UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

COMMENT OF THE FEDERAL TRADE COMMISSION REGARDING PROPOSED AMENDMENTS TO THE U.S. SENTENCING GUIDELINES

United States Sentencing Commission
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The Federal Trade Commission ("FTC") submits this comment advocating enhanced sentences for telemarketing fraud offenses. The FTC concurs with the position the U.S. Department of Justice has advocated to the Sentencing Commission on this issue: that telemarketing fraud is a distinctive form of fraud, and that the current sentencing guidelines fail to recognize the seriousness of telemarketing fraud. The FTC therefore encourages the Sentencing Commission to amend the sentencing guidelines to correspond to the statutory enhancements enacted by Congress in the Senior Citizens Against Marketing Scams Act, (SCAMS), 18 U.S.C. §§ 2325-2327.

The FTC is the primary federal consumer protection agency, with wide-ranging responsibilities over nearly all segments of the economy. In pursuing its mandate of protecting consumers, the FTC enforces the Federal Trade Commission Act,(1) which broadly prohibits unfair or deceptive acts and practices, as well as more than twenty other consumer protection statutes and thirty regulations that address such matters as consumer credit, telemarketing, and the sale of funeral goods and services.(2)

Combating telemarketing fraud has been a top priority for the FTC for the past decade. The FTC has committed significant resources to the war against telemarketing fraud -- a type of fraud that frequently victimizes the elderly. Prior to 1994, the FTC brought civil injunctive actions against fraudulent telemarketers alleging they had engaged in unfair and deceptive acts and practices in violation of Section 5 of the FTC Act. In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act , 15 U.S.C. §§ 6101- 08 ("Telemarketing Act"), giving the FTC additional authority specifically to attack telemarketing fraud. At Congress' direction, the FTC promulgated the Telemarketing Sales Rule, 16 C.F.R. Part 310, which became effective on December 31, 1995. The Rule defines and prohibits deceptive telemarketing practices and prohibits other abusive telemarketing practices.

Typically, the FTC enforces Section 5 and the Telemarketing Sales Rule against fraudulent telemarketers by seeking an *ex parte* temporary restraining order and asset freeze to halt ongoing fraudulent activities and preserve assets for consumer redress. The FTC's ultimate objective in its enforcement actions is to obtain restitution for injured consumers, if possible; if not, disgorgement to the U.S. Treasury of defendants' ill-gotten monies. Violators of the Rule are also subject to civil penalties. The FTC refers civil penalty cases to the Department of Justice, in the first instance, but may prosecute them if the Department declines to do so.

One very important feature of the Telemarketing Act is that it empowers the state Attorneys General to go into federal court to enforce the Telemarketing Sales Rule, to halt fraudulent schemes through nationwide injunctions against companies or individuals that violate the Rule, and to obtain restitution for injury caused to the residents of their states by the Rule violations. This grant of authority to the states has provided the Commission with an enormous opportunity to coordinate and leverage federal law enforcement resources with the states for maximum effect.

With the Telemarketing Sales Rule as part of our law enforcement arsenal, the FTC has led twenty cooperative law enforcement efforts focused upon the most prevalent and harmful types of telemarketing fraud, including telemarketing fraud that targets older consumers, since the Rule's promulgation in 1996. These law enforcement sweeps comprised a total of over 730 federal and state actions, including 112 cases brought by the FTC.

This concerted and aggressive response to deceptive telemarketing has provided the FTC with substantial expertise in this area. The FTC's law enforcement experience has revealed that while telemarketing fraud victimizes consumers of all ages, levels of income, and backgrounds, the elderly are disproportionately represented among victims of telemarketing fraud; and in some scams, 80 percent or more of the victims are 65 or older.(3) Fraudulent telemarketers often deliberately target the elderly and take advantage of the fact that many older people have cash reserves or other assets to spend on deceptively attractive offers. Older Americans seem especially susceptible to fraudulent offers for prize promotions and lottery clubs, charitable solicitations, and investment offers.(4)

In addition to coordinating with other civil enforcement agencies, as part of its battle against telemarketing fraud, the FTC routinely coordinates with, assists, and receives assistance from federal and state criminal authorities. For example, when the Department of Justice launched operation Senior Sentinel in December, 1995, a law enforcement project aimed at telemarketing boiler rooms that targeted the elderly, the FTC complemented its effort by filing simultaneous civil actions against numerous fraudulent telemarketers. Very often, criminal prosecutions of fraudulent telemarketers follow on the heels of FTC civil actions. FTC attorneys have also actively prosecuted fraudulent telemarketers as Special Assistant U.S. Attorneys.(5) The most notable example of this occurred in Chattanooga, Tennessee, where FTC attorneys were cross-designated as Special Assistant U.S. Attorneys and prosecuted criminal actions against telemarketers operating in the area. By the end of 1996, the Chattanooga Telemarketing Task Force had completed its work, having obtained fifty convictions and combined prison sentences against fraudulent telemarketers totaling over 1,695 months.(6)

Notwithstanding the multi-front offensive launched by federal and state civil and criminal law enforcement agencies, fraudulent telemarketing still plagues society, at great cost. Estimates of losses specifically caused by fraudulent telemarketers range from $3 billion to as high as $40 billion annually. The FTC's experience shows that these telemarketers are aware of the constant law enforcement scrutiny upon them. Nevertheless, they continue their relentless assault upon our nation's elderly population.

