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October 13, 2017

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information section of this notice.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding

retroactive application of any of the proposed amendments, should be received by the Commission not later than **October 10, 2017**. Written reply comments, which may only respond to issues raised in the original comment period, should be received by the Commission not later than **November 6, 2017**. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment period, may not be considered.

(2) Public Hearing.—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESS: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@ussc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an

independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) a multi-part proposed amendment to respond to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), including (A) revisions to Appendix A (Statutory Index), and a related issue for comment; and (B) amending §2B1.1 (Theft, Property Destruction, and Fraud) to address new increased penalties for certain persons who commit fraud offenses under certain Social Security programs, and related issues for comment;

(2) a multi-part proposed amendment relating to the findings and recommendations contained in the May 2016 Report of the Commission’s Tribal Issues Advisory Group, including (A) amending the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider in determining whether, and to what extent, an upward departure based on a tribal court conviction is appropriate, and related issues for comment; and (B) amending the Commentary to §1B1.1 (Application Instructions) to provide a definition of “court protection order,” and a related issue for comment;

(3) a multi-part proposed amendment to Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence), including (A) setting forth options for a new Chapter Four guideline, at §4C1.1 (First Offenders), and amending §5C1.1 (Imposition of a Term

of Imprisonment) to provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table, and related issues for comment; and (B) revising Chapter Five to (i) amend the Sentencing Table in Chapter Five, Part A to expand Zone B by consolidating Zones B and C and (ii) amend the Commentary to §5F1.2 (Home Detention) to revise language requiring electronic monitoring, and related issues for comment.

(4) a proposed amendment to the Commentary to §3E1.1 (Acceptance of Responsibility) setting forth options to revise how a defendant’s challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline, and a related issue for comment;

(5) a multi-part proposed amendment to the Guidelines Manual to respond to recently enacted legislation and miscellaneous guideline issues, including (A) amending §2B5.3 (Criminal Infringement of Copyright or Trademark) to respond to changes made by the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016); (B) amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index) to respond to changes made by the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016); (C) revisions to Appendix A (Statutory Index) to respond to a new offense established by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016); (D) a technical

amendment to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor); and (E) amending §5D1.3 (Conditions of Supervised Release) to respond to changes made by the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016).

(6) a proposed amendment to make technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace “marihuana equivalency” as the conversion factor in the Drug Equivalency Tables for determining penalties for certain controlled substances;

(7) a proposed amendment to make various technical changes to the Guidelines Manual, including (A) an explanatory note in Chapter One, Part A, Subpart 1(4)(b) (Departures) and clarifying changes to the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud); (B) technical changes to §4A1.2 (Definitions and Instructions for Computing Criminal History) and to the Commentary of other guidelines to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); and (C) clerical changes to §2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5D1.3 (Conditions of Supervised Release), Appendix A (Statutory Index), and to the Commentary of other guidelines.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment 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.

William H. Pryor, Jr.,

Acting Chair

**PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY
STATEMENTS, AND OFFICIAL COMMENTARY**

1. Bipartisan Budget Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively).

(A) Conspiracy to Commit Social Security Fraud

The Bipartisan Budget Act of 2015 added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. §§ 408, 1011, and 1383a). For each of the three statutes, the new subdivision provides that whoever “conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not

more than five years, the same statutory maximum penalty applicable to the substantive offense.

The three amended statutes are currently referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

An issue for comment is provided.

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

The Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. The Act included a provision in all three statutes identifying such a person as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

A person who meets this requirement and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds Commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying.

Issues for comment are also provided.

(A) Conspiracy to Commit Social Security Fraud

Proposed Amendment:

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. § 408 by inserting “, 2X1.1” at the end; in the line referenced to 42 U.S.C. § 1011 by inserting “, 2X1.1” at the end; and in the line referenced to 42 U.S.C. § 1383a(a) by inserting “, 2X1.1” at the end.

Issue for Comment:

1. Part A of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses? Should the Commission reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment?

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

Proposed Amendment:

Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively, and by inserting the following new paragraph (13):

“(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies, increase by [4][2] levels. If the resulting offense level is less than [14][12], increase to level [14][12].”.

The Commentary to §2B1.1 captioned “Application Notes” is amended by redesignating Notes 11 through 20 as Notes 12 through 21, respectively, and by inserting the following new Note 11:

“11. Interaction of Subsection (b)(13) and §3B1.3.—[If subsection (b)(13) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).][Application of subsection (b)(13) does not preclude a defendant from consideration for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).]”.

Issues for Comment:

1. The Bipartisan Budget Act of 2015 amended sections 408, 1011, and 1383a of Title 42 to include a provision in all three statutes increasing the statutory maximum term of imprisonment from five years to ten years for certain persons who commit fraud offenses under subsection (a) of the three statutes. The Act identifies such a person as:

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases in which the offense of conviction is 42 U.S.C. § 408, § 1011, or § 1383a, and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). Are these cases adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If so, as an alternative to the proposed amendment, should the Commission amend §2B1.1 only to provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply? If not, how should the Commission amend the guidelines to address these cases?

2. The proposed amendment would amend §2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). However, there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment, is convicted under a general fraud statute (e.g., 18 U.S.C. § 1341) for an offense involving conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a).

The Commission seeks comment on whether the Commission should instead amend §2B1.1 to provide a general specific offense characteristic for such cases. For example,

should the Commission provide an enhancement for cases in which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination”? If so, how many levels would be appropriate for such an enhancement? How should such an enhancement interact with the existing enhancements at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill)?

2. Tribal Issues

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission’s study of the May 2016 Report of the Commission’s Tribal Issues Advisory Group. See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 82 FR 39949 (Aug. 22, 2017). See also Report of the Tribal Issues Advisory Group (May 16, 2016), at

<http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

In 2015, the Commission established the Tribal Issues Advisory Group (TIAG) as an ad hoc advisory group to the Commission. Among other things, the Commission tasked the TIAG with studying the following issues—

- (A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;
- (B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;
- (C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;
- (D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;
- (E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and
- (F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers appropriate. See Tribal Issues Advisory Group Charter § 1(b)(3).

The Commission also directed the TIAG to present a final report with its findings and recommendations, including any recommendations that the TIAG considered appropriate on potential amendments to the guidelines and policy statements. See id. § 6(a). On May 16, 2016, the TIAG presented to the Commission its final report. Among the recommendations suggested in the

Report, the TIAG recommends revisions to the Guidelines Manual relating to the use of tribal court convictions in the computation of criminal history points and how the guidelines should account for protection orders issued by tribal courts.

The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate one or both of these parts, as they are not mutually exclusive.

(A) Tribal Court Convictions

Pursuant to Chapter Four, Part A (Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). See USSG §4A1.2(i). The policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history. Among the grounds for departure, the policy statement includes “[p]rior sentences not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).” USSG §4A1.3(a)(2)(A).

As noted in the TIAG’s report, in recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA), Pub. L. 111–211, to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal

court systems. In 2013, the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Pub. L. 113–4, was enacted to expand the criminal jurisdiction of tribes to prosecute, sentence, and convict Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country. It also established new assault offenses and enhanced existing assault offenses. Both statutes increased criminal jurisdiction for tribal courts, but also required more robust court procedures and provided more procedural protections for defendants.

The TIAG notes in its report that “[w]hile some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources, and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon.” TIAG Report, at 10–11. Members of the TIAG describe their experience with tribal courts as “widely varied,” expressing among their findings certain concerns about funding, perceptions of judicial bias or political influence, due process protections, and access to tribal court records. *Id.* at 11–12.

The TIAG report highlights that “[t]ribal courts occupy a unique and valuable place in the criminal justice system,” while also recognizing that “[t]ribal courts range in style.” *Id.* at 13. According to the TIAG, the differences in style and the concerns expressed above “make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.” *Id.* at 11. It also asserts that “taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian

defendants in federal courts.” *Id.* at 12. Thus, the TIAG concludes that tribal convictions should not be counted for purposes of determining criminal history points pursuant to Chapter Four, Part A, and that “the current use of USSG §4A1.3 to depart upward in individual cases continues to allow the best formulation of ‘sufficient but not greater than necessary’ sentences for defendants, while not increasing sentencing disparities or introducing due process concerns.” *Id.* Nevertheless, the TIAG recommends that the Commission amend §4A1.3 to provide guidance and a more structured analytical framework for courts to consider when determining whether a departure is appropriate based on a defendant’s record of tribal court convictions. The guidance recommended by the TIAG “collectively . . . reflect[s] important considerations for courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant’s criminal history.” *Id.* at 13.

The proposed amendment would amend the Commentary to §4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether, and to what extent, an upward departure based on a tribal court conviction is appropriate.

Issues for comment are also provided.

(B) Court Protection Orders

Under the Guidelines Manual, the violation of a court protection order is a specific offense

characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence). The Commission has heard concerns that the term “court protection order” has not been defined in the guidelines and should be clarified.

The TIAG notes in its report the importance of defining “court protection order” in the guidelines, because—

[a] clear definition of that term will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. TIAG Report, at 14.

The TIAG recommends that the Commission adopt a definition of “court protection order” that incorporates the statutory provisions at 18 U.S.C. §§ 2265 and 2266. Section 2266(5) provides that the term “protection order” includes:

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or

criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. § 2266(5).

Section 2265(b) provides that

A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be

heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 U.S.C. § 2265(b).

The proposed amendment would amend the Commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b).

An issue for comment is also provided.

(A) Tribal Court Convictions

Proposed Amendment:

Section 4A1.3(a)(2) is amended by striking “subsection (a)” and inserting “subsection (a)(1)”; and by striking “tribal offenses” and inserting “tribal convictions”.

The Commentary to §4A1.3 captioned “Application Notes” is amended in Note 2 by inserting at the end the following new paragraph (C):

“(C) Upward Departures Based on Tribal Court Convictions.—In determining whether, or to

what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (March 7, 2013).
- (iii) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (iv) The conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).
- [(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.]”.

Issues for Comment:

1. Part A of the proposed amendment would provide a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted. The Commission seeks comment on whether the factors provided in the proposed amendment are appropriate. Should any factors be deleted or changed? Should the Commission provide additional or different guidance? If so, what guidance should the Commission provide?

In particular, the Commission seeks comment on how these factors should interact with each other and with the factors already contained in §4A1.3(a). Should the Commission provide greater emphasis on one or more factors set forth in the proposed amendment? For example, how much weight should be given to factors that address due process concerns (subdivisions (i) and (ii)) in relation to the other factors provided in the proposed amendment, such as those factors relevant to preventing unwarranted double counting (subdivisions (iii) and (iv))? Should the Commission provide that in order to consider whether an upward departure based on a tribal court conviction is appropriate, and before taking into account any other factor, the court must first determine as a threshold factor that the defendant received due process protections consistent with those provided to criminal defendants under the United States Constitution?

Finally, Part A of the proposed amendment brackets the possibility of including as a factor that courts may consider in deciding whether to depart based on a tribal court conviction if, “at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.” The Commission invites broad comment on this factor and its interaction with the other factors set forth in the proposed amendment. Is this factor relevant to the court’s determination of whether to depart? What are the advantages and disadvantages of including such a factor? How much weight should be given to this factor in relation to the other factors provided in the proposed amendment? What criteria should be used in determining when a tribal government has “formally expressed a desire” that convictions from its courts should count? How would tribal governments notify and make available such statements?

2. Pursuant to subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). As stated above, the policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history.

The Commission invites comment on whether the Commission should consider changing

how the guidelines account for sentences resulting from tribal court convictions for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending §4A1.2(i) and, if so, how? For example, should the guidelines treat sentences resulting from tribal court convictions same as other sentences imposed for federal, state, and local offenses that may be used to compute criminal history points? Should the guidelines treat sentences resulting from tribal court convictions more akin to military sentences and distinguish between certain types of tribal courts? Is there a different approach the Commission should follow in addressing the use of tribal court convictions in the computation of criminal history scores?

(B) Court Protection Orders

Proposed Amendment:

The Commentary to §1B1.1 captioned “Application Notes” is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

“(D) ‘court protection order’ means ‘protection order’ as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).”.

Issue for Comment:

1. Part B of the proposed amendment would include in the Commentary to §1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Is this definition appropriate? If not, what definition, if any, should the Commission provide?

3. First Offenders / Alternatives to Incarceration

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

(A) First Offenders

Part A of the proposed amendment is primarily informed by the Commission’s multi-year study of recidivism, including the circumstances that correlate with increased or reduced recidivism.

See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 82 FR 39949 (Aug. 22, 2017). It is also informed by the Commission’s continued study of alternatives to incarceration. Id.

Under the Guidelines Manual, offenders with minimal or no criminal history are classified into Criminal History Category I. “First offenders,” offenders with no criminal history, are addressed

in the guidelines only by reference to Criminal History Category I. However, Criminal History Category I includes not only “first” offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point.

Accordingly, the following offenders are classified in the same category: (1) first time offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in §4A1.2(d) and (e); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their “staleness” (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions or infractions); and (4) offenders with a prior conviction that received only one criminal history point.

Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (compared to otherwise similar offenders in Criminal History Category D). Recidivism data analyzed by the Commission indicate that “first offenders” generally pose the lowest risk of recidivism. See, e.g., U.S. Sentencing Comm’n, “Recidivism Among Federal Offenders: A Comprehensive Overview,” at 18 (2016), available at <http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview>. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. The new Chapter Four guideline, in conjunction with the revision to §5C1.1 (Imposition of a Term

of Imprisonment) described below, would further implement the congressional directive at section 994(j).

Part A of the proposed amendment provides two options for defining a “first offender” who would be eligible for a decrease in offense level under the new guideline. **Option 1** defines a defendant as a “first offender” if the defendant did not receive any criminal history points from Chapter Four, Part A. **Option 2** defines a defendant as a “first offender” if the defendant has no prior convictions of any kind.

Part A also provides two options for the decrease in offense level that would apply to a first offender. **Option 1** provides a decrease of [1] level from the offense level determined under Chapters Two and Three. **Option 2** provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

Part A also amends §5C1.1 (Imposition of a Term of Imprisonment) to add a new subsection (g) that provides that if (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options.

Finally, Part A of the proposed amendment also provides issues for comment.

(B) Consolidation of Zones B and C in the Sentencing Table

Part B of the proposed amendment is a result of the Commission’s continued study of alternatives to incarceration. See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 82 FR 39949 (Aug. 22, 2017).

The Guidelines Manual defines and allocates sentencing options in Chapter Five (Determining the Sentence). This chapter sets forth “zones” in the Sentencing Table based on the minimum months of imprisonment in each cell. The Sentencing Table sorts all sentencing ranges into four zones, labeled A through D. Each zone allows for different sentencing options, as follows:

Zone A.—All sentence ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. A sentencing court has the discretion to impose a sentence that is a fine-only, probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A allows for probation without any conditions of confinement.

Zone B.—Sentence ranges in Zone B are from one to 15 months of imprisonment. Zone B allows for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement. Zone B allows for non-prison sentences, which technically result in sentencing ranges larger than six months, because the minimum term of imprisonment is one month and the maximum terms begin at seven months. To avoid sentencing ranges exceeding six months, the guidelines require that probationary sentences in Zone B include conditions of confinement. Zone B also allows for a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (i.e., a “split sentence”) or a term of imprisonment only.

Zone C.—Sentences in Zone C range from 10 to 18 months of imprisonment. Zone C allows for split sentences, which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.—The final zone, Zone D, allows for imprisonment only, ranging from 15 months to life.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and allow for the sentencing options described above. Although the proposed amendment would in fact delete

Zone C by its consolidation with Zone B, Zone D would not be redesignated. Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language instructing that (1) electronic monitoring “ordinarily should be used in connection with” home detention; (2) alternative means of surveillance may be used “so long as they are effective as electronic monitoring;” and (3) “surveillance necessary for effective use of home detention ordinarily requires” electronic monitoring.

Issues for comment are also provided.

(A) First Offenders

Proposed Amendment:

Chapter Four is amended by inserting at the end the following new Part C:

“ PART C — FIRST OFFENDER

§4C1.1. First Offender

[Definition of “First Offender”

[Option 1:

- (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.]

[Option 2:

- (a) A defendant is a first offender if the defendant has no prior convictions of any kind.]]

[Decrease in Offense Level for First Offenders

[Option 1:

- (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by [1] level.]

[Option 2:

- (b) If the defendant is determined to be a first offender under subsection (a),

decrease the offense level as follows:

- (1) if the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or
- (2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.]]

Commentary

Application Note:

1. Cases Involving Mandatory Minimum Penalties.—If the case involves a statutorily required minimum sentence of at least five years and the defendant meets the criteria set forth in subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level determined under this section shall be not less than level 17. See §5C1.2(b).”.

Section 5C1.1 is amended by inserting at the end the following new subsection (g):

- “ (g) In cases in which (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or

possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.”.

The Commentary to §5C1.1 captioned “Application Notes” is amended by inserting at the end the following new Note 10:

“10. Application of Subsection (g).—

(A) Sentence of Probation Prohibited.—The court may not impose a sentence of probation pursuant to this provision if prohibited by statute. See §5B1.1 (Imposition of a Term of Probation).

[(B) Definition of ‘Crime of Violence’.—For purposes of subsection (g), ‘crime of violence’ has the meaning given that term in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

(C) Sentence of Imprisonment for First Offenders.—A sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the

offense].”.

Issues for Comment:

1. Part A of the proposed amendment provides two options for how to define “first offender” for purposes of applying the new §4C1.1 (First Offender). Option 1 defines a defendant as a “first offender” if the defendant did not receive any criminal history points from Chapter Four, Part A. Option 2 defines a defendant as a “first offender” if the defendant has no prior convictions of any kind. The Commission seeks comment on the proposed definition. Should the Commission adopt a broader definition than either Option 1 or Option 2? Should the Commission adopt a narrower definition than either option? Should the Commission adopt a definition that is narrower than Option 1 but broader than Option 2? For example, should the Commission define “first offender” as a defendant who did not receive any criminal history points from Chapter Four, Part A and has no prior felony convictions? Should the Commission instead define “first offender” as a defendant who either has no prior convictions of any kind or has only prior convictions that are not counted under §4A1.2 for a reason other than being too remote in time? Should the Commission provide additional or different guidance for determining whether a defendant is, or is not, a first offender?
2. Part A of the proposed amendment provides two options for the decrease in offense level that would apply to a first offender. One of the options, Option 1, would provide that if the defendant is determined to be a first offender (as defined in the new guideline) a decrease of [1] level from the offense level determined under Chapters Two and Three would apply.

Should the Commission limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels? For example, should the Commission provide that if the offense level determined under Chapters Two and Three is less than level [16], the offense level shall be decreased by [1] level? What other limitations or requirements, if any, should the Commission provide for such an adjustment?

3. Part A of the proposed amendment would amend §5C1.1 (Imposition of a Term of Imprisonment) to provide that if the defendant is determined to be a first offender under the new §4C1.1 (First Offender), [the defendant's instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options. Should the Commission further limit the application of such a rebuttable "presumption" and exclude certain categories of non-violent offenses? If so, what offenses should be excluded from the presumption of a non-incarceration sentence? For example, should the Commission exclude public corruption, tax, and other white-collar offenses?
4. If the Commission were to promulgate Part A of the proposed amendment, what conforming changes, if any, should the Commission make to other provisions of the

Guidelines Manual?

(B) Consolidation of Zones B and C in the Sentencing Table

Proposed Amendment:

Chapter Five, Part A is amended in the Sentencing Table by striking “Zone C”; by redesignating Zone B to contain all guideline ranges having a minimum of at least one month but not more than twelve months; and by inserting below “Zone B” the following: “[Zone C Deleted]”.

The Commentary to the Sentencing Table is amended by inserting at the end the following:

“Background: The Sentencing Table previously provided four ‘zones,’ labeled A through D, based on the minimum months of imprisonment in each cell. The Commission expanded Zone B by consolidating former Zones B and C. Zone B in the Sentencing Table now contains all guideline ranges having a minimum term of imprisonment of at least one but not more than twelve months. Although Zone C was deleted by its consolidation with Zone B, the Commission decided not to redesignate Zone D as Zone C, to avoid unnecessary confusion that may result from different meanings of ‘Zone C’ and ‘Zone D’ through different editions of the Guidelines Manual.”.

The Commentary to §5B1.1 captioned “Application Notes” is amended in Note 1(B), in the heading, by striking “nine months” and inserting “twelve months”; and in Note 2 by striking

“Zone C or D” and inserting “Zone D”, and by striking “ten months” and inserting “fifteen months”.

Section 5C1.1 is amended—

in subsection (c) by striking “subsection (e)” both places such term appears and inserting “subsection (d)”;

by striking subsection (d) as follows:

“(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

- (1) a sentence of imprisonment; or
- (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.”;

and by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

The Commentary to §5C1.1 captioned “Application Notes” is amended—

in Note 3 by striking “nine months” and inserting “twelve months”;

by striking Note 4 as follows:

“4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.”;

by striking Note 6 as follows:

“6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.”;

by redesignating Notes 5, 7, 8, and 9 as Notes 4, 5, 6, and 7, respectively;

in Note 4 (as so redesignated) by striking “Subsection (e)” and inserting “Subsection (d)”;

in Note 5 (as so redesignated) by striking “subsections (c) and (d)” and inserting “subsection (c)”; and in Note 7 (as so redesignated) by striking “Subsection (f)” and inserting “Subsection (e)”, and by striking “subsection (e)” and inserting “subsection (d)”.

The Commentary to §5F1.2 captioned “Application Notes” is amended in Note 1 by striking “Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention” and inserting “Electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “may be used so long as they are as effective as electronic monitoring” and inserting “may be used if appropriate”.

The Commentary to §5F1.2 captioned “Background” is amended by striking “The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring” and inserting “The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “the court should be confident that an alternative form of surveillance will be equally effective” and inserting “the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant’s case”.

Issues for Comment:

1. The Commission requests comment on whether the zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?
2. The proposed amendment would consolidate Zones B and C to create an expanded Zone B. Such an adjustment would provide probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B defendants. If so, what guidance should the Commission provide?

4. Acceptance of Responsibility

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission’s consideration of miscellaneous guideline application issues, including whether a defendant’s denial of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of §3E1.1. See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 82 FR 39949 (Aug. 22, 2017).

Section 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility. Application Note 1(A) of §3E1.1 provides as one of the appropriate considerations in determining whether a defendant “clearly demonstrate[d] acceptance of responsibility” the following:

truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner

inconsistent with acceptance of responsibility;

In addition, Application Note 3 provides further guidance on evidence that might demonstrate acceptance of responsibility, as follows:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.

A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

The Commission has heard concerns that the Commentary to §3E1.1 (particularly the provisions cited above) encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility.

The proposed amendment amends the Commentary to §3E1.1 to revise how a defendant's challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, the proposed amendment would revise Application Note 1(A) by substituting a new sentence for the sentence that states "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The proposed amendment includes two options for the substitute.

Option 1 would provide that "a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction."

Option 2 would provide that "a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact."

An issue for comment is also provided.

Proposed Amendment:

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1(A) by striking "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility", and

inserting the following:

[Option 1:

“In addition, a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction”.]

[Option 2:

“In addition, a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact”.]

Issue for Comment:

1. The Commission seeks comment on whether the Commission should amend the Commentary to §3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant’s challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1. If so, what changes should the Commission make to §3E1.1?

One of the options included in the proposed amendment, Option 1, would provide that “a defendant may make a non-frivolous challenge to relevant conduct without affecting his

ability to obtain a reduction” under §3E1.1(a). If the Commission were to adopt Option 1, what additional guidance, if any, should the Commission provide on the meaning of “non-frivolous”? The second option included in the proposed amendment, Option 2, would provide that “a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.” If the Commission were to adopt Option 2, should the Commission provide additional guidance on when a challenge “lacks an arguable basis either in law or in fact”? For example, should the Commission state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis either in law or in fact? If the Commission were to adopt either Option 1 or Option 2, should the challenges covered by the amendment include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to address other sentencing considerations, such as departures or variances? Should the Commission, instead of adopting either option in the proposed amendment, remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense of conviction?

5. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

The proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. They are as follows—

Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index).

Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016), by amending Appendix A (Statutory Index).

Part D amends §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

Part E responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), by amending §5D1.3 (Conditions of Supervised Release).

(A) Transnational Drug Trafficking Act of 2015

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016). The primary purpose of the Act is to enable the Department of Justice to target extraterritorial drug trafficking activity. Among other things, the Act clarified the mens rea requirement for offenses related to trafficking in counterfeit drugs, without changing the statutory penalties associated with such offenses. The Act amended 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services), which prohibits trafficking in a range of goods and services, including counterfeit drugs. The amended statute is currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B5.3 (Criminal Infringement of Copyright or Trademark).

In particular, the Act made changes relating to counterfeit drugs. First, the Act amended the penalty provision at section 2320, replacing the term “counterfeit drug” with the phrase “drug that uses a counterfeit mark on or in connection with the drug.” Second, the Act revised section 2320(f)(6) to define only the term “drug” instead of “counterfeit drug.” The amended provision defines “drug” as “a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).” The Act did not amend the definition of “counterfeit mark” contained in

section 2230(f)(1), which provides that—

the term “counterfeit mark” means—

(A) a spurious mark—

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

(iv) the use of which is likely to cause confusion, to cause mistake,

or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36

Part A of the proposed amendment amends §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” The proposed amendment would also amend the Commentary to §2B5.3 to delete the “counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

Proposed Amendment:

Section 2B5.3(b)(5) is amended by striking “counterfeit drug” and inserting “drug that uses a counterfeit mark on or in connection with the drug”.

The Commentary to §2B5.3 captioned “Application Notes” is amended in Note 1 by striking the third undesignated paragraph as follows:

“‘Counterfeit drug’ has the meaning given that term in 18 U.S.C. § 2320(f)(6).”,

and by inserting after the paragraph that begins “‘Counterfeit military good or service’ has the

meaning” the following new paragraph:

“‘Drug’ and ‘counterfeit mark’ have the meaning given those terms in 18 U.S.C. § 2320(f).”.

(B) International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act (“International Megan’s Law”), Pub. L. 114–119 (Feb. 8, 2016). The Act added a new notification requirement to 42 U.S.C. § 16914 (Information required in [sex offender] registration). Section 16914 states that sex offenders who are required to register under the Sex Offender Registration and Notification Act (SORNA) must provide certain information for inclusion in the sex offender registry. Those provisions include the offender’s name, Social Security number, address of all residences, name and address where the offender is an employee, the name and address where the offender is a student, license plate number and description of any vehicle. The International Megan’s Law added as an additional requirement that the sex offender must provide “information relating to intended travel of the sex offender outside of the United States, including any anticipated dates and places of departure, arrival or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.”

The International Megan’s Law also added a new criminal offense at 18 U.S.C. § 2250(b) (Failure to register). The new subsection (b) provides that whoever is required to register under SORNA who knowingly fails to provide the above described information required by SORNA relating to intended travel in foreign commerce and who engages or attempts to engage in the intended travel, is subject to a 10-year statutory maximum penalty. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender).

Part B of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250(b) are referenced to §2A3.5. The proposed amendment also brackets the possibility of adding a new application note to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

Finally, Part B makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C. § 2250(c) by the International Megan’s Law.

Proposed Amendment:

The Commentary to §2A3.5 captioned “Statutory Provision” is amended by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”.

[The Commentary to §2A3.5 captioned “Application Notes” is amended by redesignating Note 2 as Note 3, and by inserting the following new Note 2:

“2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), a defendant shall be deemed to be in a ‘failure to register status’ during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).”.]

Section 2A3.6(a) is amended by striking “§ 2250(c)” and inserting “§ 2250(d)”.

The Commentary to §2A3.6 captioned “Statutory Provisions” is amended by striking “2250(c)” and inserting “2250(d)”.

The Commentary to §2A3.6 captioned “Application Notes” is amended—

in Note 1 by striking “Section 2250(c)” and inserting “Section 2250(d)”, and by inserting after “18 U.S.C. § 2250(a)” the following: “or (b)”;

in Note 3 by striking “§ 2250(c)” and inserting “§ 2250(d)”;

and in Note 4 by striking “§ 2250(c)” and inserting “§ 2250(d)”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 2250(a) by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”; and in the line referenced to 18 U.S.C. § 2250(c) by striking “§ 2250(c)” and inserting “§ 2250(d)”.

(C) Frank R. Lautenberg Chemical Safety for the 21st Century Act

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016). The Act, among other things, amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) to add a new subsection that provides that any person who knowingly and willfully violates certain provisions of the Toxic Substances Control Act and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury shall be subject to a fine up to \$250,000, imprisonment of up to 15 years, or both.

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615(b)(2), is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Proposed Amendment:

Appendix A (Statutory Index) is amended—

in the line referenced to 15 U.S.C. § 2615 by striking “§ 2615” and inserting “§ 2615(b)(1)”;

and by inserting before the line referenced to 15 U.S.C. § 6821 the following new line reference:

“15 U.S.C. § 2615(b)(2) 2Q1.1”.

(D) Use of a Computer Enhancement in §2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment clarifies how the use of a computer enhancement at §2G1.3(b)(3) interacts with its corresponding commentary at Application Note 4. Section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) of §2G1.3 provides a 2-level enhancement if—

the offense involved the use of a computer or an interactive computer service to

(A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

Application Note 4 to §2G1.3 sets forth guidance on this enhancement providing as follows:

Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

An application issue has arisen as to whether Application Note 4, by failing to distinguish between the two prongs of subsection (b)(3), prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor.

Most courts to have addressed this issue have concluded that Application Note 4 is inconsistent with the language of §2G1.3(b)(3), and have permitted the application of the enhancement for use of a computer in third party solicitation cases. See, e.g., *United States v. Cramer*, 777 F.3d 597, 606 (2d Cir. 2015) (“We conclude that Application Note 4 is plainly inconsistent with subsection (b)(3)(B) The plain language of subsection (b)(3)(B) is clear, and there is no

indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4.”); *United States v. McMillian*, 777 F.3d 444, 449–50 (7th Cir. 2015) (“[The defendant] points out that Application Note 4 states that ‘Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.[’] But the note is wrong. The guideline section provides a 2-level enhancement whenever the defendant uses a computer to ‘entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor’ When an application note clashes with the guideline, the guideline prevails.”); *United States v. Hill*, 783 F.3d 842, 846 (11th Cir. 2015) (“Because the application note is inconsistent with the plain language of U.S.S.G. § 2G1.3(b)(3)(B), the plain language of the guideline controls.”); *United States v. Pringler*, 765 F.3d 445, 455 (5th Cir. 2014) (“[W]e hold that the commentary in application note 4 is ‘inconsistent with’ Guideline § 2G1.3(b)(3)(B), and we therefore follow the plain language of the Guideline alone.”).

Part D of the proposed amendment would amend the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Proposed Amendment:

The Commentary to §2G1.3 captioned “Application Notes” is amended in Note 4 by striking

“(b)(3)” each place such term appears and inserting “(b)(3)(A)”.

(E) Justice for All Reauthorization Act of 2016

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016). The Act made statutory changes to protect the rights of crime victims and to address the use of DNA and other forensic evidence. Among other things, the Act amended 18 U.S.C. § 3583, the statute addressing supervised release. Section 3583(d) requires a court, when imposing a sentence of supervised release, to impose certain specified conditions of supervised release. The Act amended section 3583(d) to require the court to include, as one of those conditions, “that the defendant make restitution in accordance with sections 3663 and 3663A [of Title 18, United States Code], or any other statute authorizing a sentence of restitution.”

Part E of the proposed amendment amends the “mandatory” condition of supervised release set forth in subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release). It conforms §5D1.3(a)(6)(A) to section 3583(d) as amended by the Justice for All Reauthorization Act.

Proposed Amendment:

Section 5D1.3(a)(6)(A) is amended by striking “18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664” and inserting “18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a

sentence of restitution”.

6. Marihuana Equivalency

Synopsis of Proposed Amendment: This proposed amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term “marihuana equivalency” which is used in the Drug Equivalency Tables when determining penalties for certain controlled substances.

The Commentary to §2D1.1 sets forth a series of Drug Equivalency Tables. These tables provide a conversion factor termed “marihuana equivalency” for certain controlled substances that is used to determine the offense level for cases in which the controlled substance involved in the offense is not specifically listed in the Drug Quantity Table, or where there is more than one controlled substance involved in the offense (whether or not listed in the Drug Quantity Table). See §2D1.1, comment. (n.8). The Drug Equivalency Tables are separated by drug type and schedule.

In a case involving a controlled substance that is not specifically referenced in the Drug Quantity Table, the base offense level is determined by using the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its marihuana equivalency, then finding the offense level in the Drug Quantity Table that corresponds to that quantity of marihuana. In a case involving more than one controlled substance, each of the drugs is converted

into its marihuana equivalency, the converted quantities are added, and the aggregate quantity is used to find the offense level in the Drug Quantity Table.

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. In particular, some commenters suggested that the Commission should replace “marihuana equivalency” with another term.

The proposed amendment would amend §2D1.1 to replace “marihuana equivalency” as the conversion factor for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with a new value termed “converted drug weight.” Specifically, the proposed amendment would add the new conversion factor to all provisions of the Drug Quantity Table at §2D1.1(c). In addition, the proposed amendment would change the title of the “Drug Equivalency Tables” to “Drug Conversion Tables,” and revise the commentary to §2D1.1 to change all references to marihuana as a conversion factor and replace it with the new value.

All changes set forth in the proposed amendment are not intended as a substantive change in policy for §2D1.1.

Proposed Amendment:

Section 2D1.1(c)(1) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● 90,000 KG or more of Converted Drug Weight.”

Section 2D1.1(c)(2) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(3) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(4) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(5) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(6) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 700 KG but less than 1,000 KG of Converted Drug Weight.”.

Section 2D1.1(c)(7) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 400 KG but less than 700 KG of Converted Drug Weight.”.

Section 2D1.1(c)(8) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 100 KG but less than 400 KG of Converted Drug Weight.”.

Section 2D1.1(c)(9) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 80 KG but less than 100 KG of Converted Drug Weight.”

Section 2D1.1(c)(10) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 60 KG but less than 80 KG of Converted Drug Weight.”

Section 2D1.1(c)(11) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 40 KG but less than 60 KG of Converted Drug Weight.”

Section 2D1.1(c)(12) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 20 KG but less than 40 KG of Converted Drug Weight.”

Section 2D1.1(c)(13) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 10 KG but less than 20 KG of Converted Drug Weight.”

Section 2D1.1(c)(14) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

“ ● At least 5 KG but less than 10 KG of Converted Drug Weight.”

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

“ ● At least 2.5 KG but less than 5 KG of Converted Drug Weight.”

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

“ ● At least 1 KG but less than 2.5 KG of Converted Drug Weight.”

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

“ ● Less than 1 KG of Converted Drug Weight.”

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table” is amended by inserting at the end the following new Note (J):

“(J) The term ‘Converted Drug Weight,’ for purposes of this guideline, refers to a nominal reference designation that is to be used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.”.

