

rule change that refiled with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. JR-NASD-99-45 and should be submitted by January 13, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,
Deputy Secretary.

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of: (1) Proposed options for promulgating a temporary, emergency guideline amendment revising the guideline for offenses involving electronic copyright infringement; and (2) intent to re-promulgate as a permanent amendment to the sentencing guidelines the temporary emergency guideline amendment relating to telemarketing fraud offenses. Request for Comment. Notice of public hearing.

SUMMARY: (1) The Commission is preparing to promulgate a temporary, emergency guideline amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark) and accompanying commentary to implement the directive contained in section 2(g) of the No Electronic Theft (NET) Act of 1997. This notice sets forth three options for implementing that directive.

The proposed amendment is presented in one of two formats. First, the amendment is proposed as specific revisions to guideline § 2B5.3 and accompanying commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed

enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, a bracketed specific offense characteristic means that the Commission invites comment on whether the provision is appropriate as a specific offense characteristic, or whether it should be considered as a departure factor, or not at all. Second, the Commission has highlighted certain issues for comment and invites suggestions for how the Commission should respond to those issues.

Recently, Congress clarified the Commission's emergency amendment authority to implement the directive in the NET Act. The Commission must implement that directive within 120 days of the enactment of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (not later than April 6, 2000).

(2) The Commission proposes to make permanent the temporary, emergency guideline amendment to § 2F1.1 (Fraud and Deceit) and § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) promulgated by the Commission in September 1998. This emergency amendment was issued to implement section 6 of the Telemarketing Fraud Prevention Act of 1998. The Commission proposes to re-promulgate as a permanent amendment the temporary emergency telemarketing fraud amendment without change.

DATES: (1) The NET Act temporary, emergency amendment.—Comment on the proposed amendment should be received by the Commission not later than January 26, 2000. After considering any public comment, the Commission plans to promulgate a temporary emergency amendment not later than April 6, 2000. (2) The telemarketing fraud amendment.—Comment on the proposed re-promulgation of the telemarketing fraud amendment should be received not later than March 10, 2000. (3) Public hearing.—The Commission has scheduled a public hearing for March 23, 2000, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002-8002 (time to be announced). The scope of the hearing is expected to include the proposed re-promulgation of the telemarketing fraud amendment described herein and any other permanent amendments that may be proposed for action in this amendment cycle ending May 1. (The Commission may promulgate a temporary, emergency guideline amendment to implement the NET Act before the public hearing on March 23.)

A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502-4590 not later than March 10, 2000. Written testimony for the hearing must be received by the Commission not later than March 16, 2000. Submission of written testimony is a requirement for testifying at the public hearing.

ADDRESSES: Send comments to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500 South, Washington, DC 20002-8002, Attention: Public Information—Public Comment.

FOR FURTHER INFORMATION CONTACT:

Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: Reports and other additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.3, 4.4.

Diana E. Murphy,
Chair.

Proposed Temporary, Emergency Guideline Amendment

1. Synopsis of Proposed Amendment: The No Electronic Theft (NET) Act of 1997, Pub. L. 105-147, directs the Commission to: (1) Ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (2) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

This proposal presents three options for implementing the congressional directives. Each option implements the directives by changing the monetary calculation currently found in the copyright and trademark infringement guideline, § 2B5.3, to provide for consideration of the retail value of the infringed item. (Currently, § 2B5.3(b)(1) contains an enhancement based on a calculation of the retail value of the infringing item multiplied by the quantity of infringing items.) Some or all of a number of aggravating and mitigating factors could be incorporated into the guideline as an additional means of implementing the directive to provide sufficient deterrence. (These factors, or some combination thereof, are presented in Options 2 and 3 but

²⁴ 17 CFR 200.30-3(a)(12).

could be added to Option 1 as well. In addition, any number of these factors could form the basis for a departure provision.)

The NET Act gave the Commission emergency authority to promulgate temporary amendments necessary to implement the Act's directives. The recently enacted Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 requires the Commission to promulgate the emergency amendments within 120 days after the date of the enactment of that Act, *i.e.*, by April 6, 2000.

