

subsequent conviction for a crime of violence against an elderly victim.

Currently, the guidelines account for victim harm in a number of ways. For federal offenses that are most apt to cause physical harm (e.g., assault, criminal sexual abuse, kidnapping, robbery), the guidelines expressly require a higher sentence, regardless of the victim's age, if the victim sustained bodily injury. Additionally, § 3A1.1 (Vulnerable Victim), provides a two-level upward adjustment if the defendant knew or should have known that a victim was unusually vulnerable due to, among other factors, the victim's age. Furthermore, the guidelines, both generally, through § 5K2.0 (Grounds for Departure), and specifically, through, e.g., § 5K2.8 (Extreme Conduct) (involving unusually heinous, cruel, brutal, or degrading conduct), invite courts to depart upward for circumstances that potentially involve elderly victims. The guidelines also account for the seriousness, recency, and relatedness of a defendant's prior record of criminal conduct. See Chapter Four (Criminal History and Criminal Livelihood).

The Commission invites comment on whether the guidelines provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim. If not, the Commission invites comment on how, and to what extent, existing factors might be modified as well as how, and to what extent, additional factors should be considered.

(B). Synopsis of Proposed Amendment: This proposed amendment implements the third criterion of the directive in section 240002, pertaining to enhanced punishment for a defendant with a prior conviction for a crime of violence against an elderly victim. This amendment recommends a departure under § 3A1.1 (Vulnerable Victim).

Proposed Amendment: The Commentary to § 3A1.1 captioned "Application Notes" is amended by inserting the following additional note:

"3. If (A) an adjustment applies under this section; and (B) the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted."

(C). 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.

Violations of fraud statutes are covered under § 2F1.1 (Fraud and Deceit), which increases penalties proportionately based on a number of factors, including the amount of loss sustained by victims, the sophistication of the offense, and whether particular types of harm occurred. In addition, a two-level increase under § 3A1.1 (Vulnerable Victim) applies if the fraud exploited vulnerable victims, including victims who are vulnerable because of age.

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.

Chapter Four, Part B (Career Offenders and Criminal Livelihood)

28. Issue for Comment: Section 70001 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 3559 to mandate a sentence of life imprisonment for a defendant convicted of a "serious violent felony" if the defendant has been convicted on separate prior occasions in federal or state court of two or more serious violent felonies and one or more serious violent felonies and one or more serious drug offenses. The Commission invites

comment on how it should incorporate into the sentencing guidelines the amendments to 18 U.S.C. § 3559. In particular, the Commission invites comment as to whether the career offender guidelines should be replaced with a new guideline incorporating the current career offender provisions and the statutory requirements of section 70001. Alternatively, the Commission could add an application note to § 4B1.1 directing the court to refer to 18 U.S.C. § 3559 for offenses to which this statute applies. The Commission also invites comment as to whether no action need be taken because § 5G1.1 already provides instructions on the application of mandatory statutory penalties that conflict with the guidelines.

Chapter Five, Part C (Imprisonment)

29. Synopsis of Proposed Amendment: Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 (the "Safety Valve" provision) authorized and directed the Commission to promulgate guidelines and policy statements to implement section 80001(a), providing an exception to otherwise applicable statutory mandatory minimum sentences for certain defendants convicted of specified drug offenses. Pursuant to this provision, the Commission promulgated § 5C1.2. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994.

Proposed Amendment: Pursuant to its "permanent" amendment authority under 28 U.S.C. § 994(p), the Commission proposes to repromulgate § 5C1.2, as set forth in the Guidelines Manual effective November 1, 1994. See also 59 Fed. Reg. 52210-13.

Additional Issue for Comment: The Commission also invites comment on any aspect of § 5C1.2 or other guideline that should be modified to effectuate congressional intent regarding the "safety valve" provision.

Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures)

30. Synopsis of Proposed Amendment: Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires mandatory restitution for sexual abuse and sexual exploitation of children offenses under 18 U.S.C. §§ 2241-2258. These provisions also require that compliance with a restitution order be a condition of probation or supervised release. When there is more than one