

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42240; File No. SR-NASD-99-45]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Public Disclosure Program

December 16, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 15, 1999, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary NASD Regulation, Inc. ("NASD Regulation"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation. On December 1, 1999, NASD Regulation submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice of the rule change, as amended, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation proposes to amend Interpretive Material 8310-2(a), which concerns the Public Disclosure Program. Proposed new language is italicized; proposed deletions are in brackets.

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 1, 1999. In Amendment No. 1, NASD Regulation clarifies certain proposed changes to the Public Disclosure Program and submits Form U-6 as an exhibit ("Amendment No. 1"). The Commission notes that the Form U-6 is being submitted to help the public determine what additional information will be disclosed through the Public Disclosure Program and is not the subject matter of this rule filing.

IM-8310-2. Release of Disciplinary Information

(a) [The Association shall, in response to a written inquiry, electronic inquiry, or telephonic inquiry via a toll-free telephone listing, release certain information contained in its files regarding the employment and disciplinary history of members and their associated persons, including information regarding past and present employment history with Association members; all final disciplinary actions taken by federal, state, or foreign securities agencies or self-regulatory organizations that relate to securities or commodities transactions; all pending disciplinary actions that have been by federal or state securities agencies or self-regulatory organizations that relate to securities and commodities transactions and are required to be reported on Form BD or U-4 and all foreign government or self-regulatory organization disciplinary actions that relate to securities or commodities transactions and are required to be reported on Form BD or U-4; and all criminal indictments, information or convictions that are required to be reported on Form BD or Form U-4. The Association will also release information required to be reported on Form BD or Form U-4 concerning civil judgments and arbitration decisions in securities and commodities disputes involving public customers, pending and settled customer complaints, arbitrations and civil litigation, current investigations involving criminal or regulatory matters, terminations of employment after allegations involving violations of investment-related statutes or rules, theft or wrongful taking of property, bankruptcies less than ten years old, outstanding judgments or liens, any bonding company denial, pay out or revocation, and any suspension or revocation to act as an attorney, accountant or federal contractor.]

In response to a written inquiry, electronic inquiry, or telephonic inquiry via a toll-free telephone listing, the Association shall release certain information contained in the Central Registration Depository regarding a current or former member, an associated person, or a person who was associated with a member within the preceding two years, through the Public Disclosure Program. Such information shall include:

(1) the person's employment history and other business experience required to be reported on Form U-4;

(2) currently approved registrations for the member or associated person;

(3) the main office, legal status, and type of business engaged in by the member; and

(4) an event or proceeding—

(A) required to be reported under Item 23 on Form U-4;

(B) required to be reported under Item 11 on Form BD; or

(C) reported on Form U-6.

The Association also shall make available through the Public Disclosure Program certain arbitration decisions against a member involving a securities or commodities dispute with a public customer. The Association shall not release through the Public Disclosure Program social security numbers, residential history information, or physical description information, or information that the Association is otherwise prohibited from releasing under Federal law.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD Regulation included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD Regulation has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD Regulation's Public Disclosure Program is described in Interpretive Material 8310-2 of the NASD Rules ("the Interpretation"). Under the Public Disclosure Program, NASD Regulation releases to the public certain information reported on uniform forms⁴

⁴ The uniform forms are Form BD (the Uniform Application for Broker-Dealer Registration); Form BDW (the Uniform Request for Broker-Dealer Withdrawal); Form U-4 (the Uniform Application for Securities Industry Registration or Transfer); Form U-5 (the Uniform Termination Notice for Securities Industry Registration); and Form U-6 (the Uniform Disciplinary Action Reporting Form). Except for the Form U-6, all of these forms have been approved by the Commission. See Securities Exchange Act Release No. 41594 (July 2, 1999), 64 FR 37586 (July 12, 1999) (order adopting the amended Form BD); Securities Exchange Act Release No. 41356 (April 30, 1999), 64 FR 25144 (May 10, 1999) (order adopting the amended Form BDW); Securities Exchange Act Release No. 41560

to the Central Registration Depository ("CRD") regarding the employment history, other business experience⁵ and disciplinary history of NASD members and associated persons. The NASD's practice is and will continue to be to provide such information on a per associated person or per member basis. The primary purpose of the Public Disclosure Program is to help investors make informed choices about the individuals and firms with whom they may wish to do business.

