in April of 1997, officials from both countries prepared a joint study to examine ways to counter the serious and growing problem of cross-border telemarketing fraud. The report of this joint study was issued in November 1997. Its key recommendations include consideration of

³³The Department of Justice takes the position that the increased statutory maximum of 18 U.S.C. § 2326 is a sentencing enhancement and not an element of the offense. This position, in the context of the increased statutory penalties for the unlawful reentry of illegal aliens, was recently argued before the Supreme Court, *United States v. Almendarez-Torres*, 96 F.3d 1443 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3665 (U.S. Mar. 31, 1997) (No. 96-6839), on October 14, 1997.

³⁴In the government's memorandum in support of an upward departure for three separate defendants, the government stated: "The statute [18 U.S.C. § 2326] thus demonstrates Congressional intent and public desire for more stringent penalties in telemarketing fraud cases. Congress was obviously concerned about the very same combination of factors that make the telemarketing fraud offense at issue here under penalized under current sentencing guidelines. This Congressional recognition adds strength to the assertion that these factors were not adequately considered by the Sentencing Commission, and in combination, warrant an upward departure."

³⁵One of the more substantial upward departures, from a 41-51 month guideline range to 97 months, was granted in the case of *United States v. Riordan*, No. Cr 94-00017 (E.D. Tenn.), and affirmed on appeal, 85 F.3d 629, 1996WL 233988 (6th Cir. 1996) (unpublished).

improving bi-national enforcement and evidentiary efforts and research into improved educational efforts to prevent telemarketing fraud.

The report indicates that telemarketing fraud victims “are not created at random or by accident,” but are “chosen by the offenders themselves because they are vulnerable in some way and because they have enough money or assets to be attractive.” The U.S.-Canadian Working Group noted that those at the highest risk of being victimized are those who have already been victimized in the past. Offenders not only re-use the victim information, but they also commonly sell it to other offenders or brokers of such information.

The report concludes that senior citizens in both countries are over represented among victims. Supporting this conclusion, the report cites the 1996 survey by the AARP which demonstrated that while 36 percent of the adult population is age 50 or older, 56 percent of the telemarketing fraud victims are 50 or older. Not only are the elderly more susceptible, but they tend to be more seriously affected when they are victimized because they can no longer work to replenish their lost assets.

F. Other Active Organizations

A number of other governmental and non-profit agencies are also active in monitoring, detecting, and educating consumers about telemarketing fraud. Prominent among them are the National Association of Attorneys General, the National Consumers League, and the American Association of Retired Persons.

The National Association of Attorneys General has made telemarketing fraud and elder issues a top priority. The association recently designated an office, headed by an FTC senior litigation attorney, to coordinate a multifaceted enforcement and educational approach to telemarketing fraud. It also sponsored a Presidential Summit on Elder Issues this past year. The summit addressed ways to combat telemarketing fraud and educate elderly consumers to avoid such scams.

The National Consumers League established a National Fraud Information Center in 1992. The Center maintains a toll free advice line for the public about telephone solicitations and reports suspected fraud to the database maintained jointly by the Federal Trade Commission and the National Association of Attorneys General. In addition to telemarketing fraud, the National Consumers League monitors Internet fraud and cyberfraud activity, which are both on the rise.³⁶

The American Association of Retired Persons (“AARP”) recently sponsored a study which concluded that the profile of the typical telemarketing fraud victim is changing. Once thought to be typically a lonely, vulnerable or isolated elder female, current telemarketing fraud efforts appear to be targeting well-educated and socially active elders, both male and female, with at least average incomes. The AARP is currently concentrating its fraud prevention efforts on education, and has teamed with law enforcement officials to call and warn individuals whose names appear on telemarketing “mooch” or “sucker” lists. Information suggests that many “mooch” lists are first developed by responses to direct mail solicitations for prizes, sweepstakes, and other giveaways.

Finally, business organizations such as Bell South and American Express Financial Services have joined forces with local law enforcement authorities to sponsor educational sessions aimed at telemarketing fraud prevention.

G. Other Telemarketing Fraud Prevention Efforts

Although the Commission is principally concerned with the criminal aspects of telemarketing fraud, the following is intended to provide additional information regarding some of the initiatives in the civil and administrative context aimed at preventing telemarketing fraud. This information may help to inform the Commission’s policy considerations.

(1) On August 16, 1994, President Clinton signed the Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (1994). The purposes of

³⁶None of the 115 telemarketing fraud cases reviewed by the staff Working Group involved the use of the Internet or computers, however.

the Act are to combat the growth of telemarketing fraud by providing law enforcement agencies with powerful new tools and to give consumers new protections and guidance on how to tell the difference between fraudulent and legitimate telemarketing. One such enforcement tool is the strengthening of the ability of states' attorneys general to sue firms in federal courts and obtain nationwide injunctions against them (targets operations of boiler rooms operating in one state but making calls to another).

In response to this Act, the Federal Trade Commission adopted the Telemarketing Sales Rules ("the Rule"), effective December 31, 1995. The Rule requires sellers and telemarketers to comply with certain disclaimers and recordkeeping requirements.³⁷ The Rule also prohibits express and implied misrepresentations, assisting and facilitating those who violate the Rule, credit card laundering, and specific abusive practices, such as threats, intimidation, and profane or obscene language. Finally, the Rule imposes payment restrictions on sales of recovery services. Violators are subject to a \$10,000 civil fine for each violation.

