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Report to the Congress:

# Adequacy of Penalties for Fraud Offenses Involving Elderly Victims

(as directed by section 250003 of Public Law 103-322)



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U.S. Department of Justice  
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UNITED STATES SENTENCING COMMISSION  
March 1995

**REPORT TO CONGRESS:**  
**ADEQUACY OF PENALTIES FOR FRAUD OFFENSES INVOLVING ELDERLY VICTIMS**

**I. INTRODUCTION**

**A. The Statutory Directive**

This Report to Congress is submitted pursuant to the directive in section 250003 of the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter the "statutory directive"), which states:

(a) **REVIEW.** The United States Sentencing Commission shall review and, if necessary, amend the sentencing guidelines to ensure that victim related adjustments for fraud offenses against older victims over the age of 55 are adequate.

(b) **REPORT.** Not later than 180 days after the date of enactment of this Act, the Sentencing Commission shall report to Congress the result of its review under subsection (a).<sup>1</sup>

**B. Results of the Review**

Because the statutory directive calls for submission of a report to Congress prior to the assessment of public comment and final amendment decisions in the current guideline amendment cycle,<sup>2</sup> Commission consideration of relevant issues necessarily is incomplete at this time. However, based on its empirical analyses of sentencing data and its review of pertinent case law, the Commission makes the following preliminary observations and conclusions:

- Lack of consistently reported information on victim age in case files prevents a comprehensive assessment of the adequacy of guideline sentences in fraud offenses involving older victims.
- 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.
- In older victim fraud cases in which the vulnerable victim enhancement applies, courts apparently find the magnitude of the enhancement (approximately a 25 percent increase) to be adequate.

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<sup>1</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250003, 108 Stat. 1796, 2085 (1994).

<sup>2</sup> This amendment cycle will culminate in Commission decisions on proposed guideline amendments in April and their submission to Congress by May 1, 1995.

- 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.

### C. The Sentencing Commission

The United States Sentencing Commission, an independent agency in the Judicial Branch of government, was created by the Sentencing Reform Act of 1984. Commission authorities and duties are set out in Chapter 58 of title 28, United States Code. The primary functions of the Commission are to "establish sentencing policies and practices for the federal criminal justice system"<sup>3</sup> and to promulgate a system of sentencing guidelines that prescribes the appropriate form and severity of punishment for offenders convicted of federal crimes. *See* 28 U.S.C. § 994. In its organic statute, the Commission is empowered and directed to collect information on sentences imposed under the guidelines, to revise the guidelines periodically in light of these data and other information, and to make recommendations to Congress in furtherance of an effective, humane, and rational sentencing policy.

### D. Organization of Report

Part II of the report provides an overview of the legislative history leading to the statutory directive; Part III discusses the operation of the relevant sentencing guidelines and policy statements; Part IV examines case law; Part V provides an empirical analysis of sentencing data; and Part VI states the report's conclusions.

## II. LEGISLATIVE HISTORY

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).<sup>4</sup> This legislation resulted from a concern about possible increased fraud activity against elderly victims and was apparently responsive to a two-year FBI undercover investigation into telemarketing fraud in Salt Lake City, Utah, announced by the Bureau in early 1993. Among other provisions, SCAMS proposed a new federal statute criminalizing

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<sup>3</sup> 28 U.S.C. § 991(b).

<sup>4</sup> Two other bills pertaining to similar concerns were introduced in the 103d Congress and referred to committee 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. S10017 (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 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.

telemarketing fraud and providing enhanced penalties when senior citizens were the principal victims. It also called for a Sentencing Commission review and report to Congress on fraud offenses involving older victims.

According to a committee discussion draft report on S. 557,<sup>5</sup> Congress, while principally concerned with telemarketing fraud, wanted to "take steps to ensure that all fraud related offenses against older victims are properly punished."<sup>6</sup> Language fulfilling this objective eventually found its way into the statutory directive.<sup>7</sup>

### III. OPERATION OF THE SENTENCING GUIDELINES

The sentencing guidelines for individual defendants, applicable to offenses occurring on or after November 1, 1987, contain multiple, related mechanisms designed to achieve appropriate punishment for fraud offenses, including frauds perpetrated against elderly victims. These provisions, to be discussed more fully below, include: 1) the fraud offense guideline (§2F1.1), 2) a generally applicable vulnerable victim adjustment (§3A1.1), and 3) related policy statements and commentary describing atypical circumstances that may warrant a sentence above the applicable guideline range (upward departure). Additionally, the guideline range itself provides limited discretion - the greater of 25 percent or six months between the lowest and highest sentences - within which sentencing judges can take into account the nature of the victim, among other factors.<sup>8</sup>

#### 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,

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<sup>5</sup> While 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. S10016 (daily ed. July 30, 1993).