NASD Regulation has determined that the Interpretation governing the Public Disclosure Program should be amended to ensure that disclosure practices are clearer and fairer to NASD members, associated persons, and the public.⁶ The proposed rule change would affect only information released through the Public Disclosure Program. NASD Regulation is not proposing any change to the uniform forms or requesting authority to delete or change any information in CRD records that would require agreement from state regulators.

Persons Subject to the Interpretation. Since the inception of the Public Disclosure Program, NASD Regulation's practice has been to release information about a *current or former* member or associated person. The current Interpretation, however, refers to the release of information about "members" or "their associated persons," which the NASD By-Laws define as current members and persons currently associated with members.⁷ The Interpretation does not explicitly address the issue of disclosure regarding former members and associated persons.

The proposed rule change would explicitly address disclosure on former members and associated persons. Persons who would be subject to disclosure under the Program would include: (1) Current and former NASD members; (2) persons currently associated with an NASD member; and (3) persons who have been associated with an NASD member within the preceding two years. NASD Regulation

(June 25, 1999), 64 FR 36059 (July 2, 1999) (order approving the new Forms U-4 and U-5).

⁵ Employment experience includes the last ten years of full- and part-time work, self-employment, military service, unemployment, and full-time education. The Form U-4 also requires registered persons to report certain other business experience on page 2 of the Form.

⁶ To that end, the Interpretation has been reformatted to make it easier to read and understand. The Interpretation has been amended to conform to style and grammatical conventions followed in the NASD Rules, e.g., using singular nouns. In addition, certain words and phrases in the Interpretation have been conformed to usage in the uniform forms. All of these changes are clarifying, non-substantive amendments.

⁷ See Articles I(q) and (ee) of the NASD By-Laws.

believes that it is inappropriate to continue public disclosure indefinitely for an individual who has chosen to leave the securities industry. Instead, NASD Regulation believes it should strike a balance between an investor's interest in being easily able to obtain information about a former associated person and that person's desire for privacy once he has left the securities industry. A two-year disclosure period coincides with the period in which an individual can return to the industry without being required to requalify by examination and the initial period in which an individual remains subject to the jurisdiction of the Association.⁸ NASD Regulation notes, however, that with the exception of part II of the Form U-5 Internal Review Disclosure Reporting Page ("DRP"),⁹ there is currently no mechanism for a former associated person or member to submit information to amend or update a disclosure record. Accordingly, NASD Regulation intends to clearly identify the scope of the disclosure information for former associated persons or members.

Release of Information Reported on Forms U-5 and U-6. NASD Regulation currently releases under the Public Disclosure Program those events and proceedings that are *required to be reported* on Form U-4 and Form BD. The Interpretation currently does not explicitly address events and proceedings reported on Form U-5 or Form U-6.

Form U-6 is filed by state securities regulators and self-regulatory organizations ("SRO") to report disciplinary and other matters that are also required to be reported on Form U-4 or Form BD.¹⁰ Form U-6 includes

⁸ See NASD Rules 1021(c) and 1031(c); NASD By-Laws Article V, Section 4. Article V, Section 4 of the By-Laws provides that a person whose association with a member has been terminated or revoked shall continue to be subject to the NASD's jurisdiction for certain specified purposes. Under that provision, the two-year period begins on the effective date of the termination, and may be extended under certain circumstances. For purposes of disclosure under the Public Disclosure Program, the two-year period would begin on the effective date of the termination and would not be extended beyond the initial two-year period. The effective date of termination is the date that the Form U-5 is captured by the CRD system. Conversation between Mary Dunbar, Office of General Counsel, NASD Regulation, and Joseph P. Corcoran, Attorney, Division, Commission on December 10, 1999.