(A) Option 1

Option 1 provides the most direct and straightforward manner for implementing the directive to provide for consideration of the retail value of the infringed item. Option 1 amends the copyright and trademark infringement guideline to provide a sentencing enhancement based on a calculation of the retail value of the infringed item multiplied by the quantity of infringing items for all copyright and trademark offenses. As presented, it does not incorporate any additional enhancements or adjustments for aggravating or mitigating factors, nor does it propose any change in the base offense level (although this, too, could be made a part of that option).

An arguable disadvantage of Option 1 is that it likely would overstate the pecuniary harm caused to copyright and trademark owners in the majority of cases currently sentenced under the guideline because it presumes: (1) a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate infringed items, which is unlikely in most cases, and (2) that the pecuniary harm resulting from each lost sale is equal to the retail value of the infringed item. Proposed Application Note 3 would address substantial overstatement of pecuniary harm through an invited downward departure provision. That proposed application note would also provide an upward departure provision for cases in which the pecuniary harm is substantially understated.

Proposed Amendment—Option 1: Strike § 2B5.3 in its entirety and insert the following:

§ 2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1)(A) Except as provided in subdivision (B), if the retail value of the infringed items multiplied by the quantity of infringing items exceeded \$2,000, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to that amount.

(B) If (i) the defendant was convicted of an offense under 18 U.S.C. 2319A; and (ii) the retail value of the infringing items multiplied by the quantity of infringing items exceeded \$2,000, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to that amount.

Commentary

Statutory Provisions: 17 U.S.C. 506(a); 18 U.S.C. 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Definitions.—For purposes of this guideline:

“Infringed items” means the copyrighted or trademarked items with respect to which the crime against intellectual property was committed.

“Infringing items” means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

2. In a case involving the illegal interception of a satellite cable transmission in violation of 18 U.S.C. 2511, the “retail value of the infringed items”, for purposes of subsection (b)(1)(A), is the price the user of the transmission would have paid to lawfully receive that transmission. (In such a case, the “infringed items” are the satellite transmissions rather than the intercepting devices.)

3. Departure Provision.—There may be cases in which the offense level determined under subsection (b)(1) substantially understates or substantially overstates the pecuniary harm caused by the offense. In such cases, an upward departure or a downward departure, as appropriate, may be warranted.]

Background: Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, which directs the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

(B) Option 2

Option 2 is a revised proposal submitted by the Department of Justice in August 1998 in response to the Commission's May 1998 **Federal Register** notice (see 63 FR 28202 (1998)) and has not previously been published in the **Federal Register**. Like Option 1, Option 2 amends the copyright and trademark infringement guideline to provide an enhancement based on a calculation of the retail value of the infringed items multiplied by the quantity of infringing items for all copyright and trademark offenses (except offenses involving a copyright violation of 18 U.S.C. 2319A, for which

there is no infringed item). In contrast to Option 1, the Department proposed a 2-level reduction in offense level (but not less than offense level 6) for offenses involving infringing goods with a price less than 10% of the average retail price of the infringed item. According to the Department of Justice, this downward adjustment is proposed to address the likelihood that “relying on the price of the infringed-upon item may lead to an inappropriately high economic harm calculation where there is a dramatic price differential between the genuine and illegal products.” The Commission has bracketed options for this reduction that would provide a 2-level downward adjustment for cases in which the price of the infringing item is [10%] [20%] [30%] [40%] [50%] of the retail price of the infringed item.

In addition, Option 2 includes adjustments for two aggravating factors and one mitigating factor. It provides a 2-level increase for offenses involving “online electronic infringement,” and a 2-level increase for offenses involving a “reasonably foreseeable risk to public health or safety,” with a minimum offense level of level 13. It also provides a 2-level decrease (but not less than offense level 6) if the offense was not committed for purposes of commercial advantage or private financial gain.

Proposed Amendment—Option 2: Strike § 2B5.3 in its entirety and insert the following:

§ 2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

(1) Except as provided in subsection (2), if the infringed value exceeded \$2,000, increase by the number of levels from the monetary table in § 2F1.1 (Fraud and Deceit) corresponding to that value.

(2) If (A) the offense involved a copyright violation under 19 U.S.C. 2319A; and (B) the infringing value exceeded \$2,000, increase by the number of levels from the monetary table in § 2F1.1 corresponding to that value.

(3) If the offense involved online electronic infringement, increase by 2 levels.

(4) If (A) the offense was not committed for commercial purpose or private financial gain, or (B) subsection (1) applies and the offense involved greatly discounted merchandise, decrease by 2 levels, but not below level 6.