<sup>6</sup> 139 CONG. REC. S10016 (daily ed. July 30, 1993).

<sup>7</sup> The procedural history relevant to this legislation is as follows: On July 30, 1993, the Senate, by voice vote, passed S. 557. 139 CONG. REC. S10017 (daily ed. July 30, 1993). On November 5, 1993, the Senate incorporated S. 557 as an amendment (number 1110) into S. 1607, Violent Crime Control and Law Enforcement Act of 1993. 139 CONG. REC. S15148 (daily ed. November 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 of S. 1607, as amended) by a vote of 95-4. 139 CONG. REC. S16301 (daily ed. November 19, 1993). Amendment number 1110 became Section 3905 (Increased Penalties For Fraud Against Older Victims) of H.R. 3355. Ultimately, Section 3905 would become Section 250003 of Pub. L. No. 103-322 (Sept. 13, 1994).

<sup>8</sup> Although not directly related to the concerns examined in this report, it should be pointed out that the sentencing guidelines mandate restitution to identifiable victims for any case in which it is practicable to determine the amount of restitution and the defendant's ability to pay. See USSG §5E1.1.

computer, or other means invoking federal jurisdiction), affected victims, and penalty structure. To ensure greater sentencing uniformity for similar criminal conduct regardless of the particular fraud statute charged, the Sentencing Commission promulgated a single, generic fraud guideline, §2F1.1.<sup>9</sup> 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), 4) whether the conduct violated a judicial or administrative order, 5) whether serious bodily injury was risked, and 6) whether a financial institution was substantially harmed. With the exception of the latter factor (which the Commission added pursuant to congressional directives), 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 via a generally applicable sentence enhancement for targeted vulnerable victims, described in the next paragraph.

### **B. Vulnerable Victim Adjustment**

Guideline 3A1.1 (Vulnerable Victim)<sup>10</sup> addresses predatory conduct in which a defendant targets victims because of their vulnerability. This general adjustment, potentially applicable to a wide variety of offense types including fraud, provides a two-level enhancement (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. Significantly, however, the guideline does not provide a *per se* rule that equates any particular age with the status of being a vulnerable victim. Rather, the guideline contemplates a case-by-case determination by the court, focusing on 1) whether the victim was in fact "unusually vulnerable" and 2) whether the defendant knew or should have known that fact.

### **C. Upward Departure**

Guideline 5K2.0 (Grounds for Departure)<sup>11</sup> 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

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<sup>9</sup> See Appendix A for the text of §2F1.1.

<sup>10</sup> See Appendix A for the text of §3A1.1.

<sup>11</sup> See Appendix A for the text of §5K2.0.

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.<sup>12</sup> 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 inconsistent with the section 3553(b) departure statute<sup>13</sup> and the Commission's amplification of it, briefly described *supra*, 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)<sup>14</sup> 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.<sup>15</sup>

The following part examines the manner in which appellate courts have treated some of these issues.

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<sup>12</sup> See USSG Ch. 1, Pt. A 4(b).

<sup>13</sup> 18 U.S.C. § 3553(b).

<sup>14</sup> See Appendix A for the text of §5K2.3.

<sup>15</sup> Section 2F1.1, comment. (n. 10).

#### IV. CASE LAW

Since the advent of the sentencing guidelines, the courts of appeals have generated a substantial body of case law relating to the sentencing of fraud offenses. Because the fraud guideline itself does not enhance sentences according to the nature of individual victims, appellate decisions related to the subject matter of this report tend to fall into one of two categories: 1) those construing and applying the vulnerable victim guideline enhancement and 2) those evaluating the propriety of upward departures from the guideline range premised upon victim age or related reasons.<sup>16</sup>

##### A. Vulnerable Victim Adjustment

Appellate courts appear to be following two somewhat divergent lines of reasoning in their application of the vulnerable victim guideline. The broader interpretation of §3A1.1 requires only that the fact of victim vulnerability and the fact that the defendant knew or should have known of that vulnerability be established. The vulnerability need not have been a factor in the decision to commit the offense. For example, in United States v. Boise,<sup>17</sup> the Ninth Circuit rejected the defendant's contention that §3A1.1 requires a defendant to select a victim intentionally because of the victim's age. The court held that a six-week-old infant is a vulnerable victim under §3A1.1 because the infant "is 'unusually vulnerable due to age,' not because [the defendant] selected him because of his vulnerability."<sup>18</sup> Consistent with this reasoning, several other circuit courts have determined that the enhancement is appropriate if the defendant knew or should have known that the victim was vulnerable.<sup>19</sup>

Other appellate courts have applied a somewhat more restrictive interpretation of §3A1.1 by requiring, additionally, that the defendant actually target the victim(s) because of their vulnerability.<sup>20</sup> For example, in United States v. Cree,<sup>21</sup> the Eighth Circuit reversed application of §3A1.1 in a case

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<sup>16</sup> See Appendix B for a synopsis of relevant cases.