The Commentary to §2D1.1 captioned “Application Notes” is amended—

in Note 6 by striking “marihuana equivalency” and inserting “converted drug weight” and by inserting after “the most closely related controlled substance referenced in this guideline.” the following: “See Application Note 8.”;

in the heading of Note 8 by striking “Drug Equivalency” and inserting “Drug Conversion”;

in Note 8(A) by striking “Drug Equivalency Tables” both places such term appears and inserting “Drug Conversion Tables”; by striking “to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana” and inserting “to find the converted drug weight of the controlled substance involved in the offense”; by striking “Find the

equivalent quantity of marihuana” and inserting “Find the corresponding converted drug weight”; by striking “Use the offense level that corresponds to the equivalent quantity of marihuana” and inserting “Use the offense level that corresponds to the converted drug weight determined above”; by striking “an equivalent quantity of 5 kilograms of marihuana” and inserting “5 kilogram of converted drug weight”; and by striking “the equivalent quantity of marihuana would be 500 kilograms” and inserting “the converted drug weight would be 500 kilograms”;

in Note 8(B) by striking “Drug Equivalency Tables” each place such term appears and inserting “Drug Conversion Tables”; by striking “convert each of the drugs to its marihuana equivalent” and inserting “convert each of the drugs to its converted drug weight”; by striking “For certain types of controlled substances, the marihuana equivalencies” and inserting “For certain types of controlled substances, the converted drug weights assigned”; by striking “e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana” and inserting “e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight”; by striking “determine the marihuana equivalency for each schedule separately” and inserting “determine the converted drug weight for each schedule separately”; and by striking “Then add the marihuana equivalencies to determine the combined marihuana equivalency” and inserting “Then add the converted drug weights to determine the combined converted drug weight”;

in Note 8(C)(i) by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent to 95 kilograms” and

inserting “The total therefore converts to 95 kilograms”;

in Note 8(C)(ii) by striking the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.”,

and inserting the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The amount of marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.”;

in Note 8(C)(iii) by striking “is equivalent” both places such term appears and inserting “converts”; by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent” and inserting “The total therefore converts”;

in Note 8(C)(iv) by striking “marihuana equivalency” each place such term appears and inserting “converted drug weight”; by striking “76 kilograms of marihuana” and inserting “76 kilograms”;

by striking “79.99 kilograms of marihuana” both places such term appears and inserting “79.99 kilograms of converted drug weight”; by striking “equivalent weight” each place such term appears and inserting “converted weight”; by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms”;

and in Note 8(D)—

in the heading, by striking “Drug Equivalency” and inserting “Drug Conversion”;

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

“Schedule I or II Opiates*”,

and inserting the following new heading:

“Schedule I or II Opiates*

Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

“Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*”,

and inserting the following new heading:

“Cocaine and Other Schedule I and II Stimulants

(and their immediate precursors)*

Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

“LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*”,

and inserting the following new heading:

“LSD, PCP, and Other Schedule I and II Hallucinogens

(and their immediate precursors)*

Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Schedule I Marihuana, by striking the heading as follows:

“Schedule I Marihuana”,

and inserting the following new heading:

“Schedule I Marihuana Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Flunitrazepam, by striking the heading as follows:

“Flunitrazepam**”,

and inserting the following new heading:

“Flunitrazepam** Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid),

by striking the heading as follows:

“Schedule I or II Depressants (except gamma-hydroxybutyric acid)”,

and inserting the following new heading:

“Schedule I or II Depressants

(except gamma-hydroxybutyric acid)

Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

“Gamma-hydroxybutyric Acid”,

and inserting the following new heading:

“Gamma-hydroxybutyric Acid

Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

“Schedule III Substances (except ketamine)***”,

and inserting the following new heading:

“Schedule III Substances (except ketamine)*** Converted Drug Weight”;

by striking “1 gm of marihuana” and inserting “1 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “79.99 kilograms of marihuana” and inserting “79.99 kilograms of converted drug weight”;

under the heading relating to Ketamine, by striking the heading as follows:

“Ketamine”,

and inserting the following new heading:

“Ketamine Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

“Schedule IV Substances (except flunitrazepam)*****”,

and inserting the following new heading:

“Schedule IV Substances (except flunitrazepam)***** Converted Drug Weight”;

by striking “0.0625 gm of marihuana” and inserting “0.0625 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms of converted drug weight”;

under the heading relating to Schedule V Substances, by striking the heading as follows:

“Schedule V Substances*****”,

and inserting the following new heading:

“Schedule V Substances***** Converted Drug Weight”;

by striking “0.00625 gm of marihuana” and inserting “0.00625 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms of converted drug weight”;

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****”,

and inserting the following new heading:

“List I Chemicals (relating to the manufacture
of amphetamine or methamphetamine)***** Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking the heading as follows:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)”,

and inserting the following new heading:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine) Converted Drug Weight”;

and by striking “marihuana” each place such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking “To facilitate conversions to drug equivalencies” and inserting “To facilitate conversions to converted drug weights”.

7. Technical Amendment

Synopsis of Amendment: This proposed amendment makes various technical changes to the Guidelines Manual.

Part A of the proposed amendment makes certain clarifying changes to two guidelines. First, the proposed amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Part B of the proposed amendment makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging,

Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to—

- (1) the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), to correct a typographical error by inserting a missing word in Application Note 4;
- (2) subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a typographical error in the line referencing Pseudoephedrine;
- (3) subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a punctuation mark under the heading relating to List I Chemicals;
- (4) the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions,” to add a missing section symbol and a reference to Appendix A (Statutory Index);

- (5) the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions,” to add a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);
- (6) the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions,” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- (7) the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions,” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- (8) subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), to change an inaccurate reference to “probation” to “supervised release”; and
- (9) the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index), to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

(A) Clarifying Changes

Proposed Amendment:

Chapter One, Part A is amended—

in Subpart 1(4)(b) (Departures) by inserting an asterisk after “§5K2.19 (Post-Sentencing Rehabilitative Efforts)”, and by inserting after the first paragraph the following new paragraph:

“*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)”;

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking “Supplement to Appendix C” and inserting “USSG App. C”.

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 2(A)(i) by striking “as determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction” and inserting the following: “specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines)”.

(B) Title References to §4A1.3

Proposed Amendment:

The Commentary to §2Q1.3 captioned “Application Notes” is amended in Note 8 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §2R1.1 captioned “Application Notes” is amended in Note 7 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

Section 4A1.2 is amended in subsections (h), (i), and (j) by striking “Adequacy of Criminal History Category” each place such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4A1.2 captioned “Application Notes” is amended in Notes 6 and 8 by striking “Adequacy of Criminal History Category” both places such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4B1.4 captioned “Background” is amended by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History

Category (Policy Statement)”.

(C) Clerical Changes

Proposed Amendment:

The Commentary to §1B1.13 captioned “Application Notes” is amended in Note 4 by striking “factors set forth 18 U.S.C. § 3553(a)” and inserting “factors set forth in 18 U.S.C. § 3553(a)”.

Section 2D1.11 is amended—

in subsection (d)(6) by striking “Pseudoephedrine” and inserting “Pseudoephedrine”;

and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

The Commentary to §2M2.1 captioned “Statutory Provisions” is amended by striking “§ 2153” and inserting “§§ 2153”, and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.1 captioned “Statutory Provisions” is amended by striking “42 U.S.C. § 6928(e)” and inserting “42 U.S.C. §§ 6928(e), 7413(c)(5)”, and by inserting at the end the

following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.2 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

Section 5D1.3(a)(4) is amended by striking “release on probation” and inserting “release on supervised release”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 371 by rearranging the guidelines to place them in proper numerical order; and in the line referencing 18 U.S.C. § 1591 by rearranging the guidelines to place them in proper numerical order.



U.S. Department of Justice

October 10, 2017

The Honorable William H. Pryor, Jr.
Acting Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Pryor:

The Department of Justice respectfully submits this response to the U.S. Sentencing Commission's August 25, 2017, request for public comment regarding proposed amendments to the U.S. Sentencing Guidelines.¹ Thank you for considering the Department's views on these important issues.

I. Amendments Regarding the Bipartisan Budget Act of 2015

Congress passed the Bipartisan Budget Act on November 2, 2015.² In a portion of the Act entitled "New and Stronger Penalties," Congress amended three existing statutes that criminalize defrauding certain Social Security programs—42 U.S.C. §§ 408 (Federal Old-Age and Survivors Insurance Trust Fund), 1011 (World War II Veterans Fund), and 1383a (Supplemental Security for the Aged, the Blind,

¹ U.S. SENTENCING COMM'N, 82 Fed. Reg. 40651 (Aug. 25, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

² Bipartisan Budget Act of 2015, Pub. L. No. 114-74 (Nov. 2, 2015), <https://www.congress.gov/bill/114th-congress/house-bill/1314/text?overview=closed>.

and the Disabled).³ The Act added a conspiracy provision to each of those three statutes.⁴ Additionally, the Act doubled the statutory maximum from five to ten years' imprisonment for certain defendants.⁵ Defendants face the increased statutory maximum if they "received a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or former employee of the Social Security Administration)," or if the defendant "is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination."⁶

The Commission has responded to the Bipartisan Budget Act by proposing a multi-part amendment. First, the Commission has proposed amending Appendix A of the Guidelines by adding a reference to §2X1.1 for defendants convicted of conspiracy under 42 U.S.C. §§ 408, 1011, and 1383a. Second, the Commission has proposed amending the Guidelines by adding either a 2 or 4-level enhancement, as well as a minimum offense level of either 12 or 14 in those cases where the newly created 10-year statutory maximum applies. Third, the Commission has proposed amending the Commentary to address the availability of an abuse of trust adjustment in those cases where the enhancement mentioned above is applicable. The Department addresses each proposal below.

³ *See id.* at Sec. 813.

⁴ *Id.* at Sec. 813(a).

⁵ *Id.* at Sec. 813(b).

⁶ *Id.*

A. Adding a Reference to §2X1.1 for the Conspiracy Offense

The Department has no objection to the Commission's addition of a reference to §2X1.1 in Appendix A for violations of 42 U.S.C. §§ 408, 1011, and 1383a(a). The addition of a reference to §2X1.1 is consistent with the Commission's approach to a number of other conspiracy provisions.⁷

B. Enhancing Penalties for Certain Social Security Fraud Offenders

The Department agrees with the Commission's proposal to enhance the Guidelines range for those defendants who face the Bipartisan Budget Act's 10-year statutory maximum. The Commission has proposed amending the fraud guideline, §2B1.1, by (1) providing either a 2 or 4-level enhancement for defendants who face the newly created 10-year statutory maximum, and (2) prescribing a minimum offense level of either 12 or 14 in such cases. The Commission has also invited comment on whether any enhancement should be accompanied by language in the Commentary stating that an abuse of trust adjustment is unavailable under §3B1.3 if the enhancement applies.

1. The Commission Should Adopt a 4-Level Enhancement

Subsection 813(b) of the Bipartisan Budget Act makes clear that Congress intended for the identified class of defendants to receive increased sentences. Indeed, the title of subsection 813(b) is "Increased Criminal Penalties for Certain Individuals Violating Positions of Trust." Additionally, members of Congress who

⁷ For example, violations of 16 U.S.C. § 831t(c), 18 U.S.C. §§ 115(a), 115(b)(3), 373, 844(f), 956, 1201(c), 1201(d), 1203, 1349. *See* U.S.S.G., App'x A (2016).

were influential in the passage of the Bipartisan Budget Act have asked the Commission to amend the Guidelines “in a manner consistent with the penalty increase in the law, reflecting the new and stronger penalties for Social Security fraud.”⁸ That request was made after the Commission previously proposed an amendment that did not provide an enhancement. The Department is pleased that the Commission is now proposing an enhancement, and the Department believes a 4-level enhancement would be more appropriate than a 2-level enhancement.

The current guideline scheme for the Social Security fraud cases identified by the Bipartisan Budget Act does not reflect the seriousness of the offense. Consider the following example. Defendant X is a Social Security employee who engages in a scheme to defraud one of the identified Social Security funds out of \$7.5 million. Under §2B1.1 as currently written, Defendant X’s base offense level would be 6. He would also receive an 18-level enhancement due to the loss amount. After pleading guilty, Defendant X would receive a 3-level reduction for acceptance of responsibility, for a total offense level of 21 (assuming no other adjustments applied). If Defendant X fell within Criminal History Category I, his applicable Guidelines range would be 37 to 46 months’ imprisonment.

The Department believes that a Guidelines range of 37-46 months’ imprisonment is insufficient for a defendant who used his specialized knowledge

⁸ Letter from Rep. Bob Goodlatte, Chairman, House Judiciary Committee, Rep. Kevin Brady, Chairman, House Ways and Means Committee & Sen. Orin Hatch, Chairman, Senate Committee on Finance, to U.S. Sentencing Commission (Mar. 18, 2016), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/Goodlatte-Hatch-Brady.pdf>.

and access to defraud the Social Security Administration out of \$7,500,000. Social Security is an important program that serves as a safety net for millions of Americans.⁹ The Department believes an enhancement will help ensure that the penalties are sufficient to deter fraud and abuse so that these funds will remain available for deserving citizens.

As between the Commission's proposed options of a 4-level enhancement and a 2-level enhancement, the Department favors the 4-level enhancement. Section 2B1.1 currently provides 4-level enhancements for such things as committing the theft of medical products while serving as an employee in a pre-retail medical product's supply chain,¹⁰ committing securities or commodities fraud while serving in certain positions,¹¹ and for knowingly causing the transmission of a program, information, code or command that resulted in intentional damage to a protected computer.¹² The Department believes that the type of fraud that is subject to the 10-year statutory maximum under the Bipartisan Budget Act is as troubling as the conduct above that already receives a 4-level enhancement. Accordingly, the Department believes that a 4-level enhancement is appropriate.

⁹ In the 2015 fiscal year, the Social Security Administration provided approximately \$144 billion in disability insurance payments to more than 10.8 million citizens, as well about \$51.5 billion dollars in Supplemental Security Income to about 8.4 million citizens. SOCIAL SECURITY ADMINISTRATION, AGENCY FINANCIAL REPORT FOR FISCAL YEAR 2015, MANAGEMENT DISCUSSION AND ANALYSIS, 31 (Nov. 2015), <https://www.ssa.gov/finance/2015/Complete%20MD&A.pdf>.

¹⁰ U.S.S.G. §2B1.1(8)(B).

¹¹ U.S.S.G. §2B1.1(19)(A)-(B).

¹² U.S.S.G. §2B1.1(18)(A)(ii).

2. The Department Supports the Proposed Minimum Offense Level of 14

Additionally, the Commission has proposed adopting a minimum offense level of either 12 or 14 for those defendants who face the 10-year statutory maximum under the Bipartisan Budget Act. The Department supports the minimum offense level of 14 for the reasons previously stated. The Department believes that the combination of a 4-level enhancement and a minimum offense level of 14 would be sufficient to satisfy the Bipartisan Budget Act's goal of increasing penalties for the specified Social Security fraud offenses.

C. Availability of the Abuse of Trust Adjustment in §3B1.3

The Commission has also sought comment on whether the addition of an enhancement to §2B1.1 should affect the availability of the 2-level increase for abuse of trust under §3B1.3. If the Commission adopts the proposed 4-level enhancement as set forth above, the Department has no objection to the addition of Commentary stating that a defendant who receives the 4-level enhancement is ineligible for an abuse of trust adjustment. If the Commission instead adopts the proposed 2-level enhancement and adds Commentary stating that those who receive the 2-level enhancement are ineligible for the 2-level abuse of trust adjustment under §3B1.3, most of the defendants targeted by the Bipartisan Budget Act would likely receive the same Guidelines range as they do today. The two amendments would effectively cancel each other out. Under the current Guidelines, most defendants who served in a role identified in the Bipartisan Budget Act would likely receive a 2-level abuse of trust adjustment. If the Commission chooses to add a 2-

level enhancement, but then also excludes the simultaneous application of §3B1.3, the defendant would receive the enhancement but not the 2-level adjustment for abuse of trust. Thus, the defendant would be in the same place today (2 offense levels added under §3B1.3) as after the amendment (2 offense levels added under the new enhancement in §2B1.1, but no increase under §3B1.3). Such a result would be inconsistent with the Bipartisan Budget Act’s goal of increasing penalties for the specified Social Security fraud offenses.

II. Amendments Regarding Tribal Issues

The Commission has proposed two amendments based on recommendations made by the Tribal Issues Advisory Group (TIAG) in its 2016 report. The first amendment lists factors for the district court to consider when deciding whether to depart upward under §4A1.3 based on the exclusion of tribal court convictions from the defendant’s criminal history score. The second amendment defines the phrase “court protection order” in a manner that is intended to provide consistency regarding the treatment of protection orders issued by tribal courts.

A. Amendment Adding Commentary to §4A1.3

As the Commission is aware, tribal court convictions do not receive criminal history points. But, a court may depart upward based on a finding that the defendant’s criminal history category is inadequate due to the exclusion of tribal court convictions.¹³ The Commission has proposed amending §4A1.3’s Commentary to include five non-exclusive factors that a court may consider when deciding

¹³ U.S.S.G. §4A1.3(a)(2)(A).

whether to grant an upward departure in such cases. The Department supports the first four factors proposed by the Commission, which are as follows:

- The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution;
- The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010;
- The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter; and
- The conviction is for an offense that otherwise would be counted under §4A1.2.

The Department has concerns with the fifth factor, which focuses on whether “[a]t the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.”¹⁴ It is unclear exactly what would be required to constitute a formal expression of tribal intent. Would a statement by the tribal court suffice? Would a resolution by the tribal government be required? Moreover, there are hundreds of tribes across the country

¹⁴ The TIAG previously expressed concern regarding this factor, in part because “how tribes would express a preference is not defined and most tribes do not understand how tribal court criminal history would impact a defendant if tribal court convictions counted as criminal history.” See Letter from Tribal Issues Advisory Group, to U.S. Sentencing Commission at 5 (Feb. 21, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/TIAG.pdf>.

of varying size and sophistication. Some tribes may be familiar with the U.S. Sentencing Guidelines and, therefore, may understand the significance of the issue. Other tribes may lack that familiarity and understanding. Because different tribes will likely reach different decisions on this issue, unwarranted disparities seem inevitable. Accordingly, the Department respectfully requests that the Commission delete the fifth factor.

With respect to the Commission's request for comment on how the factors should be balanced, the Department requests that no particular weight be assigned to the individual factors. Rather, the sentencing court should consider the factors as part of a totality of the circumstances analysis. Indeed, assigning weight to the individually listed factors would undercut the very idea that the factors are non-exclusive considerations that the sentencing court may consider.

B. Amendment Defining “Court Protection Orders” in the Commentary to §1B1.1

The Commission has proposed an amendment that would define the phrase “court protection order” in the Commentary to §1B1.1. The phrase is currently undefined, which has led to some confusion regarding whether violating a tribal court protection order triggers an enhancement under §§ 2A2.2, 2A6.1, and 2A6.2. The Commission's proposal is consistent with the TIAG's recommendation, and it will promote uniformity in the application of the Guidelines. The Department supports this proposal.

III. “First Offenders” and Alternatives to Incarceration

The Commission has proposed a two-part amendment that addresses “first offenders” and alternatives to incarceration. In “Part A,” the Commission has set forth a new guideline provision that would lower the offense level for “first offenders.” In “Part B,” the Commission has proposed a revision to the sentencing table that would collapse Zone C into an expanded Zone B. The Department strongly opposes the proposed amendment and urges the Commission to reject it.

A. Proposed “First Offender” Amendment

In Part A, the Commission proposes a new Chapter Four guideline (§4C1.1) that would lower sentencing ranges for “first offenders.” The Commission has set forth two options, both of which involve decreasing the offense level. Under the first option, all defendants who qualify as “first offenders” would receive a 1-level reduction from their offense level. Under the second option, defendants who qualify as “first offenders” would receive a 2-level reduction if their offense level is less than 16. Those defendants with an offense level above 16 would receive a 1-level reduction. Neither option is satisfactory to the Department. The proposed amendment is unnecessary and ignores the reality that “first offenders” routinely engage in conduct that warrants stiff punishment.

The Commission has not presented an adequate rationale for reducing the sentencing range of approximately 22,000 defendants each year¹⁵ and disrupting a

¹⁵ U.S. SENTENCING COMM’N, 2016 SOURCEBOOK, Table 20 “Offender’s Receiving Chapter Four Criminal History Points,” (<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table20.pdf>) (reporting that in Fiscal Year 2016,

criminal history approach that has worked well for three decades. The Commission references the fact that defendants with “0” criminal history points present the lowest recidivism rate (30.2%).¹⁶ This is neither surprising nor new. The Commission’s data has shown that the risk of recidivism generally increases as the number of criminal history points increases.¹⁷ Each criminal history category encompasses multiple criminal history points. And, in almost all criminal history categories, there is a difference in recidivism between those with the lowest points in the category and those with the highest points in the category.¹⁸ That is not a reason to grant those with the lowest points in the category a sentencing reduction. Rather, it is simply an unavoidable consequence of the “category approach” to criminal history¹⁹—an approach that has served the Commission well since 1987. Moreover, the simple fact that defendants with “0” criminal points recidivate less than other criminals is an insufficient justification for the proposed sentencing

22,878 defendants (36.9%) received “0” criminal history points). The Department appreciates that the number of defendants could be lower, depending on how the Commission would choose to define the phrase “first offender.”

¹⁶ U.S. SENTENCING COMM’N, 82 Fed. Reg. 40651 at (August 25, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf (referencing U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW at 5 (2016) (“Each additional criminal history point was generally associated with a greater likelihood of recidivism.”)), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf).

¹⁷ See U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW at 5.

¹⁸ *Id.* at 18, Figure 6 (graphically displaying the different recidivism rates based on the number of criminal history points); see also *id.* at 27 (concluding that “an offenders’ total criminal history points, as determined under Chapter Four of the Commission’s *Guidelines Manual*, were closely correlated with recidivism rates”).

¹⁹ See generally Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1288-91 (2017) (explaining the Commission’s decision to use “six ‘Criminal History Categories (CHCs)’ which in turn were based on the number of criminal history points calculated in a defendant’s case”).

reduction. There are other important sentencing principles to consider, such as deterrence, just punishment, and the need to promote respect for the law.²⁰

Importantly, it must be remembered that the label “first offender” is not synonymous with “minor offender” or “non-dangerous offender.” Indeed, the proposed amendment as drafted would reduce the offense level for *all* “first offenders,” regardless of whether their first offense was child sexual abuse, carjacking, or the orchestration of one of the world’s largest fraud schemes.²¹ Along those lines, on an annual basis hundreds of robbers, child molesters, child pornographers, firearms offenders, as well as thousands of drug traffickers would likely receive lower sentencing ranges due to the proposed amendment.²²

The proposed amendment would be especially problematic in the prosecution of individuals who supply firearms to convicted felons and other prohibited persons. Many firearms end up in the hands of convicted felons due to “straw purchasers”—people with clean backgrounds who are paid to procure firearms for felons and other prohibited persons. By definition, defendants convicted for serving as straw

²⁰ 18 U.S.C. § 3553(a); 28 U.S.C. § 994(a)(2), (3).

²¹ The Commission has referenced 28 U.S.C. § 994(j) in support of its proposed amendment. *See* U.S. SENTENCING COMM’N, 82 Fed. Reg. 40651 at 28-29 (August 25, 2017), https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf. But, § 994(j) does not support the Commission’s proposed amendment. Whereas the Commission’s proposed amendment would ensure an offense level reduction for all “first offenders” regardless of the nature or severity of their offense, § 994(j) speaks only of offenders who have “not been convicted of a crime of violence or an otherwise serious offense.” 28 U.S.C. § 994(j).

²² *See* U.S. SENTENCING COMM’N, “Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment” at 15 (Dec. 2016), https://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20161209/20160109_DB_alternatives.pdf (using 2014 data to estimate the number of offenders who would have qualified for the proposed first offender amendment).

purchasers will usually be “first offenders.” Thus, under the proposed amendment, the offense level for straw purchasers who provide firearms to convicted felons would be reduced in almost all cases. That is troubling to the Department, especially since the Guidelines range for straw-purchasers is already quite low (starting with a base offense level of 14).²³

Additionally, the proposed amendment is likely to have a significant impact in white-collar crime cases because many such defendants are “first offenders.” One of the biggest beneficiaries of this proposed amendment would be tax fraud defendants because approximately 81.5% of such offenders fall within Category I.²⁴ According to the Commission’s data, tax fraud offenders already receive relatively low sentences. In fiscal year 2015, about 59% of tax offenders received sentences that included imprisonment, compared to 90.2% of all offenders.²⁵

Providing an offense level reduction for “first offenders” would result in even lower sentences for tax fraud defendants. The Department is concerned that the resulting sentences will be insufficient to provide even a modicum of deterrence. The Commission itself has recognized the importance of deterrence in tax fraud cases, stating: “[b]ecause of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax

²³ U.S.S.G. §2K2.1(a)(6).

²⁴ U.S. SENTENCING COMM’N, QUICK FACTS, TAX FRAUD OFFENSES, https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf (2015).

²⁵ U.S. SENTENCING COMM’N, 2015 ANNUAL REPORT AND 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 12 (2016), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table12.pdf>.

laws is a primary consideration underlying these Guidelines.”²⁶ Deterrence is achieved by demonstrating that “the sentence for a criminal tax case will be commensurate with the gravity of the offense.”²⁷ The proposed “first offender” amendment will undercut the Commission’s stated “primary consideration” of deterring tax fraud.

The unstated premise underlying the Commission’s proposal is that the sentences imposed on “first offenders” are generally too long. That is a false premise. The median sentence for all defendants in Category I is 24 months’ imprisonment.²⁸ The Department suspects the median sentence for those with “0” criminal points is even lower. Moreover, in extraordinary cases where particular “first offenders” are deserving of a sentence below the applicable Guidelines range, judges have the ability to vary downward under 18 U.S.C. § 3553(a). Put simply, there is no need for the proposed amendment.

B. Amendment Adding §5C1.1(g) to Recommend Sentences Other than Imprisonment for “First Offenders”

The Commission has also proposed adding a new subsection (g) to §5C1.1. The new subsection would piggyback on the “first offender” provision discussed above by recommending that “first offenders” receive sentences other than imprisonment if (1) they are in Zone A or B, (2) and their offense of conviction was

²⁶ U.S.S.G., §2T1.1, Introductory Comment.

²⁷ *Id.*

²⁸ U.S. SENTENCING COMM’N, 2016 SOURCEBOOK, Table 14 “Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category” (2017), (<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table14.pdf>).

not a “crime of violence” and did not involve “a firearm or dangerous weapon.” Aside from being unnecessary, this provision would further complicate the Guidelines and generate additional litigation.

The proposed amendment incorporates the “crime of violence” definition that is currently used in the career offender context. As the Commission is well aware, that particular definition (and the categorical approach that goes along with it) is the source of incredibly complex and time-consuming litigation that often yields bizarre results.²⁹ The Department believes it would be a mistake for the Commission to compound the existing problem by incorporating the “crime of violence” language into a new guideline provision.

Furthermore, the Department is concerned that the Commission’s proposal would effectively amend the sentencing table to provide “first offenders” who have an offense level of 11 or below with a presumptive Guidelines range of 0-0. The Commission has offered very little explanation in support of what is a significant proposed change. It is also worth pointing out that judges currently have the authority to vary downward under 18 U.S.C. § 3553(a) and impose a sentence other than imprisonment.

²⁹ See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, at 50-51 (Aug. 2016), <https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements> (reporting that “[t]he scope and requirements of the categorical approach have resulted in significant litigation and over a dozen Supreme Court opinions over the last 26 years, including an opinion as recently as this term”).

C. Amendment Consolidating Zones B and C

The Commission has proposed an amendment that would increase the availability of alternatives to incarceration by consolidating Zones B and C. The Department opposes the proposed amendment. Just seven years ago, the Commission expanded Zones B and C of the Sentencing Table to make alternatives to incarceration more available.³⁰ In other words, in the recent past the Commission addressed the precise issue the Commission says it is trying to address with the newly proposed amendment. The Department is aware of no reason why it is necessary, once again, to expand Zones B and C so that more defendants are eligible for non-prison sentences.

If there are certain Zone C offenders who should be eligible for probation due to exceptional circumstances, the court currently has the discretion to impose such a sentence. As with some of the other Commission proposals discussed above, the amendment appears to be grounded in the belief that (absent unusual circumstances) offenders at the lower end of the Sentencing Table simply should not face imprisonment. The Department disagrees. A sentence of incarceration, even if brief, can serve as an effective deterrent to offenders who find themselves in Zone C. The Department believes the current Zone B and Zone C structure strikes the appropriate balance. Accordingly, the Department opposes the proposed amendment.

³⁰ U.S.S.G., App'x C, amend. 738 (2010) (“This amendment is a two-part amendment expanding the availability of alternatives to incarceration. The amendment provides a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the sentencing table by one level each . . .”).

IV. Amendment Regarding “Non-frivolous” Challenges and Acceptance of Responsibility

The Commission has proposed an amendment to §3E1.1, Application Note 1 regarding a defendant’s ability to challenge relevant conduct at sentencing without losing the downward adjustment for acceptance of responsibility. The Commission has provided two options. The first option would provide that “a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction.”³¹ The second option would provide that “a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.”³² The Department opposes both options and believes the Commission should leave Application Note 1 to §3E1.1 undisturbed.

First, the Commission has not identified a circuit split regarding the language currently found in Application Note 1 to §3E1.1. On the other hand, it is a virtual certainty that if the Commission enacts either of the proposed amendments, litigation will commence almost immediately. Defendants and their attorneys will read the new language as providing them with an opportunity to plead guilty, broadly and aggressively challenge relevant conduct, and then seek acceptance of responsibility. Litigation will then commence over whether the challenges made to relevant conduct were “non-frivolous” or “lack[ed] an arguable basis in either fact or

³¹ U.S. SENTENCING COMM’N, 82 Fed. Reg. 40651 at 47-48 (August 25, 2017), https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

³² *Id.*

law.”³³ All of this litigation will negate one of the primary reasons why a defendant who pleads guilty receives an adjustment for acceptance of responsibility in the first place—the avoidance of litigation costs and the conservation of scarce judicial resources.³⁴

Second, the Department agrees with the Victims Advisory Group’s prior comment letter that the proposed amendment “would not be victim friendly” because it “could result in forcing the victim to testify in a type of mini-trial” if the defendant has challenged relevant conduct.³⁵ In cases involving a victim (especially minor victims), one of the reasons the prosecution may offer a plea agreement is to spare the victim from having to testify. It is concerning to the Department that a victim could be required to testify at sentencing, endure cross examination, and then the defendant could receive a reduction for acceptance of responsibility. The Department believes that the risks inherent in the proposed approach outweigh any potential benefits.

V. Amendment to Replace “Marijuana Equivalency” Phrase with “Converted Drug Quantity” Phrase

The Commission proposes to replace the term “marijuana equivalency” with “converted drug weight” in the Drug Equivalency Tables. The Department has no objection to this change in nomenclature. This change will hopefully eliminate

³³ *Id.*

³⁴ *See, e.g., United States v. Williams*, 86 F.3d 1203, 1206 (D.C. Cir. 1996) (stating that §3E1.1 “is designed to prevent the government from engaging in needless trial preparation and to give the overburdened trial courts an opportunity to allocate their limited resources in the most efficient manner”).

³⁵ Letter from Victims Advisory Group to U.S. Sentencing Commission, at 3 (Feb. 21, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/VAG.pdf>.

confusion regarding the drug quantity conversion process, especially among those who are not well versed in the Guidelines.

* * *

Thank you for the opportunity to share the Department's views, comments, and suggestions. The Department looks forward to working with you and the other Commissioners to ensure that the U.S. Sentencing Guidelines are as effective, efficient, and fair as possible.

Respectfully submitted,

s/Zachary C. Bolitho
Zachary C. Bolitho
Counsel to the Deputy Attorney General &
Department of Justice *Ex Officio*, U.S. Sentencing
Commission

Cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

October 6, 2017

The Honorable William H. Pryor, Jr., Acting Chair
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comments on the Proposed 2017 Holdover Amendments to the Sentencing Guidelines Related to Social Security Fraud

Dear Judge Pryor:

On behalf of the Social Security Administration (SSA) Office of the Inspector General (OIG), I am pleased to submit the following views, comments, and suggestions to the proposed 2017 holdover *Bipartisan Budget Act of 2015* (BBA)¹ amendments to the Federal sentencing guidelines and issues for comment, published on August 25, 2017.²

We thank the Commission for considering our prior comments, dated March 11, 2016 and February 21, 2017, on the proposed amendments, published in the Federal Register on January 15, 2016³ and December 19, 2016.⁴ We stand by our prior comments, which we are attaching, and respectfully request incorporation by reference; and provide the following additional comments for consideration.

(A) Conspiracy to Commit Social Security Fraud – Support Amendment

SSA OIG continues to support amending Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to both § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud or Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other Than Counterfeit Bearer Obligations of the United States) and §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

(B) Increased Penalties for Certain Individuals Violating Positions of Trust – Support Alternate Proposal

¹ Bipartisan Budget Act of 2015, Pub. L. No. 114–74, § 813(a)-(b), 129 Stat. 584, 602-603 (Nov. 2, 2015).

² U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 82 Fed. Reg. 40651 (Aug. 25, 2017).

³ U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 2295 (Jan. 15, 2016).

⁴ U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 92003 (Dec. 19, 2016).

We support the Commission’s alternate proposal to create a general specific offense characteristic⁵ within § 2B1.1 with an enhancement of 4 levels and a minimum offense level of 14⁶ for cases in which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination...” In addition, if the Commission amends § 2B1.1 to create an enhancement of 4 levels, SSA OIG supports the proposal that an adjustment under § 3B1.3 need not apply.

As stated in our previous views letters, the § 2B1.1 enhancements are inadequate because the current specific offense characteristics, such as dollar loss amounts⁷ and number of victims,⁸ are inapplicable to SSA fraud cases. In addition, the § 3B1.3 adjustment is insufficient in cases of SSA fraud because these cases go well beyond the offense and offenders covered under § 3B1.3 in both severity of penalty and scope of activity.⁹

With the rise of SSA fraud by persons in positions of trust¹⁰ and the magnitude of potential fraud losses,¹¹ the Congress intentionally enacted bipartisan legislation to subject these offenders to a

⁵ We appreciate the Commission recognizing that there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment, is convicted under a general fraud statute (*e.g.*, 18 U.S.C. § 1341) and not 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). We share this concern and therefore support the proposal to amend §2B1.1 to provide a general specific offense characteristic for such cases.

⁶ While some may argue that the wide range of potential offenders covered by the new statute, including translators, could make an offense level floor over-inclusive, the BBA does not make distinctions between the types of persons in a position of trust that defraud SSA. In addition, regardless of the type of person in a position of trust involved in the fraud scheme, whether a translator or physician, the level of harm to SSA is no different. In support, we reference our investigation in Seattle, Washington of translators for former refugees that led to 40 prosecutions, more than \$4 million in overpayments assessed, and an estimated \$11 million in projected savings to SSA.