(2) On April 18, 1996, John F. Barker, vice president, National Consumers League and director, National Fraud Information Center, testified before the House Subcommittee on Crime about the coordinated effort between the National Fraud Information Center and the AARP to give the elderly new resources to avoid becoming victims of fraud. He also stated that the "enforcement climate is much better today than it was even a year and a half ago. Federal and state agencies are working together to combat fraud; federal and state agencies are working together with consumer protection agencies and organizations like the National Fraud Information Center to promote joint efforts to target and remove illegal operations preying on elderly victims."

(3) As part of a House Appropriations subcommittee hearing,³⁸ Representative Charles H. Taylor questioned the Department of Justice about the Office of Justice Policy's initiative to combat telemarketing fraud against seniors and whether funds were being used for the TRIAD program. The Department's response highlighted the goals of the TRIAD program, which included regional training workshops dedicated to the identification and prevention of frauds (including telemarketing scams) and other crimes against the elderly. The Department also described a satellite broadcast relating to crimes against the elderly.

³⁷These include: (1) disclosure of material information (information necessary for a consumer to make an informed purchasing decision) before the consumer pays for goods or services that are the subject of the sales offer; (2) prompt oral disclosures of certain information, including the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the offered goods or services, and in the case of a prize promotion, that no purchase or payment is necessary to participate or to win; (3) verifiable authorization for use of bank account information to obtain payment; and (4) the keeping of certain records that relate to telemarketing activities, including information about prize recipients, sales records, employee records, and all verifiable authorizations for demand drafts.

³⁸*Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997 Before the Subcomm. on Appropriations of the House of Representatives*, 104th Cong., 2d Sess. at 549-50.

V. IDENTIFICATION OF ISSUES FOR COMMENT

The working group is examining the characteristics of telemarketing fraud offenses, the new statutory penalty enhancement for telemarketing fraud at 18 U.S.C. § 2326, and whether current adjustments in Guidelines §2F1.1 (Fraud), §3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in sections 5K2.0-5K2.18 (Other Grounds for Departures) provide adequate punishment for defendants convicted of telemarketing fraud. As described *supra* Part III, mechanisms exist in the current guideline structure for courts to use when sentencing defendants convicted of fraud offenses, including telemarketing fraud. In conjunction with its examination, the staff working group submitted for Commission consideration issues for comment asking whether current mechanisms were inadequate in certain instances and how to address those deemed to be.³⁹ Arguably, some of these issues address concerns that are broader than just telemarketing fraud. The issues for comment focus on telemarketing fraud generally, and more specifically, on multiple victims, revictimization, sophisticated means, and departures (*see* Appendix B).

Relating to telemarketing fraud generally, proposed issues invite comment on whether telemarketing fraud offenses should be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss. Additionally, the proposal asks what types of harm unique to telemarketing fraud are not adequately addressed by the guidelines.

With respect to use of a foreign country to evade prosecution, pending telemarketing legislation (discussed at Appendix B), includes directives to the Commission related to this area. The Commission currently has a minimum base offense level for use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct (USSG §2F1.1(b)(5)), and has proposed enhancements for “sophisticated concealment” conduct, defined to include perpetrating an offense from outside U.S. borders. According to an August 24, 1997, *Washington Post* article, Canadian-based scam artists targeting the United States account for about one-third of the telemarketing fraud complaints received by U.S. and Canadian authorities. The staff working group analysis showed that 7.8 percent of the telemarketing fraud cases involved conduct crossing international borders.

³⁹Subsequently, these proposed issues for comment were published. *See* 63 *Fed. Reg.* 625-26 (1998).

VI. RECOMMENDATIONS

A. Capturing Victim Age-Related Information

Congress has tied part of the statutory telemarketing fraud enhancement to victim age. The Commission, however, when analyzing these types of fraud cases, is not always able to identify victim age in its case files because probation officers are not required to code this information for fraud offenses. H.R. 1499, as introduced on April 7, 1995, proposed to amend the Rules of Criminal Procedure to require presentence reports to include information about the age of each fraud offense victim.⁴⁰ Alternatively, the Commission might make a written request to the Probation Division and Judicial Conference Criminal Law Committee that probation officers collect this type of information and include it in presentence reports.

B. Addition of Conspiracy Offenses

Both H.R. 1847 as passed by the House in the last session and the Senate-passed version of this legislation propose amending 18 U.S.C. § 2326 to include conspiracy to commit an enumerated fraud offense listed in the statute. The Working Group recommends support of this amendment because the sentencing guidelines generally treat a conspiracy to commit an offense the same as the substantive offense.⁴¹ In addition, of the 115 telemarketing fraud cases reviewed by the staff Working Group, 49 involved cases in which the defendant was convicted only of 18 U.S.C. § 371, and thus not subject to the sentencing enhancement statute.