<sup>17</sup> 916 F.2d 497 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991).

<sup>18</sup> Boise, at 506. *Cf. United States v. Roberson*, 872 F.2d 597, 608-09 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989) (84-year-old man is a vulnerable victim due to age).

<sup>19</sup> See United States v. Hershkowitz, 968 F.2d 1503 (2d Cir. 1992); United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992), *cert. denied*, 115 S. Ct. 920 (1995); United States v. Salver, 893 F.2d 113, 117 (6th Cir. 1989). See also United States v. Caterino, 957 F.2d 681 (9th Cir.), *cert. denied*, 113 S. Ct. 129 (1992).

<sup>20</sup> See, e.g., United States v. Smith, 39 F.3d 119 (6th Cir. 1994); United States v. Sutherland, 955 F.2d 25, 26 (7th Cir. 1992) (focus on whom the defendant targets, not on whom his solicitation happens to defraud); United States v. Cree, 915 F.2d 352, 354 (8th Cir. 1990) (§3A1.1 application justified only when a defendant's actions in some way exploited or took advantage of that vulnerability); United States v. Wilson, 913 F.2d 136 (4th Cir. 1990).

<sup>21</sup> 915 F.2d 352 (8th Cir. 1990).

in which the defendant struck with his car and killed an intoxicated pedestrian. The appellate court held that the vulnerable victim enhancement is justified only when a defendant's actions in some way exploited a victim's vulnerability.

In general, the appellate courts have been unwilling to accept the notion that elderly victims are *per se* "vulnerable victims" for purposes of §3A1.1, particularly in fraud cases. For example, the Tenth Circuit held in United States v. Smith,<sup>22</sup> that "elderly" status cannot be equated with *per se* vulnerability.<sup>23</sup> Where, however, other vulnerability factors converge with elderly status, the appellate courts typically have approved application of the §3A1.1 enhancement.<sup>24</sup> Under some circumstances, targeted elderly fraud victims have been considered vulnerable victims without any additional showing of special vulnerability. For example, in United States v. Stewart,<sup>25</sup> the Seventh Circuit upheld application of the §3A1.1 enhancement in a case in which a number of persons aged 70 and older were defrauded of annuities intended as payment for funeral services.

Circuit courts also have held that a vulnerable victim need not be the primary victim of the offense of conviction,<sup>26</sup> nor need the victim suffer any actual harm.<sup>27</sup>

## B. Upward Departure

Only a few appellate cases involving elderly fraud victims have discussed upward departures. In United States v. Kaye,<sup>28</sup> a case in which a defendant defrauded his elderly great aunt of her life

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<sup>22</sup> 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991).

<sup>23</sup> *See also* United States v. Lee, 973 F.2d 832 (10th Cir. 1992) (defrauded bank customers cannot be considered vulnerable victims under §3A1.1 solely because of elderly class; elderly victims must be shown unable to handle own financial affairs or otherwise unusually vulnerable).

<sup>24</sup> *See, e.g.*, United States v. Haines, 32 F.3d 290 (7th Cir. 1994); United States v. Harris, 38 F.3d 95 (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 3643 (Feb. 27, 1995); United States v. Brown, 7 F.3d 1155 (5th Cir. 1993); United States v. Lowder, 5 F.3d 467 (10th Cir. 1993); United States v. Yount, 960 F.2d 955 (11th Cir. 1992); United States v. Boulton, 905 F.2d 1137 (8th Cir. 1990).

<sup>25</sup> 33 F.3d 764 (7th Cir. 1994).

<sup>26</sup> United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994); United States v. Eschevarria, 33 F.3d 175 (2d Cir. 1994); United States v. Stewart, 33 F.3d 764 (7th Cir. 1994); United States v. Lee, 973 F.2d 832 (10th Cir. 1992); United States v. Hildebrandt, 961 F.2d 116 (8th Cir.), *cert. denied*, 113 S. Ct. 225 (1992); United States v. Yount, 960 F.2d 955 (11th Cir. 1992); United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 150 (1992). *But see* United States v. Wright, 12 F.3d 70 (6th Cir. 1993) (rejected the use of relevant conduct rules in deciding whether one of the defendant's victims was vulnerable, requiring that the person be a victim of the offense of conviction).

<sup>27</sup> United States v. Roberson, 872 F.2d 597 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989) (rejecting argument that aged victim could not be considered vulnerable because he was dead before his credit card was misused).

