

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed 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 in Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of NSCC. All submissions should refer to the File No. SR-NSCC-98-07 and should be submitted by November 9, 1998.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**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) promulgation of temporary, "emergency" guideline amendment increasing the penalties for (A) fraud offenses involving sophisticated means; and (B) offenses involving a large number of vulnerable victims; and (2) final action regarding amendments to sentencing guidelines and policy statements effective November 1, 1998.

**SUMMARY:** The United States Sentencing Commission hereby gives notice of the following actions: (1) Pursuant to the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105-184, the Commission has promulgated temporary, emergency amendments to §§ 2F1.1 (Fraud and Deceit) and 3A1.1 (Hate Crime Motivation and Vulnerable Victim) and accompanying commentary; (2) pursuant to its authority under 28 U.S.C. 994(a) and (p), the Commission has promulgated amendments to commentary and the statutory index.

**SUPPLEMENTARY INFORMATION:** The Telemarketing Fraud Prevention Act of 1998 directed the Commission generally to provide for substantially increased penalties for persons convicted of an

offense described in section 2326 of title 18, United States Code, in connection with the conduct of telemarketing fraud. The temporary, emergency amendments set forth in this notice implement this general directive in a broader form and also respond to a number of specific requirements in the Act.

**DATES:** The Commission has specified an effective date of November 1, 1998 for the emergency amendments increasing the penalties for fraud offenses involving sophisticated means and offenses involving a large number of vulnerable victims, and the amendments to the commentary and the statutory index.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 273-4590.

**Authority:** 28 U.S.C. 994(a) and (p).  
**Richard P. Conaboy,**  
*Chairman.*

1. Amendment: Section 2F1.1(b) is 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" is 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

<sup>5</sup> 17 CFR 200.30-3(a)(12).

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" is 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(b) is amended to read as follows:

"(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".

Reason for Amendment: This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105-184 (the "Act").

The Act directs the Commission to provide for "substantially increased

penalties" for telemarketing frauds. It also more specifically requires that the guidelines provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States," and "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes."

This amendment responds to the directives by building upon the amendments to the fraud guideline, § 2F1.1, that were submitted to Congress on May 1, 1998. (See Amendment #2 in the Report of the Commission entitled "Amendments to the Sentencing Guidelines" and submitted to Congress on May 1, 1998.) Those amendments added a specific offense characteristic for "mass-marketing," which is defined to include telemarketing, and a specific offense characteristic for sophisticated concealment.

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

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

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

2. Amendment: The Commentary to § 2C1.4 captioned "Background" is amended by striking the last sentence.

The Commentary to § 2J1.1 captioned "Application Notes" is amended in Note 2 in the third sentence by inserting "(a)(1) and to any offense under 18 U.S.C. 228(a)(2) and (3)" after "228"; and in the fourth sentence by inserting "(a)(1)" after "228".

Reason for Amendment: This is a two-part amendment. First, this amendment updates and corrects the background commentary of § 2C1.4, the guideline that covers offenses involving unlawful compensation for federal employees and bank officials. Currently, the background commentary states that 18 U.S.C. 209 (involving the unlawful supplementation of the salary of various federal employees) and 18 U.S.C. 1909 (prohibiting bank examiners from performing any service for compensation for banks or bank officials) both are misdemeanors for which the maximum term of imprisonment is one year. In fact, however, as a result of enacted legislation, the maximum term of imprisonment for violations of 18 U.S.C. 209 is now five years if the conduct is willful. The amendment deletes the sentence of the commentary that describes the maximum term of imprisonment for these offenses.

Second, this amendment amends the commentary in the contempt guideline, § 2J1.1, pertaining to offenses under 18 U.S.C. 228 involving the willful failure to pay court-ordered child support. The commentary notes that the contempt guideline applies to second and subsequent offenses under 18 U.S.C. 228 because a first offense is a Class B misdemeanor not covered by the guidelines.

However, in the Deadbeat Parents Punishment Act of 1998, Pub. L. 105-187, Congress amended 18 U.S.C. 228 to add two new violations of that section (found at 18 U.S.C. 228(a)(2) and (3)) and to make even the first offense under those new violations a felony that would be subject to the guidelines. Accordingly, the commentary in the contempt guideline is amended to reflect that it is only the first offense under a violation of 18 U.S.C. 228(a)(1) that is not covered by the guideline.