⁷ The dollar loss amount in an individual SSA fraud case does not account for the actual loss created by the fraud scheme because that dollar figure is nearly impossible to ascertain by the time of sentencing. To calculate this amount, SSA must review all cases linked to that person in a position of trust (which could be hundreds or thousands of cases) to identify and establish the loss or overpayments. These reviews are complex, time-consuming, and can be followed by appeals. For example, in the case of Dr. Luis Escabi-Perez (discussed in our March 11, 2016 views letter), Dr. Escabi-Perez pled guilty to Wire Fraud, 18 U.S.C. § 1343, and admitted to submitting fraudulent psychiatric reports to SSA for five co-defendants who also paid him a fee for backdating their medical files. He was sentenced to five years of probation and 500 hours of community service, and was ordered to pay a restitution of \$230,244. However, Dr. Escabi-Perez said he provided medical reports for more than 1,100 applicants for Social Security disability, not just the five co-defendants. If the entire fraud loss was calculated by the time of sentencing, he may have received an increased penalty.

⁸ The victims in SSA fraud cases are SSA itself and other deserving beneficiaries.

⁹ For instance, § 3B1.3 is simply not broad enough to capture all categories of individuals in a position of trust included in the BBA, such as translators and non-attorney claimant representatives.

¹⁰ We note that the SSA OIG investigations inventory currently includes approximately 91 cases that would likely meet the BBA’s increased penalties.

¹¹ We refer the Commission to our March 11, 2016 views letter where we have included specific case summaries.

higher penalty. We note that the Chairmen of the House Ways and Means and Judiciary Committees and the Senate Committee on Finance, submitted a joint letter to the Commission requesting that the sentencing guidelines be amended to conform to Congressional intent and in a manner consistent with the penalty increase in the law.

We thank the Commission for publishing the proposed amendments to the sentencing guidelines and issues for comment. We appreciate the opportunity to provide our views, comments, and suggestions and look forward to working with you on the amendments to the sentencing guidelines. Should you have further questions or requests for information, please contact me, or have your staff contact Ranju R. Shrestha, Attorney, at (410) 966-4440.

Sincerely,

A handwritten signature in blue ink that reads "Gale Stallworth Stone". The signature is written in a cursive, flowing style.

Gale Stallworth Stone
Acting Inspector General

Attachments

cc: Commissioners

Kenneth P. Cohen, Staff Director

Kathleen Grilli, General Counsel

March 11, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Saris:

On behalf of the Social Security Administration (SSA) Office of the Inspector General (OIG), we submit the following views, comments, and suggestions regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 15, 2016.¹ We thank the Commission for the opportunity, and we look forward to working with you on the proposed amendments to sentencing guidelines related to convictions of Social Security fraud.

SOCIAL SECURITY ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL VIEWS ON CERTAIN PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT PUBLISHED IN THE FEDERAL REGISTER ON JANUARY 15, 2016.

1. Social Security Administration Office of the Inspector General's Comments on Proposed Amendments and Issues for Comment on New Conspiracy Offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

The Commission requests comment on whether the guidelines covered by the proposed amendment adequately account for the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1. If not, what revisions to the guidelines would be appropriate to account for these offenses?

SSA OIG comments:

From our reading of the applicable Sentencing Guidelines at §2X1.1, the base offense level for the conspiracy charge will be the base offense level from the guideline for the substantive offense, plus any adjustments from the applicable guidelines for any intended offense conduct that can be established with reasonable certainty. Therefore, the OIG believes that this should be sufficient, especially if the guidelines are amended to address those individuals in a position of trust as outlined below.

¹ U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines*, Fed. 81 Reg. 10 (Jan. 15, 2016).

2. Social Security Administration Office of the Inspector General’s Comments on Proposed Amendments and Issues for Comment on the amendments to 42 U.S.C. §§ 408, 1011, and 1383a to add increased penalties for individuals in positions of trust who commit fraud offenses under the relevant Social Security programs.

The *Bipartisan Budget Act of 2015* included a provision in 42 U.S.C. §§ 408, 1011, and 1383a identifying individuals in positions of trust as:

“a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . .”

The Commission seeks comment on whether the guidelines should be amended to address cases involving defendants convicted of a fraud offense under one of the three amended statutes and who meet this new criteria set forth by the *Bipartisan Budget Act of 2015*. Specifically, the Commission has asked the following questions: *Are the existing provisions in the guidelines, such as the provisions at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill), adequate to address these cases? If not, how should the Commission amend the guidelines to address them?*

SSA OIG comments:

The OIG believes the guidelines are currently not adequate to address these cases and therefore should be amended to address the unique type of fraud inflicted by persons in positions of trust against SSA. Following are our views to support this opinion.

SSA OIG Background

The SSA OIG was established in 1995, when SSA became an independent agency. The OIG is charged with detecting and preventing fraud, waste, and abuse in Social Security’s programs and operations. We accomplish this through audits of Social Security’s programs and operations and investigations of individuals, groups, and organizations suspected of defrauding SSA.

The OIG’s Office of Investigations (OI) conducts and coordinates investigative activity related to fraud, waste, abuse, and mismanagement in SSA’s programs and operations. This includes wrongdoing by applicants, beneficiaries, contractors, claimant representatives, translators, representative payees, and Social Security employees. Our investigations gather evidence of administrative, civil, and criminal violations, and our national investigative projects identify and respond to emerging trends in Social Security-related fraud. In Fiscal Year 2015, for example, OI opened more than 8,400 cases and closed 8,100 cases. OI investigations led to more than 1,200 criminal convictions and contributed to more than \$700 million in monetary accomplishments, though Social Security recoveries, restitution, fines, settlements, judgements, and projected savings.

Identifying and pursuing fraud committed by people in positions of trust has always been a high priority for the OIG. One of our earliest investigations uncovered a facilitator fraud scheme in the Seattle,

Washington area. In that case, translators for former refugees from Cambodia and Vietnam coached the immigrants—for fees as high as \$3,000—to obtain State and Federal disability benefits. The translators instructed the immigrants how to dress and act during reviews with benefit agencies, to appear as if they were mentally disabled and to increase their chances of a benefit approval. Ultimately, more than 40 people were prosecuted for their involvement in the scheme, including translators, State welfare workers, a doctor and his wife, and about 30 benefit recipients. Because of the OIG investigation, SSA assessed more than \$4 million in overpayments and estimated \$11 million in projected savings to the Agency's disability programs.

In recent years, we have been involved in several investigations involving large-scale facilitator fraud, most notably occurring in the Commonwealth of Puerto Rico, and in and around New York City. While these cases have demonstrated the ability and effectiveness of our office to work with SSA and other law enforcement agencies to identify and stop these schemes, they also show that more must be done to detect and prevent similar operations from abusing Social Security's disability programs and stealing upwards of millions of dollars from the Federal government.

When Congress asked how SSA and the OIG could better address and deter facilitator fraud, one suggestion was to increase the penalty for a violation by a "person in a position of trust." With a significant prison sentence possible, we believe these individuals—doctors, lawyers, claimant representatives, and SSA employees involved in the disability process—might not participate in these schemes. The OIG submitted a legislative proposal to amend the three fraud statutes within the *Social Security Act* to double the maximum prison term for fraud facilitators from five years to 10 years.²

The increased penalties were recommended for individuals in a position of trust because there must be stronger deterrence to prevent these individuals from defrauding SSA. These fraud schemes can go undetected for years, with the result being that hundreds of individuals may fraudulently receive Social Security benefits, leading to significant losses to SSA. This defrauds SSA and its deserving beneficiaries, causes a strain on Social Security's trust funds and the Treasury's general funds, and damages SSA's reputation in the eyes of its stakeholders.

The OIG's proposal has been included in legislation introduced by both parties in the current Congress. Mr. Sam Johnson, Chairman of the Subcommittee on Social Security, House Ways and Means Committee, included this proposal in H.R. 2359, the *Disability Fraud Reduction and Unethical Deception (FRAUD) Prevention Act*.³ Mr. Xavier Becerra, Ranking Member of the Subcommittee, included this proposal in H.R. 1419, the *Social Security Fraud and Error Prevention Act of 2015*.⁴ The proposals subsequently were included in the *Bipartisan Budget Act of 2015*, Public Law 114-74.⁵

² In addition, a proposal was made to increase the maximum Civil Monetary Penalty that could be assessed against a facilitator pursuant to Section 1129 of the *Social Security Act*, 42 U.S.C. § 1320a-8, from \$5,000 for each violation to \$7,500 for each violation.

³ See Section 3(b) of H.R. 2359.

⁴ See Section 7(b) of H.R. 1419.

⁵ See Section 813(b) of Public Law 114-74.

Further, SSA supports increased penalties for people in positions of trust who defraud the Agency. SSA in recent years has amplified its anti-fraud efforts, establishing the Office of Anti-Fraud Programs in 2014, collaborating with the OIG to expand the highly successful Cooperative Disability Investigations program⁶, researching and developing predictive analytics tools to identify potentially fraudulent disability claims, and increasing anti-fraud communication and outreach efforts. SSA agrees that identifying and stopping facilitator fraud is a priority, and imposing strict penalties against people in positions of trust who defraud the Agency's programs can have a strong deterrent effect on others.

In addition, in 2013, the OIG piloted an investigative program focused on identifying fraud by persons in positions of trust and involved in the disability process. Through collaboration with SSA and records and data analysis, the program identified and pursued allegations of organized fraud schemes involving attorneys and non-attorney representatives who represent disability claimants, doctors and medical providers, and SSA employees, including disability adjudicators.

These individuals in positions of trust have specialized knowledge as to what information is necessary to support an application for benefits. When these individuals abuse their position of trust to commit fraud against SSA, it has an adverse effect on SSA's programs as well as those who rightfully are entitled to Social Security benefits. Because of our increased focus, our pilot program opened about 40 facilitator fraud cases. We have about 25 ongoing investigations involving persons in a position of trust, including several where indictments have been returned. These cases are time-consuming and complex—often involving reviews of voluminous SSA records, surveillances, and undercover operations—but the pilot program reinforced our need to prioritize facilitator fraud investigations and to pursue any tools that could deter others from engaging in these schemes.

Facilitator Fraud Investigations

Dr. Roberto Velasquez

In this first example, a licensed San Diego psychologist, Dr. Roberto Velasquez, falsified disability reports to the Department of Homeland Security (DHS)⁷ and to SSA. We opened this case in October 2011 as a joint investigation with DHS Homeland Security Investigations, based on information received from a mutual informant. Dr. Velasquez admitted that he falsely certified that dozens of patients were disabled. Specifically, he made up patient histories, fabricated test results, suggested symptoms and complaints that did not exist, intentionally underestimated patient scores on standardized tests, and lied about the length of time he had been seeing patients.⁸ He further admitted that he falsely

⁶ The Cooperative Disability Investigations (CDI) program, established in Fiscal Year 1998, brings together personnel from SSA, the OIG, State Disability Determination Services (DDS), and local law enforcement agencies to analyze and investigate suspicious or questionable Social Security disability claims, and to help resolve questions of potential fraud, often before benefits are ever paid. Currently, there are 37 CDI units covering 32 states, the District of Columbia, and the Commonwealth of Puerto Rico.

⁷ Dr. Velasquez's false certifications allowed certain immigrant to avoid taking the English language and Civics portions of the U.S. citizenship exam. Based on the fraudulent forms, DHS granted disability exemptions to at least 25 immigrants who were not actually disabled.

⁸ United States Attorney, Southern District of California <https://www.justice.gov/usao-sdca/pr/san-diego-psychologist-sent-prison-15-million-dollar-fraud-scheme>.

certified patients were eligible for Social Security disability when he knew they were not; he said he charged \$200 per false diagnosis.

It is estimated that between 2006 and 2012, SSA paid out more than \$1.5 million in unwarranted disability benefits based on these false certifications. Dr. Velasquez admitted that about 33 percent of his patient files contained fabrications, false statements, and false certifications of disability. A review found that Dr. Velasquez provided medical reports in over 400 cases. Dr. Velasquez provided to our investigator a list of about 50 patients for whom he had provided false medical reports, far short of 33 percent of his patients. Thus, SSA is reviewing the remainder of Dr. Velasquez's patient files.

Indicted in April 2012, Dr. Velasquez pled guilty in July 2012 to a violation of 18 U.S.C. § 1546, False Statements in Immigration Documents, and a violation of 42 U.S.C. 1383(a)(2), False Statements in Application for SSI Disability Benefits. In May 2013, Dr. Velasquez was sentenced to 21 months in prison and was ordered to pay \$1.5 million in restitution to SSA. He also was sentenced to two years' probation upon release from prison.

Puerto Rico Disability Fraud Scheme

Based on allegation referrals from SSA employees, the OIG conducted a joint investigation, with the FBI and the Puerto Rico Police Department (PRPD), of a multimillion-dollar Social Security disability fraud scheme in Puerto Rico. The investigation led to the arrest of over 70 individuals in Puerto Rico in August 2013, including a non-attorney claimant representative and several physicians.

In September 2014, Samuel Torres-Crespo, a non-attorney claimant representative and a former SSA employee, pled guilty to making a materially false, fictitious, and fraudulent statement and representation to SSA, on June 5, 2012, and November 29, 2012, in violation of 42 U.S.C. § 408(a)(3). Torres-Crespo conspired with several physicians to provide fraudulent disability reports, containing exaggerated and false information, to SSA on behalf of claimants Torres-Crespo represented. When SSA approved his claimants' applications, Torres-Crespo charged each claimant as much as \$6,000 for helping the claimant receive benefits. In January 2016, Torres-Crespo was sentenced to eight months in prison. SSA is reviewing cases in which Torres-Crespo was the claimant representative from August 2008 through September 2014.

In October 2013, Dr. Jose Hernandez-Gonzalez pled guilty to participating in a conspiracy to make false statements to SSA, in violation of 18 U.S.C. § 371. He admitted that he associated with Torres-Crespo, and they agreed to share in the proceeds that Torres-Crespo received as payment from approved beneficiaries. Dr. Hernandez-Gonzalez would exaggerate medical complaints and symptoms to maximize the probability that his patients would be approved for Social Security disability benefits. SSA is also reviewing applications in which Dr. Hernandez-Gonzalez provided medical evidence from August 2008 through October 2013.

Dr. Hernandez-Gonzalez further admitted that he referred his patients to other medical specialists for medical diagnosis and treatment, even though the patients' conditions did not warrant the referral. These referrals were made to doctors who he knew would also exaggerate or fabricate the patients' conditions to strengthen the patients' disability applications. Two of the doctors named by Dr. Hernandez-Gonzalez pled guilty to having failed to keep documents or make required entries, which

they were required by law to maintain, in violation of 26 U.S.C. § 5603(b)(1) and (2). They were both sentenced to a year of probation in 2014.

Dr. Wildo Vargas pled guilty to his involvement in the scheme in September 2014, to having made a materially false, fictitious, and fraudulent statement and representation to SSA on April 10, 2013, and August 6, 2012, in violation of 42 U.S.C. § 408(a)(3). The false statements were made in connection with reports provided to SSA as to the medical condition of two individuals, to maximize the possibility of the two individuals receiving Social Security benefits, to which they were not entitled. In April 2015, Dr. Vargas was sentenced to 18 months in prison and three years' probation, and he was fined \$25,000. SSA is reviewing applications in which Dr. Vargas provided medical evidence from January 2012 through September 2014.

New York Disability Fraud Conspiracy

In January 2014, as the result of a joint investigation by the OIG, NYPD, and the Manhattan District Attorney's Office (MDAO), 106 people, including four scheme facilitators, were indicted and arrested for their involvement in a multimillion-dollar Social Security disability fraud conspiracy. The MDAO is prosecuting the case.

The investigation revealed that recent NYPD or FDNY retirees contacted former NYPD officers Joseph Esposito or John Minerva, who connected retired employees with Thomas Hale, a disability consultant. Hale scheduled the applicants to meet with common psychiatrists or psychologists, to begin a year of treatment for depression, anxiety and related disorders (many of the applicants claimed the ailments resulted from their participation in events following the terrorist attacks of Sept. 11, 2001) before applying for Social Security disability. Medical evidence was gathered and included in the applicant's disability claim, which was completed and filed by Hale or Raymond Lavalley, who served as the applicant's attorney.

Because the applicants were treated for a year before applying for benefits, their ultimate disability award included a lump sum retroactive payment from the alleged disability onset date—these payments ranged between \$10,000 and \$50,000. Lavalley, as the applicant's representative, would receive a \$6,000 representative's fee from SSA, but scheme participants also agreed to pay the facilitators 14 months' worth of benefits—or as much as \$45,000—for the facilitators' efforts to ensure their claims were approved. Some of the people indicted had received disability since as far back as 1998, and in some instances, the total fraudulent amount obtained was close to \$500,000 per applicant. The average annual disability payment for charged defendants was about \$30,000 to \$50,000.⁹ In February 2014, 28 additional people were indicted and arrested for their involvement in the scheme.¹⁰

Lavalley, Hale, Esposito, and Minerva were all charged in the State of New York with one count of First Degree Grand Larceny, 102 counts of Second Degree Grand Larceny, one count of Attempted Second Degree Grand Larceny, and one count of Fourth Degree Conspiracy.

⁹ Manhattan District Attorney's Office: <http://manhattanda.org/press-release/da-vance-106-defendants-including-80-nypd-and-fdny-retirees-indicted-social-security-d>.

¹⁰ Manhattan District Attorney's Office <http://www.manhattanda.org/press-release/da-vance-28-additional-defendants-indicted-ongoing-social-security-fraud-investigation>.

The facilitators reached plea deals and agreed to assist authorities with the ongoing investigation:

- In August 2014, Esposito pled guilty to grand larceny and agreed to serve 1½-to-4½ years in prison and pay \$733,000 in restitution.
- In September 2014, Minerva pled guilty to grand larceny and agreed to serve up to 3 years in prison and pay \$315,000 in restitution.
- In January 2015, Hale pled guilty to grand larceny and agreed to serve a 3-to-9-year prison sentence and pay \$2 million in restitution and fines.
- In February 2015, Lavallee pled guilty to conspiracy and agreed to serve a one-year prison sentence and pay \$2 million in restitution and fines.

To date, more than 100 people connected to the scheme have pled guilty and been sentenced to probation and community service; restitution ordered totals \$24 million.

The investigation has also shown that more than 500 disability applications may be subject to possible imposition of Civil Monetary Penalties, pursuant to Section 1129 of the *Social Security Act* (42 U.S.C. § 1320a-8) by the OIG's Office of Counsel to the Inspector General, and also to SSA's redetermination of the application for benefits pursuant to Section 205 (u) and 1631(e)(7)(A)(i) of the *Social Security Act*, 42 U.S.C. §§ 405(u) and 1383(e)(7)(A)(i).

Dr. Luis Escabi-Perez

The OIG investigative efforts continued in Puerto Rico, after the August 2013 arrest operation already described. In January 2015, after an OIG, FBI, and PRPD investigation, we indicted and arrested Dr. Luis Escabi-Perez, of Puerto Rico, and 39 people involved in a disability fraud scheme. Dr. Escabi-Perez allegedly supported the submission of false and fraudulent applications for Social Security disability benefits with SSA by submitting a false and fraudulent medical report, which would support the existence of a disabling psychiatric condition.¹¹

In July 2015, Dr. Escabi-Perez entered into a Plea Agreement whereby he pled guilty to Wire Fraud, 18 U.S.C. § 1343. Dr. Escabi-Perez admitted to submitting fraudulent psychiatric reports to SSA for five co-defendants. In addition, Dr. Escabi-Perez admitted the five co-defendants paid him a fee to backdate their medical files.

In October 2015, Dr. Escabi-Perez signed a Statement Under Penalty of Perjury. In this statement, he pled guilty to committing fraud against SSA. He admitted that he backdated the medical files of patients who applied for Social Security disability benefits, and he charged a special fee to patients for the backdating. In the backdated cases submitted to SSA, the patient always knew and agreed to the backdating, and the information included in his Psychiatric Medical Report contained template language that represented symptoms and medical conditions that the patients did not actually experience. Dr. Escabi-Perez said he provided medical reports for more than 1,100 applicants for Social Security disability. His sentence is pending in U.S. District Court in Puerto Rico.¹²

¹¹ See Indictments, Criminal No. 15-046(PG) and 15-047 (PG), United States District Court, District of Puerto Rico.

¹² To date, about 90 people connected to the fraud schemes in Puerto Rico have pled guilty and been sentenced; restitution ordered totals \$2 million.

Effects on Social Security's Operations and Stakeholders

As shown, Social Security fraud cases involving individuals in positions of trust have the potential to drain millions of dollars from SSA that could go to eligible, deserving beneficiaries. While the OIG agrees that fraud loss demonstrates the damaging effects of these schemes, it does not account for the additional workloads SSA must take on to resolve the many administrative issues that result from these schemes.

The provisions of Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit (§2B1.1) applicable to these cases focus on the dollar loss that can be immediately determined. Under §2B1.1(b), Specific Offense Characteristics, subsection (1) provides for an increase in the level depending upon the amount of the loss that can be determined prior to sentencing. Subsection (8) provides for an increase in the level if the defendant were convicted of a Federal Health Care Offense¹³ and the loss was more than \$1 million. Based on our reading of the definition of a Federal Health Care Offense, its applicability is limited.

The Application Note for §2B1.1(3) provides examples of what constitutes a loss under §2B1.1(b). For example, in discussing loss in cases involving Government Benefits, it states that if the defendant was entitled to \$100 in benefits, but received \$150, the loss would be \$50.¹⁴ The OIG does not believe that any of the current definitions adequately address the situation in its Social Security facilitator fraud investigations.¹⁵ The OIG is required to make available to SSA information identifying an individual when the OIG has reason to believe that fraud was involved in the application for monthly insurance benefits under title II of the *Social Security Act*, or for benefits under titles VIII and XVI of the *Social Security Act*.¹⁶ Pursuant to this referral, SSA has certain responsibilities to conduct continuing disability reviews and Supplemental Security Income redeterminations to identify and assess benefit overpayments.¹⁷

These disability reviews are not simple procedures. SSA has had to develop a process for reviewing the applications in question, providing the individual an opportunity to present evidence other than that of the allegedly fraudulent evidence presented by the person in a position of trust. As these cases may go

¹³ See Application Notes for §2B1.1, Definitions, p. 87. This section defines a “Federal health care offense” as the meaning given that term in 18 U.S.C. §24. 18 U.S.C. §24(a) defines a “Federal health care offense” as a violation of: (1) 18 U.S.C. §§ 669, 1035, 1347, or 1518; 42 U.S.C. § 1320a-7b; or (2) 18 U.S.C. §§ 287, 371, 664, 666, 1001, 1027, 1341, 1343, 1349, or 1954; 21 U.S.C. § 331; 29 U.S.C. § 1131; or 29 U.S.C. §§ 1111, 1131, 1141, and 1148, if the violation or conspiracy relates to a health care benefit program.

¹⁴ See Application Notes, §2B1.1(3)(v)(F)(ii), p. 91.

¹⁵ The section also provides that costs to the government of the prosecution and criminal investigation of an offense is not included in the computation of the loss. See Application Notes, §2B1.1(3)(v)(D)(ii), p. 90.

¹⁶ Section 1129(l) of the *Social Security Act*, 42 U.S.C. § 1320a-8(l).

¹⁷ Pursuant to this referral, SSA has certain responsibilities under Section 205 (u) and 1631(e)(7)(A)(i) of the Act, 42 U.S.C. §§ 405(u)¹⁷ and 1383(e)(7)(A)(i).

back years, this can be a challenging and time-consuming process. Each case is to be reviewed by either an Administrative Law Judge or the Appeals Council, as appropriate, and appeals may ensue.

As mentioned in the case examples above, the individuals in positions in trust involved in the fraud schemes admitted to dealing with hundreds, and sometimes thousands, of applicants. SSA thus is in the process of reviewing several thousand benefit claims based on alleged fraudulent activities by persons in positions of trust.¹⁸ If SSA determines a beneficiary connected to the scheme was overpaid or should not receive benefits, notice of the any impending action must be provided to the beneficiary. Further, opportunity must be made for the beneficiary to provide evidence supporting his or her claim of disability. The beneficiary's file must be reviewed to see if other evidence may be present to support the application for benefits. This all requires a major reallocation of SSA's resources and takes time away from regular workloads, as the Agency must process incoming initial claims and perform mandated program integrity reviews.¹⁹

Recently, in a *qui tam* action filed against an attorney claimant representative and a former SSA Administrative Law Judge, the U.S. Government filed a Motion to Partially Intervene for Good Cause.²⁰ In its argument, the Government states:

*..... Intervention would further two related public interests: the ethical and transparent administration of the Social Security Disability Insurance (SSDI) and the Supplemental Security Income (SSI) Programs generally, and the ethical and transparent representation of SSDI and SSI claimants. SSDI and SSI are two of the largest social insurance programs administered by the United State government. The public has an interest in ensuring that these taxpayer-funded programs are administered with transparency and integrity. Related, those SSDI and SSI claimants who rely on representation in seeking a statutory right or benefit must have confidence that their representatives will "provide competent assistance" and recognize SSA's authority to "lawfully administer the process." 20 C.F.R. §§ 404.1740(a), 416.1540(a), see also 42 U.S.C. §§ 408, 1383a. In turn, because the public has an interest in payment of fees to representative payees, appointed "representatives must be forthright in their dealings with" SSA. 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2).*²¹

We believe this same argument applies in support of amending the guidelines to reflect the increased penalties as enacted by the *Bipartisan Budget Act of 2015*.

¹⁸ For example, in connection to the fraud schemes uncovered in Puerto Rico, SSA reviewed almost 7,000 cases that contained evidence from the scheme facilitators.

¹⁹ For more information, please see OIG audit reports, [SSA's Progress in Reducing the Initial Disability Claims Backlog](#) (April 2014) and [SSA's Completion of Program Integrity Workloads](#) (August 2014).

²⁰ United States of America, *ex rel.* Jennifer L. Griffith and Sarah Carver, Plaintiffs v. Eric C. CONN, ERIC CONN, P.S.C., and David B. Daugherty, Defendants, Civil No. 7:11-CV-157-ART, United States District Court for the Eastern District of Kentucky, Southern Division at Pikeville.

²¹ *Id.* at page 7. The Motion also noted that 1,780 claim files had been referred by the OIG to SSA and were being reviewed by SSA.

Conclusion

The OIG, with a history of investigating and stopping large-scale disability fraud schemes, supports amending the sentencing guidelines to reflect the proposed increased penalties for Social Security fraud for individuals in positions of trusts. As the OIG moves forward, investigating these and similar schemes, the increased penalties send a stern message to the public that individuals who facilitate Social Security fraud schemes will be prosecuted and receive severe sentences if found guilty. SSA supports amending the guidelines, as well.

The increased penalties will provide a deterrent for future wrongdoing, and they will demonstrate that as a matter of public policy, the U.S. Government will not permit such egregious acts. When individuals in positions of trust undermine the disability programs, faith in SSA and the government erodes. As stewards of Social Security's disability programs, it is imperative to create a sense of confidence in the future of this system for hard-working and honest Americans who play by the rules and to prevent these valuable programs from being undermined by the avarice of a few.

Additionally, it appears the guidelines do not currently account for the number of individual cases that may be connected to these investigations. As discussed, these individuals in positions of trust may have submitted false information to SSA in hundreds if not thousands of cases. The amount of resources and time needed to address these issues is significant. Therefore, the OIG believes that the guidelines should take into account the number of individuals that the person in a position of trust assisted, similar to guideline §2B1.1(2), involving the number of victims, though here, the individuals may not be victims.

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions on the amendment of the sentencing guidelines as to persons in a position of trust. Should you have further questions or requests for information, please contact me, or have your staff contact Special Agent Kristin Klima, Congressional and Intra-Governmental Liaison, at (202) 358-6319.

Sincerely,



Patrick P. O'Carroll, Jr.
Inspector General
Social Security Administration

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination” In addition, if the enhancement under § 2B1.1 applies, we suggest that an adjustment under § 3B1.3 need not apply.

The existing guidelines at § 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) are inadequate to address cases of Social Security fraud facilitated by persons in a position of trust. Following are our views to support this opinion.

Program Integrity Harmed. SSA OIG is charged with detecting and preventing fraud, waste and abuse in Social Security programs and operations. As stewards of the Social Security disability programs, maintaining integrity of these programs is a priority. When individuals in a position of trust undermine the Social Security disability programs, faith in the SSA and the government erodes. As detailed in our March 11, 2016 letter, SSA OIG has been involved in several large-scale Social Security fraud cases facilitated by persons in a position of trust, as defined in the BBA.⁷ When Congress asked how we could better address and combat this type of fraud, SSA OIG submitted a legislative proposal to amend the three fraud statutes - 42 U.S.C. §§ 408, 1011, and 1383a - to double the maximum prison term for persons in a position of trust who defraud SSA from five years to 10 years. SSA agrees that these fraud cases are a priority and supports increased penalties for persons in a position of trust that defraud SSA. With bipartisan support, Congress subsequently included our proposal in the BBA aiming to restore and maintain confidence in the future of this system for hard-working and honest Americans who play by the rules. With our increased focus on identifying fraud by persons in positions of trust, SSA OIG’s

⁵ We agree that there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years’ imprisonment, is convicted under a general fraud statute (*e.g.*, 18 U.S.C. § 1341). It is respectfully submitted that even in these situations, the reality is that in Appendix A those general fraud statutes are also referenced to § 2B1.1 and as such, we confront the same problems set forth below.

⁶ While some may argue that the wide range of potential offenders covered by the new statute, including translators, could make an offense level floor over-inclusive, the BBA does not make distinctions between the types of persons in a position of trust that defraud SSA. In addition, regardless of the type of person in a position of trust involved in the fraud scheme, whether a translator or physician, the level of harm that can be inflicted upon SSA is no different. In support, we reference our investigation in Seattle, Washington of translators for former refugees, which led to 40 prosecutions, more than \$4 million in overpayments assessed, and an estimated \$11 million in projected savings to SSA.

⁷ Section 813(b) of the BBA defines a person in a position of trust as: “a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination....”

investigations inventory includes approximately 55 cases that would likely meet the BBA's increased penalties.⁸

Loss Greater Than One Individual Criminal Case. The enhancements under § 2B1.1 are inadequate because the magnitude of the loss suffered in these cases goes far beyond the individual criminal case. This is mainly because the victims in these cases are SSA and deserving beneficiaries, which is very different from other basic forms of individual fraud, and the fraud schemes can go undetected for years, with the result that hundreds of individuals may fraudulently receive Social Security benefits. This causes a strain on Social Security's trust funds and the Treasury's general funds. The loss calculations under § 2B1.1(b)(1) simply do not reflect the actual loss suffered by SSA. When investigating these cases, SSA OIG frequently relies on a confidential source with a recording device to prove that the person in a position of trust is defrauding SSA beyond a reasonable doubt. Thus, the loss in that criminal case only pertains to the loss incurred by SSA due to the person in a position of trust submitting false evidence on behalf of that one individual confidential source claimant. However, as explained in our March 11, 2016 letter, persons in positions of trust often work with hundreds, if not thousands, of claimants throughout the course of their fraud scheme; the loss in that individual confidential source's case does not account for all the loss associated with other claimants involved in the fraud scheme. The loss calculations also do not account for the costs associated with SSA's responsibility to conduct continuing disability reviews and administrative redeterminations to identify and assess benefit overpayments for each case associated with that person in a position of trust.⁹ These reviews are complex and time-consuming and can be followed by appeals.

BBA Definition of Person in "Position of Public Trust" Broader than § 3B1.3. SSA fraud involving persons in positions of trust go well beyond the offense and offenders covered under § 3B1.3 in both severity of penalty and scope of activity. The § 3B1.3 adjustment is not broad enough to capture all categories of individuals in a position of trust included in the BBA. For instance, § 3B1.3 refers to the use of a "special skill" and provides the following examples: pilots, lawyers, doctors, accountants, chemists and demolition experts. However, the BBA is broader and defines an individual in a position of trust as someone who: "receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination...." Additionally, the simple fact of receiving a fee is not noted anywhere in § 3B1.3, nor is the fact of submitting medical or other evidence in connection with a determination under the relevant program.

Enhanced Penalties in Sentencing Guidelines Necessary to Implement BBA. Although the Federal sentencing guidelines are advisory, the reality is that judges typically give deference to them without following the maximum penalties established by Congress. Therefore, if the guidelines are not amended to increase penalties against persons in a position of trust that defraud SSA, judges will not impose

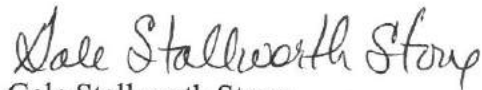
⁸ These cases are time-consuming and complex – often involving reviews of voluminous SSA records, surveillances, and undercover operations. However, there is a great need to prioritize these fraud investigations given the serious impact they have on SSA, Social Security trust funds, Treasury's general funds, and deserving beneficiaries.

⁹ For example, in connection with to the fraud scheme uncovered in Puerto Rico, discussed in our attached March 11, 2016 letter, SSA conducted about 7,000 disability reviews of cases containing tainted evidence from persons in a position of trust.

greater criminal penalties, and there will be no practical effect to the BBA. While we recognize that the sentencing guidelines are often complex, Congress has evaluated the great impact of these SSA fraud cases, given our recent criminal investigations in Puerto Rico and New York,¹⁰ and enacted legislation to increase penalties against these criminals.

We thank the Commission for publishing the proposed amendments to the guidelines and issues for comment. We appreciate the opportunity to provide our views, comments, and suggestions, and we look forward to working with you on the proposed amendments to the guidelines. Should you have further questions or requests for information, please contact me, or have your staff contact Ranju R. Shrestha, Attorney, at (410) 966-4440.

Sincerely,


Gale Stallworth Stone
Acting Inspector General

Attachment: March 11, 2016 views letter

cc: Commissioners

Kenneth P. Cohen, Staff Director

Kathleen Grilli, General Counsel

¹⁰ The details of these case examples are included in our attached March 11, 2016 letter.

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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October 10, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on Proposed 2017 Holdover Amendments

Dear Judge Pryor:

Defenders are pleased to provide comments on the proposed 2017 holdover amendments. Because many of these proposed amendments are similar to those the Commission proposed during the 2017 amendment cycle, Defender comments below are similar to those we submitted in February 2017,¹ but also include some updated information.

I. Proposed Amendment #1: Bipartisan Budget Act

The Commission proposes amending the guidelines to address changes made by the Bipartisan Budget Act of 2015 to three existing statutes² addressing fraudulent claims under certain Social Security programs. Defenders have no objection to the Commission's proposal in Part A to respond to the addition of new conspiracy prohibitions by amending Appendix A to reference the three statutory provisions to §2X1.1 in addition to §2B1.1. Defenders, however, oppose the Commission's proposal in Part B to respond to a new 10-year statutory maximum sentence for a subgroup of people convicted of violating these three statutes by adding yet another specific offense characteristic to the already unwieldy §2B1.1 guideline. The current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to guide courts toward sufficiently (and

¹ See Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Feb. 20, 2017) (*Meyers Letter Feb. 2017*) (commenting on proposed amendments for 2017).