<sup>28</sup> 23 F.3d 50 (2d Cir. 1994).

savings, the appellate court affirmed application of the §3A1.1 enhancement and also upheld an upward departure equivalent to two offense levels. The increased sentence was premised on fraud guideline commentary (application note 10) inviting an upward departure for cases in which the measurable loss did not fully capture the seriousness of the harm, a situation that existed here because the court said the elderly woman was left "financially dependent on the generosity of others, quite possibly for the rest of her life." In another fraud case involving elderly victims, the Third Circuit upheld an upward departure based on extreme psychological injury inflicted on victims who happened to be older.<sup>29</sup> The victims' elderly status was not expressly cited in support of the enhanced sentence.

## V. EMPIRICAL ANALYSIS

### A. General Approach

The Commission attempted to assess empirically the adequacy of current guideline sentences for fraud offenses involving victims over age 55. As a preliminary step to answering this ultimate question posed by the statutory directive, an effort was made to address the following: 1) whether fraud cases involving elderly victims, in comparison to those that do not, tend to receive more lengthy sentences, as measured by greater use of the vulnerable victim adjustment, upward departure, and court discretion to sentence at or near the top of the guideline range; 2) the frequency with which victim age is mentioned as a reason to increase the sentence using the available guideline mechanisms; and 3) whether it is possible empirically to determine a threshold in judges' perceptions about victim age that demarcates elderly fraud victims from non-elderly fraud victims.

### B. Methodology and Data Limitations

Fiscal year 1993 sentence monitoring data and sentencing documents (principally, presentence reports and court sentencing orders) were analyzed to gather information for this study. Some of the information needed for these analyses - *e.g.*, the number of sentenced cases in which the fraud guideline was applied (6,125 in FY 1993), the number of fraud cases in which the vulnerable victim adjustment was applied (104 in FY 1993) - was readily available in the Commission's sentencing information databank. Other needed information - specifically, whether a fraud case involved a victim over age 55 and the impact of that circumstance on the sentence - previously had not been collected. In an effort to obtain this information, the Commission reviewed case file documents in 1) all 104 fraud (§2F1.1) cases in which the vulnerable victim adjustment (§3A1.1) was applied, 2) all 65 fraud (§2F1.1) cases involving an upward departure, 3) a randomly selected sample of 60 fraud cases sentenced near the top of the guideline range, and 4) a randomly selected sample of 50 other fraud cases. Through examining sentencing documents in the latter sample groups, it was hoped that

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<sup>29</sup> United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991).

some useful information could be obtained about how often fraud cases involving over-age-55 victims do not result in enhanced sentences under §3A1.1 or through an upward departure.

This data collection effort was hindered considerably by the general lack of information on victim age in case files. This information deficiency, while frustrating in terms of this study, is not surprising. Probation officers are not required to report victim age information in the presentence report. Neither are judges ordinarily required to include this information in their sentencing orders or statements of sentencing reasons. These realities and the consequent lack of identifiable victim age information severely limited the empirical analyses.

### **C. Findings**

Unfortunately, case file information on victim age was insufficient for a comprehensive assessment of how often frauds involve over-age-55 victims or how often the presence of such victims is associated with increased sentence length (in terms of applying the vulnerable victim upward adjustment, an upward departure from the guideline range, or sentencing near the top of the guideline range). In contrast, the available data did allow some analysis of the association of victim age with court use of the available sentence enhancement mechanisms.

#### **1. Use of §3A1.1 in Cases Involving Older Fraud Victims**

Sixty-three of the 104 fraud cases sentenced in FY 1993 in which the vulnerable victim enhancement was applied contained either general descriptive or numerical information on victim age. Analysis of victim age status for cases in which §3A1.1 was applied shows that the most frequent descriptive term for victims considered vulnerable by the courts is "elderly" (67%). The next most frequent term is "senior citizen" (13%). In 61 of the 63 cases in which some age information was available, it appeared that application of the §3A1.1 adjustment was based, at least in part, on the victims' advanced ages. In 22 (36%) of these 61 §3A1.1 cases, victim age was the sole justification cited for the vulnerable victim adjustment. In the remaining 39 cases (64%), age, in combination with other factors, provided the basis for the enhancement. These other factors included the victims' physical or mental condition and susceptibility to the fraud conduct (e.g., the fact that an older victim was a client of the defendant). These limited data indicate that courts are using the vulnerable victim adjustment to provide enhanced sentences in fraud cases involving older victims, but the frequency with which this is occurring could not be determined.