(5) If the offense involved a reasonably foreseeable risk to public health or safety, increase by 2 levels. If the resulting offense level is less than level [13], increase to level [13].

Commentary

Statutory Provisions: 17 U.S.C. 506(a); 18 U.S.C. 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. For purposes of this guideline—

"Infringed value" means the average retail price of the infringed-upon item multiplied by the number of the infringing items. Average retail price of the infringed-upon item means the average price in the retail market at the time of the offense, which may be different from the Manufacturer's Suggested Retail Price. In cases involving the interception of a communication in violation of 18 U.S.C. 2511, the infringed value means the price the user would have paid if that communication had been obtained lawfully.

"Infringing value" means the price of the infringing item multiplied by the number of infringing items.

"Greatly Discounted Merchandise" means infringing goods whose price is less than [10%][20%][30%][40%][50%] of the average retail price of the infringed-upon item.

"Online Electronic Infringement" includes the unlawful producing, reproducing, distributing, selling, performing, or trafficking in copyrighted or trademarked articles or services via an electronic bulletin board, a worldwide web site or any online facility.

"Commercial advantage or private financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other protected works or products.

2. In some cases a 2-level enhancement may not reflect the seriousness of the risk to public health or safety. In such cases, an upward departure may be warranted.

Background: This guideline treats copyright and trademark violations much like fraud. The enhancements in subsections (b)(1) and (2) are intended as an approximate determination of the aggregate pecuniary harm resulting from trafficking in goods or services that violate the copyright or trademark laws. The reduction in subsection (b)(4) for greatly discounted merchandise is appropriate because in such cases there is some reduced likelihood of loss of legitimate sales.

The Electronic Communications Privacy Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

(C) Option 3

Like Options 1 and 2, Option 3 amends the copyright and trademark infringement guideline to provide for consideration of the retail value of the infringed item in all copyright and trademark cases, but that value ultimately might not be used in every case. For some cases, the retail value of the infringing item is used to calculate the monetary adjustment because that value is the more accurate measure of the pecuniary harm to the intellectual property owner for those cases.

Option 3 directs the court to use the retail value of the infringed item multiplied by the quantity of infringing items in any case in which: (1) the quality and performance of the

infringing item are identical to, or substantially indistinguishable from, the infringed item; (2) the retail value of the infringing item is difficult or impossible to determine; or (3) the offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. 2511; or any other case in which the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of pecuniary harm to the copyright or trademark owner than the retail value of the infringing item. The court would use the retail value of the infringing item multiplied by the quantity of infringing items (the calculation that currently exists in § 2B5.3) for all other copyright and trademark offenses.

Option 3 implements the second directive of the NET Act (to provide for consideration of the retail value of the infringed item) by permitting the government to show, for any intellectual property offense, that such value is the more accurate assessment of lost sales to the intellectual property owner than is the use of the retail value of the infringing item. An arguable advantage of Option 3 over Options 1 and 2 is that, by using the retail value of the infringing item in some cases, such as those involving obviously inferior counterfeited goods, it reduces the likelihood that the pecuniary harm would be overstated when the sale of a counterfeit item is not likely to displace the sale of a legitimate item on a one-to-one basis.

Option 3 also presents a number of enhancements and adjustments that, as mentioned above, take into account aggravating and mitigating factors that may be present in an infringement case. For ease and clarity of presentation, they are presented for the most part as specific offense characteristics. However, there is an issue for comment following Option 3 that addresses whether the Commission should adopt these as departure provisions, or not at all.

The possible additional enhancements and adjustments are as follows:

- Increase the base offense level from level 6 to level 8. A 2-level increase in the base offense level would bring the infringement guideline more in line with the fraud guideline, § 2F1.1. Both guidelines have a base of offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in the great majority of fraud offenses. A similar enhancement does not exist in the infringement guideline, but, based on a review of cases sentenced under

the guideline, if a more than minimal planning enhancement did exist, it similarly would apply in the majority of infringement cases. Thus, the majority of fraud offenses effectively start at an offense level of level 8, whereas infringement cases start at an offense level of level 6.

- Provide an enhancement of 2 offense levels (or suggested upward departure) if the infringing item was distributed by the offender before the copyright or trademark owner commercially released the infringed item. If the infringing item is a close substitute for the infringed item, the harm is exacerbated by denying the copyright or trademark owner the front end of the market. If the infringing item is substantially inferior, the harm is exacerbated by damaging the reputation of the copyright or trademark owner.