² 42 U.S.C. §§ 408, 1011, & 1383a.

often unduly) severe penalties for a broad range of offenses, including those addressed in the Act.³

No evidence shows that the current guidelines are inadequate to guide courts on appropriate punishments for the subgroup of people who are convicted under these three statutes and subject to the new 10-year statutory maximum.⁴ First, in the past decade, no one has even been convicted of violating 42 U.S.C. § 1011.⁵ Second, neither the government nor sentencing courts have indicated that the guidelines are too low in cases prosecuted under 42 U.S.C. §§ 408 or 1383a. In the last three years almost 60% of the 703 defendants sentenced for a conviction under 42 U.S.C. § 408 received sentences within the guideline recommended range, with only 1.6% of defendants sentenced above the guideline recommended range.⁶ Similarly, of the 96 defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1 in the last three years, 39.6% received sentences within the guideline recommended range and only 2.2% received a sentence above the guideline recommended range.⁷

The proposed amendment would add the 20th specific offense characteristic to §2B1.1. It would add unnecessary complexity to a guideline that already covers more than 5 pages, with more than a dozen pages of commentary full of complicated rules for calculating loss and applying the current 19 specific offense characteristics, many with several subparts. Applying this guideline is already difficult and time-consuming and can require lengthy sentencing hearings. The proposed

³ The Commission first addressed this Act in its proposed amendments for 2016, by proposing simply amending Appendix A to reference §2X1.1 in addition to §2B1.1. 81 Fed. Reg. 2295, 2299. The Commission did not propose adding a new specific offense characteristic or any other changes to Chapters Two or Three of the guidelines manual. *Id.* Following comment by members of Congress, the Justice Department and the Inspector General of the Social Security Administration, the Commission deferred action on the Act. *See* Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Washington, D.C., Apr. 15, 2016.

⁴ The Bipartisan Budget Act of 2015 increased the maximum penalties under 42 U.S.C. §§ 408, 1011, and 1383a for certain persons: “a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination.”

⁵ USSC, *FY 2007-2016 Monitoring Dataset*.

⁶ USSC, *FY 2014-2016 Monitoring Dataset*.

⁷ *Id.*

amendment is a paradigm example of “factor creep,”⁸ and is not necessary given the range of sentences already provided for in §2B1.1 combined with the adjustments in Chapter Three.

If the Commission is not convinced that the current guidelines provide adequate guidance on sentences for certain people under these three statutes, a better solution is the one the Commission identifies in the issues for comment: “provide an application note that expressly provides that, for a defendant subject to the ten years’ statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply.”⁹ The Commission took a similar approach in §2D1.1, comment. (n.23), describing situations where §3B1.3 “ordinarily would apply.” This invitation to use existing portions of the guidelines manual in certain cases is simpler than a new specific offense characteristic with set enhancement levels and floors. It also better accommodates the wide range of defendants who may fall under the new statutory maximum, from physicians who were instrumental in the fraud to translators who may have been paid a small fee for limited services.

If, despite these reasons against it, the Commission persists in its proposal to add the 20th specific offense characteristic to §2B1.1, Defenders urge the Commission to: (a) limit the enhancement to two levels without a floor; (b) specify that §3B1.3 does not apply; and (c) require, as proposed, that the defendant be convicted of one of the three statutory provisions identified in the Act and the statutory maximum term of ten years’ imprisonment applies.¹⁰

(a.) Limit the enhancement to two levels without a floor. A two-level enhancement is more than adequate to address the offenses identified in the Act. Previously, the Department of Justice asked why the Commission was not recommending an enhancement “similar” to the two-level enhancement for Federal health care offenses at §2B1.1(7).¹¹ That 2-level enhancement applies only to Federal health care offenses with large loss amounts, between \$1-7 million.¹² The current

⁸ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 752 (2001) (“In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.”).

⁹ 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017).

¹⁰ The Commission’s proposed amendments include several bracketed items, including whether the enhancement should be 2 or 4 levels, whether the floor should be 12 or 14, and whether the commentary should advise courts not to apply §3B1.3 or indicate that courts are “not preclude[d]” from applying §3B1.3. 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017).

¹¹ Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 37 (Mar. 14, 2016).

¹² See §2B1.1(b)(7).

proposed amendment would apply to all convictions subject to the 10-year statutory maximum, regardless of the scale of the offense.

The proposed floors would result in guideline-recommended sentences that are disproportionately high for these non-violent offenses. Even the lower of the two bracketed floor options—12—is disproportionately high to other guideline-recommended sentences. For example, §2A2.3 provides an offense level of 7 for an assault where physical contact is made, or use of a dangerous weapon is threatened. The offense level is 9 for assault where the victim sustained bodily injury. §2A2.3(b). And 12 is the same offense level that applies to someone who has obstructed an officer where the victim sustained bodily injury. §2A2.4. A floor also fails to acknowledge the wide range of defendants—and degrees of culpability—that fall within the subgroup of people identified in the Act. A better solution is to let the current guidelines do their work. And, if a court determines in a particular case that the guideline recommended offense level understates the seriousness of the offense, the court is free to depart under §2B1.1, comment. (n.20(A)).

(b.) Specify §3B1.3 does not apply. Where a factor addressed in a Chapter Two enhancement significantly overlaps with a factor addressed in a Chapter Three adjustment, the guidelines routinely advise against double counting by specifying not to apply both.¹³ Because the new proposed specific offense characteristic would significantly overlap with the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill), if the Commission adopts the proposed 20th specific offense characteristic, it should advise against double counting by specifying that if the enhancement applies, do not apply §3B1.3.

(c.) Require that the defendant was convicted under the statutes identified in the Act, and that the statutory maximum of ten years' imprisonment applies. The Commission's conviction-based approach to the proposed enhancement (enhancement applies when defendant was convicted under § 408(a), § 1011(a) or § 1383(a), and the statutory maximum term of ten years' imprisonment applies) is better than the relevant-conduct-based approach identified in the Issues for Comment (enhancement applies based on conduct described in the statutes). As Defenders have indicated in the past, sentencing based on relevant conduct presents numerous

¹³ See, e.g., §2A3.1, comment. (n.3(B)) (“do not apply §3B1.3 (Abuse of Position of Trust of Use of Special Skill)” if related Chapter Two enhancement applies); §2A3.2, comment. (n.2(B)) (same); §2A3.4, comment. (n.4(B)) (same); §2B1.1, comment. (n.7) (same); §2B1.1, comment. (n.15) (same); §2G1.3, comment. (n.2(B)) (same); §2G2.6, comment. (n.2(B)) (same). The guidelines take a similar approach with other Chapter Three adjustments that overlap with Chapter Two enhancements. See, e.g., §2G2.1, comment. (n.4) (“If subsection (b)(4)(B) applies, do not apply §3A1.1(b).”); §2G2.2, comment. (n.4) (same); §2K2.6, comment. (n.2) (“If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).”); §2L1.1, comment. (n.5) (“If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).”).

problems.¹⁴ It provides prosecutors with “indecent power,”¹⁵ and contributes to unwarranted disparity, undue severity, and disrespect for the law. Defenders oppose expanding the use of relevant conduct here.

II. Proposed Amendment #2: Tribal Issues

Defenders commend the Commission for convening the Tribal Issues Advisory Group (TIAG) and for proposing amendments based on some of the recommendations in the TIAG’s 2016 Report. In addition to supporting the proposed amendments, Defenders encourage the Commission to consider amendments responsive to the TIAG’s recommendation that the guidelines make changes to better address young people who are prosecuted in federal court. Federal jurisdiction over Indian young people presents important issues and is too frequently overlooked.¹⁶ We encourage the Commission to follow the recommendations of TIAG to both amend §5H1.1 (Age), and add a departure to Chapter 5, Part K “concerning juvenile and youthful offenders.”¹⁷

A. Tribal Court Convictions

In response to the TIAG’s recommendations, the Commission proposes amending the Commentary to §4A1.3 to add a non-exhaustive list of factors courts may consider when deciding “whether, or to what extent, an upward departure based on a tribal court conviction is appropriate.” Defenders support the proposed amendment as a good effort to resolve a complicated situation. While we continue to have concerns about the practices in sentencing Native defendants in federal court, at this point, the TIAG recommendation seems like a workable approach.

In response to the Commission’s issues for comment about how the proposed factors should interact with one another, Defenders support the TIAG’s recommended approach. Due to the complex issues involved in considering tribal convictions for purposes of federal sentencing,

¹⁴ See, e.g., Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 24-31 (May 17, 2013).

¹⁵ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

¹⁶ See, e.g., Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. Rev. 37 (2011) (“Historically, the federal juvenile population has been predominantly Native American males. A 2000 study found that seventy-nine percent of all juveniles in federal custody are Native American.”); Indian Law & Order Comm’n, *A Roadmap for Making Native America Safer: A Report to the President and Congress of the United States* 157 (Nov. 2013) (“Between 1999-2008, for example, 43-60 percent of juveniles held in Federal custody were American Indian.”).

¹⁷ USSC, *Report of the Tribal Issues Advisory Group* 1, 33-34 (May 16, 2016).

including the wide variety of practices among the hundreds of different tribes across the country, we support the TIAG's recommendations that the factors identified in the departure commentary be non-exhaustive, and that no one factor be weighted more heavily than any other.

Finally, in response to the request for comment on whether the Commission should amend §4A1.2(i), Defenders emphatically answer, "no." Consistent with the TIAG,¹⁸ Defenders oppose, as we have since the inception of the guidelines, counting tribal convictions in the criminal history calculation.¹⁹

B. Court Protection Orders

Also in response to the TIAG's recommendations, the Commission proposes amending §1B1.1 to define "court protection order," to mean "'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)." Defenders support this proposed amendment.

III. Proposed Amendment #3: First Offenders / Alternatives to Incarceration

Defenders are pleased that the Commission proposes amending the guidelines to encourage alternatives to incarceration for "first offenders" and consolidating Zones B and C of the Sentencing Table so that the guidelines recommend probationary sentences for a few more individuals. We discuss the proposed amendments below. We also offer suggestions for additional changes to further encourage alternatives to incarceration that will meet the purposes of sentencing better than imprisonment-only sentences. Our comments are summarized here:

- The Commission proposed two options for defining "first offender." Defenders support Option 1, which defines "first offender" as a person who "did not receive any criminal history points from Chapter Four, Part A." This definition is fair and simple to apply.

¹⁸ *Id.* at 12 ("The TIAG recommends that tribal convictions not be counted under U.S.S.G. §4A1.2."); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 28-29 (Judge Lange) ("it was unanimous among the five federal judges [on the TIAG] that [tribal convictions] ought not to be automatically counted"); *id.* at 27 (Judge Erickson) ("amongst the majority there was a concern that if we just said all tribal convictions should score ... it would exacerbate the disparity that already exists in Indian country sentencing). *See also* USSC, *Report of the Native American Advisory Group* 13 (Nov. 4, 2003) (declining to recommend counting tribal convictions in the criminal history score and reporting that "discussion among the Ad Hoc Advisory Group members revealed that there was some concern that such an amendment would raise significant constitutional and logistical problems").

¹⁹ *See* Summary of Testimony of Tova Indritz, Federal Public Defender for the District of New Mexico Before the U.S. Sentencing Comm'n, Denver, Colo. 9-10 (Nov. 5, 1986) (urging the Commission not to count tribal court convictions). *See also*, Jon M. Sands & Jane L. McClellan, *Policy Meets Practice: Why Tribal Court Convictions Should Not Be Counted*, 17 Fed. Sent'g Rep. 215 (2005) (opposing the counting of tribal sentences in defendants' criminal history); Creel, *supra* note 67, at 39 (opposing counting tribal court convictions in federal sentencing).

Option 2, on the other hand, creates several problems, by too narrowly defining “first offender” as limited to those with “no prior conviction of any kind.”

- The Commission proposed two options for a decrease in offense level for a “first offender.” Defenders believe Option 2, which would call for a 2-level decrease if the final offense level is less than 16 and a 1-level decrease if the final offense level is 16 or greater, rather than Option 1, which calls only for a 1-level decrease across all final offense levels, is more likely to encourage alternatives to incarceration. We also suggest that the Commission adopt a 3-level reduction for “first offenders” with final offense levels of 16 or less and a 2-level reduction for “first offenders” with offense levels greater than 16. The Commission also should include an invited downward departure for nonviolent “first offenders” (e.g., drug trafficking and fraud) who fall within Zones C or D to better encourage courts to consider the need for the sentence imposed to provide the defendant with the most effective correctional treatment.²⁰
- Defenders support the proposed application note to §5C1.1 (Imposition of a Term of Imprisonment), which provides for a rebuttable presumption of probation for certain “first offenders,” as a way to encourage alternatives to incarceration. Of the two options for exclusion [instant offense of conviction is not a crime of violence] [the defendant did not use violent or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], Defenders prefer the first option. An even better solution is to exclude from the presumption of probation only those “first offenders” whose instant offense of conviction resulted in serious bodily injury or whose offense involved substantial harm to the victim.

A. Alternatives to Incarceration are an Important Mechanism to Promote Public Safety and Meet the Purposes of Sentencing.

Encouraging alternatives to incarceration for “first offenders” and other individuals who need not be incapacitated to protect the public is a critically important goal of the guidelines. Research shows a “weak relationship between incarceration and crime reduction, and highlights proven strategies for improving public safety that are more effective and less expensive than incarceration.”²¹ The best way to promote public safety and ensure that convicted persons can lead law-abiding lives is through broad use of non-incarceration sentences, especially since “incarceration does little to change a person’s behavior” and persons sentenced to prison have

²⁰ 18 U.S.C. § 3553(a)(2)(D).

²¹ Vera Institute of Justice, *Overview of The Prison Paradox: More Incarceration Will Not Make Us Safer* (July 2017), <https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer>.

higher recidivism rates than those sentenced to community corrections.²² Alternatives to incarceration are far more likely than prison to meet a person's rehabilitative needs and strengthen the communities in which they reside. A recent report from the Harvard Kennedy School and the National Institute of Justice notes that a conviction, combined with a prison sentence, has devastating collateral consequences.²³ Such consequences include the loss of employment prospects, an increased likelihood of health problems, increased poverty rates and behavioral problems for children of incarcerated parents, and increased racial disparities.²⁴

Probation, when compared to imprisonment, is perceived by a majority of the public as a more effective punishment.²⁵ As a result, more alternatives to incarceration will promote greater respect for the law.

Encouraging greater use of alternatives to incarceration also will help fulfill the Commission's obligation to formulate guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."²⁶ Despite the decline in the federal prison population over the past few years, BOP is still overcrowded (14% with a projected FY 2018 increase of 2%) and understaffed. The current inmate to staff ratio is 4.1-to-1.²⁷ In

²² Nat'l Inst. of Corrs., *Myths & Facts - Why Incarceration Is Not the Best Way to Keep Communities Safe* 1, 4 (2016), <https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf>.

²³ Wendy Still et al., *Building Trust and Legitimacy Within Community Corrections*, Harvard Kennedy School and Nat'l Inst. of Just. 13-18 (2016), https://www.hks.harvard.edu/content/download/82224/1844712/version/2/file/building_trust_and_legitimacy_within_community_corrections_rev_final_20161208.pdf.

²⁴ *Id.*

²⁵ See, e.g., *Myths and Facts*, *supra* note 22, at 8. (discussing research, which shows that the "majority of the American public favors alternatives to incarceration"); Pew Charitable Trusts, *State Reforms Reverse Decades of Incarceration Growth* 11 (2017) (Sixty-nine percent of persons responding to bipartisan polling supported the view that "[t]here are more effective, less expensive alternatives to prison for nonviolent offenders, and expanding those alternatives is the best way to reduce the crime rate." Seventy-eight percent found it acceptable that "instead of mandatory minimums, judges have the flexibility to determine sentences based on the facts of each case."), http://www.pewtrusts.org/~media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf; Alliance for Safety and Justice, *Crime Survivors Speak: The First Ever National Survey of Victims' Views on Safety and Justice* 4 (2016) ("Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails"). <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

²⁶ 28 U.S.C. § 994(g).

²⁷ Federal Bureau of Prisons, *Federal Bureau of Prisons Program Fact Sheet* (Sept. 2017), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170920.pdf.

2015, then Director of the BOP, Charles Samuels, told Congress that a 4.4-to-1 ratio “negatively impacts BOP’s ability to effectively supervise inmates and provide inmate programs.”²⁸ One of the devastating consequences of prison overcrowding and lack of correctional staff is that other staff, including “teachers, psychologists, case managers, reentry coordinators, chaplains, etc., [] are pulled away periodically from their duties of providing offenders with programs and services.”²⁹ To help resolve these problems and ensure that individuals get the services they need to lead a productive life, the Commission should maximize the use of alternatives to incarceration.

Greater use of alternatives to incarceration are also consistent with the Commission’s statutory mandate to construct guidelines aimed at meeting all the purposes of sentencing,³⁰ including meeting the rehabilitative needs of the defendant through means other than a sentence of imprisonment,³¹ and that reflect “advancement in knowledge of human behavior as it relates to the criminal justice process.”³²

Since the passage of the Sentencing Reform Act, substantial evidence has emerged about human behavior as it relates to the criminal justice process and the purposes of sentencing. For several years, U.S. Probation has “expanded its training programs pertaining to evidence-based supervision practices.”³³ In addition to using actuarial risk assessment instruments to help determine appropriate levels of supervision and assess a person’s rehabilitative needs, many probation officers are now using STARR (Staff Training Aimed at Reducing Re-Arrest) skills. “STARR skills include specific strategies for active listening; role clarification; effective use of authority, disapproval, reinforcement, and punishment; problem solving; and teaching, applying, and reviewing the cognitive model.”³⁴ A study published in December 2015 shows that “[m]easurable decreases in federal recidivism coincide with concerted efforts to bring to life

²⁸ *Oversight of the Bureau of Prisons: First-Hand Accounts of Challenges Facing the Federal Prison System*, Hearing before the U.S. Senate Committee on Homeland Security & Governmental Affairs, 114th Cong. 3 (Aug. 4, 2015) (statement of Charles E. Samuels, Jr., Dir., Federal Bureau of Prisons, U.S. Dep’t of Justice).

²⁹ *Id.* at 4.

³⁰ 28 U.S.C. § 994(a)(2).

³¹ 28 U.S.C. § 994(k).

³² 28 U.S.C. § 991(b)(C).

³³ Matthew Rowland, Chief, Prob. and Pretrial Services Office, Admin. Office of the U.S. Courts, *Introduction to Laura Baber, Inroads to Reducing Federal Recidivism*, 79 Fed. Prob. J. 3, 3 (Dec. 2015).

³⁴ Probation and Pretrial Services-Annual Report 2015, <http://www.uscourts.gov/statistics-reports/probation-and-pretrial-services-annual-report-2015>.

state-of-the-art evidence-based supervision practices into the federal system, including the development and wide-scale implementation of a dynamic risk assessment instrument, emphasis on targeting person-specific criminogenic needs and barriers to success, and training on core correctional practices.”³⁵ As the report states: “despite the increase in risk of the federal post-conviction supervision population and several years of austere budgets, probation officers are improving their abilities to manage risk and provide rehabilitative interventions.”³⁶

B. First Offenders

1. Definition of First Offender

The Commission requests comment on its two proposed definitions of “first offender,” and on whether any other definition is more appropriate. Defenders support Option 1, which defines “first offender” to mean someone who “did not receive any criminal history points from Chapter Four, Part A.” This definition is both fair and simple to apply.³⁷ Option 2, limiting the definition of first offender to those with “no prior conviction of any kind,” is unduly narrow, risks exacerbating racial disparity, will impact the poor, and raises due process concerns. If the Commission rejects Option 1, at minimum, it should broaden the definition in Option 2, as suggested in the Issues for Comment, to include defendants with “prior convictions that are not counted under §4A1.2 for a reason other than being too remote in time.” The Commission also should include within the definition of “first offender” a defendant who has only prior juvenile adjudications or convictions for offenses committed before the age of 18.

Data on recidivism rates indicates Option 2 too narrowly defines “first offender” by excluding persons convicted of minor offenses. Although the Commission’s recent data analysis did not compare the recidivism rates for individuals with no prior convictions to those with prior convictions for offenses listed in §4A1.2(c), a 2004 report of the Commission showed that individuals who had convictions under §4A1.2(c) only had a reconviction recidivism rate of 2.9%, which was substantially similar to the 2.5% rate for individuals with no prior

³⁵ Laura Baber, Chief, Nat’l Program Dev. Div., Prob. and Pretrial Services, Admin. Office of the U.S. Courts, *Inroads to Reducing Federal Recidivism*, 79 Fed. Probation J. 3, 3 (Dec. 2015).

³⁶ *Id.* at 8.

³⁷ As part of its recent effort to simplify §2L1.2 (Unlawfully Entering or Remaining in the United States), the Commission opted to track the rules of Chapter Four, Part A, for purposes of measuring prior convictions. *See* §2L1.2, comment. (n.3) (“For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c).”); USSG App. C, Amend 802 (Nov. 1, 2016) (explaining the Commission is “adopt[ing] a much simpler sentence-imposed model for determining the applicability of predicate convictions”).

convictions.³⁸ In short, the available evidence shows that public safety is not undermined by including in the definition of “first offender” individuals with these types of prior convictions.

Option 2, by depriving individuals with minor misdemeanors from the benefits of “first offender” status, would exacerbate racial disparity and impact the poor. Commission data shows that if it limits the definition of “first offender” to those with no prior conviction of any kind, fewer Black individuals than White individuals will benefit.³⁹ This is consistent with research by Professor Alexandra Natapoff, who has identified the numerous “systemic implications” of misdemeanor prosecutions, including how “misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal justice system (in other words, criminalized) with little or no regard for their actual guilt.”⁴⁰ The history of misdemeanor prosecutions shows that they have been “social and economic governance tools” used predominantly in urban areas to “manage various disadvantaged populations.”⁴¹ Many minor offenses have significant impact on people of color and the poor. “Police use loitering, trespassing, and disorderly conduct arrests to establish their authority over young black men, particularly in high crime areas, and to confer criminal records on low-income populations of color.”⁴² The over-policing of poor neighborhoods of color caused by the use of “zero-tolerance” policies often results in disproportionate convictions for loitering, trespassing, and disorderly conduct.⁴³ In addition, driving on a suspended license, which constitutes a sizable portion of local misdemeanor dockets, is an offense that has a disproportionate impact on the poor. Such offenses criminalize poverty because suspensions often occur when a low-income person cannot afford to pay the fine for a simple traffic violation.⁴⁴

Option 2 also raises due process concerns due to its exclusion of individuals with convictions for minor offenses. Many individuals charged with misdemeanor offenses have a greater incentive to plead guilty so they can get out of jail and often do so without defense counsel or with counsel

³⁸ USSC, *Recidivism and the “First Offender”*: A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate 14, nn.27 & 28 (2004).

³⁹ USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 14 (2016).

⁴⁰ Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1313 (2012).

⁴¹ Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, Oxford Handbooks Online 3 (2016).

⁴² *Id.* at 5.

⁴³ See generally K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Leg. Ethics 285, 286 (2014).

⁴⁴ Natapoff, *Criminal Misdemeanor Theory and Practice*, *supra* note 41, at 4.

that only have minutes to handle a case.⁴⁵ Consequently, the frequency of wrongful convictions for such offenses is troubling.⁴⁶

Finally, if the Commission adopts Option 1 or broadens Option 2 as Defenders suggest above, Defenders request it also include an invited downward departure for persons who would qualify for “first offender” status but for a conviction in a jurisdiction where minor offenses listed in §4A1.2(c) carry a prison term of over 1 year. For example, a person convicted of a state offense classified as a misdemeanor and punishable by more than one year imprisonment, such as leaving the scene of an accident⁴⁷ should not be deprived of the benefit of “first offender” status merely because of the state in which he or she was convicted. The arbitrariness of how some state criminal codes have more severe punishments for minor offenses also should discourage the Commission from adopting the definition included in the issues for comment: defining “first offender” as a “defendant who did not receive any criminal history points from Chapter Four, Part A and has no prior felony convictions.”

2. Offense Level Decrease for First Offenders

Of the Commission’s proposed options on the offense level reduction for “first offenders,” Option 2 (a 2-level decrease if the offense level is less than 16 and a 1-level decrease if the

⁴⁵ See generally Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL Fordham Urb. L. J. 101, 147 (2013) (discussing how “a young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind, whether he commits any criminal acts or not”); Natapoff, *Misdemeanors*, *supra* note 40, at 1348 (“bulk urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction”); Robert Boruchowitz, et al., Nat’l Assoc. of Crim. Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts* (2009); Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, Slate, Apr. 17, 2012 (discussing major consequences of misdemeanors), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Courts*, 34 Cardozo L. Rev. 1751, 1754, 1803-1810 (2013) (discussing incentives for persons charged with misdemeanors to plead guilty so that they can return to their families and jobs rather than remain in jail pending a trial and elevated risk of noncitizens pleading guilty to misdemeanor offenses).

⁴⁶ See Natapoff, *Misdemeanors*, *supra* note 40, at 135-38, 143; Cade, *supra* note 45, at 1793 n.251 (discussing how pretrial detention leads to more wrongful convictions).

⁴⁷ See Mass. Gen. Laws Ann. ch. 90, § 24 (a 1/2) (1) (West 2017) (maximum term of imprisonment for failing to stop at a car accident is 2 years). Massachusetts has many offenses that are classified as misdemeanors, but have maximum terms of imprisonment over one year. See Massachusetts Sentencing Commission, *Felony and Misdemeanor Master Crime List* (e.g., hazardous waste; incinerator violations; collection, transportation, or storage of hazardous waste; cheating and swindling less than \$1,000; racing a motor vehicle), <http://www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf>.

offense level is 16 or greater) is more likely than Option 1 (a 1-level decrease no matter the offense level) to encourage the use of alternatives to incarceration. Defenders believe, however, that the Commission can go one step further by providing for a 3-level reduction in offense level for people with a final offense level of 16 or less and a 2-level reduction for individuals with a final offense level greater than 16. If the purpose of the amendment is for the guidelines to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,”⁴⁸ then that purpose would be better served if more people moved from Zone B into Zone A, and from Zone D into Zone C (or the consolidated Zones B and C if that proposed amendment is promulgated). For example, a 3-level decrease would permit a person with an offense level of 13 under Chapters 2 and 3, to move from Zone B into Zone A and have the option of a probationary sentence. Similarly, a 3-level decrease would permit a person with an offense level of 16 to move from Zone D into current Zone C or proposed Zone B. Compared to Option 2 of the Commission’s proposed amendment, which would only decrease the Zones for 24.3% of “first offenders” in the FY 2014 data sample,⁴⁹ Defenders’ proposal would decrease the Zone for 27.5% percent of “first offenders.”

The Commission requests comment on whether it should “limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels” and if it should identify other “limitations or requirements.” Defenders encourage the Commission to make the decrease in offense level available to all “first offenders” regardless of their offense level determined under Chapters Two and Three.

Making the adjustment available no matter the offense level would treat “first offenders” more fairly. The Commission’s data analysis shows that a vast majority of “first offenders” fell within Zone D and have offense levels of 16 or greater. And a sizable number—46.3 percent—of “first offenders” with final offense levels of 16 or higher were convicted of drug trafficking.⁵⁰ These are precisely the people who should receive lesser sentences. As the Honorable Patti Saris, former Chair of the Commission, wrote:

[M]ass incarceration of drug offenders has had a particularly severe impact on some communities in the past thirty years. Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in

⁴⁸ 28 U.S.C. § 994(j).

⁴⁹ USSC, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment*, Slide 12.

⁵⁰ *Id.* at Slide 15.

federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing. In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

The Honorable Patti Saris, *A Generational Shift for Federal Drug Sentences*, 52 American L. Rev. 1, 10-11 (2015).

While the Commission lowered the offense levels for many drug cases, it did not do so for all, and it has taken no steps to acknowledge the different levels of culpability and lower risk of recidivism for “first offenders.” For the Commission to exclude such persons from the benefit of a reduction in offense level would serve no purpose of sentencing. First, offense level is not correlated with recidivism.⁵¹ Second, the notion that higher offense levels serve as a general deterrent⁵² has long been debunked.⁵³ Third, a lengthier term of imprisonment is not necessary to promote just punishment. The Supreme Court acknowledged in *Gall* that the standard conditions of probation by themselves substantially restrict a person’s liberty.⁵⁴ Fourth, as previously discussed, longer terms of imprisonment do not promote rehabilitation. Fifth, the available data shows that the rise in imprisonment for federal drug offenses has resulted in high costs and low returns.⁵⁵

If the Commission wants to make an evidence-based decision, it should lower sentences for “first offenders,” no matter their final offense level, so that they do not spend much time in prison

⁵¹ USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* (“*Recidivism Report*”) 20 (2016).

⁵² The Commission’s recidivism report notes that the “offense levels in the federal sentence guidelines were intended to reflect multiple purposes of punishment, including just punishment and general deterrence.” *Id.* at 20.

⁵³ Nat’l Inst. of Justice, *Five Things About Deterrence* 1 (2016) (“The certainty of being caught is a vastly more powerful deterrent than the punishment”; “Sending an individual convicted of crime to prison isn’t a very effective way to deter crime”; “Increasing the severity of punishment does little to deter crime.”), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>.

⁵⁴ *Gall v. United States*, 552 U.S. 38, 48-49 (2007).

⁵⁵ Letter from Adam Gelb, Director, *Public Safety Performance Project of The Pew Charitable Trusts, to the Honorable Chris Christie, President’s Commission on Combating Drug Addiction and the Opioid Crisis*, at 2 (June 19, 2017), <http://www.pewtrusts.org/~media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>. See also The PEW Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return* (2015).

learning “more effective crime strategies from each other” and getting desensitized “to the threat of future imprisonment.”⁵⁶

3. Presumption of a Non-incarceration Sentence

The Commission’s proposed amendment to §5C1.1(g) suggests a presumption of probation either for a “first offender” whose “instant offense of conviction is not a crime of violence” or who did not “use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense.” The latter option, which would exclude a broader range of individuals, including those who did not commit any violent act but “possess[ed] a firearm or dangerous weapon in connection with the offense,” is not consistent with the congressional directive at 28 U.S.C. § 994(j), which excludes from the benefits of a probationary sentence only “first offenders” convicted of “a crime of violence or an otherwise serious offense.” Merely because a person possessed a firearm or dangerous weapon “in connection with the offense” does not mean the person was convicted of an “otherwise serious offense.” First, possession is broadly defined to include not only “actual possession,” but “constructive possession.”⁵⁷ Second, the presence of a firearm or weapon in the same place or near where an offense occurred, even if the individual does not use it in the offense, has been held sufficient to show that the weapon had a sufficient “connection to the offense.”⁵⁸ For example, in a recent drug trafficking case, law enforcement officials found drugs and drug proceeds in the defendant’s garage. They also found a gun stored in a different location on the premises. Although there was no evidence the defendant used a gun during trafficking, the Fifth Circuit affirmed application of the §2D1.1(b)(1) enhancement.⁵⁹

Excluding from a presumption of probation a person who “possessed a firearm or other dangerous weapon in connection with the offense” also would exacerbate a circuit split. As the Commission is aware, a circuit split exists on whether an enhancement under §2D1.1(b)(1) (“if a dangerous weapon (including a firearm) was possessed, increase by 2 levels”) precludes safety valve relief under §5C1.2(a)(2) (“the defendant did not use violence or credible threats of violence

⁵⁶ *Five Things About Deterrence*, *supra* note 53, at 1.

⁵⁷ *Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015) (“Constructive possession is established when a person, though lacking [] physical custody, still has the power and intent to exercise control over the object”).

⁵⁸ *See, e.g., United States v. Vongdeuane*, 2017 WL 3970745, *3 (D.S.C. Sept. 8, 2017) (defendant in a drug case given an enhancement for gun found in a bed underneath a pillow in the house where she resided with her husband, a coconspirator); *United States v. Grimes*, 2017 WL 3668936, *2 (11th Cir. 2017) (“proximity between drugs and guns, without more, is sufficient to meet the government’s initial burden and create the presumption of a connection between the weapon and the offense”).

⁵⁹ *United States v. Carillo*, 689 Fed. App’x 334 (5th Cir. 2017).

or possess a firearm or other dangerous weapon (or induce another participant do so (in connection with the offense’’)).⁶⁰ Courts are also split on whether constructive possession disqualifies a defendant from safety valve relief.⁶¹ Given the circuit split, the Commission’s proposal regarding a defendant’s possession of a firearm would promote disparity in application of the guideline.

And given the current Guideline definition of “crime of violence,” which is not limited to an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another,” and which includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses,⁶² Defenders believe it better to only exclude from the presumption of probation a “first offender” convicted of an offense that resulted in serious bodily injury or whose offense involved substantial harm to the victim.

The Commission requests comment on whether it should exclude other offenses, such as white collar crimes, from the presumption of a non-incarceration sentence. Defenders strongly oppose any such exclusion. Sentences of imprisonment severely limit the defendant’s ability to pay restitution, which is often ordered in white collar cases,⁶³ and do not achieve “penal objectives such as deterrence, rehabilitation, or retribution.”⁶⁴

Moreover, the notion that all “first offenders” convicted of white-collar offenses should not get the benefit of a presumption of probation is ill-founded. Our polling of Defenders revealed

⁶⁰ Compare *United States v. Carillo-Ayala*, 713 F.3d 82, 89-91 (11th Cir. 2013) (holding that not all defendants who receive the enhancement under §2D1.1(b)(1) are precluded from safety valve relief) with *United States v. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010) (actual and constructive possession of a weapon under §2D1.1(b)(1) excludes safety valve relief).

⁶¹ See, e.g., *United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (per curiam); *United States v. Matias*, 465 F.3d 169, 173-74 (5th Cir. 2006); *United States v. Herrera*, 446 F.3d 283, 287 (2d Cir. 2006); *United States v. Gomez*, 431 F.3d 818, 820-22 (D.C. Cir. 2005); *United States v. McLean*, 409 F.3d 492, 501 (1st Cir. 2005); *United States v. Stewart*, 306 F.3d 295, 327 n.19 (6th Cir. 2002); *Sealed Case*, 105 F.3d at 1463-65 (D.C. Cir. 1997). The Tenth Circuit, in contrast, has held that the scope of activity covered by §2D1.1(b)(1) is broader than that covered by §5C1.2, and that constructive possession does not preclude safety valve relief. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1188 (10th Cir. 2004).

⁶² USSG §§4B1.2(a) & comment. (n.1).

⁶³ The Mandatory Victim Restitution Act applies to an offense against property, including those committed by fraud or deceit. 18 U.S.C. § 3663A. Accordingly, defendants must compensate victims for the loss suffered. In FY 2016, restitution was ordered in 68.2% of fraud cases, with an average payment of \$1,431,017 and a median payment of \$125,750. USSC, *2016 Sourcebook of Federal Sentencing Statistics*, tbl. 15.