The same limited data suggest, however, that the threshold at which older age is equated with unusual vulnerability tends to be considerably higher than age 55. In the 18 older victim cases in which §3A1.1 was applied and the specific numerical age of the victim was known, the average victim age was 80.4 years.<sup>30</sup> In the 12 cases in which the numerical age of more than one older victim was

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<sup>30</sup> Median = 81.5, mode = 80, n = 18.

provided, the minimum and maximum ages were coded. The mean of the resulting range in these cases was 68.3 years.<sup>31</sup>

## 2. Upward Departure in Fraud Cases Involving Older Victims

An analysis of upward departures in fraud cases produced very limited evidence of courts using this mechanism as a means for enhancing fraud penalties generally, or specifically in fraud cases involving older victims. In fiscal year 1993, only 65 (0.1%) of the 6,125 §2F1.1 cases resulted in an upward departure. Of these upward departure cases, six provided victim age or age status information. In only one case did the court base the upward departure, at least in part, on the age or age status of the victims. This limited analysis of §2F1.1 upward departure cases indicates that courts tend not to view upward departures as a mechanism for enhancing penalties in cases involving older fraud victims. It also may indicate that sentencing judges perceive the guidelines as providing adequate penalties in cases involving older fraud victims.

## 3. Sentencing Near the Top of the Guideline Range in Fraud Cases Involving Older Victims

Sentencing judges may consider virtually any factor,<sup>32</sup> including advanced victim age, in choosing the specific sentence within the available guideline range.<sup>33</sup> Consequently, sentencing near the top of the applicable guideline range is one option that can be used to provide more punitive sentences when elderly persons are victims of fraud.

Again, lack of information on victim age precluded any overall assessment of whether courts tend to sentence higher in the guideline range when older victims were involved. Two different assessments were attempted to test the use of higher within-range sentences as a means of punishing victimization of older persons. First, a randomly selected sample of ten percent (60) of fraud cases sentenced in the upper quarter of the guideline range was reviewed to determine if there was any correlation between the position of the sentence within the range and advanced victim age. Unfortunately, victim age information could be ascertained in only two of these cases, and in neither case did that factor appear to affect the sentence. Secondly, an examination of sentence location within the guideline range of fraud cases in which the vulnerable victim adjustment was applied indicated that about two-thirds of those cases in which the victims were older persons were sentenced in the lower half of the guideline range. While firm conclusions cannot be drawn from the available

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<sup>31</sup> Median = 63.2, mode = 60, n = 12.

<sup>32</sup> USSG §5H1.10 forbids consideration of race, sex, national origin, creed, religion, and socioeconomic status as sentencing factors.

<sup>33</sup> See USSG §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)). In general, guideline ranges are constructed so that the maximum permissible sentence in a range exceeds the minimum by the greater of six months or 25 percent. See 28 U.S.C. § 994(b)(2).

information, courts do not appear to be regularly sentencing higher in the guideline range when older persons are victimized and the vulnerable victim adjustment is applied. This, in turn, suggests that the two-level vulnerable victim increase generally is perceived to be an adequate enhancement when applied to older victims of fraud.

## VI. CONCLUSIONS

The current statutory directive asks the Commission to report to Congress the results of its review of whether victim-related adjustments for fraud offenses perpetrated against persons over age 55 are adequate. While this assessment perhaps could be made in a variety of ways, and ultimately involves a policy judgment, the Commission initially approached the question by attempting to evaluate the current operation of the guidelines for fraud offenses involving older victims. In other words, as one way of addressing the question of "adequacy," the Commission sought to measure the degree to which sentencing judges are using available guideline mechanisms for providing higher sentences when older fraud victims are involved, and relatedly, whether the case law or empirical data suggest any significant dissatisfaction with available penalty levels. Regrettably, lack of data on victim age proved to be a substantial hindrance to drawing firm conclusions from the several analyses. The Commission did find some evidence that courts are using available guideline mechanisms, particularly the vulnerable victim enhancement, when frauds impact on persons of advanced age. When the vulnerable victim adjustment is applied, courts are finding the two-level enhancement adequate. The Commission found, additionally, that the limited data do not indicate any clear-cut age threshold of perceived victim vulnerability, but it appears that most older victims who are considered vulnerable are substantially older than age 55.

Appellate case law involving the vulnerable victim adjustment indicates that, for the most part, courts are applying guideline 3A1.1 in cases involving older victims in a manner that the Commission intended. There are, however, some intercircuit inconsistencies in interpreting the guideline language that the Commission will further evaluate, with the aim of developing appropriate clarifying amendments.

To supplement the above-described empirical analyses, the Commission currently is seeking public comment on the following issues:

**Issue for Comment:** Section 250002 of the Violent Crime Control and Law Enforcement Act of 1994 provides enhanced imprisonment penalties of up to five years when certain fraud offenses involve telemarketing conduct and enhanced imprisonment penalties of up to ten years when a telemarketing fraud offense involves victimizing ten or more persons over the age of 55 or targeting persons over the age of 55. Section 250003 directs the Commission to review and, if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims (defined as over the age of 55) are adequate.