C. Restitution

Section 2327 of title 18, United States Code, mandates restitution for the designated fraud offenses (18 U.S.C. §§ 1028-1029, 1341-1344) when committed in connection with telemarketing conduct. The effective date of this provision is for offenses committed on or after September 14, 1994. Section 2327 applies notwithstanding sections 3663 (Order of restitution) or 3663A (Mandatory restitution to victims of certain crimes). In addition, enforcement is in accordance with section 3664 (Procedure for issuance and enforcement of order of restitution) and in the same manner as 3663A.

Section 3663A, also providing mandatory restitution, was added as part of the Antiterrorism and Effective Death Penalty Act of 1996, enacted April 24, 1996, and provides for exceptions in fraud cases when (A) the number of identifiable victims is so large as to make impracticable or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden of the sentencing process.

⁴⁰The Department of Justice suggested that the presentence report contain victim age information for each victim of a scheme to defraud. *See supra* note 31, at 62.

⁴¹*See* USSG §2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline).

Enforcement of section 3663A is done in accordance with section 3664. The effective date, to the extent constitutionally permissible, is for convictions occurring on or after April 24, 1996.

There are several key differences between the mandatory restitution provisions in section 2327 specifically applicable to certain telemarketing fraud offenses and the more generally applicable mandatory provisions under section 3663A. For one thing, section 2327 provides no exceptions for large victim or complex fact-finding cases, and, in fact, specifically bars declining an order because of (i) the economic circumstances of the defendant or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source. On the other hand, section 2327 only applies to telemarketing fraud offenses prosecuted under the offenses specifically listed in section 2326; thus, it does not cover conspiracy offenses and would appear to limit restitution only to victims of the count of conviction (in comparison to section 3663A, which encompasses all victims of a scheme where the offense involves such an element).

The Commission may wish to recommend that Congress clarify the intention of these two mandatory restitution provisions. If the congressional judgment is that restitution for telemarketing fraud offenses should be mandated without regard to the large number of victims and factual complexity exceptions provided under section 3663A, then Congress should consider broadening the scope of section 2327 to cover all offenses, especially to include conspiracies involving telemarketing fraud conduct and it should ensure that restitution is mandated for all victims of a telemarketing fraud scheme.

D. Single Statutory Enhancement

The working group recommends that the Commission urge Congress to amend 18 U.S.C. § 2326 to eliminate the two-tiered penalty enhancement. Specifically, the group recommends: (1) the additional five-year penalty enhancement for telemarketing fraud conduct under section 2326(1) be eliminated; (2) the victim criteria under section 2326(2)(A) and (B) be eliminated; and (3) the Congress leave to the Commission the responsibility for developing criteria,⁴² such as victim vulnerability, that will increase guideline sentences within a ten-year enhanced statutory range.

This latter recommendation is premised on four considerations. First, telemarketing fraud is a complex and constantly changing phenomena that can be reflected more readily through amended sentencing guidelines than through amended criminal statutes. For example, emerging trends in telemarketing fraud enforcement include schemes that are international in scope and

⁴²During House debate of H.R. 4101, Telemarketing Fraud Prevention Act of 1988, Representative Whittaker stated that “We have learned in the drafting of this bill that it is difficult to legislate solutions to a problem as complex as fraud--difficult but not impossible . . . For example, we originally tried to draft more specific requirements for the FTC telemarketing rules. We found that being specific didn’t work very well because of the diversity in telemarketing practices among different industries. So we changed approaches and gave the FTC the discretion to fashion the details of the telemarketing rules, giving direction on subjects that should be considered.” 134 CONG. REC. E2191 (daily ed. June 27, 1988) (statement of Rep. Whittaker).

schemes perpetrated over the Internet. Yet, empirical data from recently sentenced cases do not show these trends in any significant numbers. In addition, according to a December 1991 House Report⁴³ describing the relationship between telemarketing fraud activity and other criminal activity:

Telemarketing fraud has merged with other kinds of white collar crime. In Florida, California, and elsewhere, Federal prosecutors are observing elements of organized crime, drugs, money laundering, international fraud, financial institution fraud, telemarketing and credit card fraud, affinity-group fraud (frauds committed on ethnic and religious communities), and financial institution fraud, all mixed together. Telemarketing fraud is no longer a discreet compartmentalized problem . . . it is now all one big economic crime enchilada, and there is no point in trying to prioritize each individual area without realizing that they are all part of the same problem now.⁴⁴

Second, victim vulnerability is not necessarily based exclusively upon age and number of victims. Moreover, as the Commission concluded in its March 1995 report to congress on fraud and elderly victims,⁴⁵ although the limited data did not indicate any clear-cut age threshold of perceived victim vulnerability, it appeared that most older victims who are considered vulnerable are substantially older than age 55. Even though case file information on victim age for the current empirical analysis remains insufficient for a comprehensive assessment of how often telemarketing frauds involve over-age-55 victims, the limited available data from sentencing records do reaffirm that the threshold at which “older age” is equated with unusual vulnerability tends to be considerably higher than age 55.

Third, the Commission, as the expert agency charged by Congress with amending the sentencing guidelines, is well positioned to ensure that potential aggravating factors receive appropriate, rational, and consistent treatment in determining the sentence, thereby avoiding unwarranted disparity among similar cases. Congress, therefore, should consider a more flexible approach in which it provides a sufficient statutory enhancement for the most serious telemarketing cases and leave it to the Commission (with such guidance as Congress deems appropriate) to develop detailed guideline enhancements to operate within the enhanced statutory maximum.

