

A Seductive Playground Indeed— The Federal Sentencing Guidelines Respond

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The internet: “a seductive playground for unscrupulous individuals bent on defrauding innocent victims.” *U.S. v. Perillo*, 255 F.3d 728 (9th Cir. 2001), cert. denied 534 U.S. 1034. At least that is how Judge Trott described it when writing for the majority in *U.S. v. Michael D. Perillo*. The majority explained that the ability to effectuate commerce between hundreds of millions of people makes the internet a valuable tool for both business and fraud. In apparently the first case to address the issue of the “mass marketing” enhancement under the federal sentencing guidelines, the Court found the facts of Michael Perillo’s internet fraud clearly illustrate his dichotomy.

Prior to the *Perillo* matter, in May of 1998, the United States Sentencing Commission submitted proposed sentencing enhancements designed to address some of the more common components of telemarketing fraud. One such proposal was a sentencing enhancement for individuals who

employ “mass marketing” techniques in telemarketing fraud. On June 23, 1998, Congress enacted the Telemarketing Fraud Prevention Act of 1998 which directed the United States Sentencing Commission to “provide an additional appropriate sentencing enhancement,” for offenses including those which employ “sophisticated means” or which “a large number of vulnerable victims” are affected by schemes to defraud. In Request for Public Comment BAC2210-40/2211-01, the Commission clearly stated, “[t]he mass-marketing amendment is intended to apply to persons who engage in a plan to victimize a large number of persons through a fraudulent telemarketing scheme.”

Underlying the enhancement are the federal sentencing guidelines which are allegedly designed to ensure uniformity in sentencing by limiting the court’s discretion to a certain guideline sentencing range. The range, found in the sentencing table, is the combined effect of the offense

level and the criminal history category. The guidelines provide a “base offense level” from which upward and downward departures, and adjustments are made. Ultimately, the “mass-marketing” enhancement found its way to Section 2F1.1(b)(3) of the federal sentencing guidelines and is now located in Section 2B1.1(b)(2)(A).

The “mass-marketing” adjustment builds on the offense level and loss enhancements for fraud and deceit offenses found in Section 2B1.1. Therein as the loss amount increases from less than \$5,000.00 to more than \$100,000,000.00, up to 26 levels are added to the “base offense level” of six. Section 2B1.1(b)(2)(A) provides for a two level enhancement for offenses involving “mass-marketing.” And, (b)(2)(B) enhances the penalty even further where the offenses involves 50 or more victims by increasing the level by four.

Note 3 to Section 2B1.1 defines “mass-marketing” to mean:

[A] plan, program, promotion, or cam-