3. Amendment: Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. 924(i)" by striking "2A1.1, 2A1.2" and inserting "2K2.1";

by striking:

"18 U.S.C. 924(j)-(n) ..... 2K2.1",

and inserting:

"18 U.S.C. 924(j)(1) ..... 2A1.1, 2A1.2",

"18 U.S.C. 924(j)(2) ..... 2A1.3, 2A1.4",

"18 U.S.C. 924(k)-(o) .... 2K2.1";

and by inserting, after the line referenced to "18 U.S.C. 2252" the following new line:

"18 U.S.C. 2252A ..... 2G2.2, 2G2.4".

Reason for Amendment: This amendment updates the Statutory Index by adding a reference to a recently created offense (pertaining to the use of

a computer to commit certain child pornography offenses) and by correcting the references to a number of firearms offenses in response to congressional redesignations of those offenses.

Specifically, Congress recently enacted 18 U.S.C. 2252A, which makes it unlawful to traffic in, receive, or possess child pornography, including by computer. The amendment references this offense to § 2G2.2 (trafficking in child pornography) and § 2G2.4 (possession of child pornography).

In addition, in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, and the Economic Espionage Act of 1996, Pub. L. 104-294, Congress redesignated a number of firearms provisions in 18 U.S.C. 924. The amendment changes the references in the Statutory Index to a number of these offenses in response to the congressional redesignations.

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## TENNESSEE VALLEY AUTHORITY

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Tennessee Valley Authority (Meeting No. 1509).

**TIME AND DATE:** 9 a.m. (CDT), October 21, 1998.

**PLACE:** Legislative Plaza Room 16, 19 Legislative Plaza, Union and 6th Streets, Nashville, Tennessee.

**STATUS:** Open.

**AGENDA:** Approval of minutes of meeting held on September 23, 1998.

### New Business

#### A—Budget and Financing

A1. Fiscal year 1998 Tax-Equivalent Payments.

#### C—Energy

C1. Abandonment of surface rights overlying coal and associated right to mine and remove such coal affecting approximately 176.84 acres of Koppers Coal Reserve in Campbell County, Tennessee (Tract No. EKCR-10).

C2. Contract with Crisp & Crisp, Inc., for initial clearing, restoration, and reclamation of right-of-way areas to support construction of new transmission lines for the eastern TVA region.

C3. Contract with Southeastern Construction and Equipment Company, LLC, for the initial clearing, restoration, and reclamation of right-of-way areas to support construction of new transmission lines for the central TVA region.

C4. Contract with ASEA Brown Boveri Power Transmission and Distribution Company, Inc., for the supply of power transformers.

C5. Contract with Ecolochem, Inc., to provide chemical management of industrial chemical needs, for example, boiler cleaners, laboratory supplies, herbicides, and pesticides, for all TVA locations.

### E—Real Property Transactions

E1. Abandonment of a portion of TVA's Athens-Pulaski and Pulaski-Fayetteville transmission line easements and right-of-way in Giles County, Tennessee, affecting approximately 8.16 acres designated in TVA's records as Parcels A and B of Tract No. AP-104, Parcels A and B of Tract No. AP-105, and Parcels A, B, and C of Tract No. PF-3.

E2. Grant of permanent easement to the State of Tennessee affecting approximately 34 acres of land on Cherokee Lake in Grainger County, Tennessee, for improvements of Highways 11W and 25E (Tract No. XTCK-61H).

### F—Unclassified

F1. Filing of condemnation cases to acquire easements and right-of-way for an expansion to an existing electric power substation affecting the following transmission lines: Charleston District-Riceville, Bradley County, Tennessee; East Cleveland-Charleston District, Bradley County, Tennessee; Johnsonville-West Nashville Tap to Pomona and Burns, Dickson, Tennessee. The expansion of the Pinhook, Tennessee, Substation involves land, road, and right-of-way easements in Davidson County, Tennessee.

### Information Items

1. Medical contribution plan for certain employees, retirees, and dependents not eligible for the TVA Retirement System supplement benefit, future access to retiree medical coverage, future access to contributions toward retiree health coverage costs for Civil Service and Federal Employees Retirement System retirees.

2. Approval of land exchange by the United States Department of Agriculture, Forest Service, affecting approximately 3.7 acres of former TVA land on Fontana Lake in Swain County, North Carolina (Tract No. XTFR-3).

3. Approval to file a condemnation case affecting the New Albany-Holly Springs Loop to Hickory Flat Transmission Line (Tract No. THSHF-2).

4. Approval to award a fixed-price contract with General Electric Company