Finally, Congress should consider a simplified, single statutory enhancement to ease proof problems that otherwise may arise in connection with the current second tier of the enhancement. The Commission has found from experience with a similar guideline requirement that requiring proof of victim targeting can be problematic, and determining victim ages can be both

⁴³H.R. Rep. No. 102-421 (1991).

⁴⁴*Id.* at 20-21.

⁴⁵United States Sentencing Commission, *supra* note 14.

burdensome and of questionable relevance to the basic issue of victim vulnerability. A single enhancement that only requires proof of a telemarketing fraudulent scheme would conserve scarce prosecutorial and court resources.

APPENDIX A

GLOSSARY OF TELEMARKETING FRAUD TERMINOLOGY

Boiler room — business that engages in illegal telemarketing, that is, the sale of goods or services or the solicitation of funds by means of false and fraudulent pretenses, representations and promises, or omissions of material facts, conducted over the telephone.

Promotion — general term describing the sales recovery program underway. Each promotion may have differing characteristics, including type of sales pitch, means of contact, type of product sold, quality of awards given, and amount of money solicited.

Lead — name, address, telephone number, and occasionally, the date of birth of a prospective victim. Leads are often purchased by boiler room owners from others who collect them from magazine subscription lists, raffles, and other sources, including other boiler rooms. An “in-house lead” is a lead that previously sent money to that same boiler room and is likely to be susceptible to an effort to re-sell him or her.

Dupes — persons recognized in the telemarketing industry as being the easiest to persuade to part with their money, based upon a number of factors, including age and prior subscriptions to sensationalistic sweepstakes and contests.

Lead Brokers — companies that specialize in collecting names of “dupes” from responses to sweepstakes, contests, and phone and mailing solicitation enterprises.

Pitch Sheet — script designed to be read over the telephone to a prospective victim. A pitch sheet may be changed from time to time, depending on the promotion underway, the prizes, or other factors. In California, pitch sheets are required to be registered with the state.

One in Five Pitch — term used to describe a sales pitch in which five prizes are described to the victim and the victim is told they are to receive one of the five. Usually the first prize is a very expensive award such as a car or cash, the second or third prize is typically the “gimme” gift, but is described as being very expensive, such as an “ancient coin plaque” and the remaining prizes, which the telemarketer often implies are the minimum awards, are typically cash or a cashier’s check.

Mystery Pitch — term used to describe a sales pitch in which the salesperson tells the victim that he or she has won or is eligible for a substantial prize but never discloses what the prize actually is, often claiming it is against the law to do so. Typically, the salesperson will compare the unidentified prize with expensive items, such as a car, to create the impression that the prize will be of comparable value.

Gimme Gift — the item which is actually provided to victims and usually is an inexpensive trinket, despite being pitched as having substantial value.

Rip & Tear — fraudulent telemarketing operation in which the participants provide no product or service to its victims, contrary to their promises to victims, and use mail drops in an effort to conceal their identities and locations from victims and law enforcement.

Mail Drop — the commercial mail receiving agency, in which individuals or business may lease post office boxes in order to receive mail and other deliveries.

Say No to Drugs Promotion — promotion in which boiler room employee induces the sale of antidrug paraphernalia (known as “products”) by offering or guaranteeing to purchasers a “bonus award” (known as a “premium”). A bonus award is pitched as having substantial value; however, it is invariably cheap merchandise or a virtually unusable travel certificate.

Recovery — fraudulent telemarketing scheme in which victims are told falsely that the telephone solicitor will assist the victim in recovering money that he or she had lost to fraudulent telemarketing schemes or prior occasions.

Sales Rep or Solicitor — boiler room employee who initially calls the victim or calls the victims a short time after initial contact. The sales rep then attempts to “close” the sale using the pitch or other representations he or she may deem appropriate. To close the sale, the sales rep must convince the victim to send money to the boiler room. The sales rep provides other information to the victim such as shipping instructions.

Dialers — new, lower-level employees, most without prior telemarketing experience, who make the first, unsolicited calls to the targeted customers.

Rebuttal — predetermined response to commonly asked questions and hesitations by the victim. Often rebuttals are pre-printed and designed to lend credibility to the boiler room or to enhance the victim’s perception of the value of the award.

Opener — boiler room employee who has the initial contact with a prospective victim by telephoning the victim identified on a lead. It is generally the opener’s responsibility to “qualify” the lead by obtaining sufficient information from the victim to determine the victim’s financial condition and likelihood that the victim will fall for the scheme. An opener generally works in a front room and relies on a pitch sheet to entice the victim to remain on the telephone and provide information to the opener. An opener may close the sale or turn the victim over to a “closer” to complete the “front sale.”

Fronters — less-experienced staff who most often make the first follow-up call to victims who were found to have some receptivity. In that call, fronters give a more extended pitch, designed to keep the victim on the line, get a commitment that they wanted the “guaranteed award,” and introduce the “product for sale” and the requested price for the product in their “promotion.”

Closer — employee who takes over the call from the opener after the victim has been qualified. The closer attempts to close the deal with the victim by inducing the victim to send money to the boiler room as quickly as possible.