⁹ Part II of the Form U-5 Internal Review DRP provides a current or former registered representative an opportunity to provide a summary of the circumstances relating to an internal review reported on a Form U-5 by a former employer.

¹⁰ If a state securities regulator or SRO chooses to report regulatory information to CRD, it must use a Form U-6 for the information to be available through the Public Disclosure Program. Regulators

DRPs in five categories: (1) Bankruptcy/SIPC/Compromise with Creditors; (2) Civil Judicial; (3) Criminal; (4) Regulatory Action; and (5) SRO Arbitration/Reparation. The format of the Form U-6 DRPs parallels the format of the DRPs used for the Forms U-4, U-5, and BD for those categories. Generally speaking, the Form U-6 reports the identifying information on the subject of the filing (i.e., the individual or entity), the regulator reporting the action, and a brief description of the matter being reported, including its status or final solution.

Until 1996, the NASD only released information actually reported on Form U-4 or Form BD. In 1996, the NASD proposed and the Commission approved a rule change that permitted the NASD to release information "required to be reported" on Form U-4 or Form BD.¹¹ NASD Regulation proposed the change because in some instances, it possessed information about a currently registered person that should have been reported on the person's Form U-4, but the amended Form U-4 had not yet been submitted. NASD Regulation proposed the rule change so that it could release all information that it possessed that was required to be reported on the Forms U-4 and BD, even if the registered person or firm was not current in its filings, thereby ensuring that investors received more complete information.

NASD Regulation currently interprets the "required to be reported" standard as follows. For current members and associated persons, NASD Regulation interprets the "required to be reported" standard to include all information reported on Form U-4 or Form BD, as well as information that has been reported on a Form U-5 or Form U-6 that should be, but has not yet been, reported on a Form U-4 or Form BD. For example, a former employer of a currently registered representative may report a customer complaint against that registered representative by amending his Form U-5. NASD Regulation includes information about this complaint in any public disclosure report it issues about the registered representative, even if the current employer of the registered person has not updated his Form U-4 to reflect the complaint.

also are able to report on Form U-6 matters involving individuals or entities that are not currently registered, provided the events being reported to CRD would be required to be reported if the individuals or entities were registered or attempted to become registered.

¹¹ See Securities Exchange Act Release No. 37797 (October 9, 1996), 61 FR 53984 (October 16, 1996).

For former members and associated persons, the "required to be reported" standard has a different result because once an association or membership is terminated, there is no longer a requirement to report on Form U-4 or Form BD, respectively. Consequently, when NASD Regulation receives a public disclosure request for a former associated person or member, NASD Regulation releases all information reported to CRD up to the date of the termination of association or membership. However, events and proceedings reported on an initial or amended Form U-5 or Form BDW,¹² or on Form U-6 after an individual has terminated his association or after termination of a firm's membership, are not released under the Program. If a former associated person or member reapplies and is approved for NASD registration or membership, NASD Regulation resumes public disclosure under the "required to be reported" standard, which includes releasing all information reported on any uniform form during any period of active or inactive registration or membership.

Under the proposed rule change, NASD Regulation would begin releasing information reported on Form U-6 for former members and associated persons, subject to the two-year time limitation discussed above. There are several reasons for this change. First, the information reported on Form U-6 is provided by regulators and SROs, and therefore NASD Regulation believes that it is highly reliable. Second, the information reported on Form U-6 may be particularly valuable to a public investor who who done business with a former member of associated person who has recently left the industry. Third, the proposed rule change would make disclosure of Form U-6 information more consistent between currently registered members and associated persons and former members and associated persons. Finally, the proposed rule change would result in more consistent disclosure by the Program and the states; some of which currently release information reported on all uniform forms, whether or not it is currently reportable on a uniform form.

NASD Regulation does not release information that has been reported on a Form U-5 regarding former registered persons because that information may not have been reviewed by such individuals and may not, as a result, include their comments on, or

concurrence with, the information. NASD Regulation does not propose any change to this policy in this filing.