⁶⁴ *United States v. Cloud*, 872 F.2d 846, 854 (9th Cir. 1989).

numerous clients who were “first offenders” who got involved in an economic crime out of desperation and efforts to support themselves or their family. They often stole to survive or were manipulated by others who took advantage of their desperate plight. They are not likely to reoffend, and for many, incarceration is a punishment greater than necessary to meet the purposes of sentencing under 18 U.S.C. § 3553(a). In such cases, imposing a prison sentence could cost society more than the original crimes because of the substantial cost of incarceration and the cost associated with removing the defendant from his or her family. Exempting persons who commit basic economic offenses sentenced under §2B1.1 would also deprive many people of color of alternatives to incarceration.⁶⁵

Three examples from the many cases involving “first time offenders” who faced terms of imprisonment under the guidelines, but who received probationary sentences, demonstrate our point. The first case involved a 54-year-old middle-school teacher, twice divorced, who suffered trauma and physical health issues and helped take care of her older sister with a serious chronic medical illness and in need of money to help meet basic needs and pay for medical expenses. She lost her mother and grandmother within a year of each other. The Veteran’s Administration’s (VA) benefits that her mother received following her father’s death continued to be paid into a joint account that the client held with her mother. She suffered from depression, had a period of unemployment, and failed to inform the VA of her mother’s death. Approximately \$1,400 a month was deposited into the account for almost 8 years, resulting in an overpayment of \$142,494. She managed to repay \$3,000 after the VA contacted her about the overpayments and before any criminal charges were brought.

The second case involved a 62-year-old former military member and disabled plumber who wrote bad checks and made fraudulent bank transfers mainly to benefit his girlfriend who suffered from cancer and to be able to pay off his creditors. The loss amount under the guidelines was \$192,299.36, but the actual loss was \$20,634.53.

The third case involved a loan processor with minor children who suffered from extensive physical and sexual abuse in her personal life and persistent mental illness that made her vulnerable to exploitation by her boss who led a scheme to inflate real estate appraisals to obtain mortgage loans that were substantially more than the actual cost of the house. She was ordered to pay restitution in the amount of \$42,676,269.14.

Defenders also have concerns about the proposed application note for §5C1.1(g). If the Commission chooses to exclude from the presumption of probation individuals who have “used violence or credible threats of violence or possessed a firearm or other dangerous weapon in

⁶⁵ USSC, *Interactive Sourcebook*, Race of Offenders in Selected Primary Sentencing Guidelines, FY 2016 (56.3% of persons sentenced primarily under §2B1.1 were Black, Hispanic, Native Americans, Alaskan Natives, Asian or Pacific Islanders, Multi-Racial, or an other non-white race).

connection with the offense,” including proposed note 10(C) is redundant. And if the Commission does not exclude such individuals from the presumption of probation, then the proposed note undercuts the presumption and potentially creates an interpretive problem about which party bears the burden of proof on whether the court should or should not impose a non-incarceration sentence. The best course of action would be to allow the presumption of an alternative to apply and let the government rebut the presumption by showing that the individual should be sentenced to a term of imprisonment.

4. Conforming Changes

The Commission requests comment on what conforming changes, if any, it should make if it were to promulgate Part A of the proposed amendment for “First Offenders.” While the complicated nature of the guidelines makes it difficult to anticipate all the conforming changes that should be made, one change is apparent. In addition to amending §5C1.1, the Commission should amend §5B1.1 (Imposition of a Term of Probation) to be consistent with §5C1.1’s presumption of an alternative sentence language. Simply adding subsection (c) to §5B1.1, with the exact language included in §5C1.1 would ensure that the presumption of an alternative sentence does not get overlooked for individuals who fall within Zones A and B of the guidelines. In addition, Defenders suggest that the Commission change the language in §5B1.1 to call for a presumption of probation.⁶⁶

C. Consolidation of Zones B and C

1. Zones B and C Should be Consolidated with Zone B Expanded to the Range of 18-24 Months.

Defenders are pleased that the Commission is considering consolidating Zones B and C to encourage greater use of alternative sentencing options. In addition to consolidating Zones B and C, the Commission should expand Zone B by 2 levels to an 18-24 month range. Such an expansion would increase the number of individuals likely to benefit from Zone B Sentencing Options, without jeopardizing public safety.⁶⁷

The Commission’s 2015 report, *Alternative Sentencing in the Federal Criminal Justice System*, concluded that the low rate of alternatives to incarceration was “primarily [] due to the predominance of offenders whose sentencing ranges were in Zone D of the Sentencing Table, in

⁶⁶ Defender public comment last year includes suggestions on how the language of §5B1.1 should be changed. *See Meyers Letter Feb. 2017*.

⁶⁷ In FY 2016, there were 4866 individuals with a guideline range of 15-21 or 18-24 months. *2016 Sourcebook*, tbl. 23 (2016).

which the guidelines provide for a term of imprisonment.”⁶⁸ Notwithstanding that conclusion, individuals falling within Zone D are receiving alternatives to incarceration. For example, individuals convicted of drug offenses were almost as common among individuals sentenced to alternatives (29%) as those sentenced to imprisonment (31.6%).⁶⁹

And as the Commission’s data analysis on “Zone C Offenders” likely to benefit from Zone B sentencing options shows, only 420 people sentenced in FY 2015 would have benefited from consolidation of the zones. A slight expansion of the new Zone B would increase those numbers without jeopardizing public safety because a large number of individuals falling within Zone D are convicted of non-violent offenses such as drug trafficking, money laundering, and fraud.⁷⁰ Moreover, an expansion of proposed Zone B to the 18-24 month range would likely have the most significant impact on individuals in criminal history category I. Data from FY 2016 show that 358 individuals with a criminal history category I had an offense level of 14 (15-21 months) and 1,377 had an offense level of 15 (18-24 months).⁷¹

Data from the Commission’s study shows that expanding Zone B to the 18-24 month range will not impact public safety. The reconviction rate for persons imprisoned from 12 to 23 months was 33.9%, just slightly above the 31.9% rate for those imprisoned 6 to 11 months.⁷² At the same time, individuals with a probation only sentence had a recidivism rate of 21.6%.⁷³ Those rates combined with data from U.S. Probation,⁷⁴ show that encouraging greater use of alternatives to incarceration will likely decrease recidivism rates.

In conclusion, the Commission’s own data, combined with other points discussed earlier in these comments about how alternatives to incarceration are retributive and more likely to meet a person’s rehabilitative needs and strengthen the communities in which they reside, show that

⁶⁸ USSC, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2015).

⁶⁹ *Id.* at 18, Fig. 14.

⁷⁰ In FY 2015, 93.5% of persons convicted of drug trafficking, 53% of persons convicted of fraud, and 79% person of persons convicted of money laundering fell within Zone D. USSC, *FY 2015 Monitoring Dataset*.

⁷¹ USSC, *Interactive Sourcebook*, tbl. 21 FY 2013-FY 2016.

⁷² *Recidivism Report*, *supra* note 51, at App. A-2.

⁷³ *Id.*

⁷⁴ Baber, *supra* note 35, at 3 (discussing how “probation officers are improving their abilities to manage risk and provide rehabilitative interventions,” and how evidence based supervision practices coincide with “[m]easurable decreases in federal recidivism”).

making alternatives to incarceration available for more people will better serve all the purposes of sentencing.

2. The Zone Changes Should Apply to All Categories of Offense and Criminal History.

The Commission requests comment on whether the Zone changes should apply to all offenses or only certain categories of offense. It asks specifically about whether public corruption, tax, and white-collar offenses should be exempt. Because the Commission deems all cases falling within current Zones B and C as not serious enough to warrant a complete term of imprisonment, it would be odd to exclude an offense from the zone expansion.

Defenders also encourage the Commission to delete §5C1.1, comment. (n.7), which discourages the use of substitutes for imprisonment for those in criminal history category III or above even if the individual falls within Zone B and C. Not all individuals who fall within Zones B and C and have higher criminal history categories should be imprisoned, particularly those in need of treatment or who suffer from mental disorders, such as trauma, that would grow worse in a prison setting. And discouraging the use of alternatives for individuals with a criminal history category of III who fall within Zones B and C contributes to prison crowding.⁷⁵

3. Modify the Invited Departure for Persons Who Abuse Controlled Substances and Alcohol or Suffer from a Mental Illness.

As part of its consolidation of Zones B and C, the Commission proposes deleting the invited departure provision at §5C1.1, comment. (n.6), which acknowledges that a departure may be appropriate for certain persons in Zone C. Rather than delete the application note, the Commission should modify it to encourage alternatives to incarceration for individuals in Zone D who have not been convicted of a crime of violence and who abuse controlled substances or alcohol, or suffer from a mental illness, particularly those convicted of a drug offense. Drug quantity often drives lower-level drug traffickers into Zone D, which has resulted in long prison sentences.⁷⁶ Many of these individuals would do much better in a therapeutic community than a prison setting, particularly given the prevalence of mental health and substance dependence or abuse in the BOP population and the lack of meaningful mental health care for those in need.⁷⁷

⁷⁵ In FY 2016, 2,860 individuals had a criminal history category of III and fell within Zones B and C. *2016 Sourcebook*, tbl. 21.

⁷⁶ Gelb Letter, *supra* note 55, at 2-3.

⁷⁷ See, e.g., BJS Special Report, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006) (finding that 45% of federal prisoners had a mental health problem within the last 12 months of the survey and 40% had symptoms of a mental health disorder based upon DSM criteria; 14% had a history of mental health problems; 49.5% suffered from alcohol or drug abuse or dependence),

Notwithstanding that about half of BOP inmates suffer from a mental health or substance abuse or dependence problem, and about 15.2% of newly committed inmates may require mental health services,⁷⁸ only 5% of BOP's population receives mental health care.⁷⁹ And the Residential Drug Abuse Program does not meet the needs of all inmates with drug abuse disorders.⁸⁰

4. Home Detention

Defenders have no objection the amendment to §5F1.2 regarding home detention.

IV. Proposed Amendment #4: Acceptance of Responsibility

We are pleased that the Commission has proposed amendments that respond to concerns about how some courts interpret commentary in §3E1.1 to deny a reduction in sentence for acceptance of responsibility when a defendant pleads guilty, accepts responsibility for the offense of conviction, but unsuccessfully challenges relevant conduct.⁸¹ Of the two options the Commission proposes, Option 2 (“a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact”) is significantly more likely to resolve the problem rather than Option 1 (“a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction”).

<https://www.bjs.gov/content/pub/pdf/mhppji.pdf>. See also U.S. Dep't of Justice: *Federal Prison System, FY2018 Performance Budget: Congressional Submission, Salaries and Expenses* 30-31 (2017) (“[a]pproximately 40 percent of federal inmates have a diagnosed drug use disorder;” only 38,916 inmates were projected to participate in drug abuse treatment in FY 2017).

⁷⁸ Philip Magaletta, et al., *Estimating the Mental Illness Component of Service Needed in Corrections: Results from the Mental Health Prevalence Project*, 36 Crim. Just. & Behav. 229, 239 (2009) (research completed by Federal Bureau of Prisons staff and a professor of the mental health needs of federal prison inmates; acknowledging the study results led to a “conservative estimate”).

⁷⁹ See Federal Bureau of Prisons, *Program Fact Sheet* (Sept. 2017) (95% of the population are placed in Care Level I facilities, which do not provide significant mental health care), https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170920.pdf. That care level is not a reliable estimate of the individuals in need of treatment. See Magaletta et al., *supra* note 78, at 240 (“only measuring service utilization may under represent those who have a diagnosable and potentially treatable mental health condition”) (quoting Magaletta et al., *The Mental Health of Federal Offenders: A Summative Review of the Prevalence Literature*, 33 Admin. & Pol. in Mental Health and Mental Health Services Research 253, 261 (2006)).

⁸⁰ Federal Bureau of Prisons, *FY2018 Performance Budget: Congressional Submission: Salaries and Expenses* 30 (2017) (reporting that “[a]pproximately 40 percent of federal inmates have a diagnosed drug use disorder,” but estimating that only 16,971 inmates were projected to participate in RDAP in FY 2017 while others participated in drug abuse education or nonresidential treatment).

⁸¹ The right to challenge the scope of relevant conduct under §1B1.3 is acknowledged in §6A1.3 and Federal Rule of Criminal Procedure 32(i), but undermined by the current commentary in §3E1.1.

If the Commission proceeds with Option 2, Defenders also support, as suggested in the issue for comment, that the Commission provide additional guidance and specifically state that “the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis in either law or fact.” An even better solution, however, than either of the two options is for the Commission to remove from §3E1.1 all references to relevant conduct.

A. The Commission Should Remove from §3E1.1 All References to Relevant Conduct and Reference Only the Offense of Conviction.

The Commission requests comment on whether it should “remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense.” Defenders strongly support such an approach because looking to relevant conduct when assessing acceptance of responsibility undermines a fair and just resolution of disputed sentencing factors without serving legitimate sentencing purposes.

Defenders recommend the following changes to the commentary in §3E1.1, notes 1(A), 3, and 4:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting **the elements of the** ~~conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).~~ Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting **the elements of** ~~conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)),~~ **generally** will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. **Arguing that the government has not carried its burden of proving relevant conduct or other enhancements by a preponderance of the evidence or that the evidence does not meet the legal definition of those provisions is not inconsistent with acceptance of responsibility.** ~~A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.~~

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

The reference to relevant conduct in §3E1.1 should be removed because it does not serve the purposes the Commission originally contemplated when it promulgated the guidelines and undermines a fair and accurate sentencing proceeding. When the guidelines were first created, the Commission believed that a defendant's acceptance of responsibility was a "sound indicator of rehabilitative potential" that should be rewarded with a reduced sentence.⁸² The Commission's recent recidivism report, however, reveals that the acceptance of responsibility provision has not proven to be a "sound indicator of rehabilitative potential."⁸³ The report concluded that an adjustment for acceptance of responsibility "was not associated with lower recidivism rates."⁸⁴

The Commission included relevant conduct in the sentencing guidelines as a compromise between real and charged offense sentencing to prevent prosecutors from being able to "influence sentences by increasing or decreasing the number of counts in an indictment." See USSG Ch. 1, Pt. A, 4(a). This presumably was to promote one purpose of the guidelines—reducing unwarranted disparity. But the reference to relevant conduct in §3E1.1 undermines a defendant's ability to challenge allegations at sentencing that often have a significant impact on the guideline calculation.

The guidelines already allow an increase in sentence based on relevant conduct under the lowest standard of proof and with a low threshold of reliable evidence.⁸⁵ Thus, a prosecutor may choose

⁸² USSC, *Preliminary Draft of Sentencing Guidelines*, Ch. Three: Offender Characteristics: Post-Offense Conduct, Acceptance of Responsibility §B321, comment. (1986). See also *United States v. Garrasteguy*, 559 F.3d 34, 39 (1st Cir. 2009) (noting that acceptance of responsibility recognizes "increased potential for rehabilitation"); *United States v. Belgard*, 694 F. Supp. 1488, 1497 (D. Ore. 1988) (reduction for acceptance of responsibility recognizes "increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct"), *aff'd sub nom, United States v. Summers*, 895 F.2d 615 (9th Cir. 1990).

⁸³ USSC, *Recidivism Report*, *supra* note 51, at 21. See also *id.* at App. A-1, A-2, and A-3 (defendants who received no adjustment for acceptance of responsibility had lower rearrest, reconviction, and incarceration rates than those who received a 2- or 3-level adjustment).

⁸⁴ *Id.* at 21.

⁸⁵ See, e.g., *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) ("[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.") (citing *United States v. Clark*, 583 F.3d 803, 813 (7th Cir. 2008)).

to charge a defendant with a lesser offense only to seek a significant enhancement at sentencing based upon relevant conduct established through a de minimis form of proof.⁸⁶ For example, prosecutors often present uncorroborated hearsay evidence to probation officers that greatly increases the drug quantity for which defendants are held responsible,⁸⁷ and probation officers typically include it in the report without further investigation into its accuracy. Even when the information in the presentence report is objectively unreliable, the defense must object⁸⁸ to the government's version of the conduct and, in some circuits, the defense bears the burden of "articulat[ing] the reasons why the facts contained therein are untrue or inaccurate."⁸⁹ Due process requires an opportunity to be heard on these allegations but inclusion of relevant conduct in §3E1.1 chills that opportunity.

Including relevant conduct in §3E1.1 gives prosecutors excessive control over the plea bargaining and sentencing process by giving them a tool to discourage the defendant from challenging the government's version of the offense conduct.⁹⁰ If the defense fails to carry the

⁸⁶ See *United States v. Miller*, 910 F.2d 1321, 1331 (6th Cir. 1990) (Merritt, J., dissenting) ("The Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.").

⁸⁷ See generally Claudia Catalan, *Admissibility of Testimony at Sentencing, Within Meaning of USSG § 6A1.3, Which Requires Such Information be Relevant and Have "Sufficient Indicia of Reliability to Support its Probable Accuracy,"* 45 A.L.R. Fed. 2d 457 (originally published in 2010).

⁸⁸ See Fed. R. Crim. P. 32(i)(3)(A) (permitting court to "accept any undisputed portion of the presentence report as a finding of fact"); USSG §6A1.3 (governing opportunity of parties to object to a factor important to the sentencing determination); *United States v. McCully*, 407 F.3d 931, 933 (9th Cir. 2005) (no plain error for imposing upward enhancements for drug quantity, possession of a weapon, and obstruction of justice where presentence report set forth facts supporting enhancements and defendant did not object); *United State v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) ("failure to object to allegations of fact in a PSI admits those facts for sentencing purposes").

⁸⁹ *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990). See also, *United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) ("where a defendant's objections to a presentence investigation report are wholly conclusory and unsupported by countervailing evidence, the sentencing court is entitled to rely on the facts set forth in the presentence report"); *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997) (even though defendant objected to certain facts in the presentence report, he "did not provide the sentencing court with evidence to rebut the factual assertions" so the "court was justified in relying on the contested facts"); *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988) (approving district court's decision to accept "controverted matters in the report unless the defendant presented [contrary] evidence"). But see *United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Wilken*, 498 F.3d 1160, 1169-70 (10th Cir. 2007).

⁹⁰ The National Association of Criminal Defense Lawyers pointed out fifteen years ago that the relevant conduct provisions give "the government an opportunity to enter into plea agreements without having to carry the burden of reasonable doubt standards for the enhancement of relevant conduct issues." NACDL Sentencing and Post-Conviction Comm., Written Testimony 24-25 (Feb. 25, 1992) (Concerning United

burden of proving that the government's allegations are untrue or inaccurate and the court finds defense counsel's argument frivolous solely because the challenge was unsuccessful, the court can deny the reduction for acceptance of responsibility. The Commission should not further ease the government's burden of proof by requiring a defendant to either admit relevant conduct or take the risk of having an objection found "frivolous."

A provision that permits a court to deny a 2-level reduction because it considers a defendant's challenge to be frivolous undermines the principles of real offense sentencing. If defense counsel must make a strategic decision on whether a judge will consider a challenge frivolous and chooses not to make the challenge out of fear that the court will deny the client acceptance of responsibility, then the defendant may have to serve a sentence that does not accurately account for real offense conduct.⁹¹

Including relevant conduct also results in unwarranted disparity because courts take radically different approaches to applying the rule. This is most apparent in the disparity arising from the different interpretations of what is a "frivolous" challenge. A survey of Defenders throughout the country shows vastly different judicial views on whether a defendant's unsuccessful challenge to relevant conduct should result in a denial of the adjustment for acceptance of responsibility. Some judges do not penalize the defense for holding the government to its burden of proof on relevant conduct, whether the challenge is successful or not. Other judges, however, view an unsuccessful challenge as justifying a denial of the reduction. For example, the Seventh Circuit concluded:

Contesting the veracity of the alleged relevant conduct is no doubt permissible and often perfectly appropriate. However, if a defendant denies the conduct and

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⁹¹ Take, for example, a defendant in criminal history category I who pleads guilty to possession of marijuana with intent to distribute. He has a base offense level of 10, but faces a 2-level enhancement for possession of a dangerous weapon under §2D1.1(b)(1). If he does not contest the enhancement and is given a 2-level reduction for acceptance of responsibility, his final offense level is 10, with a range of 6-12 months in Zone B and the possibility of a probationary sentence with home confinement. If, however, defense counsel challenges the enhancement but loses, and the defendant is denied acceptance, the final offense level is 12 and in Zone C where the guidelines recommend imprisonment. Under this scenario, a defendant may forego contesting the enhancement to increase the possibility of a probationary sentence. If the facts, however, actually show that the weapon was not connected to the offense, then the sentence would not truly reflect the real offense.

Cf. Alexa Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. Ch. L. Rev. 1467, 1494 (2013) (discussing how government control over the additional 1-level reduction under §3E1.1(b) may result in an increased sentence because it creates a disincentive for the defendant to challenge relevant conduct).

the court determines it to be true, the defendant cannot then claim that he has accepted responsibility for his actions.

United States v. Cedano-Rojas, 999 F.2d 1175, 1182 (7th Cir. 1993).⁹² Even an unsuccessful challenge to the credibility of a witness has been deemed sufficient to deny a defendant credit for acceptance of responsibility.⁹³ The varying view among courts⁹⁴ as to what constitutes a “frivolous” challenge is directly contrary to the Commission’s goal of promoting the uniform application of the Guidelines.

Some appellate courts have upheld the denial based upon the district court’s disagreement with the lawyer’s argument even if the defendant stands silent. For example, in *United States v. Purchess*, 107 F.3d 1261, 1266-69 (7th Cir. 1997), defense counsel contested relevant conduct without proffering any evidence and the defendant exercised his right to remain silent. The

⁹² The defendant in *Cedano-Rojas* challenged the previous requirement that a defendant admit relevant conduct to receive the acceptance reduction, but the Guideline was amended pending his appeal to permit acceptance as long as there was no false or frivolous denial. *Cedano-Rojas*, 999 F.2d at 1181-82. Subsequent cases reaffirm the principle that a defendant who denies relevant conduct has not accepted responsibility. *See, e.g., United States v. Brown*, 47 F.3d 198, (7th Cir. 1995) (“If a defendant denies relevant conduct and the court determines such conduct occurred, the defendant cannot claim to have accepted responsibility for his actions.”); *United States v. Sandidge*, 784 F.3d 1055, 1064 (7th Cir. 2015) (affirming denial of acceptance of responsibility adjustment simply because court rejected defendant’s factual challenge to applicability of cross-reference). *See also United States v. Ratliff*, 376 F. App’x 830, 843 (10th Cir. 2010) (quoting *Brown* to uphold court’s denial of acceptance of responsibility adjustment for defendant who challenged extent of the fraud committed); *United States v. Skorniak*, 59 F.3d 750, 757 (8th Cir. 1995) (“a defendant who denies relevant conduct that the court later determines to have occurred has acted in a manner inconsistent with clearly accepting responsibility”); *Elliott v. United States*, 332 F.3d 753, 766 (4th Cir. 2003) (“a denial of relevant conduct is ‘inconsistent with acceptance of responsibility’”); *United States v. Burns*, 781 F.3d 688, 690, 693 (4th Cir.), *cert. denied*, 135 S. Ct. 2872 (2015) (defendant who pled guilty to a firearm offense argued that cross-reference to aggravated assault rather than attempted murder should apply because of insufficient evidence of mens rea; even though the defendant did not testify, the court affirmed denial of acceptance of responsibility merely because he “falsely denied” relevant conduct). *See generally* Kimberly Winbush, Annotation, *Downward Adjustment for Acceptance of Responsibility under USSG § 3E1.1—Drug Offenses*, 17 A.L.R. Fed. 2d 193 (2007 & Supp. 2016) (citing numerous cases where the defendant was denied a reduction for acceptance of responsibility because he or she contested relevant conduct).

⁹³ *See, e.g., United States v. Berthiaume*, 233 F.3d 1000, 1004 (7th Cir. 2000) (upholding district court’s decision that defendant “frivolously” contested drug quantity calculation because court rejected the challenge to the reliability of the government’s witnesses); *United States v. Jones*, 539 F.3d 895, 897-98 (8th Cir. 2008) (defendant’s unsuccessful challenge to credibility of cooperating witness was sufficient to deny acceptance of responsibility adjustment even though appellate court acknowledged that the witness was “not a strong witness” and his “testimony as to drug transactions amounts and frequency was confusing and often internally inconsistent”).

⁹⁴ *See* discussion *infra* pp. 29-30 (citing case law that shows differing judicial views on meaning of “frivolously contest”).

Seventh Circuit concluded that the “defendant and his attorney appear to have been attempting to manipulate the Guidelines” and suggested that whether the attorney proffers evidence or not, “the court can alternatively question the otherwise silent defendant to determine if the defendant understands and adopts the attorney’s statements challenging facts underlying possibly relevant conduct. . . . If the defendant does understand and agrees with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney’s argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney’s factual challenges without risking the acceptance of responsibility reduction.” *Id.* at 1267, 1269.⁹⁵ The Eleventh Circuit has encouraged denial of an acceptance of responsibility reduction when the defendant’s lawyer contested the significance of the facts set forth in the presentence report⁹⁶ or challenged the constitutionality of his convictions even after pleading guilty.⁹⁷

In sum, denying an acceptance of responsibility reduction merely because a defendant has contested relevant conduct and lost gives prosecutors undue power, undermines the concept of real offense sentencing, and creates unwarranted disparity, without adding to the assessment of a defendant’s potential for rehabilitation. Therefore, the Commission should delete from §3E1.1 any reference to relevant conduct and amend the guideline to focus on the offense of conviction.

⁹⁵ See also *United States v. Lister*, 432 F.3d 754, 759-60 (7th Cir. 2005) (following *Purchess* and denying acceptance of responsibility reduction to a defendant whose attorney challenged the chronology of events presented in the PSR; when the court questioned Lister about whether he agreed with the challenges, Lister stated that he relied on his attorney—an answer that the appellate court characterized as “legal hair-splitting, ultimately frustrating the court’s determination”); *United States v. Dong Jin Chen*, 497 F.3d 718, 720-21 (7th Cir. 2007) (following *Purchess* and denying acceptance of responsibility reduction based on the defendant contesting facts contained in the PSR that were established at sentencing hearing; rejecting argument that the defendant did not have sufficient command of the English language to be excused from his conduct); *United States v. Booker*, 248 F.3d 683, 690 (7th Cir. 2001) (affirming denial of acceptance reduction because defendant’s denial of relevant conduct was “meritless”).

⁹⁶ *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (even though district court reduced defendant’s offense level for acceptance of responsibility, the en banc court opined that the defendant’s challenge to whether evidence in the PSR established fraudulent intent was “factual”, not “legal” and would have justified denial of the reduction for acceptance of responsibility).

⁹⁷ *United States v. Wright*, 133 F.3d 1412, 1413-14 (11th Cir. 1998) (“even if the district court’s conclusion rested *exclusively* on Wright’s challenges to the constitutionality of his convictions, the district court’s refusal to reduce Wright’s offense level was permissible”).

B. Whether a Defendant is Entitled to an Adjustment for Acceptance of Responsibility Should Depend on Whether the Challenge has Either an Arguable Basis in Law or Fact, Rather Than the Court’s Assessment of Whether the Challenge Is “Frivolous” or “Non-frivolous,” Particularly Given the Chilling Effect Such an Assessment Has on a Lawyer’s Ethical Responsibilities.

If the Commission chooses to maintain the reference to relevant conduct in §3E1.1, Defenders strongly encourage the Commission to adopt Option 2 because a defendant’s eligibility for a reduction for acceptance of responsibility should not depend upon a court’s subjective assessment of frivolity.

Option 1 of the Commission’s proposed amendment to §3E1.1 does not resolve the myriad problems associated with the current wording of the guideline. The proposed language merely converts an affirmative statement about how a frivolous denial of relevant conduct is inconsistent with acceptance of responsibility into a negative statement that a non-frivolous denial does not preclude relief. The term “non-frivolous” is as subjective as the term “frivolous.”⁹⁸ Under either wording, a defendant who makes a challenge that the court deems “frivolous” is likely to be denied acceptance of responsibility. Consequently, the continued risk of losing one of the few available reductions in the length of a term of imprisonment will deter defense lawyers from “making reasonable arguments in defense of their clients.”⁹⁹

Reasonable lawyers can disagree about the legal and factual scope of relevant conduct, including disputes about whether the government’s allegations are based upon sufficiently reliable evidence, and whether the evidence presented to support an enhancement satisfies the preponderance of the evidence standard. Instructing a court to decide whether to penalize a defendant for challenging relevant conduct based upon the court’s view of whether the challenge is frivolous raises due process concerns and chills the rights of defendants to put the government to its burden of proof – a right which is recognized in §6A1.2 (allowing objections to presentence reports) and §6A1.3 (resolution of disputed sentencing factors).¹⁰⁰ And, as discussed above, it also results in unwarranted disparity.

⁹⁸ As Justice Douglas recognized, the “frivolity standard” is “elusive.” See Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 Hous. L. Rev. 747, 757 (2008) (quoting *Cruz v. Hasck*, 404 U.S. 559, 65 (1971) (Douglas, J., concurring)). The problem results from the “fine line ‘between the tenuously arguable and the frivolous.’” Further, there is a distinction between factual and legal frivolity. *Id.* (quoting *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993)) (other citations omitted).

⁹⁹ *United States v. Edwards*, 635 F. App’x 186, 197 (6th Cir. 2015) (Merritt, J., dissenting).

¹⁰⁰ The first Commissioners opined that “[t]he guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing.” William

The lack of a definition of frivolity has resulted in inconsistent application of the acceptance of responsibility reduction. As previously discussed, some courts consider “frivolous” to mean any unsuccessful challenge to relevant conduct.¹⁰¹ Other courts, however, have taken a more refined approach to the meaning of frivolous by focusing on whether the challenge “lacks an arguable basis in law or fact” or is “based on an ‘indisputably meritless legal theory.’”¹⁰² The Fifth Circuit distinguishes between a legal and a factual challenge, opining that “merely pointing out that the evidence does not support a particular upward adjustment or other sentencing calculation, does not strike us as a legitimate ground for ruling that the defendant has not accepted responsibility.”¹⁰³

Even judges within the same circuit court do not agree on the meaning of “frivolously contest.” The Sixth Circuit’s decision in *United States v. Edwards*, 635 F. App’x. 186, 188-89 (6th Cir. 2015), demonstrates the ambiguity of the term “frivolous” and explains the dilemma attorneys face in deciding whether to challenge an adjustment. Edwards pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine and 28 grams or more of cocaine base. The final PSR stated that “Edwards should receive a four-level increase under USSG §3B1.1(a) for being an organizer or leader of criminal activity that involved five or more participants, because Edwards had directed the activities of others and recruited participants for the offense.” *Id.* at 189. It also recommended a three-level reduction for acceptance of responsibility. Edwards objected to the §3B1.1 enhancement, arguing that he did not play an aggravating role and the offense did not involve five or more participants. The court disagreed and increased Edwards’ offense level by four points, pursuant to §3B1.1(a). The court also concluded that, in contesting the leadership-role enhancement, Edwards had frivolously denied relevant conduct, and therefore refused to grant Edwards a reduction for acceptance of responsibility. A panel majority on the Sixth Circuit affirmed the district court’s decision.

Judge Merritt dissented, noting that the application of the role enhancement was “debatable,” and that the lengthier sentence imposed “deter[s] defense lawyers from making reasonable arguments in defense of their clients”:

W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990).

¹⁰¹ See *supra* note 92.

¹⁰² See *United States v. Santos*, 537 F. App’x 369, 375 (5th Cir. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) and *Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995)).

¹⁰³ *Id.* at 375 (citing *United States v. Nguyen*, 190 F.3d 656, 659 (5th Cir. 1999) and finding that court erred in denying acceptance of responsibility simply because defendant objected to sufficiency of evidence supporting importation enhancement). See also *United States v. Patino-Cardnas*, 85 F.3d 1133, 1136 (5th Cir. 1996) (court improperly denied reduction for acceptance of responsibility because defendant “objected to the legal characterization of leadership role given his actions”).

The court upholds a 15-year drug sentence for a first-time offender. It does so by affirming a debatable “organizer or leader” enhancement that added many years to the sentence and then added more years by denying Edwards an “acceptance of responsibility” deduction—all because at sentencing his lawyer contested the applicability of the enhancement. The 15-year sentence is much longer than necessary to deter this first-time offender from further violations but does deter defense lawyers from making reasonable arguments in defense of their clients.

I do not believe that a criminal defendant's choice to object to the “organizer/leader” enhancement—when it was in dispute by various parties throughout the pendency of the case—is “frivolous.” A reduction for accepting responsibility is supposed to be accorded to a criminal defendant who enters a guilty plea and “truthfully admits the conduct compromising the offense.” U.S.S.G. § 3E1.1, app. n.3. At the sentencing hearing, defense counsel objected to and argued against the 4-level “organizer or leader” enhancement, but Edwards had consistently admitted the offense conduct. He admitted having contacts with the other conspirators. His counsel only disputed that those contacts demonstrated that he was an organizer or leader. Counsel did not deny any conduct. He only argued that Edwards’ conduct did not suggest a leadership role.

The evidence regarding the significance and extent of those contacts was somewhat equivocal and should have been open for debate without being deemed a “frivolous objection” to relevant conduct. Simply put, Edwards did not deny any conduct. He only denied that his conduct should be characterized as a “leadership role.”

United States v. Edwards, 635 F. App’x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting).

Judge Merritt’s acknowledgment of the deterrent effect of the court’s ruling on defense counsel’s willingness to raise arguments on behalf of a client is noteworthy. Permitting a court to deny acceptance of responsibility to a defendant based upon the court’s belief that the defense attorney presented a frivolous challenge to relevant conduct merely because the defense loses gives the court extensive power to control litigation and impinge on the lawyer’s ethical responsibilities to zealously represent his or her clients.¹⁰⁴

¹⁰⁴ See Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2165 (2003) (discussing how the acceptance of responsibility provision in the guidelines “is the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients”). See also Hadar Aviram et al., *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 Hastings Const. L.Q. 775, 822-23 (2014) (noting how judges may “extend defendant’s sentence in response” to an attorney’s “adversarial tactics that judges deem unnecessary”).

The manner in which some courts consider any unsuccessful challenge to relevant conduct as “frivolous,” makes defense attorneys face a “Hobson’s choice”¹⁰⁵: if they challenge relevant conduct, they run the risk that their client will be denied a reduction in sentence. But if they do not raise the challenge, they run the risk of being ineffective advocates.

Option 2, which eliminates variations of the term “frivolous” is better suited than Option 1 to address the problems identified above. To better ensure Option 2 remedies the problems addressed above, Defenders also encourage the Commission, as suggested in its Issue for Comment, to “state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lack an arguable basis either in law or in fact.” Because some courts have previously determined lack of success disqualifies a defendant from an acceptance of responsibility adjustment, it would be helpful to include explicit language making clear that lack of success is not determinative.

C. The Commission Should Not Include in §3E1.1 Any Reference to Departures/Variations or Informal Challenges to Relevant Conduct.