Verifier — boiler room employee who contacts victims and attempts to clarify the terms of the sale. In many cases, boiler room personnel tape record all or part of the verification in the event of customer complaints or law enforcement action.

Frontloaders — individuals who open the door to unsuspecting victims for the telemarketing company. The frontloader gets a victim to purchase a product or informs the victim of winning a fictitious prize. Then, the frontloader explains to the victim that the money needs to be sent to the telemarketing company in order to receive the victim's product or prize. The frontloader explains that the victim's money is needed in order to make an invoice before shipping the victim his/her prize. Once the front-loader has baited the hook, so to speak, then the frontloader turns his victim's scenario over to another individual called a "reloader."

Reloader — boiler room employee who telephones victims who have previously purchased products from a boiler room. They take the frontloader's information about the victim, then contact the victim for purpose of collecting higher fees on various fictitious prizes and/or products that were agreed upon with the front-loader. Reloaders stipulate the highest fees charged, explain the process of mailing fees and the cash value of the victims' fraudulent prize.

APPENDIX B

LEGISLATIVE HISTORY AND COMMISSION ACTION REGARDING TELEMARKETING FRAUD

(1) 103d Congress (1993-1994)/1994-1995 Amendment Cycle

On March 10, 1993, Senator Hatch (R-UT), joined by Senators Biden (D-DE), DeConcini (D-AZ), Moseley-Braun (D-IL), and Thurmond (R-SC), introduced S. 557, the Senior Citizens Against Marketing Scams Act of 1993 (SCAMS).¹ This legislation resulted from a concern about possible increased fraud activity against elderly victims and was apparently motivated in part by a two-year FBI undercover investigation into telemarketing fraud in Salt Lake City, Utah, the results of which were announced by the Bureau in early 1993. Among other provisions, SCAMS proposed a new federal statute criminalizing telemarketing fraud and providing enhanced penalties when senior citizens were the principal victims.

The legislation also called for a Sentencing Commission review and report to Congress on fraud offenses involving older victims. According to a committee draft report on S. 557,² Congress, while principally concerned with telemarketing fraud, wanted to “take steps to ensure that all fraud related offenses against older victims are properly punished.”³ Language fulfilling this objective eventually found its way into the statutory directive.⁴ Both the penalty

¹Two other bills pertaining to similar concerns were introduced in the 103d Congress but were not acted upon. On July 14, 1993, Senator Cohen (R-ME) introduced S. 1217, the Protection of the Elderly Against Fraudulent Practices Act, which directed the Sentencing Commission to provide a seven-level increase under the vulnerable victim guideline if the offender knew or should have known that the victim was unusually vulnerable or that the victim was otherwise particularly susceptible to the offense. Senator Cohen subsequently became a co-sponsor of S. 557. 139 CONG. REC. S10,017 (daily ed. July 30, 1993). On November 10, 1993, Representative Manton (D-NY) introduced H.R. 3501, the Senior Citizen Protection Act of 1993, which also provided a seven-level enhancement under the vulnerable victim guideline if the offender knew or should have known that the victim was 65 years of age or older.

²While the Senate Judiciary Committee issued no formal report on S. 557, Senator Hatch requested that the discussion text of the draft report be printed in the *Congressional Record*. 139 CONG. REC. S10,016 (daily ed. July 30, 1993).

³*Id.*

⁴The procedural history relevant to this legislation is as follows: On July 30, 1993, the Senate, by voice vote, passed S. 577. 139 CONG. REC. S10,017 (daily ed. July 30, 1993). On November 5, 1993, the Senate incorporated S. 577 as an amendment (number 1110) into S. 1607, Violent Crime Control and Law Enforcement Act of 1993. 139 CONG. REC. S15,148 (daily ed. Nov. 5, 1993). On November 19, 1993, the Senate passed H.R. 3355, the Violent Crime Control and Law Enforcement Act of 1993 (as amended by striking existing text and substituting the text

enhancements for telemarketing fraud and the directive to the Commission for a general study of fraud against the elderly were enacted as part of the 1994 Crime Bill.

The Commission responded to the legislation by conducting the requested review of fraud offenses against elderly victims and presenting a report to Congress.⁵ Specifically, in its March 1995 report, the Commission noted that the lack of consistently reported information on victim age in case files prevented a comprehensive assessment of the adequacy of guideline sentences for fraud offenses involving older victims.⁶ In addition, the Commission clarified the commentary of the vulnerable victim guideline (§3A1.1) to address an inter-circuit conflict and broaden its applicability.⁷ Specifically within the commentary to the vulnerable victim guideline, the Commission removed the “targeting” requirement so that the enhancement applies if the

of S. 1607, as amended) by a vote of 95-4. 139 CONG. REC. S16,301 (daily ed. Nov.19, 1993). Amendment number 1110 became Section 3903 (Enhanced Penalties for Telemarketing Fraud) and Section 3905 (Increased Penalties for Fraud Against Older Victims) of H.R. 3355. Ultimately Sections 3903 and 3905 would become Sections 250002 and 250003 of Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁵United States Sentencing Commission, *Report to Congress: Adequacy of Penalties for Fraud Offenses Involving Elderly Victims*, March 1995.