Release of Arbitration Decisions Involving Members. NASD Regulation makes all arbitration awards rendered in its forum available pursuant to NASD Rule 10330(f). Interested persons may obtain hard copies of such awards upon request by contacting the Office of Dispute Resolution. In addition, for the convenience of investors, NASD Regulation makes available through the Public Disclosure Program information on awards rendered in the arbitration forum administered by the NASD that involve securities or commodities disputes between members and public customers.¹³

Clarification of Information Not Released Through Program. A number of members and associated persons have asked whether social security numbers, home addresses, or physical description information reported on the uniform forms are released through the Public Disclosure Program. NASD Regulation does not release such information, and the proposed rule change clarifies this policy.

The proposed rule change also clarifies that NASD Regulation will not release information through the Public Disclosure Program that it is otherwise prohibited from releasing under Federal law, e.g., criminal history record information provided by the Federal Bureau of Investigation.¹⁴ The criminal history information that is released through the Public Disclosure Program is the information provided by the associated person or the member on the uniform forms.

Discontinuing Release of Certain Factually Incorrect Information. NASD Regulation also would like to inform the Commission of NASD Regulation's intention to exercise discretion in discontinuing public disclosure of a limited category of factually incorrect information that may be contained in the CRD. NASD Regulation occasionally receives requests to expunge an event from CRD where the person who was the subject of the CRD filing can demonstrate that it was factually impossible for him to have been involved in the event (e.g., a person was named in an arbitration as a branch manager of a firm, and the person was working at a different firm at that time). NASD Regulation and the North American Securities Administrators

Association ("NASAA") agree that such information can be expunged from the CRD if the person obtains a court order of expungement. However, obtaining a court order can be time-consuming and expensive. NASD Regulation believes that information that can be proven to be factually incorrect should be expunged from the CRD system without a court order and is discussing this issue with NASAA. NASD Regulation and NASAA also are currently discussing other circumstances in which expungement orders are appropriately honored.¹⁵ Until an agreement is reached with NASAA on expunging factually incorrect information from the CRD system, NASD Regulation intends to discontinue releasing such information via the Public Disclosure Program. NASD Regulation will develop guidelines to implement this policy. The policy will provide some measure of assurance that this type of factually incorrect information is not provided to investors or other members of the public.

Automation of Public Disclosure Reports. Currently, when NASD Regulation receives a public disclosure request, NASD Regulation staff reviews the CRD record of the subject of the request, identifies events that must be disclosed under the Interpretation, and manually prepares a summary report for the requester. With the deployment of Web CRD,¹⁶ NASD Regulation's Internet-based registration system, the staff plans to discontinue the manual preparation of these reports. Instead, staff will use a computer program that automatically generates a report after drawing information directly from the Web CRD data base. The computer program will draw the information from specified fields in WEB CRD that parallel fields on the Forms U-4, U-6,, and BD (and Form U-5 in the limited circumstances discussed above). The report then will be sent by regular or electronic mail to the requester. This approach removes the NASD Regulation staff from the preparation of the reports, provides for consistent disclosure without manual intervention, and allows the information that is actually reported to Web CRD on the uniform forms or from the NASD Regulation Office of Dispute Resolution¹⁷ to be reported to the public.¹⁸

¹⁵ See Notices to Members 99-09 and 99-54.

¹⁶ See Securities Exchange Act Release No. 41326 (April 22, 1999), 64 FR 23366 (April 30, 1999)(notice of filing of SR-NASD-98-96, which describes Web CRD).

¹⁷ See *supra* note 13.

¹⁸ As part of the transition from Legacy CRD to Web CRD, information that was reported prior to

¹² The Commission notes that copies of a firm's Form BDW is available to the public through the Commission's Public Reference Room.

¹³ CRD obtains information regarding awards involving members from its Office of Dispute Resolution because members are not required to report arbitration awards on Form BD.

¹⁴ 28 CFR 50.12(b).