The Commission requests comment on whether it should reference “informal challenges” to relevant conduct or “broaden the proposed provision to include other sentencing considerations, such as departures or variances.” Defenders believe that the Commission should refrain from adding more ambiguity, further complicating the guideline, and hindering a defendant’s due process rights to contest factual and legal allegations relevant to the court’s final sentencing decision. Mentioning in §3E1.1 informal challenges to relevant conduct, departures, or variances would suggest to the court that it may deny acceptance of responsibility if the defendant objects to a sentence toward the high end of the guideline range or an upward departure or variance and the court finds the objection has no arguable basis under Option 2 or is frivolous under Option 1. If the government alleges facts to call for a sentence at the high end of the guideline range, to refute a request for a downward departure or variance, or seeks an upward departure or variance, the defendant should have an absolute right to contest it without fear that the court may use an unsuccessful challenge to further penalize him or her by denying a reduction for acceptance of responsibility.

V. Proposed Amendment #5: Miscellaneous

A. Parts A-C

Defenders have no objection to the miscellaneous amendments in response to the Transnational Drug Trafficking Act of 2015, International Megan’s Law, and the Chemical Safety Act.

¹⁰⁵ Cf. Newton, *supra* note 98, at 752 (discussing Hobson’s choice lawyers must make in raising *Almendarez-Torres* claims).

In the future, the Commission should revisit the 6-and 8-level enhancements under §2A3.5(b)(1), which apply “[i]f, while in failure to register status, the defendant committed” “a sex offense against someone other than a minor,” “a felony offense against a minor not otherwise covered by subdivision (C),” or “a sex offense against a minor.” Those enhancements apply when the court finds by a preponderance of evidence, and with evidence that need not comply with the Federal Rules of Evidence, that the defendant committed a specified offense.¹⁰⁶ To ensure greater due process protections for enhancements that can result in a 310% increase in sentence, the enhancement should be limited to individuals who were actually convicted of committing a specific offense while in failure to register status.

B. Part D: Computer Enhancement at §2G1.3

The Commission proposes amending the commentary regarding the computer enhancement at §2G1.3(b)(3) to specify that commentary note 4 applies only to subpart (A) of the computer enhancement (using a computer to “persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct”), and not to subpart (B) (using a computer to “entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor”). Defenders propose a different approach to this issue, and encourage the Commission to eliminate the computer enhancement at §2G1.3(b)(3) and related commentary entirely, or at least eliminate the enhancement in subpart (B) regarding solicitation.

We recommend eliminating or shrinking the scope of the computer enhancement because it fails to distinguish among defendants. As the Commission has noted in the context of a different guideline, changes in computer and Internet technologies used by typical defendants can affect whether a sentencing scheme adequately distinguishes among defendants.¹⁰⁷ The computer enhancement at §2G1.3(b)(3), similar to the computer enhancement at §2G2.2(b)(6) because it applies to so many defendants, fails to “differentiate among offenders in terms of their culpability.”¹⁰⁸ Last year, the computer enhancement at §2G1.3(b)(3) (either subpart (A) or (B)) was applied to 81.3% of defendants sentenced under §2G1.3.¹⁰⁹ The rate for subpart (B) alone was 48.8%.¹¹⁰ At the same time, the rate of within guideline sentences for this guideline fell to 41.1% with more than half (53.6%) of defendants sentenced below the guideline recommended

¹⁰⁶ See *United States v. Lott*, 750 F.3d 214, 220-21 (2d Cir. 2014) (guideline does not require a conviction for enhancement to apply); *United States v. Romeo*, 385 F. App’x 45, 49 (2d Cir. 2010) (relying on allegations in presentence report to uphold enhancement by a preponderance of the evidence).

¹⁰⁷ USSC, *Report to Congress: Federal Child Pornography Offenses* ii (Dec. 2012).

¹⁰⁸ *Id.* at iii.

¹⁰⁹ USSC, *Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2016*.

¹¹⁰ *Id.*

range.¹¹¹ Computer enhancements, particularly for solicitation, are out-of-date in this digital era, and fail to adequately distinguish among defendants.

VI. Proposed Amendment #6: Marihuana Equivalency

Defenders do not object to the Commission’s proposal to change the term “marihuana equivalency” to “converted drug weight” or the name of the “Drug Equivalency Tables” to “Drug Conversion Tables.” We believe, however, that the Commission should amend the guideline commentary to explain the change. The term of art – “marihuana equivalency” – has been used in the guidelines, and case law interpreting the guidelines, since 1991 when the Commission opted to “simplif[y] the application of the Drug Equivalency Table by referencing the conversions to one substance (marihuana) rather to four substances.” USSG App. C, Amend. 396, Reason for Amendment (Nov. 1. 1991). To facilitate future legal research, it would be helpful for the Commission to explain the change in the commentary on Use of Drug Conversion Tables in addition to the Reason for Amendment. We recommend explanations in both places based on our experience that many practitioners are not as familiar with Appendix C to the guidelines, and are more likely to read the commentary and notice changes made to the manual itself. While such repetition may not be necessary with every amendment, because of the long reliance on this term of art in a heavily used and litigated guideline, we recommend it in this instance.¹¹²

Specifically, Defenders suggest that the Commission add an explanation for the change at the beginning of §2D1.1, comment. (n. 8) – Use of Drug ~~Equivalency~~ **Conversion** Tables:

Background: The Drug Conversion Table was previously named the Drug Equivalency Table. The base offense levels for drugs that were not listed in the Drug Quantity Tables were originally determined by using the Drug Equivalency Table to convert the quantity of the controlled substance involved to its marihuana, heroin, and cocaine equivalency. In 1991, the Commission amended the guidelines to use a single conversion factor – “marihuana equivalency,” which was meant to simplify application of the guidelines. USSG App. C, Amend. 396 (Nov. 1, 1991). In 2017 the Commission replaced the term “marihuana equivalency” with a more generic term: “converted drug weight.” USSG App. C, Amend. ____ (Nov. 1, 2018).

VII. Proposed Amendment #7: Technical

Defenders have no objections to most of the technical amendments proposed by the Commission. We do, however, question the Commission’s proposed clerical changes to the commentary to Ch.

¹¹¹ USSC, *2016 Sourcebook of Federal Sentencing Statistics* tbl. 28.

¹¹² A Westlaw search of the terms “(marijuana marihuana) /1 equivalen! & guideline” identified 1,223 cases and 71 secondary sources (search conducted Oct. 2, 2017).

Honorable William H. Pryor, Jr.

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2 guidelines captioned “Statutory Provisions.” The guideline commentary for each Chapter 2 offense does not consistently refer to all statutes referenced to a particular guideline in the statutory index. And some commentary adds a reference to Appendix A for additional statutory provisions whereas others do not. To simplify the guidelines, and lessen the commentary, the statutory references need only appear in Appendix A. Accordingly, Parts C (4), (5), (6), and (7) of the Technical Amendments are not necessary. The better course of action is to delete the reference to “Statutory Provisions” from all of the Chapter 2 commentary.

VIII. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission’s proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,
/s/ Marjorie Meyers
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures

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Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary Bolitho, Commissioner *Ex Officio*
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**RE: Response to Request for Comment on Holdover Proposals from
Previous Amendment Cycle**

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's (August 17, 2017) request for comment on several holdover proposals from the previous amendment cycle and otherwise incorporates by reference its February 20, 2017 letter to the Commission commenting on proposed amendments. The PAG's February 20, 2017 letter is attached for the Commission's convenience.

I. PROPOSED AMENDMENT: FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

(A) Definition of First Offender

The PAG supports the Commission's proposed U.S.S.G. § 4C1.1 (First Offender) guideline but, as to the definition of first offender, **the PAG supports** Option 1, which defines a first offender as a person with no criminal history points (*i.e.*, no prior convictions countable under U.S.S.G § 4A1.2).¹

¹ If the Commission determines that the definition of a "first offender" should be limited to persons with no convictions, **the PAG recommends** that this definition be restricted to no *felony* convictions and that an Application Note to U.S.S.G. § 5C1.1 be added to clarify that U.S.S.G. § 5C1.1(g) is not intended to restrict a court's consideration of alternatives to incarceration only to "first offenders" so defined.

As we noted before, the Commission's research supports the position. In 2004, the Commission evaluated three proposed first offender groups: offenders having no prior arrests; offenders previously arrested but not convicted; and offenders with prior convictions which did not count towards criminal history. The Commission found that all three of these offender groups:

are readily distinguishable from offenders with one or more criminal history points . . . [who] are more likely to have committed a fraud or larceny instant offense. [These three offender groups] have less violent instant offenses, receive shorter sentences, and are less likely to go to prison. They are less likely to use illicit drugs, more likely to be employed, more likely to have a high school education (or beyond), and more likely to have financial dependents. . . [and] compared to other Guideline offenders, have instant offenses that are less culpable and less dangerous.²

In addition, because the Commission's and others'³ recidivism studies show that length of incarceration has relatively little effect on recidivism, **the PAG also recommends** that the first offender Chapter Two reduction not be limited to defendants under a specified offense level. Research consistently shows that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Any "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," *i.e.*, severity of a possible sentence does not deter.⁴ It follows that wholesale elimination of eligibility for first offender status based on overall offense level is unwarranted. While certain cases may merit a more significant term of incarceration based on the analysis of all § 3553(a) factors, the sentencing court is best positioned to make that determination on a case-by-case basis.

² U.S. Sentencing Comm'n., "Recidivism and the 'First Offender'" ("2004 Study") at 11 (2004), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

³ *See, e.g.*, Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 28-29 (2006) ("Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence."); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 447-48 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.").

⁴ Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, at 1-2 (1999), summary available at <http://members.multimania.co.uk/lawnet/SENTENCE.PDF>.

As for the decrease in offense level, **the PAG supports** moving more low-level offenders into sentencing ranges that will expand the pool of defendants eligible for alternatives to incarceration at the court's discretion. **The PAG supports** Option 2 but **the PAG recommends** that a larger deduction be granted to first offenders when the offense level is 16 or higher. Specifically, **the PAG suggests** a 2-level reduction for offense levels less than 16, and a 3-level reduction for offense levels at and greater than 16.

Finally, if the Commission adopts a rebuttable presumption in favor of the first offender provision, **the PAG recommends** that this provision should not exclude certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenders recidivate at higher rates and sooner than their non-violent counterparts,⁵ there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.⁶

(B) Consolidation of Zones B and C in the Sentencing Table

The PAG supports the consolidation of Zones B and C so that courts may, if appropriate, consider imposing community and home confinement alternatives after a lesser term of imprisonment for defendants who would have fallen within Zone C and who are otherwise ineligible for probation.

II. PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

The Commission proposed two options for amending the Commentary to U.S.S.G. § 3E1.1 (Acceptance of Responsibility) to “clarify how a defendant’s challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility.” The first states that “a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction.” The second explains that “a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.” See Proposed Amendments at 41-42. **The PAG does not support** either of these options, as each severely undermines defense counsel’s ability to make legal challenges to relevant conduct that could impact a defendant’s final Guidelines range.

⁵ See 2017 Data Presentation at 20-21.

⁶ See Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995).

In its February 20, 2017 letter commenting on this Guideline, the PAG previously explained that it

supports the goal of including language that affirmatively acknowledges the right of a defendant to challenge factually a relevant conduct proposal in a presentence report or a government submission, we think it equally important to acknowledge that many challenges to the inclusion or consideration of relevant conduct are legal, not factual, challenges.

The amended Guideline should allow broad deference to defense counsel to assert legal challenges without causing their clients to risk acceptance of responsibility credit. After all, such legal defenses are almost always attributable to the lawyer, not the client, and say nothing about the client's acceptance of responsibility. Equally important, much of what is now considered established law was once considered novel legal argument, which perhaps some judge even would have characterized as "frivolous" in an earlier era (*e.g.*, the right to exclude a statement in the absence of *Miranda* warnings, the advisory nature of the Guidelines, etc.). Thus, the PAG proposes that the Commission modify the Application Note to make clear that a defendant's eligibility for acceptance of responsibility should not be tied to the perceived quality of his lawyer's legal arguments, and instead, to clarify that the reference to potentially "frivolous" challenges that might entitle a judge to deny acceptance of responsibility credit is limited to "frivolous" factual challenges.

Letter from PAG to Hon. William H. Pryor at 14 (Feb. 20, 2017). Neither of the Commission's proposed options address the PAG's concerns; both would limit a defendant's attorney from making legal challenges to relevant conduct, because a sentencing court could determine that a legal challenge is frivolous or lacks an arguable basis. Providing definitional context to "non-frivolous" or "lacks an arguable basis either in law or in fact" would not address the PAG's objection, as definitions will do little to solve the inherent problem of discouraging defense counsel from making legal challenges to relevant conduct. As the PAG stated in its July 25, 2016, letter:

There simply is no need, and no basis in fundamental fairness, to include language in commentary notes 1(A) and (3) that invites judges to characterize a challenge to a government's version of the offense as a "false denial," or a "frivolous" challenge. Because such "findings" regarding a defendant's challenge of the evidence are made under the lowest standard of proof, and subject to the highest level of appellate deference, the inevitable effect is to chill the rights of defendants to put the government to its proof, as is the defendant's right.

See Letter to Honorable Patti B. Saris at 28 (July 24, 2016).

Accordingly, **the PAG respectfully suggests** that the Commission reconsider the PAG's previous proposal to modify the Commentary in Application Note 1(A) to provide:

“In addition, a defendant who makes a legal challenge or a non-frivolous factual challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a).”

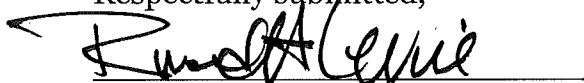
See Letter from PAG to Hon. William H. Pryor at 14 (Feb. 20, 2017). The PAG believes that this language more clearly permits legal challenges to relevant conduct without risking the loss of credit for acceptance of responsibility.

In addition, the Commission invited comment on whether it should, “instead of adopting either option in the proposed amendment, remove from U.S.S.G. § 3E1.1 all references to relevant conduct for which the defendant is accountable under U.S.S.G. §1B1.3, and reference only the elements of the offense of conviction?” See Proposed Amendments at 44. **The PAG supports** removing all references to relevant conduct from U.S.S.G. § 3E1.1. This would ensure that sentencing courts across the country apply U.S.S.G. § 3E1.1 uniformly and that defendants across the country are treated similarly for purposes of receiving credit for acceptance of responsibility. Judges and lawyers can disagree about what constitutes a valid legal challenge, and lawyers advocating for defendants should not have to err on the side of remaining silent because they are concerned that their clients will lose credit for accepting responsibility. Defense counsel should be free to make legal arguments regarding the scope of relevant conduct for which their clients are liable, without concern that their client may receive a higher sentence if their challenge is not successful.

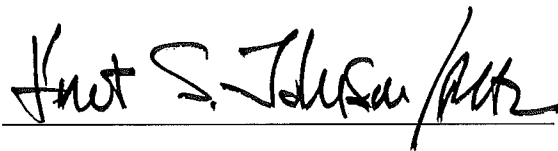
CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG’s input regarding the Commission’s proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,



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RE: Response to Request for Comment on Proposed Amendments to the Sentencing Guidelines Issued on December 19, 2016

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's request for comment on proposed Guideline Amendment Numbers 1 through 8.¹

A. Proposed Amendment Number 1 - First Offenders/Alternatives to Incarceration

The PAG supports the Commission's efforts to reduce terms of incarceration and encourage alternatives to incarceration for "first offenders" but recommends specific modifications which we believe are consistent with the policy objectives of this amendment.

1. First Offenders

Part A, at § 4C1.1 (First Offenders), sets forth a new Chapter Four Guideline that would provide lower Guideline ranges for "first offenders" and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (as compared with other offenders falling within Criminal History Category I). This amendment is consistent with

¹ The PAG has no comment on proposed Amendment Number 9 – Technical.

both the Commission’s empirical analysis of recidivism data and first offenders,² and the mandate of 28 U.S.C. § 994(j) which directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

The new Chapter Four Guideline would define first offender to include defendants who (1) do not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2) have no prior convictions of any kind. The proposed amendment then sets forth two offense level adjustment options:

Option 1 provides a decrease of [1] level from the offense level determined under Chapters Two and Three.

Option 2 provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

The PAG offers the following comments and suggested modifications.

a. Definition of First Offender.

The PAG recommends that the Commission should broaden the scope of the term “first offender” to include defendants who have a criminal history score of zero and who have no prior *felony* convictions. In its most recent recidivism study, the Commission found that an individual’s criminal history, as calculated under the federal sentencing Guidelines, “was closely correlated with recidivism rates.”³ Re-arrest rates were also at their lowest for those in the lowest criminal history category. *Id.* Where the Commission’s ongoing research continues to support the conclusion that an individual’s criminal history score is a reliable predictor of recidivism, only prior felony convictions should preclude first offender status when an individual’s criminal history score is zero.

The Commission’s earlier research supports this position. In 2004, the Commission evaluated three proposed first offender groups: one with offenders having no prior arrests, the second with offenders previously arrested, but not convicted; and the third with offenders with prior convictions which did not count towards criminal history. The Commission found that individuals in the three proposed first offender groups:

are readily distinguishable from offenders with one or more criminal history points...They are more likely to have committed a fraud or larceny instant offense.

² See U.S. Sentencing. Comm’n., “Recidivism Among Federal Offenders: A Comprehensive Overview” (“2016 Study”) at 18 (2016), *available at* <http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview>.

³ *Id.* at 5.

They have less violent instant offenses, receive shorter sentences, and are less likely to go to prison. They are less likely to use illicit drugs, more likely to be employed, more likely to have a high school education (or beyond), and more likely to have financial dependents. Finally, offenders in groups A, B, and C, compared to other Guideline offenders, have instant offenses that are less culpable and less dangerous.⁴

The Commission's recent data analysis also provides support for the PAG's position. Individuals with no criminal history at all had only a 14.7% reconviction rate; the reconviction rate for those with prior criminal justice contact without a conviction counting toward criminal history was only slightly higher, at 21.8%. Re-incarceration rates were 4.1% and 7.4%, respectively.⁵ Finally, defining "first offender" as a person with no criminal history points and who has never been convicted of a felony finds support in state first offender statutes.⁶

b. Application of the First Offender Adjustment.

The PAG recommends that the first offender adjustment reduction not be limited to defendants under a specified offense level as determined under Chapters Two and Three. The Commission's recidivism studies show that length of incarceration has relatively little effect on recidivism. Except for very short sentences (less than 6 months), the rate of recidivism changes very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, and 55.5% for sentences between 5 to 9 years).⁷ This data is consistent with earlier research showing that long prison terms have little impact on public safety outcomes. The National Research Council, for example, concluded in a 2014 report that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."⁸

⁴ U.S. Sentencing Comm'n., "Recidivism and the 'First Offender'" ("2004 Study") at 11 (2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

⁵ U.S. Sentencing Comm'n., "Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment" ("2017 Data Presentation") at 20 (2017), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20161209/20160109_DB_alternatives.pdf.

⁶ See, e.g., Georgia First Offender Act 42-8-60 (a "first offender" is defined as, *inter alia*, a person who has never been convicted of a felony or previously sentenced as a First Offender); Wyoming §7-13-301.

⁷ See 2016 Study at 22.

⁸ National Research Council, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" at 156 (2014), available at <https://www.nap.edu/download/18613>.

Other research has consistently shown that while the certainty of being caught and punished has a deterrent effect, “increases in severity of punishments do not yield significant (if any) marginal deterrent effects.”⁹ Any “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance,” *i.e.*, there was no basis to connect severity of a sentence with deterrence.¹⁰

It follows that wholesale elimination of eligibility for first offender status based on overall offense level is unwarranted. First offender offense level reductions should apply to all offense levels to allow the sentencing judge flexibility in selecting an appropriate punishment. While certain cases may merit a more significant term of incarceration based on the analysis of all § 3553(a) factors, the sentencing court is best positioned to make that determination on a case-by-case basis, as allowed by the rebuttable presumption in the Guideline.

c. Amount of First Offender Adjustment.

The PAG supports Option 2 but **the PAG recommends** that a larger deduction be granted to first offenders when the offense level is 16 or higher. Specifically, the PAG suggests a 2-level reduction for offense levels less than 16, and a 3-level reduction for offense levels at and greater than 16. This would expand the pool of defendants eligible for alternatives to incarceration at the court’s discretion.

2. Consolidation of Zones B and C in the Sentencing Table

The proposed amended § 5C1.1(g) provides that the court ordinarily should impose a sentence other than a sentence of incarceration if: (1) the defendant is determined to be a first offender under § 4C1.1 (First Offender); (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense]; and (3) the Guideline range applicable to that defendant falls within Zone A or Zone B of the Sentencing Table.

a. Availability of Alternatives to Incarceration.

The PAG supports the expansion of Zone B as proposed, but **the PAG recommends** that § 5C1.1(g) be clarified to avoid the presumably unintended result of fewer offenders being

⁹ Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) (“Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence.”); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) (“[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.”).

¹⁰ Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, at 1-2 (1999), *summary available at* <http://members.multimania.co.uk/lawnet/SENTENCE.PDF>.

potentially viewed as eligible for alternatives to incarceration. As noted above, Criminal History Category I includes defendants with convictions that do not result in any Criminal History points. Because the proposed definition of “first offenders” is limited to those with no convictions of any kind, § 5C1.1(g) can be read to exclude from alternatives to incarceration Category I defendants who are not “first offenders” under this proposed definition. Of course, limiting availability to those with no convictions of any kind, whether or not scoreable, would produce a relatively small pool of eligible offenders. It would result in less use of alternatives to incarceration, rather than more. **The PAG recommends** adding an Application Note to § 5C1.1 clarifying that § 5C1.1(g) is not intended to restrict a court’s consideration of alternatives to incarceration only to “first offenders.”

b. Application of Rebuttable Presumption.

The PAG recommends that the Commission should not limit the application of the rebuttable presumption by excluding certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenses should be excluded from the benefit of a first offender reduction, as violent offenders recidivate at higher rates and sooner than their non-violent counterparts,¹¹ there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.¹²

The “implementation of a first offender provision will not only impact a large percentage of the federal caseload, [] it will proportionally benefit offenders in certain demographic, social, personal, and offense categories.”¹³ However, this can only be so if the provision is applied to all categories of non-violent offenses. Wholesale exclusion of certain categories of offenses would only serve to significantly limit the application and concomitantly the benefits of the first offender provision.

The Commission’s research shows that almost half of the individuals eligible for first offender status are sentenced under the fraud or theft Guidelines.¹⁴ Additional lines drawn between categories of non-violent crimes neither is indicated nor would it serve the intended

¹¹ See 2017 Data Presentation at 20-21.

¹² See Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995).

¹³ 2004 Study at 11.

¹⁴ 2004 Study at 9.

purpose of the first offender provision, as alternatives to incarceration are already underutilized.¹⁵

B. Proposed Amendment Number 2 - Tribal Issues

1. Tribal Court Convictions

The PAG supports the Commission's recognition that tribal court convictions should not be assigned criminal history points and that only some, and certainly not all, tribal court convictions may warrant consideration for an upward departure. The PAG supports the amendment of § 4A1.3, as recommended by the TIAG, to provide guidance and a more structured framework for courts to consider when determining whether a departure is appropriate.

The PAG makes the following comments and recommendations regarding the proposed amendment:

a. **The PAG recommends** that proposed Application Note 2(C) be modified to the effect that a threshold finding either of (1) the absence of due process or (2) a conviction based on the same conduct that formed the basis for another conviction which is counted for criminal history points would bar the use of a tribal court conviction for an upward departure.

b. **The PAG recommends** that the last clause of the preamble to proposed Application Note 2(C), which currently reads "...and in addition, may consider relevant factors such as the following:....", be modified to read:

"...and, in addition, **should** consider **the presence or absence of** relevant factors such as the following:...."

The PAG makes these recommendations to emphasize that because tribal convictions may not be a reliable basis for departure, the sentencing court *should* first consider whether these factors exist.

c. The PAG recognizes the importance of tribal government communication regarding the weight to be given to tribal convictions. How, when and with whom this should be done is unclear. If this provision is to remain within the proposed amendment, **the PAG recommends** that the Commission encourage the development of a protocol by which a tribal government could satisfy this provision with timely notice to all parties and the sentencing court.

¹⁵ See U.S. Sentencing Comm'n., "Alternative Sentencing in the Federal Criminal Justice System" at 3 (Jan. 2009), *available at* http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

2. Court Protection Orders

The PAG supports defining “court protection order” to clarify that the phrase includes tribal court protection orders which meet certain due process requirements. To accomplish this, **the PAG recommends** a slight change in the language of the proposed amended Application Note 1(D), which currently reads “**court protection order**” means any “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b),” be modified to read:

“**court protection order**” means any “protection order” that meets the definition of 18 U.S.C. §2266(5), as long as the protection order also meets the requirements of 18 U.S.C. §2265(b).”

The PAG does not support a general Chapter 3 adjustment for violations of protection orders. Such an adjustment is not needed for the bulk of cases in which a protection order violation may be of concern. The assault and threat-related Guidelines, found for example in §§ 2A1.4, 2A1.5, 2A2.1(b), 2A2.2(b)(3), (b)(4) and (b)(6), 2A2.3(b)(1), 2A6.1(b)(3), 2A6.2(b)(1), already either have extremely high offense levels, an applicable adjustment for degree of injury or injury to a partner, or an adjustment for violation of protection orders.

The PAG recommends further consideration by the Commission of other Guidelines in which a violation of a court protection order as a specific offense characteristic should replace existing specific offense characteristics that are less predictive of recidivism. For example, the Commission might eliminate the specific offense characteristic currently at § 2 G2.2(b)(6) (use of a computer to view child pornography) that applies to almost every defendant and that has no connection to recidivism, with an adjustment for possessing an image of a child who is the subject of a court protection order (which tends to suggest a more likely chance of recidivism). The PAG believes that further study would be warranted, however, to determine which, if any other Guidelines should be considered for such an adjustment.

C. Proposed Amendment Number 3 - Youthful Offenders

The PAG supports Proposed Amendment 3 which eliminates consideration of juvenile adjudications for any purpose. The PAG also supports the downward departure language proposed for the Commentary. The Amendment reflects the scientific consensus, cited by the Supreme Court, that even normal adolescents “have less control, or less experience with control, over their own environment” than adults and that because of that immaturity, their “irresponsible conduct is not as morally reprehensible as that of an adult.”¹⁶

However, **the PAG recommends** that the Amendment should be more expansive per the recommendations set forth in the PAG’s *Response to Request for Comment on Proposed*

¹⁶ *Ropers v. Simmons*, 543 U.S. 551, 569-570 (2005) (citations omitted); *Graham v. Florida*, 560 U.S. 48, 68 (2010); see *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

Priorities for the Guideline Amendment Cycle Ending May 1, 2017 at 25 (July 25, 2016). For the following reasons, **the PAG recommends** that any offense committed prior to age 18 – whether sentenced as a juvenile or as an adult – should not be included in calculating a defendant’s Criminal History score:

- First, assigning criminal history points when a juvenile is sentenced as an adult in the underlying jurisdiction ignores the substantial evidence that, regardless of whether the proceeding was “adult” or “juvenile,” those under 18 bear lesser culpability for their actions.¹⁷
- Second, state jurisdictions have different practices with respect to when individuals under the age of 18 are sentenced as “adults.”¹⁸ As a result, similarly situated defendants may end up with substantially different criminal history scores, simply by virtue of different state rules concerning the treatment of juvenile offenses. Unwarranted disparities in sentencing are precisely what the Guidelines were designed to avoid.
- Third, juvenile offenders in many state jurisdictions are technically sentenced as adults – triggering points under Chapter 4 – but are nonetheless subject to the protections of the state’s juvenile court system.¹⁹

Further, for the same reasons that the PAG does not support using such convictions for calculating criminal history points, the PAG does not support adding an upward departure for juvenile convictions under § 4A1.3. Without a similar amendment that addresses youthful age as a mitigating factor when sentencing an offender, the PAG believes that permitting such upward departures would disregard the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late 20's.

¹⁷ *Gall v. United States*, 552 U.S. 38, 58 (2007).

¹⁸ *See, e.g., United States v. Moorer*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not “permit a judge to impose a juvenile ‘sentence’ based on an adult conviction for a crime” is “in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction”); *United States v. Clark*, 55 F. App’x 678, 679 (4th Cir. 2003) (noting that there is a “West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent,” but that “North Carolina has no analogous statutory provision”).

¹⁹ *See, e.g., United States v. Jones*, 260, 264 (2d Cir. 2005) (noting that “[y]outhful offender status carries with it certain benefits, such as privacy protections,” and “New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing,” yet federal courts have “still found it appropriate to consider the adjudications for federal sentencing purposes”).

Finally, if the Commission accepts the PAG's position seeking the elimination of all criminal history points for offenses committed before the age of 18, and opposing an upward departure based on such offenses, there would be no necessity for a downward departure for cases in which a juvenile has been sentenced as an adult, because those offenses would never be counted. In sum, the PAG supports the elimination of counting juvenile adjudications, but urges the Commission to eliminate the counting of any sentence for an offense committed before the age of eighteen.

D. Proposed Amendment Number 4 – Criminal History Issues

The PAG supports the Commission's proposal to amend § 4A1.2(k) to provide that:

Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

The PAG believes that the current regime, which increases offenders' criminal history points based on revocation sentences, can result in excessive terms of incarceration. The Commission's proposed amendment is a well-informed change in accord with the findings of its multi-year study on recidivism in the federal justice system²⁰ and the Commission's study of revocation sentences.

The *Introductory Commentary* to Chapter Four, Part A, emphasizes patterns of *criminal* behavior in discussing criminal history:

A defendant with a record of **prior criminal behavior** is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that **repeated criminal behavior** will aggravate the need for punishment with each recurrence. . . . **Repeated criminal behavior** is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and **patterns of career criminal behavior**. (emphasis added).

By contrast, many revocations result from violations of conditions of release that do not constitute criminal conduct (*e.g.*, failure to report, failure to fulfill financial obligations, failure to comply with instructions of probation officer, association with prohibited persons, etc.). Indeed, the 2016 Study revealed that most individuals who were re-arrested for revocation of supervision

²⁰ U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" (2016), *available at* <http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview>.

were not convicted of any crime. Since many revocation sentences are not imposed upon criminal convictions, accounting for them in computing criminal history points is inconsistent with the Commentary. Therefore, the PAG does not support an approach that would count revocation sentences in determining criminal history points.

With one modification, the PAG also supports the portion of the proposed amendment that would provide that revocation sentences may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). **The PAG recommends** that the Commission limit consideration of revocation sentences under § 4A1.3(a) to those which are based on criminal conduct. Consideration of revocation sentences based on criminal conduct is consistent with the types of information currently listed in § 4A1.3(a)(2) (*e.g.*, prior similar adult criminal conduct not resulting in a criminal conviction, and prior sentences resulting from foreign and tribal convictions).

The PAG also recommends that § 2L1.2 should be amended to conform to the proposed amendment to § 4A1.2(k). Specifically, the last sentence of Application Note 2, defining “*Sentence imposed*,” should be deleted.

For several reasons, the PAG also supports Part B of the Commission’s proposed amendment to § 4A1.3, which would amend the Commentary to provide that a downward departure from the defendant’s criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. First, this would encourage recognition of the fact that the severity of a defendant’s prior conduct may be more accurately measured by the length of time actually served rather than by the length of the sentence imposed, without putting the onus on probation officers to determine actual time served in each case. Second, the time a prisoner serves for a particular sentence varies wildly from state to state. Judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using time actually served in custody, rather than the sentence imposed, may reduce “unwarranted sentencing disparities”²¹ when sentencing offenders with identical prior convictions from different states.

The PAG thinks it is impractical to exclude from downward departure consideration cases in which the time served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant’s case. The PAG believes that this is an administratively unworkable distinction, because time served is inextricably intertwined with the facts and circumstances of a defendant’s case. For example, if an institution granted inmates early release in order to minimize overcrowding or due to state budget concerns, the criteria used to identify the individuals to be released would in all likelihood have some nexus to the facts and circumstances of the inmates’ particular cases.

²¹ 28 U.S.C. § 991(b)(1)(B).

E. Proposed Amendment Number 5 – Bipartisan Budget Act

The Bipartisan Budget Act of 2015 amended 42 U.S.C. §§ 408, 1101 and 1383a, to add new conspiracy offenses to each statutory provision. *See* 42 USC §§ 408(a)(9), 1011(a)(5), 1383a(a)(5). The Commission proposes to reference these new conspiracy offenses to § 2X1.1. The PAG agrees.

The Act also increased the statutory maximum from five years to ten years in prison for a person “who receives a fee or other income for services performed in connection with” a determination for Social Security benefits, or “is a physician or other health care provider who submits or causes the submission of medical or other evidence in connection with any such determination” 42 U.S.C. §§ 408(a), 1011(a), 1383a(a).

The Commission proposes to amend § 2B1.1 by adding 2 or 4 levels and/or an offense level floor of 12 or 14 for defendants convicted under §§ 408(a), 1011(a), or 1383a(a) who are subject to the 10-year statutory maximum, *i.e.*, defendants who receive a income for services performed in connection with any determination Social Security benefits, or who are health care providers who submit, or cause the submission of, evidence in connection with Social Security benefits determinations. The Commission seeks comment on whether the applications notes should be amended to address interaction between these proposed specific offense characteristics and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

The PAG recommends that the Commission not adopt either this additional offense characteristic or offense level floor. The Guidelines already adequately address the subset of Social Security fraud cases that are subject to the higher statutory maximum. In addition, there is no need to create additional specific offense characteristics in § 2B1.1, where the § 3B1.3 adjustment for abuse of trust or special skill already exists to further penalize – if applicable – defendants who are paid to provide Social Security benefit-related services or health care providers who submit Social Security benefit-related evidence. As recognized by myriad stakeholders, § 2B1.1 already is overly complicated, unwieldy, and, due to Guidelines “creep”, can result in harsh sentencing range calculations.²² With regard to these Social Security

²² *See, e.g., United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of “substantially overlapping 39 enhancements” at the high end of the fraud sentencing table); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (Guidelines in security fraud cases “are patently absurd on their face” due to the “piling on of points” under § 2B1.1); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (Guidelines in fraud cases have “so run amok that they are patently absurd on their face,” and describing enhancement for “250 victims or more,” along with others, as “represent[ing], instead, the kind of ‘piling-on’ of points for which the Guidelines have frequently been criticized”); accord Alan Ellis, John R. Steer, Mark Allenbaugh, “At a ‘Loss’ for Justice: Federal Sentencing for Economic Offenses,” 25 *Crim. Just.* 34, 37 (2011) (“the loss table often overstates the actual harm suffered by the victim,” and “[m]ultiple, overlapping enhancements also have the effect of ‘double counting’ in some cases,” while “the

offenses, the PAG is unaware of any research or sentencing data suggesting that the Guidelines fail to recommend sufficiently lengthy sentences. To the contrary, analysis of the Commission’s data indicates that Guideline recommendations in this area are frequently too high.²³

Given the absence of data suggesting that sentences are too low for this category of cases, further tinkering with § 2B1.1 is unnecessary. If, however, the Commission feels a need to differentiate these new cases from other forms of Social Security fraud, changes to the Guidelines should be, at most, incremental. In that case, **the PAG recommends** that the Commission only adopt the proposed 2-level enhancement and make clear that: (a) it applies only to those defendants who are convicted of committing the offenses subject to the 10-year statutory maximum; and (b) if applied, 3B1.3 would not be applicable. This would allow the Commission to isolate and analyze cases brought under the new provisions and use that information to tailor any further proposals to actual experience and demonstrated need.