Telemarketing fraud goes beyond the simple taking of money: it also destroys lives. The FTC's experience shows that the vast majority of fraudulent telemarketing operations depend upon "reloading.(7) Telemarketers purchase names of people who have been victimized by their cohorts and then repeatedly victimize those same people for larger amounts of money.(8) We have observed that many operations have separate rooms where their best "reloaders" can work undisturbed. These reloaders are skilled at identifying all the available assets of a victim and then continuing to defraud that same vulnerable victim until the victim's life savings are gone.

Tape recordings made by victims reveal the particularly vicious nature of this crime. Telemarketers engage their victims in a war of attrition, peppering them with non-stop phone calls that are often replete with verbal abuse if the victim resists. They often convince their victims to take out loans, run up high credit card debt or sell their valuables. Many victims, who had previously been financially secure, are reduced to destitution. The victims are very often humiliated by their losses, and, further, unwilling to tell their family of their financial distress. This only leaves them even more vulnerable to the next call where the reloaders assure them that if they trust the telemarketers just one more time, they will recoup all the funds that they have lost.

Telemarketing fraud is also unique in that it is not an isolated crime; rather, it is a distinct and pervasive criminal industry. The FTC has found that people who engage in telemarketing fraud treat it as a profession. In order to perpetrate their scheme, they recruit and train others to that same criminal profession. Once these new telemarketers have been "trained," they set up their own telemarketing establishments, and begin the cycle again. When a boiler room is shut down by state or federal authorities, the telemarketers working at that room do not leave the industry, they merely find another establishment at which to practice their trade. When there have been criminal convictions, they see their colleagues sentenced to short terms of imprisonment, and are not deterred. As the Sentencing Commission points out in its notice requesting comment on this issue, and as the FTC's experience corroborates, these relatively short sentences result even after courts have enhanced the sentence under Section 3A1.1 of the guidelines (the vulnerable victim enhancement). Based upon its extensive experience, the FTC believes that stronger sanctions are necessary for those who engage in telemarketing fraud to make the threat of criminal prosecution more than just the "cost of doing business." The FTC believes that nothing less than the threat of lengthy incarceration will effectively deter this group of people who have made fraud their livelihood

Vigilant civil enforcement by the FTC and state Attorneys General has led to the successful lawsuits against numerous telemarketing operations, shutting down their operations and providing restitution for the victims in some cases. However, fraudulent telemarketing will remain a problem of epidemic proportions as long as the benefits to the perpetrators outweigh the costs. Currently, the costs are low enough that fraudulent telemarketing still flourishes as its own criminal industry. Higher sentences should help to raise those costs, deter law violations and punish appropriately those who use the telephone to bilk the public. Accordingly, the FTC urges the Sentencing Commission to amend the sentencing guidelines to require enhanced penalties for those convicted of telemarketing fraud.

By Direction of the Commission

Benjamin I. Berman
Acting Secretary

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Endnotes

(1) 15 U.S.C. §§ 41 *et seq.*

(2) *E.g.*, the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., which mandates disclosures of credit terms; the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*, which provides for the correction of billing errors on credit accounts; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, which establishes rights with respect to consumer credit reports; and the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, which provides disclosure standards for consumer product warranties; the Care Labeling Rule, 16 C.F.R. Part 423, which requires the provision of care instructions for wearing apparel; the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; the Mail and Telephone Order Merchandise Rule, 16 C.F.R. Part 435, which gives consumers certain rights when ordering products through the mail; and the Funeral Rule, 16 C.F.R. Part 453, which regulates certain pricing and sales practices by funeral providers.

(3) The owner of one boiler room testified that 99 percent of the victims were over sixty and that 90 percent were over seventy. Transcript of Trial, United States v. Brown, Cr. No. 1-96- 50 (E.D. Tenn. 1996) at 45 [testimony of Craig Heaps].

(4) Recent survey research conducted on behalf of the American Association of Retired Persons shows that there is no ready answer explaining why a disproportionate number of telemarketing fraud victims are elderly. The research rebuts the notion that the elderly are vulnerable because they are socially isolated, ill-informed, or confused. The survey shows, however, that older people who fall for telemarketing scams tend to believe the pitches they hear -- that they have a good chance of actually winning the grand prize, and that the products touted are worth the price charged for them. Ninety percent of respondents report awareness of consumer fraud; yet two-thirds said it is hard to spot fraud when it is happening. The survey also shows that elderly victims find it difficult to terminate telephone conversations, even when they say they are not interested in continuing a conversation. They are also reluctant to seek advice or assistance from others about financial matters in general.

(5) These prosecutions have included not only traditional prosecutions for mail fraud and wire fraud, but also prosecutions for criminal contempt when telemarketers violate the terms of injunctions obtained in FTC civil actions. *See, e.g.*, United States v. Jordan, No CR-S-96-113- LCL (D. Nev. 1996).

(6) In recognition of the FTC's contributions, the U.S. Department of Justice honored the FTC attorneys with its John Marshall Award for inter-agency cooperation in support of litigation in 1996. This project was cited by Representative Goodlatte, the author of the House-passed version of H.R. 1847 (105th Cong., 1st Sess.), The Telemarketing Fraud Prevention Act of 1997, to show the need for enhanced penalties for telemarketing fraud. *See*, Cong. Rec. p. H4870 (daily ed. July 8, 1997)(statement of Rep. Goodlatte).

(7)" *See e.g.*, FTC v. Thomas E. O'Day, No 94-1108-Civ-Orl-22 (M.D. Fla. 1994); FTC v. Best Marketing, No. 96-6781-Civ-Zloch (S.D. Fla. 1996); United States v. Brown, Cr. No.1-96- 50 (E.D. Tenn. 1996).

(8) Proof of this can be found in the words of telemarketers themselves. One professional telemarketer, for example, testified that the name of one victim was found in every boiler room in which she had worked.