One significant consequence of this approach is that the automatically generated reports will include verbatim any comment submitted by a registered representative, firm, or regulator in response to the last question on the Disclosure Reporting Pages of the uniform forms. This question typically asks for a summary of the circumstances or details relating to the disclosure event. These comments are not currently included in the manual reports prepared by the staff and may contain customer names. They also may contain confidential account information or language that is offensive or potentially defamatory, although that is far less likely.

Because these comments have not been included previously in the manual reports, NASD Regulation does not intend to begin using these automated reports until the SEC approves this proposed rule change. Upon approval, NASD Regulation will inform members and registered persons via a Notice to Members and other communications that it is inappropriate, and may subject members to regulatory sanctions or civil liability, to submit offensive or potentially defamatory language on the uniform forms.¹⁹ NASD Regulation also is considering developing electronic notices that would appear on the electronic screen when forms are being completed on-line advising Web CRD users of this issue. NASD Regulation would undertake to conduct a continuing program to educate members and registered persons on this issue.

After implementation of automated reports, NASD Regulation will address objections to disclosure of customer names, confidential customer

the deployment of Web CRD was converted from the Legacy CRD system and brought into the Web CRD database structure. Because of differences between the current and previous uniform registration forms, data was necessarily reformatted. In nearly all cases, information was converted as filed (*i.e.*, information reported on a Form U-4 in Legacy CRD was converted to Web CRD as Form U-4 information, albeit reformatted). In certain circumstances, however, information submitted on different uniform forms relating to the same disclosure event was combined in the data conversion; this occurred only if there were inconsistencies reported regarding such event. For example, of a Form U-4 reported that a regulatory action became final but did not report the date of the final action, and a Form U-6 reported both the regulatory action and the date, the date of the final action was populated to the Form U-4 on Web CRD. NASD Regulation will include an explanation of the data conversion process in all public disclosure reports provided pursuant to the Program.

¹⁹ For example, if a Form contained egregiously offensive language, NASD Regulation may take disciplinary action against the member and/or registered person under NASD Rule 2110, which requires them to observe just and equitable principles of trade and high standards of commercial honor.

information, or offensive or potentially defamatory language on a case-by-case basis as follows. After receiving an objection, NASD Regulation will identify the filer of the uniform form (*i.e.*, a member firm, regulator, or self-regulatory organization) containing the language in controversy and notify the filer of the objections. NASD Regulation will provide the filer with the opportunity to amend the filing to remove the language in controversy. If the filer determines not to amend, NASD Regulation will apply a balancing test to weigh the value of the language in controversy for regulatory and investor protection purposes against the objector's asserted privacy rights and/or defamation claims.²⁰ Based on the outcome of this test, NASD Regulation may determine to redact the language in controversy from reports prepared under the Public Disclosure Program. NASD Regulation will inform any requester of a report that has been redacted of the reasons for the redaction. NASD Regulation staff anticipates that objections to disclosure will be infrequent. If objections are more frequent than anticipated, NASD Regulation staff will consider alternative approaches.

Other. In Notice To Members 98-71, the NASD requested comment on whether public disclosure of certain non-investment-related crimes should be discontinued after ten years. In response, the NASD received nearly 100 comments. The NASD is still considering this issue in light of the comments, and therefore the issue is not addressed in this filing.

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6)²¹ of the Act, which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD Regulation believes that the proposed rule change is consistent with Section 15A(b)(6)²² because it strikes an appropriate balance between: (1) Investor's interest in obtaining accurate and up-to-date information about current or former members or associated persons; and (2) members' and associated persons' interests in having

²⁰ If it is impossible for a filer to amend, *e.g.*, the firm is defunct and the person is no longer registered, then NASD Regulation also will apply the balancing test and proceed as described above.

²¹ 15 U.S.C. 78o-3(b)(6).