⁶Other findings from the Commission’s congressionally-mandated review included: (1) When older victims are defrauded, there is some evidence that courts are using existing sentence enhancement mechanisms under the guidelines, particularly the upward adjustment for offenses involving vulnerable victims; (2) In older victim fraud cases in which the vulnerable victim enhancement applies, courts apparently find the magnitude of the enhancement (approximately a 25% increase) to be adequate; and (3) Based on court sentencing decisions, the threshold at which fraud victims generally are perceived to be vulnerable because of age appears to be substantially greater than age 55.

⁷The Commission also published issues for comment on whether the current victim-related adjustments were adequate to address such cases and whether the provisions concerning vulnerable victims should be different for telemarketing fraud than other types of fraud. *See* 60 *Fed. Reg.* 2442 (Jan. 9, 1995). The Aleph Institute, a senior United States Probation Officer, Citizens for the Rehabilitation of Errants (CURE), Federal Public and Community Defenders, and the Practitioners’ Advisory Group (PAG) expressed the view that the current guidelines provided sufficiently stringent punishment for crimes against the elderly. The Department of Justice, however, submitted comment stating that USSG §2F1.1 did not adequately address telemarketing fraud and suggested the following changes: (1) an additional two-to-four level enhancement under §2F1.1(b) where the offense involved a scheme to defraud large numbers of victims (*e.g.*, 100 or more); (2) a separate two-to-four level enhancement for an offense which involves a scheme to defraud the same victim or victims more than once; and (3) consideration of whether an offense caused substantial financial hardship to one or more victims.

defendant knew or should have known that a victim was particularly susceptible to the criminal conduct.⁸

(2) 104th Congress (1995-1996)/1995-1996 Amendment Cycle

On September 25, 1996, the House of Representatives passed telemarketing fraud-related legislation principally sponsored by Representative Heineman (R-NC). This legislation, H.R. 1499, the Telemarketing Fraud Punishment and Prevention Act of 1996, required the Commission to provide at least a four-level increase if enumerated fraud offenses involved telemarketing conduct, and at least an eight-level increase if the telemarketing-related offense victimized ten or more persons over the age of 55 or targeted persons over the age of 55. The legislation also required the Commission to increase the offense level for any fraud offense by at least two levels if the defendant conducted activities to further the fraud from a foreign country. The Senate had no comparable legislation⁹ and did not act on the House-passed bill.

Prior to passage, the House Subcommittee on Crime on April 18, 1996, held a hearing on the proposed legislation.¹⁰ Of particular relevance is the testimony of Mitchell D. Dembin, AUSA, Southern District of California, and Chief, General Crimes Section, who stated that the guidelines have been “instrumental in guaranteeing lengthy prison sentences where defendants’ conduct is aggravated by large losses, false testimony, or the commission of further criminal activity while on release.”¹¹ He expressed a further concern, however, that because the guidelines “are largely based upon the loss generated by defendants, law enforcement efforts that promptly discover and terminate fraudulent telemarketing ventures before the operation has a chance to generate huge losses result in lower sentences that would be obtained had law enforcement waited until more people were victimized.”¹²

In response to a question posed by Representative Scott (D-VA) concerning the kinds of sentences given, AUSA Dembin replied generally that if loss is low, sentences are low and if loss is significant, sentences are significant. Specifically, he stated that if “the losses generally are low, the defendants get probation. If the losses start getting up beyond \$100,000, \$150,000 into the

⁸See Amendment 521, effective November 1, 1995.

⁹At one time, Senator Abraham circulated a “Dear Colleague” letter indicating his intent to introduce, and inviting cosponsors for, a bill directing the Commission to increase penalties for those who “purposefully defraud the vulnerable in our society and those who utilize international borders to evade prosecution.” Subsequently, Commission legislative staff met with Senator Abraham’s staff on this issue to explain how such conduct is currently handled under the guidelines. For reasons unknown to Commission staff, the bill never was introduced.

¹⁰*H.R. 1499, Consumer Fraud Prevention Act of 1995 Before the Subcommittee on Crime of the House Committee on Judiciary*, 104th Cong. (April 18, 1996).

¹¹*Id.* at 48, 51.

¹²*Id.*

quarter of a million range, they go to jail generally for about a year.”¹³ In fact, because a defendant’s guideline sentencing range is determined by many factors in addition to actual loss amounts (*e.g.*, previous criminal record, cooperation with the authorities, whether the defendant accepted responsibility, number of counts in the conviction, the defendant's role in the offense), the actual sentence may vary. In the 115 cases analyzed by the staff working group (*see* Part IVA), the defendants in the 25 cases with losses less than \$100,000 received sentences greater than one year, ranging from 15 to 168 months, with three of them significantly above 60 months.

The Commission took no action regarding telemarketing fraud during this amendment cycle.

(3) 105th Congress (1997-1998)/1996-1997; 1997-1998 Amendment Cycles

On July 8, 1997, the House of Representatives passed H.R. 1847, the Telemarketing Fraud Prevention Act of 1997.¹⁴ The legislation is substantially the same as the bill passed by the House in the preceding Congress, with the addition of a directive to the Commission to “ensure that the sentences, guidelines, and policy statements for the specified offenders are appropriately severe and reasonably consistent with other relevant directives and other guidelines.”