F. Proposed Amendment Number 6 – Acceptance of Responsibility

The PAG supports the Commission’s view that § 3E1.1 should be amended to clarify that a defendant who pleads guilty, and accepts responsibility for the offense of conviction, nonetheless may make a good faith challenge to the inclusion of relevant conduct without risking the loss of acceptance of responsibility credit under that Guideline. The proposed amendment would add the following new sentence at the end of Application Note 1(A):

“In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a).”

The PAG believes, however, that the specific wording of the proposed amendment has the potential for ambiguity and recommends a modification below.

1. Justification for the Amendment Generally

Part of the need for the proposed amendment is apparent from a tension within the Guideline itself. On the one hand, the focus of § 3E1.1 and its Commentary appears to be on

Guidelines fail to take into account important mitigating offense and offender characteristics.”); Justice Stephen Breyer, “Federal Sentencing Guidelines Revisited,” 11 Fed. Sent’g Rep. 180, 1999 WL 730985, at *11 (1999) (“false precision”).

²³ In 2016, the Federal Public and Community Defenders analyzed sentencing data collected and maintained by the Commission for sentences imposed under each of the statutes at issue. *See* Comments, Federal Defender Sentencing Guidelines Committee (Mar. 21, 2016) at 13-14, available at <http://www.ussc.gov/policymaking/public-comment/public-comment-march-21-2016>. Between 2012 and 2014, 54.7% of sentences for defendants convicted under § 408(a) were within the recommended guideline range, 43.7% were below the recommended range, and only 1.6% were above. For defendants convicted under § 1383(a), 53.5% received a within-guideline sentence, 46.5% received a below-guideline sentence, and none received an above-guideline sentence. According to the Commission’s data, no one has been convicted of an offense under § 1011(a) over the past ten years.

truthful admission of the offense conduct. *See* Application Note 1(A) (“a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction....”). Yet, the same Note also provides that a defendant can lose acceptance of responsibility credit not only for “falsely denying” relevant conduct, but also for “frivolously contesting” relevant conduct, and the Guideline and the Application Notes do not define the line between “not admitting” and “contesting.” This is not a theoretical issue. A challenge involving the lack of an admission may be equated to “frivolously contesting” relevant conduct.²⁴

Even greater than the problems caused by the facial conflicts within the Guideline are the real dilemmas posed by the current Guideline in practice. The PAG shares the concern articulated by the Commission in its Synopsis: that the current suggestion in the Commentary that a defendant who “falsely denies” or “frivolously contests” relevant conduct is ineligible for acceptance of responsibility credit creates a significant risk that any unsuccessful challenge to relevant conduct will result in a denial of acceptance of responsibility credit.

Our concern arises as much from the collective experience of the PAG as from reported cases. Unsurprisingly, there are few reported cases dealing with denying acceptance of responsibility credit on relevant conduct grounds, for it is our experience is that many pleas have been thwarted (or reluctantly accepted) because of the risk of losing acceptance credit when the probation office or the prosecutor include relevant conduct that is subject to good faith, legitimate legal and factual attack. Defense counsel frequently must discuss with clients the risk of bringing good faith arguments against conduct that is believed to be irrelevant, unproven, or legally inconsequential, but which, if accepted by the court, would dramatically increase the defendant’s sentencing range exposure. We face this dilemma daily, in contexts such as the amount of loss, whether a firearm was actually used in the offense, or whether a defendant’s conduct constituted leader and organizer activity. Under the current Commentary, lawyers now frequently feel compelled to advise clients to abandon good, creative, and potentially valid legal arguments, and to not present facts or challenge government witnesses that put the allegations in the proper perspective, for fear of losing acceptance of responsibility credit for the underlying offense, even though the defendant quite clearly has not opposed or contested the facts of the offense of conviction.

²⁴ *See, e.g., U.S. v. Smith*, 13 F.3d 860, 866 (5th Cir. 1994) (affirming denial of acceptance credit because “...even though [defendant] admitted the conduct comprising the offense, she steadfastly refused to admit any connection, even vicarious, with the additional cocaine found in the floor of the house.”); *United States v. Edwards*, 635 F. App’x 186 (6th Cir. 2015) (affirming district court’s decision to deny acceptance credit because drug defendant had “frivolously denied conduct relevant to the leadership-role enhancement”); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) (affirming district court’s decision to deny acceptance credit because defendant contested the factual basis for a four-level enhancement based on relevant conduct). In none of these cases did the defendant testify at sentencing. Rather, relying on the language of the application note, courts characterized appropriate sentencing arguments as “frivolously contesting” or a “falsely denying” relevant conduct and denied the acceptance credit.

The PAG believes that the proposed amendment (with the modification recommended below) will strengthen and clarify the right of a defendant to “put the government to its burden of proof” as to relevant conduct.²⁵

2. The PAG’s Recommended Modification

The PAG is concerned that the proposed amendment may unintentionally create confusion regarding the circumstances under which a defendant might lose a potential reduction under § 3E1.1 when the defendant raises both legal and factual challenges to the inclusion of certain relevant conduct. While the PAG supports the goal of including language that affirmatively acknowledges the right of a defendant to challenge factually a relevant conduct proposal in a presentence report or a government submission, we think it equally important to acknowledge that many challenges to the inclusion or consideration of relevant conduct are legal, not factual, challenges.

The amended Guideline should allow broad deference to defense counsel to assert legal challenges without causing their clients to risk acceptance of responsibility credit. After all, such legal defenses are almost always attributable to the lawyer, not the client, and say nothing about the client’s acceptance of responsibility. Equally important, much of what is now considered established law was once considered novel legal argument, which perhaps some judge even would have characterized as “frivolous” in an earlier era (*e.g.*, the right to exclude a statement in the absence of *Miranda* warnings, the advisory nature of the Guidelines, etc.). Thus, the PAG proposes that the Commission modify the Application Note to make clear that a defendant’s eligibility for acceptance of responsibility should not be tied to the perceived quality of his lawyer’s legal arguments, and instead, to clarify that the reference to potentially “frivolous” challenges that might entitle a judge to deny acceptance of responsibility credit is limited to “frivolous” factual challenges.

Accordingly, **the PAG recommends** the following modification to the wording of the proposed new sentence in Application Note 1(A) to clarify that both legal challenges and non-frivolous factual challenges should not lead to the loss of acceptance of responsibility credit:

“In addition, a defendant who makes a **legal challenge** or a non-frivolous **factual** challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a).”

G. Proposed Amendment Number 7 – Miscellaneous

1. PART A. Transnational Drug Trafficking Act of 2015

The Transnational Drug Trafficking Act of 2015 targets extraterritorial drug trafficking. Included in the Act is an amendment of 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services) which replaces the term “counterfeit drug” with the phrase “drug that uses a counterfeit

²⁵ *U.S. v. Jimenez-Oliva*, 82 Fed. Appx. 30, 34 (10th Cir. 2003) (affirming grant of acceptance of responsibility credit after defendant’s unsuccessful challenge to the adequacy of the government’s evidence that the defendant was an organizer or leader).

mark on or in connection with the drug;” the Act also revised § 2320(f)(6) to define only the term “drug” instead of “counterfeit drug.” The term “counterfeit mark” then is defined in § 2320(f)(1). Pursuant to the statutory index, the applicable sentencing Guideline for § 2230 is § 2B5.3 (Criminal Infringement of Copyright or Trademark).

The proposed amendments include two changes to §2B5.3 in light of the Act:

i. Section 2B5.3. Currently, §2B5.3(b)(5) includes a two-level enhancement if the offense involved a “counterfeit drug.” The proposed amendment modifies this enhancement in line with the Act, by replacing the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” The PAG has no objection to this amendment.

ii. Commentary to Section 2B5.3. In line with the Act, the proposed amendment adds to the Definitions section of § 2B5.3 (*i.e.*, note 1 of the Commentary), the following definition: “‘Drug’ and ‘counterfeit mark’ have the meaning given those terms in 18 U.S.C. § 2320.” The PAG agrees that this amendment is necessary in light of the provisions of the Act.

2. PART B. International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

The Sex Offenders Registration and Notification Act (SORNA, 42 U.S.C. § 16914) requires sex offenders to provide a wide range of information to authorities, including name, Social Security number, residence and employment addresses, etc. The International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act (“International Megan’s Law”) added a new notification requirement, requiring sex offenders to provide detailed information related to intended international travel – dates and places of departure and return, carrier and flight numbers, destination country, and “any other itinerary or other travel-related information required by the Attorney General.”

A violation of SORNA’s registration requirements remains punishable at 18 U.S.C. § 2250(a). The International Megan’s Law added a new crime at 18 U.S.C. § 2250(b) for failure to provide the now-required travel-related information. The law punishes the knowing failure to provide the information by a SORNA-restricted individual who travels or attempts to travel in foreign commerce. Section 2250(a) offenses are currently covered by § 2A3.5 (Failure to Register as a Sex Offender). Included in § 2A3.5 are enhancements for a defendant who, while in a “failure to register status,” commits a sex offense against an adult (6 levels), a sex offense against a minor (8 levels), or a non-sexual felony against a minor (6 levels). § 2A3.5(b)(1)(A)-(C).

In light of the new criminal provision, the Commission proposes amendments:

i. Statutory Provision and Appendix A Amendments. Currently, § 2250(a) offenses are covered by § 2A3.5. The proposed amendment clarifies that § 2250(b) offenses will also be covered by § 2A3.5. The PAG has no objection to applying § 2A3.5 to § 2250(b) offenses.

ii. Application Note 2 to § 2A3.5. The proposed amendment adds an application note to § 2A3.5 to the effect that a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b). The PAG does not object to this proposed amendment.

iii. Clerical Changes to § 2A3.6. The proposed amendment makes clerical changes to § 2A3.6 to reflect the re-designation of 18 U.S.C. § 2260(c) by the International Megan’s Law. The PAG does not object to this proposed amendment.

The PAG recommends one modification in this regard. Under the proposed amendment, § 2A3.5 addresses conduct of two distinct reporting statutes (SORNA and International Megan’s Law). However, § 2A3.5 also deals by way of specific offense characteristics with conduct violative of additional criminal statutes, providing enhancements for the commission of sex offenses against minors and adults. *See* § 2A3.5(b)(1). The commission of such sex offenses, however, is addressed by other Guideline sections in Part A(3) (§ 2A3.1 *et. seq.*) and Part G (§ 2G1.1 *et. seq.*) of the Sentencing Guidelines. This could raise confusion about the application of the grouping provisions of §§ 3D1.2 and 3D1.3. Because § 3D1.2(d) does not list all of the different sex offense conduct provisions that are covered in the enhancement provisions of § 2A3.5(b)(1), inconsistent application of grouping provisions could result.

For this reason, **the PAG recommends** that the Commentary to § 2A3.5 be amended to clarify that a count of conviction for a violation of § 2250(a) and/or (b) (*i.e.*, a conviction for a SORNA registration violation and/or an International Megan’s Law reporting violation), including any enhancement that is applicable under § 2A3.5(b)(1), be grouped together with any other count that addresses the same underlying sexual offense conduct, pursuant to § 3D1.2(c) (Groups of Closely Related Counts). Such an amendment would be consistent with the many “grouping” paragraphs contained in the commentaries of different Guideline sections. *See, e.g.*, § 2A6.2 (Application Note 4); § 2K2.6 (Application Note 3); and § 2P1.2 (Application Note 3).

3. PART C. Frank R. Lautenberg Chemical Safety for the 21st Century Act

The Frank R. Lautenberg Chemical Safety for the 21st Century Act added a new criminal provision to 15 U.S.C. § 2615 (the Toxic Substances Control Act), punishing any person who knowingly and willfully violates certain provisions of § 2615 and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury.

The proposed amendment references this new offense (§ 2615(b)(2)) to § 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining § 2615(b)(1)’s reference to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering and Falsification; Unlawfully Transporting Hazardous Materials in Commerce).

The difference between the § 2615(b)(1) misdemeanor offense and the § 2615(b)(2) felony offense is that the felony requires proof of “knowing endangerment” (*i.e.*, knowledge that the violation places an individual in imminent danger of death or bodily injury). Since § 2Q1.1 applies to “knowing endangerment” related to hazardous or toxic substances, the application of § 2Q1.1 for § 2615(b)(2) felony offenses, along with its higher base offense level appears appropriate, and the PAG has no objection.

4. PART D. Use of a Computer Enhancement in § 2G1.3

The proposed amendment relates to a conflict within the language of § 2G1.3 and its commentary. Section 2G1.3 applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) contains an enhancement if-

the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

The proposal notes a tension between the Guideline and the Commentary, because the Application Note fails to distinguish between the two prongs of subsection (b)(3). Application Note 4 to § 2G1.3 provides that the § 2G1.3(b)(3) enhancement is intended to apply only to the use of a computer or an interactive computer service to communicate *directly* with a minor or with a person who exercises custody, care, or supervisory control of the minor.²⁶ Thus, on its face, the Application Note precludes application of the enhancement where a computer is used to solicit a third party to engage in prohibited sexual conduct with a minor.

The proposed amendment would amend the Commentary to § 2G1.3 to clarify that the guidance contained in Application Note 4 refers only to § 2G1.3(b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in § 2G1.3 (b)(3)(B)). The PAG does not object to the proposed amendment.

H. Proposed Amendment Number 8 – Marihuana Equivalency

In setting offense levels for narcotics offenders, the Guidelines place heavy emphasis on the type and quantity of controlled substances involved in the offense. *See* § 2D1.1(c)(1)-(16) (Drug Quantity Tables). For the most common substances such cocaine, heroin, methamphetamine, and marijuana, the Drug Quantity Tables specifies the corresponding offense level based on the quantity involved in the offense.

Where the Drug Quantity Tables do not specifically include a particular controlled substance, § 2D1.1 includes Drug Equivalency Tables. *See* § 2D1.1, Commentary, Application

²⁶ For example, it would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

Note 8. The Drug Equivalency Tables use marihuana as the common currency, and have an equivalency ratio for each controlled substance. One gram of methadone, for example, is the equivalent of 500 grams of marihuana.. *See id.*, Note 8(d). Additionally, the tables “also provide a means for combining different controlled substances to obtain a single offense level.” *Id.*, Note 8(B) and (C) (examples).

The Commission has received comments to the effect that using marihuana as the common denominator unit is misleading and results in confusion for individuals not fully versed in the Guidelines. Based on these concerns, the proposal would amend § 2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables with a uniform “converted drug weight.” Correspondingly, the amendment would change the term “Drug Equivalency Tables” to “Drug Conversion Tables.” The Commission points out that the proposed amendment is not intended as a substantive policy change.

The PAG agrees with the proposal. PAG attorneys have found clients confused by the conversion of controlled substances into marihuana for Guidelines calculations purposes. The use of a neutral converted drug weight as a “nominal reference designation” will maintain the Commission’s choice of drug type and quantity as the benchmark in determining an offense level, its use of a standardized unit of measurement for poly-substance offenses or those involving uncommon substances, and its previous determinations of the inherent danger in any particular substance as reflected in the conversion ratio.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG's input for the 2017 amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,



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An Advisory Group of the United States Sentencing Commission

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September 28, 2017

The Honorable William H. Pryor, Jr., Acting Chair
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Dear Judge Pryor,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 8 and 9, 2017, to discuss and formulate recommendations to the United States Sentencing Commission (USSC). After the meeting, POAG submitted comments relating to issues published for comment dated December 9, 2016. The document was dated February 21, 2017. On August 17, 2017, the USSC released Proposed Amendments to the Sentencing Guidelines (Preliminary). This letter will serve as POAG's official comment to this latest publication, and we look forward to engaging in further discussion on these important amendments.

1. BIPARTISAN BUDGET ACT

POAG members noted that they have very little experience with this statute given it is a fairly new law. However, POAG members did favor the reference to 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) at USSG §2B1.1(b)(13) as such a citation makes it clear which cases the enhancement was intended to apply, which has the effect of decreasing litigation at sentencing. Further, POAG members preferred the two-level increase under USSG §2B1.1(b)(13), with a notation that a two-level increase under USSG §3B1.3 would ordinary apply, thereby limiting increases for these types of offenses to a total of four levels.

2. TRIBAL ISSUES

The proposed amendment incorporates recommendations from the Tribal Issues Advisory Group (TIAG) regarding the use of tribal convictions to compute criminal history scores under Chapter Four and how to account for protection orders issued by tribal courts.

POAG concurs with TIAG's recommendations and the Commission's proposed changes to the guidelines for consideration of tribal convictions. The convictions should not be assessed criminal history points under USSG §4A1.1, and should remain under USSG §4A1.2(i). POAG recognizes procedures may vary among the many tribal courts. Due process issues and lack of documentation of tribal convictions are a concern and impact the correct assessment of criminal history points.

The policy statement under USSG §4A1.3 (Adequacy of Criminal History) will continue to provide a means for the court to grant departures based on information available regarding tribal convictions. Additionally, important changes have expanded the jurisdiction of tribes in criminal prosecution (i.e. Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013). POAG concurs with the proposed commentary under USSG §4A1.3, comment. (n.2(C)(i) –(iv)) and agrees this provision will provide clear guidance. However, POAG recommends that (iv) be expanded to include language to also allow for a departure if the defendant was under tribal court post-conviction supervision at the time of the federal offense, similar to the application of USSG §4A1.1(d). POAG believes there will be difficulties with practical application of USSG §4A1.3, comment. (n.2(C)(v)) in determining if the tribal government has “formally expressed” a desire for the convictions from the tribal court to be used for computation of criminal history points. It is unclear who determines this formal expression, how it is determined, and how it will be documented. The definition of “formally expressed” may lead to additional disparity because the procedures vary among tribal courts. POAG believes (v) could be eliminated from the list because (i)-(iv) provide sufficient guidance.

POAG concurs with the recommendations of TIAG and the Commission's proposed language to define “court protection order” under USSG §1B1.1, as it will provide consistency with statutory definitions.

3. FIRST OFFENDERS/ALTERNATIVES TO INCARCERATION

First Offenders

The First Offender Amendment garnered much discussion amongst the members of POAG. While the idea of conferring a benefit to those offenders who pose the lowest risk of recidivism was generally agreed upon, the practicality of defining who falls into this “first offender” definition proved rather difficult.

The majority of the members favored Option 1, which suggested a decrease of one level from the offense level determined under Chapters Two and Three. This approach was favored because it was similar to the upward departure from category VI directive under USSG §4A1.3(a)(4)(B) where the departure is structured by moving incrementally down the sentencing table. It was

believed that this option provided a way around the prohibition of a departure from Criminal History Category I by resulting in a reduced offense level as if there were a Criminal History Category 0. While the idea of creating, in essence, a Criminal History Category 0 was pleasing, POAG had concerns about how to appropriately define a “first offender.”

POAG was unable to reach a consensus as to the criminal history characteristics of a first offender. While some agreed that a defendant who does not receive any criminal history points under Chapter Four, Part A, and has no convictions of any kind is a “first offender,” others favored a stricter adherence to the definition of the term wherein a defendant with any criminal history, including an adjudication, arrest, or infraction, is disqualified from the adjustment. Given the variety of reasons for the dismissal of criminal charges, it was believed by some that a defendant with several law enforcement contacts, despite having no convictions, is not the quintessential first offender. Additionally, it was believed that there may exist unintended consequences and disparate application of the adjustment. First, the consequences for certain minor offenses, including driving with a suspended license, vary greatly by state and can involve either criminal or civil punishments. As such, a defendant’s civil punishment for these minor offenses, despite not being attributed criminal history points, could be considered a “conviction” resulting in the defendant being precluded from the adjustment. Second, POAG recognized that defendants of lower socioeconomic status and/or minority populations are often subject to more police presence in their neighborhoods which increases the likelihood of sustaining convictions for minor offenses resulting in them being precluded from the adjustment more often than the typical white collar or even child pornography defendant.

POAG discussed whether the nature and the duration of the instant offense should be a factor in the determination of a first offender. For example, should a defendant who commits a firearms-related offense or who commits a tax fraud over a prolonged period of time involving the submission of several fraudulent tax returns be considered a first offender? Given the complexity of establishing an elements-based analysis for a first offender and the need to simplify guideline applications, it was agreed that criminal history should be the determinative factor in deciding who is a first offender and that the nature and duration of the offense should be considered in determining the application of the rebuttable presumption for a non-custodial sentence at USSG §5C1.1. POAG believes the severity and/or the extended duration of the offense should not bind the court to the presumption of an alternative sentence and that it could impose imprisonment in those cases.

Alternatives to Incarceration

POAG appreciates the Commission’s continuing work to expand the use of alternatives to incarceration within the structure of the guidelines. POAG has encouraged the Commission to adopt a bifurcated Sentencing Table that expands the availability of probation-only sentences. POAG stands by this proposal and believes this cost-effective alternative is under-utilized within the present framework. The Federal Probation system provides national leadership in its approach

to risk-based supervision – tailoring higher intensity interventions for high risk cases. However, POAG has concerns that the well-intentioned Zone B/C consolidation will lead to longer terms of location monitoring (LM) for low risk cases that may result in a higher rate of negative supervision outcomes.

As POAG discussed in its two previous papers, there is a legitimate concern that longer terms of home detention with LM in low risk cases will ultimately run afoul of the “risk principle” and actually reduce successful outcomes. POAG argues that LM should be imposed mindfully, to address specific risks and needs, rather than being imposed in a blanket fashion to everyone within a particular guideline imprisonment range. Anecdotal feedback from officers in the field is strongly critical of home detention terms that exceed six months. It is a very restrictive intervention that can impact the mental health of those under supervision, and the longer someone is subject to LM, the more likely they are to test the limits of the equipment.

Officers responsible for LM supervision have a number of policy requirements to meet in all cases. Monthly home contacts are required to examine the equipment and officers must respond to certain key alerts during the day and night – expanding the range of non-traditional working hours. LM officers are responsible for verifying the activities of offenders outside their homes and must review geo-locational data for all offenders enrolled in GPS systems. In short, individuals sentenced to home detention with LM receive resource intensive supervision consistent with that of a sex offender or violent recidivist.

Location Monitoring Specialists are known to experience high stress levels/burnout due to the nature of their work, a contributing factor to the national system dedicating resources to provide education on officer wellness. POAG is concerned the proposed amendment will embolden courts to impose long terms of LM in a blanket fashion more often – significantly adding to the overall workload of LM officers and taking resources away from the true high-risk cases that deserve the most intensive supervision.

POAG encourages the Commission to exercise caution in its approach to this proposal and instead seek to expand probation-only dispositions rather than authorizing lengthy terms of home detention with LM. At the district court level, probation officers work hard to educate judges and attorneys about the most effective use of LM, and POAG hopes that the Commission can strike a balance that expands the use of probation without overly relying on home detention as the vehicle to achieve that end.

4. ACCEPTANCE OF RESPONSIBILITY

A defendant who enters a plea of guilty must admit to the elements of the offense; however, at the time of sentencing, the focus is on the concept of relevant conduct when determining if a defendant is eligible for an Acceptance of Responsibility reduction. The Commission is seeking comment on whether the references to relevant conduct should be removed from USSG §3E1.1 and, instead, focus only on the elements of the offense of conviction. POAG notes that relevant conduct is a

broad concept that seeks to capture actual offense conduct versus the charged conduct, and that it can include conduct underlying charges that have been, or will be dismissed. As such, the current structure of USSG §3E1.1 requires defendants to “not falsely deny” any additional alleged conduct that is considered to be relevant conduct. POAG recommends that relevant conduct continue to serve as a basis for determining if a defendant is eligible for an Acceptance of Responsibility reduction out of concern that focusing on the elements of the offense would likely have the effect of increasing the amount of litigation at sentencing. Further, relying on relevant conduct in determining if a defendant is eligible for an Acceptance of Responsibility reduction is consistent with the rest of the guideline applications that are based upon relevant conduct. POAG believes that this approach has generally worked well and does not have any concerns regarding this part of the process.

The Commission is also seeking comment on whether USSG §3E1.1, comment. (n.1), should be amended by striking “However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility,” and replacing it with “In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a).” POAG supports this amendment, but recommends that references to “not falsely deny” or “non-frivolous” in USSG §3E1.1, comments. (n.1(A)) and (n.3), be replaced with “frivolously deny” so as to avoid the use of double negatives in the application instructions. Further, POAG supports this amendment as it seeks to distinguish defendants who have objections based upon reason and fact from defendants who have objections that have no good faith basis. POAG also recommends that the Commission consider defining what constitutes “frivolous,” as the layperson’s understanding of that term may differ from the common legal definition.

The Commission identified the above noted issue as a priority out of concern that the Commentary to USSG §3E1.1 encourages courts to deny an Acceptance of Responsibility reduction when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report’s assessment of relevant conduct or the application of a Specific Offense Characteristic. As it is currently written, the Commentary in USSG §3E1.1 requires a defendant to “not falsely deny any additional relevant conduct,” which has been interpreted by some to mean that a reduction is not appropriate if the defendant falsely denies conduct that is determined to be relevant conduct. If that was not the Commission’s intent, then POAG would support an amendment to the Commentary to USSG §3E1.1 to clarify that unsuccessful challenges to relevant conduct do not preclude a defendant from being eligible for an Acceptance of Responsibility reduction and that such amendment be significant enough that it creates a new standard under this guideline. POAG believes the aforementioned amendments to USSG §3E1.1 could increase due process for defendants who have legitimate challenges to relevant conduct and lessens their risk for automatic acceptance of responsibility denials in these cases.

Further, POAG recommends that USSG §3E1.1, comment. (n.5), which directs that “The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review,” be stricken from the Guidelines Manual. POAG believes that the Guidelines Manual should focus on application instructions while leaving the issue of standard of review to the discretion of the appellate courts.

6. MARIHUANA EQUIVALENCY

The proposed amendment makes technical changes to USSG §2D1.1 to replace the term “marihuana equivalency” with “converted drug weight.” The term “marihuana equivalency” is used in cases that involve a controlled substance that is not specifically referenced in the Drug Quantity Table as well as cases with more than one controlled substance where it is necessary to convert each of the drugs to its marihuana equivalency. Although the Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines, POAG unanimously agreed that they have never experienced similar confusion by counsel, the defendant, or the court. POAG suggests that the confusion may be a result of the presentation of the information in the Presentence Report and noted that the report should be clear as to the actual drug(s) and drug quantity(ies) for which the defendant is accountable with a notation thereafter of the marihuana equivalency. POAG also suggests that the Commission should include clarification of the term in its training sessions both nationally and district wide. Additionally, there is considerable case law in every circuit that references “marihuana equivalency” and changing this term could potentially lead to further litigation with regard to determining drug equivalencies. The change will make it much harder to compare sentencing recommendations between newer cases, using the new conversion process, and older cases. Moreover, POAG noted the potential confusion that could result from the use of the term “converted drug weight.” The proposed guideline defines this term as a “nominal reference designation that is to be used as a conversion factor...” Nevertheless, upon inspection of the Drug Quantity Table and the Drug Conversion Table, it is clear this term is the same as marihuana. Therefore, to avoid further confusion, it is POAG’s recommendation to make no changes to the term “marihuana equivalency.”

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments.

Respectfully,

Probation Officers Advisory Group

September 2017

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

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October 10, 2017

Honorable William H. Pryor, Jr., Acting Chair
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Dear Judge Pryor:

On behalf of the Tribal Issues Advisory Group (TIAG), we submit the following comments in response to the Commission's proposed amendments published on August 25, 2017. In this letter, TIAG addresses two amendments: First Offenders/Alternatives to Incarceration and Tribal Issues. The TIAG takes no position on the remainder of the proposed amendments published for comment.

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION¹

Part A of this amendment addresses first offenders and sets forth a new Chapter Four guideline at §4C.1.1. The TIAG offers the following comment on §4C.1.1, subparts (a) and (g)(3).

For the definition of "first offender" the currently proposed amendment offers a choice between individuals who receive no criminal history points and those with no prior convictions of any kind. TIAG believes that a middle course would best reflect the reality of practice in Indian Country while reserving the first offender reduction for individuals without a history of violence.

¹ The Department of Justice's (DOJ) representative on the TIAG advises that the DOJ does not support the proposed new §4C1.1 guideline, nor does it support the proposed new §5C1.1(g). Accordingly, the DOJ representative on the TIAG does not join the other TIAG members in the comments on this amendment.

TIAG recommends that “first offender” be defined in §4C1.1(a) as follows:

- (a) A defendant is a first offender if (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2) the defendant has no prior convictions of any kind, except convictions from tribal or foreign jurisdictions which are not for violent crimes.

The Commission’s published definition includes a bracketed paragraph (2) requiring that the defendant have no convictions of any kind in order to qualify as a first offender. TIAG understands the term “no conviction of any kind” to include tribal convictions and believes that this exclusion would operate too broadly. Many tribal courts have misdemeanor jurisdiction and routinely handle a wide variety of criminal matters ranging from petty offenses to crimes of violence. Status offenses such as public intoxication, vagrancy, or protective custody are very common offenses of conviction, often as a means to provide protective services. TIAG believes that there should be emphasis on distinguishing between petty offenses and crimes of violence in determining whether a person with tribal court convictions qualifies as a “first offender.” The term “first offender” should not be interpreted to exclude a person who has prior convictions for petty offenses from tribal or foreign courts. However, TIAG also believes that individuals who have been convicted of a crime of violence in tribal court or a foreign court, should not qualify as a “first offender.”

TIAG also supports the proposed additional subsection in § 5C1.1:

- (g)and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.

TIAG believes that this language appropriately draws the distinction based on a history of violence that we encourage the Commission to implement above for §4C1.1(a). Even with this requested delineation, the new language will remind the sentencing court that a non-incarceration sentence is an appropriate alternative under the Guidelines. TIAG recognizes that are cases in which a term of imprisonment remains the most appropriate choice. By way of example, incarceration may be chosen for a defendant who has a history of violence or an extensive history of significant unscored violations in foreign or tribal courts.

2. TRIBAL ISSUES

TIAG supports the proposed commentary to § 4A1.3(a) intended to provide courts with guidance on whether an upward departure is appropriate based on tribal court convictions. The commentary includes five relevant factors that the court may consider in making this determination, and the Commission has asked how these factors should interact with one another. TIAG believes that no factor should be a threshold requirement or determinative and that their weighting should be left to judicial discretion in the individual case. TIAG believes that the current approach to tribal convictions remains appropriate with the additional guidance

the proposed commentary provides for considering possible departures based on tribal court criminal history.

Additionally, TIAG makes the following additional observations about the first, second and fifth factors (subsections (i), (ii) and (v)). Proposed subsection (i) provides as follows:

- (C) **Upward Departures Based on Tribal Court Convictions**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the the following:
- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protection consistent with those provided to criminal defendants under the United States Constitution.

The Commission has asked for comment on whether due process should be a threshold factor to apply §4A1.3(a). TIAG recommends that it should not. Imposing the due process requirements set forth in subpart (i) as a mandatory threshold ignores the diversity and historical culture of tribal courts as well as applicable statutes and Supreme Court precedent. Critically, it also undercuts tribal sovereignty.

In the United States there are approximately 351 tribal courts of varying capacity.² Imposing subpart (i) as a threshold requirement could be read as mandating a western court model on all tribal courts. Tribal courts vary in capacity and model based on a variety of local factors beginning with purposeful policy choices by individual sovereign tribes and including other factors like geography, population, and tradition or cultural practice. Tribal nations are not political subdivisions of the United States; each federally recognized tribe is a separate sovereign. Imposing subpart (i) as a threshold requirement above all others may be viewed as paternalistic and a rejection of tribal sovereignty.

The term “due process protections” in this section also must be considered in light of the distinction between certain rights which are protected by the United States Constitution and those protections afforded under the Indian Civil Rights Acts of 1968 (ICRA). Those rights are not identical. Due process, as it is known in federal and state courts, should not serve as a litmus test under this proposed amendment. ICRA governs tribal court proceedings and provides safeguards to tribal court defendants that are “...similar to, but not identical to those contained in the Bill of Rights and the Fourteenth Amendments.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

As a further reflection of this reality, the United States Supreme Court has affirmed the use of uncounseled tribal court domestic violence convictions as predicate offenses for habitual domestic offender prosecutions under 18 U.S.C. §117(a). *See United States v. Bryant* 136 S. Ct. 1954 (2016). The Court reaffirmed that the Sixth Amendment did not extend to tribal courts. Making subsection (i) a threshold would preclude consideration of tribal court conditions on their own terms, effectively excluding any consideration of convictions from tribal courts which,

² Report of the Tribal Issues Advisory Group May 16, 2016, p.12.

although complying with the requirements of their own law and the Indian Civil Rights Act, did not provide all the protections applicable to state or federal courts.

In light of the foregoing, the TIAG believes that subpart (i) should be included, but not made a threshold requirement.

TIAG also believes that the Commission should continue to include, as separate subparts, subpart (i) and subpart (ii). They address different things. Subpart (ii) states:

- (ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act (TLOA) of 2010, Pub. L. 111-211 (July 29, 2010) and the Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. 113-4 (March 7, 2013).

TLOA amended ICRA to permit a tribe to opt in to enhanced sentencing authority of up to 3 years or a fine of \$15,000 for any one offense, up to a total of nine years, if the tribe met certain requirements. Those requirements include providing indigent defendants a licensed defense attorney at the tribe's expense, the presiding judges being licensed and law trained, a published criminal law code, and that any custody be served at a facility that meets minimum federal requirements.

VAWA 2013 was enacted to allow tribes to investigate, prosecute, convict, and sentence both Indian and non-Indians who assault Indian spouses or dating partners or violate protection orders against Indians and non-Indians if certain rights are afforded. Those rights include those that are described in TLOA as well as requirements that jury pools include a fair cross-section of the community and not systematically exclude non-Indians and that defendants detained by a tribal court be informed of their right to file federal habeas corpus petitions.

Because they address different types of prosecutions and different protections for defendants, subparts (i) and (ii) are ultimately different considerations. TIAG therefore recommends that both remain included.

Lastly, TIAG believes that the inclusion of subpart (v) is appropriate but requires additional clarification in application notes.³ Subpart (v) provides:

- (v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.

TIAG believes that obtaining the input of tribes is a critical acknowledgment of their sovereignty. TIAG previously reported that there are 567 federally recognized Indian tribes. BIA reports that 351 have tribal courts while the remaining tribes presumably are Public Law 280 tribes or otherwise rely on state courts as their criminal courts.⁴ Each of these tribes is a

³ The DOJ does not support inclusion of this fifth factor. Accordingly, the DOJ representative on the TIAG does not join the other TIAG members in the comments on this fifth factor.