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The Commission invites comment on whether the current victim-related adjustments are adequate to address such cases or whether §2F1.1 or §3A1.1 should be amended. Focusing on §3A1.1 as a possible vehicle for remedying any inadequately addressed concerns regarding older victims, the Commission specifically invites comment as to how this adjustment might best be amended. For example, should commentary be added to establish a rebuttable presumption related to age? If so, what threshold victim age should be equated with victim vulnerability (recognizing that section 250002 uses age 55 for fraud offenses while section 240002 uses age 65 for certain violent offenses)? If such a presumption for older victims is established, should there also be a counterpart presumptive age for vulnerability of young victims (*e.g.*, victims under age 16)? In lieu of a rebuttable presumption, should §3A1.1 be amended to require an upward adjustment in the offense level if the offense involved victim(s) older or younger than the designated threshold ages? The Commission also invites comment on whether the provisions concerning vulnerable victims should be different for telemarketing fraud than other types of fraud offenses.<sup>34</sup>

At this juncture, the Commission's review of the adequacy of fraud penalties in cases involving older victims necessarily is incomplete. As part of the ongoing, 1994-95 guideline amendment process, the Commission will carefully consider written public comment, together with testimony at its March 14, 1995, public hearing on proposed amendments before making final decisions on these issues. Should this process support the need for guideline amendments to address more effectively adverse impacts on older persons in fraud offenses, the Commission intends to promulgate any needed amendments and submit them to Congress for review no later than the May 1 statutory deadline.<sup>35</sup>

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<sup>34</sup> 60 Fed. Reg. 2443.

<sup>35</sup> See 28 U.S.C. § 994(p) (1993).

APPENDIX A

SELECTED GUIDELINE PROVISIONS  
APPLICABLE TO A STUDY OF FRAUD OFFENSES  
INVOLVING OLDER VICTIMS

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

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

- (1) If the loss exceeded \$2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) \$2,000 or less	no increase
(B) More than \$2,000	add 1
(C) More than \$5,000	add 2
(D) More than \$10,000	add 3
(E) More than \$20,000	add 4
(F) More than \$40,000	add 5
(G) More than \$70,000	add 6
(H) More than \$120,000	add 7
(I) More than \$200,000	add 8
(J) More than \$350,000	add 9
(K) More than \$500,000	add 10
(L) More than \$800,000	add 11
(M) More than \$1,500,000	add 12
(N) More than \$2,500,000	add 13
(O) More than \$5,000,000	add 14
(P) More than \$10,000,000	add 15
(Q) More than \$20,000,000	add 16
(R) More than \$40,000,000	add 17
(S) More than \$80,000,000	add 18.

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

- (5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.
- (6) If the offense --
- (A) substantially jeopardized the safety and soundness of a financial institution; or
- (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,
- increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

*Commentary*

*Statutory Provisions:* 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78d, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).

*Application Notes:*

1. The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.
2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).
3. "Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.
4. Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.
5. Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).

6. *Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).*
7. *Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.*

*There are, however, instances where additional factors are to be considered in determining the loss or intended loss:*

(a) *Fraud Involving Misrepresentation of the Value of an Item or Product Substitution*

*A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.*

(b) *Fraudulent Loan Application and Contract Procurement Cases*

*In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.*

*In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.*

(c) *Consequential Damages in Procurement Fraud and Product Substitution Cases*

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) *Diversion of Government Program Benefits*

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) *Davis-Bacon Act Cases*

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.
9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.
10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:
  - (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;
  - (b) false statements were made for the purpose of facilitating some other crime;
  - (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;
  - (d) the offense endangered national security or military readiness;
  - (e) the offense caused a loss of confidence in an important institution;

(f) *the offense involved the knowing endangerment of the solvency of one or more victims.*

*In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.*

11. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.*
12. *If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Vulnerable Victim).*
13. *Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.*
14. *"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.*
15. *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.*
16. *"The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(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).*

17. *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."*
18. *If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."*

*Background:* This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

*Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.*

*The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.*

*Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.*

*Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.*

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

*Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.*

\* \* \* \* \*

### **§3A1.1. Vulnerable Victim**

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

*Commentary*

*Application Notes:*

1. *This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.*
2. *Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.*

\* \* \* \* \*

**§5K2.0. Grounds for Departure (Policy Statement)**

Under 18 U.S.C. § 3553(b) 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." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

*Commentary*

*The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.*

*In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

\* \* \* \* \*

**§5K2.3. Extreme Psychological Injury (Policy Statement)**

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

## APPENDIX B

### Synopsis of Relevant Case Law on Guideline §3A1.1 (Vulnerable Victim)

#### First Circuit

United States v. Pavao, 948 F.2d 74 (1st Cir. 1991): Affirmed application of §3A1.1 to a 21-year-old female drug user. Although not everyone involved with drugs would be *ipso facto* a "vulnerable victim," sentencing court had opportunity to hear victim testify and to observe firsthand and, thus, consider her as an individual, rather than as member of class of 21-year-old female drug users.