- Provide an enhancement of 2 offense levels (or suggested upward departure) if purchasers of the infringing item were deceived to believe that they were purchasing the legitimate infringed item. This enhancement takes into account harm to the consumer who is actually deceived, over and above the harm to the copyright or trademark owner. However, this enhancement may present significant proof problems. An attempt to ameliorate those problems by lowering the standard for triggering the enhancement to something less than actual deception, such as the reasonable likelihood of deception, risks promulgating an enhancement that is triggered merely by an element of the offense (see 18 U.S.C. 2320(e)).

- Provide a downward adjustment of 2 offense levels, but not less than the base offense level, (or suggested downward departure) if the offense was not committed for commercial advantage or private financial gain. This proposed adjustment is identical to one included in Option 2 and takes into account the different statutory penalty structures established for these offenses by the NET Act. The Commission has been unable to determine the frequency with which such a downward adjustment would apply because the statutory change criminalizing such conduct was enacted in December 1997, and has formed the basis for a very limited number of prosecutions.

- Provide an enhancement of 2 offense levels (and a minimum offense level of level 12) if the offense involved the manufacture, importation, or uploading of infringing items. The uploading prong is somewhat similar to the 2-level enhancement proposed in Option 2 for online electronic infringement. The Commission estimates that this enhancement would

apply in approximately 60% of the cases currently sentenced under § 2B5.3. Defendants who manufacture, import, or upload infringing items arguably are more culpable because they initially place infringing items in the stream of commerce, thereby enabling many others to infringe the copyright or trademark.

6. Provide an enhancement of 2 offense levels [and minimum offense level of level 13 as proposed in Option 2] (or suggested upward departure) if the offense involved the conscious or reckless risk of serious bodily injury. The Commission's review of cases sentenced under the guideline suggests that this enhancement rarely would apply, which might argue for taking this factor into account as a departure provision, if at all.

7. Provide an application note that expressly provides that § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply if the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to copyrighted material.

Alternatively, the Commission could suggest an upward departure or specific offense characteristic for such cases. As stated in the background commentary to § 3B1.3, persons who use a special skill to facilitate or commit a crime generally are viewed as more culpable. Based on the Commission's review of cases sentenced under the copyright and trademark infringement guideline, it is anticipated that this adjustment rarely would be applied.

Proposed Amendment—Option 3:
Strike § 2B5.3 in its entirety and insert the following:

§ 2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: [8]

(b) Specific Offense Characteristics

(1) If the infringement amount exceeded \$2,000, increase by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to that amount.

[2] If the infringing item was distributed before the infringed item was commercially released by the copyright or trademark owner, increase by [2] levels.]

[3] If a purchaser of an infringing item actually believed such item was the infringed item, increase by [2] levels.]

[4] If the offense was not committed for commercial advantage or private financial gain, decrease by [2] levels[, but not less than level [6][8].]

[5] If the offense involved the manufacture, importation, or uploading of infringing items, increase by [2] levels. If the resulting offense level is less than level [12], increase to level [12].]

[6] If the offense involved the conscious or reckless risk of serious bodily injury, increase

by [2] levels.] If the resulting offense level is less than level [13], increase to level [13].]

Commentary

Statutory Provisions: 17 U.S.C. 506(a); 18 U.S.C. 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Definitions.—For purposes of this guideline:

“Commercial advantage or private financial gain” means the receipt, or expectation of receipt, of anything of value, including other protected works.

“Infringed item” means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

“Infringement amount” means the approximate pecuniary harm to the copyright or trademark owner caused by the offense.

“Infringing item” means the item that violates the copyright or trademark laws.

“Uploading” means making an infringing item available by electronic means with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

(i) The quality and performance of the infringing item are identical to, or substantially indistinguishable from, the infringed item.

(ii) The retail value of the infringing item is (I) difficult to determine without unduly complicating or prolonging the sentencing proceeding; or (II) impossible to determine.

(iii) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the ‘retail value of the infringed item’ is the price the user of the transmission would have paid to lawfully receive that transmission, and the ‘infringed item’ is the satellite transmission rather than the intercepting device.)

(iv) The government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. 2319A.