²² *Id.*

accurate information provided through the Public Disclosure Program; and (3) former associated persons' interest in protecting their privacy after leaving the securities industry. By expanding the availability of Form U-6 information, the proposed rule change also will provide investors and the public with additional information about former associated persons with whom they have done business. NASD Regulation also believes that the proposed rule change is consistent in all respects with Section 15a(i),²³ particularly the provision for immunity from liability for actions taken or omitted in good faith with respect to the Public Disclosure Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD Regulation does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceeding to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed

²³ This Section requires the NASD to establish and maintain a public disclosure program. 15 U.S.C. 78o-3(i).

rule change that refiled with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. JR-NASD-99-45 and should be submitted by January 13, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-33346 Filed 12-22-99; 8:45 am]

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of: (1) Proposed options for promulgating a temporary, emergency guideline amendment revising the guideline for offenses involving electronic copyright infringement; and (2) intent to re-promulgate as a permanent amendment to the sentencing guidelines the temporary emergency guideline amendment relating to telemarketing fraud offenses. Request for Comment. Notice of public hearing.

SUMMARY: (1) The Commission is preparing to promulgate a temporary, emergency guideline amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark) and accompanying commentary to implement the directive contained in section 2(g) of the No Electronic Theft (NET) Act of 1997. This notice sets forth three options for implementing that directive.

The proposed amendment is presented in one of two formats. First, the amendment is proposed as specific revisions to guideline § 2B5.3 and accompanying commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed

enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, a bracketed specific offense characteristic means that the Commission invites comment on whether the provision is appropriate as a specific offense characteristic, or whether it should be considered as a departure factor, or not at all. Second, the Commission has highlighted certain issues for comment and invites suggestions for how the Commission should respond to those issues.

Recently, Congress clarified the Commission's emergency amendment authority to implement the directive in the NET Act. The Commission must implement that directive within 120 days of the enactment of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (not later than April 6, 2000).

(2) The Commission proposes to make permanent the temporary, emergency guideline amendment to § 2F1.1 (Fraud and Deceit) and § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) promulgated by the Commission in September 1998. This emergency amendment was issued to implement section 6 of the Telemarketing Fraud Prevention Act of 1998. The Commission proposes to re-promulgate as a permanent amendment the temporary emergency telemarketing fraud amendment without change.

DATES: (1) The NET Act temporary, emergency amendment.—Comment on the proposed amendment should be received by the Commission not later than January 26, 2000. After considering any public comment, the Commission plans to promulgate a temporary emergency amendment not later than April 6, 2000. (2) The telemarketing fraud amendment.—Comment on the proposed re-promulgation of the telemarketing fraud amendment should be received not later than March 10, 2000. (3) Public hearing.—The Commission has scheduled a public hearing for March 23, 2000, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002-8002 (time to be announced). The scope of the hearing is expected to include the proposed re-promulgation of the telemarketing fraud amendment described herein and any other permanent amendments that may be proposed for action in this amendment cycle ending May 1. (The Commission may promulgate a temporary, emergency guideline amendment to implement the NET Act before the public hearing on March 23.)

A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502-4590 not later than March 10, 2000. Written testimony for the hearing must be received by the Commission not later than March 16, 2000. Submission of written testimony is a requirement for testifying at the public hearing.

ADDRESSES: Send comments to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500 South, Washington, DC 20002-8002, Attention: Public Information—Public Comment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: Reports and other additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.3, 4.4.

Diana E. Murphy,
Chair.

Proposed Temporary, Emergency Guideline Amendment

1. *Synopsis of Proposed Amendment:* The No Electronic Theft (NET) Act of 1997, Pub. L. 105-147, directs the Commission to: (1) Ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (2) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

This proposal presents three options for implementing the congressional directives. Each option implements the directives by changing the monetary calculation currently found in the copyright and trademark infringement guideline, § 2B5.3, to provide for consideration of the retail value of the infringed item. (Currently, § 2B5.3(b)(1) contains an enhancement based on a calculation of the retail value of the infringing item multiplied by the quantity of infringing items.) Some or all of a number of aggravating and mitigating factors could be incorporated into the guideline as an additional means of implementing the directive to provide sufficient deterrence. (These factors, or some combination thereof, are presented in Options 2 and 3 but

²⁴ 17 CFR 200.30-3(a)(12).