United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991): Reversed application of §3A1.1 based on an interstate prostitution ring's use of single teenage mothers as prostitutes. The victims in this case were not atypical because the defendants were convicted under the Mann Act, which was designed to protect women and girls who, because of "their innocence, their hard lives and their vulnerability, were particularly susceptible to becoming victims of unscrupulous men and women who would take advantage of their situation for immoral purposes."

#### Second Circuit

United States v. Harris, 38 F.3d 95 (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 6343 (Feb. 27, 1995): Affirmed application of §3A1.1 where victims - a grieving widow, a 71-year-old widow, and a 23 year old recently involved in an accident - were particularly susceptible to alluring promises of financial security by virtue of their ages and difficulties in providing for themselves.

United States v. Kaye, 23 F.3d 50 (2d Cir. 1994): Affirmed application of §3A1.1 where defendant defrauded his great-aunt of her life savings, and affirmed an upward departure pursuant to §2F1.1, comment. (n. 10)(1992) to reflect the serious degree of harm caused by the fraud.

#### Third Circuit

United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992), *cert. denied*, 115 S. Ct. 920 (1995): Affirmed application of §3A1.1 in case in which defendants operated a roof repair scam and victims were elderly homeowners. Defendants knew or should have known that the elderly victims would be particularly vulnerable to the consumer fraud scheme because in many instances the scheme depended upon the victims' inability to verify the need to replace or repair the roofs.

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991): Affirmed application of §3A1.1 in case in which the defendant defrauded, among others, his girlfriend's parents of their lifesavings. Because application of §3A1.1 was sufficiently based on the victimization of the parents, the appellate court did not address whether the court's other finding of basing the enhancement on victims' ages was correct.

#### Fourth Circuit

United States v. Depew, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991): Affirmed application of §3A1.1 to defendant convicted of conspiracy to exploit a minor in a sexually explicit film, although an actual victim had not been selected. Because a 12-year-old boy was to be targeted for the film, the adjustment was proper, as any boy of such age would be "unusually vulnerable" if the defendant was successful in his endeavor.

#### Fifth Circuit

United States v. Brown, 7 F.3d 1155 (5th Cir. 1993): Affirmed application of §3A1.1 where female fraud victims were specifically chosen for their age, loneliness, and gullibility.

United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991): Affirmed application of §3A1.1 based on kidnapping victim chosen because of his young age and who, as the district court observed, was still terrified at time of trial.

United States v. Roberson, 872 F.2d 597 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989): Affirmed application of §3A1.1 in case in which 84-year-old man was vulnerable victim due to age.

#### Sixth Circuit

United States v. Smith, 39 F.3d 119 (6th Cir. 1994): Reversed district court's application of §3A1.1 where a fraudulent scheme victimized some elderly victims because the evidence did not support the contention that the defendant chose her victims because of any particular vulnerability.

#### Seventh Circuit

United States v. Haines, 32 F.3d 290 (7th Cir. 1994): Affirmed application of §3A1.1 where fraud victim was an 87-year-old woman and relied completely on the defendant to manage her affairs.

United States v. Stewart, 33 F.3d 764 (7th Cir. 1994): Reversed district court's failure to apply §3A1.1 where the defendant targeted elderly persons, inducing them to buy annuities to pay for "pre-need funeral services."

United States v. Newman, 965 F.2d 206 (7th Cir.), *cert. denied*, 113 S.Ct. 470 (1992): Affirmed application of §3A1.1 where the primary victim of the fraud was a 20-year-old woman. The appellate court held that a 20 year old "is hardly an experienced adult well able to resist the lies and threats of a much older person." Furthermore, the circuit court held that as a previous victim of sexual abuse, she could be found to be particularly susceptible to sexual exploitation as an adult. Moreover, the defendant must have realized at some time during their eight-month relationship that the victim was abnormally susceptible to intimidation and deceit.

United States v. Sutherland, 955 F.2d 25 (7th Cir. 1992): Reversed district court's finding that victims were unusually vulnerable because of their ages and status as war veterans. The appellate court found that neither the victims' ages nor their war veteran status made them unusually vulnerable because the defendant targeted both young and old war veterans. The court did not address whether aged persons are "unusually vulnerable" as a matter of law.

