

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of a temporary, emergency amendment to sentencing guidelines, policy statements, and commentary.

SUMMARY: Pursuant to section 4 of the Telephone Records and Privacy Protection Act of 2006 (the "Telephone Act"), Pub. L. 109–476, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

DATE: The Commission has specified an effective date of May 1, 2007, for the emergency amendment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer,
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SUPPLEMENTARY INFORMATION: The Commission must promulgate a temporary, emergency amendment to implement the directive to section 4 of the Telephone Act by July 11, 2007. On January 30, 2007, the Commission published in the Federal Register an issue for comment regarding the implementation of this directive.

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); section 4 of Pub. L. 109-476.

Ricardo H. Hinojosa,

Chair

Pretexting

Amendment: Section 2H3.1 is amended in the heading by striking "Tax Return Information" and inserting "Certain Private or Protected Information".

Section 2H3.1(b)(1) is amended by inserting "(A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B)" after "If".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by inserting "§ 1039," after "18 U.S.C. §".

The Commentary to §2H3.1 captioned "Application Notes" is amended by striking Note 1; by redesignating Note 2 as Note 1; and by inserting after Note 1, as redesignated by this amendment, the following:

"2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the

conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15-21 months and the court determines a 'total punishment' of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the "total punishment" in a manner that satisfies the statutory requirement.

3. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:
 - (i) The offense involved confidential phone records information of a substantial number of individuals.
 - (ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, severe emotional trauma, or a substantial invasion of privacy interest) to individuals whose private or protected information was obtained."

The Commentary to §2H3.1 is amended by striking the Background Commentary.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1038 the following new line:

"18 U.S.C. § 1039 2H3.1".

Reason for Amendment: This amendment implements the emergency directive in section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by July 11, 2007, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code."

Section 1039 criminalizes the fraudulent acquisition or disclosure of confidential phone records. The penalties for violating the statute include fines and imprisonment for a term not to exceed 10 years. The statute also includes enhanced penalties for certain forms of aggravated conduct, providing for up to a five year term of imprisonment, in addition to the penalties for a violation of section 1039(a), (b), or (c). See 18 U.S.C. § 1039 (d), (e).

The amendment refers the new offense at 18 U.S.C. § 1039 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information). The Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced to this guideline. In addition, this guideline includes a cross reference, instructing that if the purpose of the offense was to facilitate

another offense, that the guideline applicable to an attempt to commit the other offenses should be applied, if the resulting offense level is higher. The Commission concluded that operation of the cross reference would capture the harms associated with the aggravated forms of this offense referenced at 18 U.S.C. § 1039(d) or (e). Finally, the amendment expands the scope of the existing three-level enhancement in the guideline to include cases in which the defendant is convicted under 18 U.S.C. § 1039(d) or (e). Thus, in cases where the cross reference does not apply, application of the enhancement will capture the increased harms associated with the aggravated offenses.