On November 9, 1997, the Senate passed a substitute version of H.R. 1847. The Senate-passed substitute does not require specific enhancements in offense levels. Rather, it directs the Commission to provide for “substantially increased penalties” for telemarketing fraud offenses and requires “appropriate sentencing enhancements” for sophisticated means and large numbers of vulnerable victims.¹⁵ The legislation also provides emergency authority for promulgation of amendments within 120 days of passage of the legislation, with an effective date for the amended guidelines not earlier than 30 days after their submission to Congress.

As part of proposed amendments to the fraud guideline considered in the 1996-1997 amendment cycle, the Commission published for comment proposed amendments and issues for

¹³*Id.* At 66.

¹⁴Early in the 105th Congress, two telemarketing fraud bills, H.R. 474 and S. 489, were introduced. Both bills would have required the Commission to increase the vulnerable victim guideline by two levels and to increase the offense level for any fraud offense by two levels if the defendant conducted activities to further the fraud from a foreign country in order to impede prosecution for the offense. In addition, both bills would have required the presentence report to include victim age information.

¹⁵The legislation also requires the Commission to: 1) ensure that the guidelines and policy statements submitted reflect the serious nature of the offenses, are reasonably consistent with other relevant statutory directives to the Commission and with other guidelines, account for any aggravating or mitigating circumstances that might justify upward or downward departures, adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; and, 2) to take any other action the Commission considers necessary.

comment regarding appropriate enhancements for telemarketing fraud offenses.¹⁶ The Commission, however, deferred action on all fraud issues this past amendment cycle and, instead, made consideration of revisions to the fraud guidelines a priority for the current amendment cycle. As part of its recommended fraud guideline amendments package, the Department of Justice proposed last year that the Commission provide appropriate increases in the fraud guideline to reflect the congressional judgment that telemarketing fraud is more serious than many other frauds. No other interested parties commented specifically on the telemarketing fraud-related issues.

Currently, the Commission is continuing its comprehensive review of the fraud guidelines and has approved for comment revisions in the fraud monetary table that will substantially increase penalties for all fraud cases involving larger dollar losses. Additionally, the Commission has approved for comment a new fraud guideline enhancement for the use of foreign bank accounts or transactions, corporate shells, or similarly sophisticated means of concealment.

¹⁶See 62 *Fed. Reg.* 169 (Jan. 2, 1997).

APPENDIX C

TABLE C-1

TELEMARKETING FRAUD CONVICTIONS - SENTENCED FY 1997 (RECEIVED BY COMMISSION AS OF JUNE 1, 1997)

Category	18 U.S.C. § 2326 PSR Consideration (n=7) ¹	18 U.S.C. § 2326 Indictment clause only (n=13) ²	18 U.S.C. § 2326 Eligible (n=23) ³	Non 18 U.S.C. § 2326 Eligible (n=72) ⁴
	Median	Median	Median	Median
Sentences				
Overall (in months)	24.0	18.0	12.0	10.0
Victim Related Information				
Number of victims/relevant conduct ⁵	16	52-54	10-12	15.5-17
Age of victims in relevant conduct ⁶	84.0 ⁷	68.0	76.0	78.0
Loss Information				
Amount of Loss (in dollars)	37,198	186,914	43,005	104,391
Restitution Information				
Restitution ordered (in dollars)	33,723	28,421	12,199	9,588
Criminal History Category Information				
Criminal History Category	1.0	1.0	1.0	1.0

¹ These are cases in which the 18 U.S.C. § 2326 penalty enhancement was considered by the court at sentencing and included in the statutory provisions in the presentencing report.

² These are cases in which the defendant the 18 U.S.C. § 2326 penalty enhancement was cited in the violation clause of the indictment but not considered at sentencing.

³ These are cases in which the defendant was apparently eligible for the 18 U.S.C. § 2326 penalty enhancement due to the date of the offense and the reported offense conduct, but the enhancement was not considered in the indictment nor the presentencing report.

⁴ These are cases in which the defendant was neither subject to nor assessed the 18 U.S.C. § 2326 penalty enhancement.

⁵ Number of victims is defined as “the number of victims for which the offender was found liable under the principles of relevant conduct” (as distinct from all the victims in the entire scheme). For a detailed explanation of relevant conduct, see USSG §1B1.3 (Relevant Conduct).

Because the number of victims was sometimes provided as a range of values (for example, “at least 200, not more than 400 victims”) there will be a lower and an upper estimate of the number of victims in each case. Of the seven “PSR Consideration” cases, six had number of victim information for the lower estimate and five for the upper estimate. For the “Indictment clause only” group, there was information on 11 cases for the lower estimate and seven for the upper. For the “18 U.S.C. § 2326 Eligible” group, there was information on 21 cases for the lower and upper estimate. For the “non 18 U.S.C. § 2326 Eligible” group, there were 58 cases with information for the lower estimate and 44 for the upper estimate.

⁶ In most cases, the victim age information was missing. For the “PSR Consideration” group, this information only one victim had age information; for the “Indictment clause only” group, eight victims had age information; for the “18 U.S.C. § 2326 Eligible” group, 11 victims had age information; and for the “non-18 U.S.C. § 2326 Eligible” group, 97 victims had age information.