United States v. White, 903 F.2d 457 (7th Cir. 1990): Affirmed application of §3A1.1 where victim was in his sixties and experienced respiratory problems. The appellate court found it reasonable and logical to believe that the defendant decided to kidnap the elderly gas station attendant with respiratory problems because he would be less likely to flee or resist.

### **Eighth Circuit**

United States v. Callaway, 943 F.2d 29 (8th Cir. 1991): Reversed application of §3A1.1 in case in which defendant fraudulently received social security benefits intended for her infant grandchild who had cerebral palsy and was blind. Although the victim was young and handicapped, the record did not support a finding that the defendant targeted the victim because of the victim's youth or handicap.

United States v. Paige, 923 F.2d 112 (8th Cir. 1991): Reversed application of §3A1.1 where the only evidence of vulnerability was the defendant's statements that he targeted young caucasian store clerks whom he considered "inexperienced and naive" as victims of his scheme to pass falsified money orders. Appellate court found that the clerks "who accepted the falsified money orders were not physically or mentally disabled, nor were they of such youthful ages as to give rise to any presumption of unusual vulnerability."

United States v. Boulton, 905 F.2d 1137 (8th Cir. 1990): Affirmed application of §3A1.1 where fraud victim was selected because of his age, mental condition, and physical stature.

### **Ninth Circuit**

United States v. Lusier, 983 F.2d 1507 (9th Cir. 1993): Affirmed application of §3A1.1 in case in which the intoxicated defendant stabbed his 83-year-old aunt who was unable to move without a walker. Defendant was deemed responsible for his intoxication and should have known that his aunt was vulnerable.

United States v. Caterino, 957 F.2d 681 (9th Cir.), *cert. denied*, 113 S.Ct. 129 (1992): Affirmed application of §3A1.1 in case in which the defendants used "the telephone to get behind the defenses" of old people "who don't have the ability to protect themselves."

United States v. White, 974 F.2d 1135 (9th Cir. 1992): Affirmed application of §3A1.1 in case involving child victim. Merely because the crime of involuntary manslaughter itself was not an

intentional crime did not mean that defendant did not know or should not have known that two-year-old victim of the offense was "unusually vulnerable" due to age.

United States v. Boise, 916 F.2d 497 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991): Affirmed application of §3A1.1 where defendant was convicted of killing a six-week-old infant. The court rejected the argument that §3A1.1 was only applicable where a defendant selects a victim intentionally because of his vulnerability. The court concluded that the defendant's son was a vulnerable victim for purposes of §3A1.1 "because a six-week-old infant is 'unusually vulnerable due to age' and not because [Boise] selected him because of his vulnerability."

### Tenth Circuit

United States v. Lowder, 5 F.3d 467 (10th Cir. 1993): Affirmed application of §3A1.1 where the victims were inexperienced, elderly, and particularly reliant on the funds fraudulently stolen from them.

United States v. Lee, 973 F.2d 832 (10th Cir. 1992): Reversed application of §3A1.1 that was based solely on the "victims' membership in the class of 'elderly' persons[.]" without any particularized finding of vulnerability. Appellate court held that the label "elderly" is too vague, standing alone, to provide a basis for a finding of unusual vulnerability.

United States v. Pearce, 967 F.2d 434 (10th Cir.), *cert. denied*, 113 S.Ct. 341 (1992): Affirmed application of §3A1.1 based on the "unusual vulnerability of the victim" where the defendant kidnapped a 57-year-old woman who was small, frail, and recovering from a double mastectomy, and sexually assaulted her during the course of the kidnapping. Held that §3A1.1 encompasses cases in which a defendant, while committing the offense for which he is convicted, targets the victim for related, criminal conduct because he knows the victim is unusually vulnerable to that criminal conduct.

United States v. Smith, 930 F.2d 1450 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991): Reversed for failure to specifically address §3A1.1, the district court's upward departure based on the defendant taking a vehicle in preparation of the crime from "a vulnerable victim, that being an elderly woman." In terms of §3A1.1 application, the circuit court held that, as a matter of law, it is insufficient to equate "elderly" status with *per se* vulnerability. Citing United States v. Creech, 913 F.2d 780, 782 (1990), the court held that the use of §3A1.1 "to enhance a defendant's punishment for the exploitation of a vulnerable victim under §3A1.1 requires analysis of the victim's personal or individual vulnerability."

### Eleventh Circuit

United States v. Yount, 960 F.2d 955 (11th Cir. 1992): Affirmed application of §3A1.1 for misappropriation of funds from trust accounts held by elderly persons. The appellate court found that

the record in this case demonstrates that the "trust accountholders were very old, infirm, and no longer capable of managing their own affairs."