(C) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B). For

example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

(D) Determination of Retail Value.—For purposes of this Application Note, the ‘retail value’ of an infringed item or an infringing item usually is the retail price of that item in the market in which it is sold.

3. Pre-Release Infringement.—Subsection (b)(2) applies to the distribution of an infringing item before the infringed item is commercially released by the copyright or trademark owner. For example, if the defendant unlawfully videotaped a film at a movie theater, then distributed copies of that videotape before lawful copies of the film were commercially available in videotape form, the enhancement will apply.

4. Manufacturing, Importing, and Uploading Enhancement.—With respect to uploading, subsection (b)(5) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.

5. Application of § 3B1.3.—If the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to an infringed item, an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act by using the retail value of the infringed items, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be impracticable or inappropriate. In these types of cases, use of the retail value of the

infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Issue for Comment: The Commission has bracketed specific offense characteristics (b)(2) through (b)(6) in Option 3 to indicate that any or all of these factors, or any combination thereof, could form the basis for an enhancement. The Commission specifically invites comments on which, if any, of these specific offense characteristics, or combination of these specific offense characteristics, should be incorporated into the guideline. The Commission also specifically invites comment on whether, if the Commission were to adopt either Option 1 or Option 2, any or all of these specific offense characteristics, or any combination of these specific offense characteristics, should be incorporated into the adopted Option.

The Commission also invites comment on whether, as an alternative to proposed specific offense characteristics (b)(2) through (b)(6), the factors which form the bases for those specific offense characteristics should be expressed as bases for departure from the guideline range.

Proposed Re-Promulgation as Permanent Guideline Amendment

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

The Act directs the Commission to provide for "substantially increased penalties" for telemarketing fraud offenses. It also more specifically requires that the guidelines provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States," and "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud

victims over age 55], are affected by a fraudulent scheme or schemes."

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

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

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

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

Section 2F1.1(b), as amended by amendment 577, is further amended by striking subdivision (3) and all that follows through the end of the subsection and inserting the following:

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

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

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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

(7) If the offense—

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

(B) Affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to § 2F1.1 captioned "Application Notes", as amended by amendment 577, is further amended by striking Application Note 14 and all that follows through the end of the Application Notes and inserting the following:

"15. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

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

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under § 3C1.1

(Obstruction of Justice), do not apply an adjustment under § 3C1.1.

16. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. 20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

17. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

18. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. 982(a)(4).

19. If the defendant is convicted under 18 U.S.C. 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable

presumption that the offense involved 'more than minimal planning.'".

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

"3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies."

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

The Commentary to § 2F1.1 captioned "Background" is amended by inserting after the fifth paragraph the following new paragraph:

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

Section 3A1.1 is amended by striking subsection (b) in its entirety and inserting:

"(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels."

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 in the first paragraph by striking "'victim' includes any person" before "'who is'" and inserting "'vulnerable victim' means a person (A)"; and by inserting after "(Relevant Conduct)" the following:

"; and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in

Note 2 in the second paragraph by striking "where" each place it appears and inserting "in which".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 in the third paragraph by striking "offense guideline specifically incorporates this factor" and inserting "factor that makes the person a vulnerable victim is incorporated in the offense guideline".

The Commentary to § 3A1.1 captioned "Background" is amended by adding at the end the following additional paragraph:

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

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

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SOCIAL SECURITY ADMINISTRATION

Testing Modifications to the Disability Determination Procedures; Extension of Single Decisionmaker Model and Full Process Model With Rationale Summary

AGENCY: Social Security Administration.
ACTION: Notice of extension of tests involving a single decisionmaker and Full Process Model.

SUMMARY: The Social Security Administration (SSA) is announcing the extension of two tests being conducted under the authority of current rules codified at 20 CFR 404.906 and 416.1406. These rules provide authority to test, individually or in any combination, several modifications to the disability determination procedures we normally follow in adjudicating claims for disability insurance benefits under title II of the Social Security Act (the Act) and for supplemental security income (SSI) payments based on disability under title XVI of the Act. Under these rules, SSA is testing the use of a single decisionmaker who may make the initial disability determination without requiring the signature of a medical consultant in all cases. SSA is also testing integrated model procedures which will focus on certain SSA requirements for preparing a rationale for the adjudicator's disability determination to see if these modifications have any effect on how these requirements are met.

DATES: Selection of cases to be included in these tests is being extended through