⁷ This number represents the only victim in which age information was present, and thus is not a true median but an absolute value.

APPENDIX C

Table C-1A
TELEMARKETING FRAUD CONVICTIONS - SENTENCED FY 1997
(RECEIVED BY COMMISSION AS OF JUNE 1, 1997)

Category	18 U.S.C. § 2326 PSR Consideration (n=7)		18 U.S.C. § 2326 Indictment Clause Only (n=13)		18 U.S.C. § 2326 Eligible (n=23)		Non-18 U.S.C. § 2326 Eligible (n=72)	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Departure Status								
No Departure	6	85.7	10	76.9	12	52.2	41	60.3
Upward Departure	0	0.0	0	0.0	1	4.3	0	0.0
Downward Departure	0	0.0	0	0.0	1	4.3	2	2.9
Substantial Assistance Departure	1	14.3	3	23.1	9	39.1	25	36.8
18 U.S.C. § 2326 Enhancements								
Telemarketing Enhancement	1	14.3	0	0.0	0	0.0	0	0.0
10 Or More Victims Over 55 Years Old	4	57.1	0	0.0	0	0.0	0	0.0
Targeting Of Victims 55 Years and Older	0	0.0	0	0.0	0	0.0	0	0.0
Both 10+ More Victims and Targeting 55+	2	28.6	0	0.0	0	0.0	0	0.0
Missing as to which enhancement applies	1	14.3	0	0.0	0	0.0	0	0.0
Functional Role in the Offense Designation								
Front Loader	1	14.3	4	30.8	12	60.0	15	22.0
Re-Loader	5	71.4	2	15.4	5	25.0	18	26.5
Recovery Room Personnel	0	0.0	0	0.0	0	0.0	7	10.3
Manager	1	14.3	2	15.4	1	5.0	5	7.4
Owner	0	0.0	3	23.1	2	10.0	16	23.5
Other role	0	0.0	2	15.4	0	0.0	7	10.3
Guideline Role in the Offense Designation								
Mitigating Role Adjustment (Chapter 3)	0	0.0	2	15.4	3	13.0	6	8.3
Aggravating Role Adjustment (Chapter 3)	1	14.3	5	38.5	2	8.6	25	34.7
Specific Offense Characteristics								
Misrepresentation that def. acting on behalf of a charitable, educational, religious or political org.	2	28.6	5	38.5	7	30.4	17	23.6
Vulnerable Victim Adjustment (Chapter 3)								
Vulnerable Victim Adjustment Total	7	100.0	13	100.0	23	100.0	70	95.9
<i>Vulnerable Victim due to Age</i>	6	85.7	10	76.9	19	82.6	51	70.8
Scope of Operations								
International	0	0.0	0	0.0	0	0.0	9	12.5

APPENDIX D

ISSUES FOR COMMENT - TELEMARKETING FRAUD

(as published in 63 *Federal Register* 625-26 (January 6, 1998))

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

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

- 1. Telemarketing fraud generally.** Should telemarketing fraud offenses be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss? What types of harms unique to telemarketing fraud are not adequately addressed by the guidelines? Should §2F1.1 be amended to provide an increase of [2-8] levels to correspond to the application of the statutory enhancement in 18 U.S.C. § 2326?
- 2. Multiple victims.** Do the guidelines adequately address fraud offenses that impact large numbers of victims? If not, how should they be amended to address this concern? Should, for example, the fraud guideline include a table providing tiered offense level increases that correspond to the number of victims involved in the offense? If so, what are the appropriate offense level increases and corresponding ranges of number of victims? Should such an enhancement be based on the total number of victims or the number of vulnerable victims? If the enhancement is based on vulnerability, is it more appropriate to amend §3A1.1 to reflect multiple victims?
- 3. Revictimization.** Commission analysis indicates that telemarketing fraud often involves repeat victimization of persons previously victimized, typically through “reloading” (a process in which a telemarketing offender targets victims whose names are included on lists of individuals previously contacted and victimized) or “recovery services” schemes (a process in which an offender poses as a government agent or other individual in a position to help the victim recover, for a fee, the losses incurred as a result of the initial telemarketing scheme). Commission analysis further indicates that district courts often enhance the sentence under §3A1.1 (Vulnerable Victim) in these cases. Does §3A1.1 adequately address revictimization concerns? To ensure consistent application of this enhancement, should the Commission amend the guideline or commentary to ensure that §3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization? Alternatively, should the Commission promulgate additional specific offense characteristics addressing this aspect of telemarketing fraud?
- 4. Departures.** Currently, Application Note 10 of §2F1.1 encourages upward departures when monetary loss inadequately measures the harm and seriousness of fraudulent conduct. Should some of the listed departure factors be converted into specific offense characteristics? For example, should the fact that “the offense caused reasonably foreseeable, physical or psychological harm or severe emotional

trauma” (subsection (c)), or “the offense involved the knowing endangerment of the solvency of one or more victims” (subsection (f)), or other factors be made into specific enhancements under the fraud guideline? Is so, what offense level weight should be assigned to these factor(s)? In addition, should the Commission promulgate any currently specified grounds for departure listed in Chapter 5K as specific offense characteristics? If so, what weight should be given these factor(s)?

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

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