⁴ Report of the Tribal Issues Advisory Group May 16, 2016, p.12.

separate sovereign. TIAG believes that both tribal governments and tribal courts have a varying working knowledge of the Sentencing Guidelines. Many tribes have a limited knowledge of the Sentencing Guidelines and their impact on Native American defendants in federal court and that increased knowledge of the Sentencing Guidelines by tribes and tribal courts would be beneficial.

TIAG recommended a formal consultation with tribal governments and other interested groups on the issue of how tribal governments could “formally express a desire” for their convictions to be considered as well as other proposed amendments. A transcript of that consultation session is attached. Additionally, other tribes and interested parties indicated that they could comment directly to the Commission. Although the transcript and those comments will speak for themselves, they reflect the reality that each tribal government is unique and has unique perspectives and policy views. TIAG believes that those views should be heard and considered.

The practical aspect of how tribes may “formally express” their position on considering tribal court convictions is difficult. TIAG believes that additional application notes or commentary may be appropriate to clarify this. TIAG believes that any expression of the tribe’s position must be made through a resolution or other enactment of the tribal council or other governing body. TIAG also believes that such a resolution should be accompanied by a mechanism to provide information about tribal court convictions to the court.

Comments in the consultation and the professional experience of TIAG members also suggest that any expression of whether convictions should or should not be considered must be general and cannot be made on a case by case basis. TIAG believes that this subsection should be a mechanism to respect tribal sovereignty and policy on criminal justice issues generally, not to weigh in on appropriate sentences in a particular case.

Lastly, the consultation process again brought up the real possibility that, given the disparate circumstances and approaches of different tribal courts, adopting a “one size fits” all approach to tribal court convictions can exacerbate unwarranted disparity. Not all tribal courts are the same. Judges who serve in districts with significant Indian Country caseloads develop familiarity with the practices of local tribal courts and can best weigh these factors in deciding how to approach a history of tribal court convictions. The proposed guidance under § 4A1.3(a) allows them to consider the impact of those convictions in a structured, measured, and equitable manner.

On behalf of our members, we appreciate the opportunity to offer TIAG’s input.

Sincerely,



Ralph R. Erickson
Chair, Tribal Issues Advisory Group
U.S. District Judge, District of North Dakota

cc: Honorable Charles R. Breyer
Honorable Danny C. Reeves
Rachel E. Barkow
Zachary Bolitho
Patricia Wilson Smoot
Kathleen Grilli
Ken Cohen

TRIBAL ISSUES ADVISORY GROUP

**Moderator: Judge Ralph Erickson
September 25, 2017
12:00 pm CT**

Ralph Erickson: Good afternoon. I would like to just make a couple of brief comments. I want to welcome all of you who are participating in this consultation. A couple of just initial ideas. The purpose of the consultation is for us to get information from the Indian nations and their representatives and so we would like to hear as much as possible about the pending amendments to the sentencing guidelines as well as any areas of concern on the part of the representative of the various Indian nations.

And so if you're not a representative of an Indian nations we are more than willing to hear from you but we'd like you to keep your comments brief at least until we've exhausted the comments that the people with whom we are obligated to consult have had an opportunity to consult with us. And so if you just bear that in mind I would appreciate it.

I want to thank all of you for joining us today and I want to thank everyone for being part of this tribal consultation.

I am Ralph Erickson I'm a United States District Judge and I am the Chair of the United States Sentencing Commissions Tribal Issues Advisory Group which we're referred to a TIAG.

Now as you may know the Sentencing Commission formed TIAG as a permanent advisory group to provide the commission with its view on federal sentencing issues that relate to American Indian and Alaska native defendants and victims, and to offenses committed in Indian country and to engage in meaningful consultation and outreach with the tribes, tribal governments, and tribal organizations related to federal sentencing issues that have tribal impact and implications.

The TIAG is comprised of nine members who come from a diverse professional and tribal backgrounds and I think we have most of the TIAG members with us on the call today. Joining me to represent the Sentencing Commission are Wendy Bremner, Winter Martinez, Chief Judge Mekko Miller, Tim Purdon, Gretchen Shappert and Sam Winder. In addition to my work as Chair of the TIAG, I am a Judge in the District of North Dakota I think I might have mentioned that.

There are four Indian reservations in our state and as a result I've presided over a great number of cases involving Native American defendants. I grew up in North Dakota and like most of you, I have a lifelong appreciation and concern for the application of federal laws to Native Americans. I grew up near two reservations. I can't remember a time in my life where Native American people were not important in our family and the businesses that my family were involved with and I just can't imagine anything more important for us as a group than the work that we're doing here.

I would really like to hear from each of you about what your thoughts are as to how the Sentencing Commission can improve the sentencing guidelines and to make them more responsive for the needs of your citizens and your governments. I want to thank you for participating in the tribal consultation. This is a listening session and it marks the second time that the Sentencing Commission has engaged in a government to government consultation with the tribes.

I also want to thank and commend the Commission for this effort and for their support of TIAG. I know I speak on behalf of all of my colleagues on TIAG to say that we hope that this is the beginning of a long-term relationship with the tribes on federal sentencing matters.

Now with that I want to remind you that we should try to limit our content of today's consultation to the topics that are relevant to TIAG's work. You may know from the consultation materials that were circulated ahead of the call that we're looking into a number of questions that are related to proposed amendments to Chapter Four of the Sentencing Guidelines. Now the proposed amendment includes a list of criteria that courts should consider in determining whether an upward departure from the guidelines is appropriate based on the defendant's record of tribal court convictions.

The TIAG seeks tribal input to inform its work about the criteria listed in the proposed amendment. In particular we seek information on the – what the criteria should be included and we seek information about a requirement that the tribal preference about the use of its convictions should be taken into consideration. And if that criteria is included in the amendment, how would the tribes express their preference to the federal courts. And these answers are crucial for us they'll inform our work.

We hope that you will address those topics and anything else in the proposed Sentencing Guideline amendments that may be relevant to you.

If possible I'd like everyone to limit their remarks to 5 minutes to that we can hear from as many people as possible. I'm going to put the call into listening session mode and then you will have the opportunity to provide comments. Once that happens you will hear a recording that will provide instructions to you about how to alert the operator that you have a comment and how to enter the queue. It's actually very simple. If you wish to make a comment press 1 and zero on your telephone and you will automatically enter the queue.

I will take the comments in the order that they enter the queue and when it is your turn – turn to speak you will hear, "Please ask your question after the tone." Once you've heard that prompt your line will be unmuted and we very much look forward to hearing your comments.

I want to thank you again for participating in our listening session and with these instructions out of the way I'm going to place this call into listening mode if I can do that and I'll do it to the best of my ability and then you'll have an opportunity to speak.

Ralph Erickson: All right. So if there's anyone that wants to ask a question or actually consult with us. As I said this is mostly a listening conference and it's our purpose to really get your input. And really the primary area that TIAG has concerns about are the use of tribal court convictions what the tribes position is on that and how they would go about notifying the courts of their decision. So if anyone has any comments on anything I'd love to hear from you.

Jason D'Avignon: Hi this is Jason D'Avignon for the Colville tribes.

Ralph Erickson: Yes.

Jason D'Avignon: And one question I guess I have is in terms of notifying the court of willingness, you know, would this be I guess it's the idea that it would be we might send a letter or some sort of official notification or would we rely on maybe the US Attorneys or whomever contacting the tribe and asking us? And, you know, what sort of information would we need to I guess need to provide in terms of, you know, are we compliant with TLOA or VAWA or any of those things?

Ralph Erickson: The thing that if you'll if you have in front of you the Section 4A1.3 which is for departures based on the inadequacy of criminal history category. And if you look at the application notes it says that at the time the defendant is sentenced the tribal government had formally expressed the desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the guidelines manual.

Originally within our the original TIAG we had contemplated that that formal expression would be in the form of a tribal commission resolution or other formal government action that would not be undertaken on a case by case basis but, you know, just that we, you know, want them or not want them scored. There was some question whether that was appropriate and what might be the best method for the tribes to inform the courts what their government's position is.

And so that's really the question we've got for you. You just asked us the question we're looking for the answer to. And I would just tell you that originally we had talked about a formal expression and we had contemplated a commission resolution or something like that or an ordinance. So what are your thoughts?

Jason D'Avignon: And I think we have maybe some concern with a broad open up of our files. I think a resolution might work and I think we would need to work on how to interface, you know, provide access to those records. You know, because sometimes there's a lot of defendants who maybe have committed violent crimes on the reservations that have not been prosecuted in the state or federal system and so their, you know, their criminal history is certainly under-reported. There's others that maybe it's I think the tribe may have concerns with basically they're just allowing the federal government to take a look anytime it wants.

Ralph Erickson: That's interesting. You know, our experience here in the District of North Dakota is that virtually all of our tribes when our probation officers ask for a pre-sentence investigative revealing of the criminal history of a particular defendant we seem to get it all the time. And so your concern is and it's not like any member of my staff the probation officers go through and rifle through the tribal court records it's that the probation officer makes a request for the criminal history just like you would for the state criminal history through the national crime reporting system.

So that's kind of the system that we use here. And you have some concerns about that process?

Jason D'Avignon: I mean not serious concerns just I guess not quite sure what to think about it yet.

Ralph Erickson: Okay.

Jason D'Avignon: There are things that we've been talking about. I have one other I guess concern as well though.

Ralph Erickson: Okay.

Jason D'Avignon: And that and then I'll let anyone else who wants to jump in jump in.

Ralph Erickson: Thank you.

Jason D'Avignon: Let me get this citation my apologies. On the commentary for upward departures or 4A13 and then it talks about the defendant was represented by a lawyer had a right to trial by jury and received other due process protections. And I was I guess I have a comment on the use of the word "lawyer." I know TLOA uses a slightly different formulation which is, you know, licensed to practice law in a jurisdiction that has suitable governess over the profession which I have read to include tribal court bars.

Here at Colville we have a strong tradition of providing advocates for defendants and in particular non-lawyer advocates. You know, has there been any consideration of, you know, protecting sort of those positions in tribal courts, you know, and how they might play a role in this?

Ralph Erickson: Yes we've had some discussion about that. And the question of being a lawyer I think we've talked about it and I think part of the question that we had was that, you know, going to law school is not a magical piece of being a lawyer because if you think about it up until recently many states allowed non-law trained persons to sit for the bar and become licensed as lawyers. And, you know, California still allows you to go to a unaccredited law school and still be licensed as a lawyer if you can pass the bar.

And so I think that the whole issue of lawyer is something that is an open question for the individual trial judges on the federal level as they go through

this four-part balancing because in this commentary it's not the black letter of the law it's the things that the courts supposed to take into consideration. And frankly in our tribes we have both law trained public defenders and non-law trained public defenders and I think that that's what weight to put on that would depend on what the federal judge actually knows about the court system and how it's functioning.

Jason D'Avignon: Okay thank you...

Ralph Erickson: That...

Jason D'Avignon: ...Judge.

Ralph Erickson: ...make sense?

Jason D'Avignon: Yes...

Ralph Erickson: (Okay).

Jason D'Avignon: ...it does.

Ralph Erickson: Thanks.

Justin Eason: Good afternoon. Justin Eason Tribal Prosecutor for the Eastern Band the Cherokee Indians. I'm also a Special Assistant US Attorney and I was just wondering why there's even a requirement that the tribal government expressed a desire that their convictions be used in these cases? Have you guys had a lot of experience where tribal courts or tribal governments have asked you not to consider the convictions of people they're sending to federal court?

Ralph Erickson: There within in the TIAG committee – maybe I should tell you a little bit about. TIAG started off as a working group and we've presented a final product which then has resulted in the formation of a standing committee and it's also resulted in the proposed Sentencing Guidelines amendments. During the course of our discussions there was actually some deep concern about tribal sovereignty and that various tribes may have different opinions on the propriety of counting tribal convictions.

Some tribes have taken a position and frankly we have some tribal members on the original group that indicated that the federal sentencing structures were unduly harsh to start with and they were opposed to anything that made them more harsh. And so that's kind of the underlying reason why we wanted the tribes to have input and mainly we did not want to infringe on their sovereignty so that was a purpose. Did that answer your question?

Justin Eason: It did just would seem to me that if you – it seemed to me that a better way might be to ask the tribe to explicitly request an exemption rather than let it be included. I mean it's putting the onus on the tribe to ask for something that by rights if these tribes are already engaged in the other things that you wish them to be engaged in as far as the Tribal Law and Order Act and Violence Against Women Act go that probably ought to be done just as a matter of policy at that point is should be accepted in my estimation. But why do you make it that they have to opt in rather than opt out?

Ralph Erickson: You know, we never really discussed that and I think that's a really good point and something that we will take back to our working group and discuss and then move on from there. I mean I don't now maybe it was talked about and I just don't recall it but I do not have recall us having any in depth discussion about opt out versus opt in.

Woman 1: (Unintelligible).

Justin Eason: Okay thank you that answers my questions.

Ralph Erickson: Thank you. At this point I have no questions in the queue so if anybody has a question or a comment we will take it up. And so far it looks like we've got a couple of things that will provide some round for discussion by our working group. But if there's anybody else that wants to be heard. I continue to have no questions remaining so what I'll do is I'll wait one minute here and if somebody's got a question now is your chance or a comment.

Kathleen Grilli: Judge perhaps it might be helpful if I give a little historical background on the Commission and the treatment of tribal convictions in the past perhaps that...

Ralph Erickson: Okay.

Kathleen Grilli: ...might prompt another question. This is Kathleen Grilli, I'm the Commission's General Counsel. When the Commission originally created the guidelines and was thinking about criminal history, tribal convictions were excluded from the computation of the criminal history score. In large part there was some concern about the court's ability to get information. I think the Commission's experience with tribal convictions and the court's willingness to provide the information shows that it varies by tribe.

Tribes are a separate sovereignty - they are not required to provide this information. And in some instances they're willing to provide it; in other instances they were not. And so there's always been concerns about the disparities that might result if the Commission decided to include tribal

convictions as countable convictions that would be scored in the same way as any other state or felony conviction is generally scored in the criminal system.

I think with the TIAG's work suggested or at least the TIAG ad hoc group that created the report that led to the creation of this advisory group went back and forth and debated the issue and thought that this proposed amendment with criteria for the courts to use might provide some guidance to the courts on how and when to use tribal convictions. But, you know, I heard the one caller mention sort of the tribes opt out and certainly that's an interesting comment. I wonder if others on the call have a feeling about that one way or the other.

You know, are there others on the call who think that the Commission should always consider tribal convictions or at least should instruct sentencing judges to always consider them or not.

Ralph Erickson: Thank you Kathleen.

Kathleen Grilli: Judge, I just received an email from Tamera Begay from the Navajo nation. She says she has a question but the phone is not letting her into the queue. I'm going to email her back and ask her to email me the question; to try again but to email me the question.

Ralph Erickson: All right.

Kathleen Grilli: All right Judge she has emailed me that question and the question is, "How does the Tribal Access program play into Chapter Four?"

Ralph Erickson: I am a little bit confused about what is meant by the Tribal Access Program. And maybe I'm supposed to know what that is but I'm a little bit confused. Does anybody and do any of our members know?

Kathleen Grilli: I've just emailed the the questionor back, Judge. So perhaps the question is how were the tribal convictions based on the proposed amendment going to be taken into consideration under Chapter Four of the guidelines?

Ralph Erickson: Well the way that they'll be taken into consideration is that they are not scorable the same as state convictions; they're treated more closely akin to what we would do with foreign convictions. And so they may be used for bases for an upward departure based on the inadequacy of the criminal history. What we would do at that point is we would look at the criteria that are proposed and they generally have to do with the type of process that was afforded the right to representation the right to a trial by jury.

Whether the tribal court was exercising its standard jurisdiction under TLOA and VAWA that the tribal court conviction is not for the same conduct that's being charged in federal court that the offense is one that would be otherwise scorable under the guidelines so certain non-scored tribal convictions could not be considered.

And then that whether or not the tribe had indicated a preference as to whether they wanted to have their convictions taken into consideration. And so the trial judge would balance all of those things out and then make a decision whether or not there was a bases for an upward departure all right.

And so it doesn't really mandate any particular resolve but it does give guidance to trial judges as to what factors they could consider. As the commentary and rule sits now the court is free to upward depart based on a tribal court conviction history for any reason and they don't have any guidance as to how they're supposed to take those tribal convictions into consideration. So that's what the problem was that was identified and we're

really looking at trying to provide guidance to judges particularly those who only occasionally have Indian country cases presented to them.

Kathleen Grilli: Judge, one of our participants on the call has very kindly forwarded me an email explaining Tribal Access programs. Apparently the Department of Justice is expanding the Tribal Access program for national crime information. I guess that's a way for them to participate in the crime information databases. And so the email says tribes interested in participating in TAP must submit a letter or resolution from the tribe's governing body by September 15, 2017.

So perhaps that's something where tribal records are going to be more widely available than they are currently, like NCIC...

Ralph Erickson: Yes once...

Kathleen Grilli: ...records.

Ralph Erickson: ...tribal – yes once the tribal records get on the national reporting systems they're going to be available to all the probation officers and that'll be reported in the pre-trial status of or the pre-sentencing report. And once that pre-sentence investigation report is received by the judge they'll just go in a separate category because there will be non-scorable offenses because they'll be tribal convictions rather than state court convictions. And so they'll be in the section with other convictions that would involve tribal courts, foreign courts and certain other courts of not of record that may out there.

And those will not go into the guideline calculation they will still simply be used I would assume for if we follow our guidelines as they are currently written for purposes of an upward departure based on that history.

Kathleen Grilli: Correct...

Ralph Erickson: Kathleen.

Kathleen Grilli: ...TAPs might somehow that might be the way that the tribes would opt in to having their records more broadly available. So that may be something for the group to consider as well.

Ralph Erickson: Yes, that is because I think once they opt in and those records are being made available for all law enforcement agencies I think courts are going to look at them and say well there's been a determination by the tribe that they're participating and just in dispensing their conviction histories anyhow. But that's something our committee needs to talk about.

Tamera Begay: Hello.

Ralph Erickson: Hi this is Judge Erickson.

Tamera Begay: Hi Judge this is Tamera the one that emailed the question.

Ralph Erickson: Oh okay.

Tamarah Begay: And you answered my question when I had pressed the number about how you were – you mentioned that POs go to - they request sort of a pre-sentencing report from NCIC and so if tribes already participating in TAP, those tribal convictions are there and so you answered that by saying that'll be non-scorable until.

Ralph Erickson: Yes they'll still be non-scorable because they'll be like under the guidelines they'd still be looking more like foreign court convictions than state court convictions. And...

Tamera Begay: Yes.

Ralph Erickson: ...that has been the debate that our committee has had and like I said the sort of position that the advisory group came up with was is what's in the proposed rule.

Tamera Begay: Okay.

Ralph Erickson: Did that answer your question?

Tamera Begay: Yes that was basically my only questions so thank you...

Ralph Erickson: All right thank you.

Ralph Erickson: All right my phone continues to show that there is there are no remaining questions or comments and so I would just like to thank all of you for participating. Kathleen have you gotten any emails at this point?

Kathleen Grilli: I have not Judge. I'll remind the...

Ralph Erickson: (I)...

Kathleen Grilli: ...callers Judge that we do still have an open comment period on this proposed amendment the comment period is open through October 10. So anyone who did not necessarily wish to make comments today during our call

our consultation is certainly free to submit public comment directly to the Commission.

Ralph Erickson: ...yes so and if you would prefer to submit some sort of a comment to TIAG to consider to the subcommittee you can do that as well by sending it to Kathleen and she'll make sure that it gets distributed amongst us okay.

Kathleen Grilli: Correct, public comment can be sent to my email address as well and I'll make sure it gets to where it needs to go. Otherwise, any information about how to contact the Commission and submit public comment is also available on our Web site which is www.ussc.gov.

Ralph Erickson: All right, well thank you very much for participating and I hope you all have a fantastic day and hopefully we'll have a chance to talk again about issues that are of mutual interest in the near future so thank you.

END

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

T. Michael Andrews, Chair



Elizabeth Cronin
Kelli Luther
Mary G. Leary
Kimberly Garth-James
James R. Marsh
Virginia C. Swisher
Meg Garvin
Francey Hakes

September 29, 2017

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: VAG's Response to the 2017 Proposed Amendments to the Sentencing Guidelines.

Dear Chairman Pryor and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide a written response to the Commission on the proposed amendments to the Sentencing Guidelines regarding tribal issues, first offenders/alternatives to incarceration, and acceptance of responsibility. The VAG urges the Commission to consider the specific concerns addressed below especially with regard to the impact on victims.

I. Tribal Issues

The VAG recommends the Commission adopt the recommendations that lists the relevant factors that courts may consider when considering a §4A1.2(i) upward or downward departure with respect to Criminal History Category VI. The VAG supports the recommendation that each relevant factor be given equal weight. However with regard to whether the defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the Constitution, the

VAG urges the Commission to follow the holding in *US v Bryant*, 579 US__ (2016), which held that since Bryant's tribal-court convictions occurred in proceedings that complied with the Indian Civil Rights Act were valid when entered, and used as predicate offenses, did not violate the Constitution. The ICRA does not require the accused to be represented by counsel. Consequently, the VAG recommends that Commission treat tribal court convictions the same as state and local offenses to be used to compute criminal history points. The VAG's position on the tribal sovereignty question of whether Tribes should opt in and provide the criminal history for tribal defendants is that for those cases where a victim is involved and the defendant has prior convictions in tribal court, those tribal convictions should be mandatory and part of any criminal history calculation.

As for court protections orders, the VAG supports the commentary of § 1B1.1 (Application Instructions) and the definition of court protection order derived from 18 USC § 2266(5) which is consistent with 18 USC § 2265(b). In our view, this definition is appropriate and should it to be used. The most important factor with tribal court protection orders is that they should be given the same full faith and credit as state or federal courts.

II. Acceptance of Responsibility

The VAG recommends that the Commission not amend the Commentary with regard to acceptance of responsibility under §3E.1 to include a non-frivolous challenge for relevant conduct. The VAG is concerned that the term "non-frivolous" is not defined and thus would not provide the clarity the Commission is seeking. It also presents a situation where a victim may have to testify in a mini-trial regarding to the defendant's challenge of an Acceptance of Responsibility adjustment consideration, which would prevent finality for the victim. Furthermore, the VAG is concerned that there is not yet enough data or evidence to support this proposed change.

III. First Offenders

The VAG recommends that the Commission adopt the proposed first offenders definition under §4C1.1 (a). The VAG wants to maintain the status for a pattern of offenses and proposes to exclude the following crimes from the operation of the proposed amendment:

Exclusion: Any offense which meets the definition of a crime of violence, as set out in §§4B1.2(a)(1) and (a)(2); §2B1.1 in which a specific victim or group of victims has been identified; §2B1.6; §2B2.1 (burglary of a residence); §2D2.3; §2G1.1; §2G1.3; §2G2.1; §2G2.2; §2G2.3; §2G2.6; §2G3.1 as it pertains to the transfer of obscene matter to a minor; §2H4.1; §2L1.1; and, §2X6.1. Any defendant who has prior criminal convictions for offenses which meet the definition of a crime of violence or which are the same or similar to an offense included in this listing but whose convictions are not used in the calculation of the criminal history category are excluded from consideration as a first time offender.

In light of all the proposed amendments, especially the amendment to the guideline-sentencing table, it is the VAG's assessment that the noted exceptions to the first time offender amendment should be applied. First-time offenders who engage in crime(s) of violence, as

defined under §4B1.2(a) have engaged in offenses which are clearly different from first-time offenders whose offense of conviction has no element of violence and no victim(s) associated with their criminal conduct. The additional listing of specific sections of Chapter 2 of the Sentencing Guidelines has been provided because not all offenses involving victims fall into the definition of a crime of violence. In addition, as is presently proposed, a first-time offender can be an individual who has engaged in serious criminal conduct but has not been criminally charged or convicted as a result of that behavior (i.e., college students who engage in repeated sexual assaults on campus and who are disciplined by the school but whose conduct has not been reported to law enforcement would technically be a first time offender under the proposed amendment. Likewise, individuals who purchase, view, and/or distribute child pornography may not have been previously convicted and would, again, technically qualify as a first-time offender.)

Defendants who have a pattern of criminal behavior which includes crimes of violence or which is similar to the conduct listed in the recommended exclusion provision have demonstrated that they are not first-time offenders, as the Commission would envision.

More importantly, the use of the exclusion provision provides the sentencing court with a mechanism that insures the victim's right to have all harms caused by the defendant's offense conduct taken into full consideration. The placement of the defendant in CHC I recognizes the defendant's status as a first-time offender. The exclusion provision helps insure that a true distinction is drawn between first-time offenders whose offense conduct does not seek to harm any individual and those offenders who specifically seek to harm others.

Finally, if the Commission does not support the new commentary the VAG supports option 1 to decrease the offense level by one.

Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of offenses. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
September 2017

Response to Sentencing Guideline Amendments

Proposed Amendment – First Offenders/Alternatives to Incarceration: Response to Public Comment

The comments set forth below are in response to Section 3. Propose Amendment: First Offenders/Alternatives to Incarceration

Issues for comment

In reference to the definition of a first offender, the commission is seeking comments as how best to define the term “first offender”. We believe a first offender should include a combination of Option 1 and Option 2. The defendant should have no prior federal convictions that resulted in the accumulation of criminal history points from Chapter four (4), part A. In response to the relevance of time in determining the definition of a first offender, we do not believe it to be a factor for consideration.

Our belief is a base level decrease of 2 is warranted if the defendant meets the criteria of a non-violent first offender. This decrease should not be predicated on a base offense level, enhancements received, final offense level, government cooperation, or any other requirements.

If the intent is to amend the guidelines based on statistics that support lower recidivism rates for first offenders, then this downward departure is warranted. We have researched, gathered and read numerous state and federal reports and articles that unequivocally show a relationship between the rate of recidivism and the age of a defendant. Older adults, over the age of 45, have a much lower rate of recidivism than adults younger in age. We believe this fact alone warrants incorporation of further level reductions for defendants aged 45 and older. To this end, we are proposing language such as that presented below be added to this amendment and incorporated with the revised sentencing guidelines.

1. If the base offense level was under level 16 one additional downward departure should be given
2. If the defendant is between the ages of 45 – 55, one level reduction should be given; if over 55 then a reduction of 2 levels should be given

<u>Criteria</u>	<u>Downward Level Adjustments</u>
First Time Offender	(2)
Base Offense Level Under 16	(1)
Age Adjustments (based on recidivism reports)	
Age 45 – 55	(1)
Age over 55	(2)

The chart below summarizes our recommendations

In the event the definition of a first offender is added by the Sentencing Commission and a determination is made to retroactively apply the definition and hence a level reduction to those currently incarcerated, we recommend special consideration be given to define the change not on an individual case basis, but consistently across the board. In other words, all of the defendants meeting the definition of a first offender receive a level adjustment that translates into a sentence reduction.

Exceptions should not and cannot in good conscience be made based on application of sentencing guidelines; plea deals entered; case assumptions, and disputes over level calculations based on enhancements defined prior to sentencing guideline amendments. Similar to the above table, we summarize our recommendation by applying the level reductions as a percentage of a sentence received, regardless of guideline recommendations; type of plea deal accepted; appeal status, etc....

Application of Guideline Change to Prisoners Currently Serving a Federal Sentence

<u>Criteria</u>	<u>Percent of Sentence Reduction</u>
First Time Offender	10%
Base Offense Level Under 16	5%
Age 45 – 55	5%
Age 55 and Older	10%

To further demonstrate how this process would be used, we offer the following example:

In 2016, the defendant is sentenced to 60 months for fraud having a base offense level of 7. The defendant meets the definition of a first offender and has already served 5 months of his sentence. He is currently 53 years of age. The application of the sentence reduction would be as follows:

	<u>Reduction Percentage</u>	<u>Months</u>
Federal prison sentence	N/A	60
Qualifies as first offender	10%	(6)
Base offense level under 16	5%	(3)
Current age of 54	5%	(3)
Time served		(5)
Remaining length of sentence prior to sentence reduction		55
Sentence Reduction		(12)
Revised remaining sentence		43

We appreciate the opportunity to provide our comments on the proposed amendment; section entitled first offenders/alternatives to incarceration and look forward to reading the final version.

Thank you for taking the time to read our comments and incorporating changes necessary to improve the guidelines.

Sincerely,

A Better Light



October 10, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments

Dear Judge Pryor:

We are always pleased to bring you the views of the board, staff and members of FAMM on proposed amendments to the federal Sentencing Guidelines. The guidelines have touched many lives, including those of our own members – 35,000 prisoners and 40,000 individuals outside prison. We appreciate the Commission’s work to amend and improve the guidelines and, as always, welcome this opportunity to share our views on one of the proposals: First Offenders/Alternatives to Incarceration.

a. First Offenders Adjustment

FAMM generally supports the Commission’s proposal to acknowledge first offenders and provide them a measure of sentencing relief by way of a reduced guideline range. We support the most generous reduction (two levels) notwithstanding the final offense level. We also encourage the Commission to adopt Option 1. Doing so would define first offenders as those Criminal History Category I defendants with no criminal history whatsoever as well as those with no criminal history points because their prior convictions are not countable, for example under §4A1.2(c)(1) and (2).

We are pleased the Commission has proposed an adjustment for first offenders. Among its benefits, adding a first offender adjustment would help the Commission better comply with two congressional directives. In one, Congress directed the Commission to ensure that the guidelines provide for punishment other than prison for first offenders.¹ The statute defined first offenders as defendants who had not been convicted of a crime of violence or otherwise serious offense.² The guidelines missed the mark to the extent that Criminal History Category I was drawn too broadly, equating defendants with no countable criminal history with those who receive one criminal history point. The other rather neglected directive is found at 28 U.S.C. §

¹ 28 U.S.C. § 994(j).

² *Id.*

994(g). Congress requires the Commission to craft guidelines that “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons as determined by the Commission.”

In line with Congress’s interest in keeping first offenders out of prison, the former administration’s Smart on Crime initiative aimed, among other things, to dampen reliance on incarceration for less dangerous offenders. The Department encouraged prosecutors to consider alternatives to incarceration for non-violent offenders in appropriate cases. Unfortunately, it appears the program was marked by wide disparity; some districts used diversion programs robustly while others used them not at all.³

Earlier this year, the Department of Justice has announced an about face on charging policy. Attorney General Jeff Sessions has directed prosecutors to seek once again the most serious, readily provable offense, defining severity by means of measuring sentence length.⁴ This is sure to once again sweep up more first offenders and other people with minimal criminal history and ensure lengthy sentences and bulging prisons.

The sheer size of the federal prison population remains a significant concern, despite reductions due in part to actions the Commission has taken to lower sentences and make those changes retroactive. At the end of FY 2016, BOP facilities remained overcrowded. Overall, institutions were 16 percent over rated capacity and high security institutions stood at 31 percent over rated capacity.⁵ The BOP still consumes more than 25 percent of the DOJ’s discretionary budget and the administration has requested approximately \$7.2 billion for the Bureau in the FY 2018 budget.⁶ The request includes \$10 million for “expected population growth.”⁷

While disappointing, this news is not especially surprising. It underscores the continued relevance of the Commission’s ongoing effort to comply with directives that aim to reduce population pressure on the BOP. The proposals as drafted can do that as they make a modest start on scaling back sentencing for first offenders. We think they can be expanded in several ways.

Defining first offenders as individuals with no criminal history points would be consistent with the Commission’s treatment of these defendants. The guidelines view these defendants’ criminal history as so remote or insignificant -- or marked by convictions that may have been secured in ways that did not afford them due process protections – as history that should not

³ *Id.* at III-14.

⁴ Dep’t of Justice, Office of the Attorney General, Memorandum for All Federal Prosecutors, *Department Charging and Sentencing Policy* (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

⁵ Dep’t of Justice, Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice* III-13 (Nov. 10, 2016), available at <https://www.justice.gov/doj/page/file/910486/download#page149>.

⁶ Dep’t of Justice, *Federal Prison System (BOP) FY 2018 Budget Request at a Glance 1*, available at <https://www.justice.gov/jmd/page/file/968276/download>.

⁷ Dep’t of Justice, *FY 2018 Budget Request at a Glance, Discretionary Budget Authority 4*, available at <https://www.justice.gov/jmd/page/file/968216/download>.

affect their sentence in any way. We can think of no principled reason to treat them differently for first offender purposes.

The Commission has struggled with recognizing first offenders for some years. A very early staff working group proposed a two-level reduction for defendants with no criminal history points who had not used violence or weapons during the offense.⁸ According to the Commission, “[t]he significance of this proposal was that it both responded to the intent of 28 U.S.C. § 994(j) and finessed the need to create a new ‘first offender’ CHC.”⁹

The proposal did not advance. The Commission said in 2005 that the fact that the early commissions lacked recidivism data had a role in preventing any first offender guideline.¹⁰

Today, of course, we have ample evidence, thanks to the Commission’s robust collection and analysis of sentencing data. For example, now we know that offenders with zero criminal history points have the lowest recidivism rates of any sentenced in the federal system.¹¹ They enjoy the lowest re-arrest rates (30.2 percent), beating out offenders with one criminal history point who had re-arrest rates of 46.9 percent.¹² Moreover, they comprise over 40 percent of all defendants in Criminal History Category I.¹³

We point out that the Commission has chosen to err on the side of over-inclusiveness by using rearrest rates, rather than reconviction or reincarceration as the measure of recidivism. The Commission explains its choice is based on data quality problems.¹⁴ Given the extensive publicity and study of poor policing choices, and new information on the unreliability of everything from bite mark to eyewitness identification, we think that rearrest is a poor measure of recidivism. As the Commission’s most recent report on recidivism points out “[m]any rearrests do not ultimately result in reconviction or reincarceration. . . .”¹⁵ Among the reasons for not convicting those who are rearrested is that there was insufficient evidence supporting the arrest.¹⁶ The report nonetheless goes on to assume, uncritically, that rearrest is an accurate measure of recidivism, without supporting the assumption. “To the extent that the rearrest event is an accurate indicator of relapse into criminal behavior, excluding events due to non-conviction or non-incarceration will result in underestimation of recidivism.”¹⁷ Of course, one does not know if rearrest events are accurate indicators. They are certainly not used in the criminal history

⁸ U. S. Sentencing Comm’n, *Recidivism and the “First Offender”* 3 (May 2004) (“*Recidivism and the First Offender*”) (citing U.S. Sentencing Comm’n, *Criminal History Working Group Report: Category 0, Category VII, Career Offender* (1991)).

⁹ *Recidivism and the First Offender* at 3.

¹⁰ *Id.* at 4.

¹¹ U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 9 (March 2017) (“*The Past Predicts the Future*”).

¹² *Id.* at 8.

¹³ U.S. Sentencing Comm’n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 10 and Fig. 2 (March 2016)(*Recidivism Among Federal Offenders*).

¹⁴ *Id.* at 2.

¹⁵ *The Past Predicts the Future* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

calculations that the Commission otherwise relies on to assess criminal history scores and predict recidivism, unless of course they result in conviction.

In defining first offenders, the Commission should include those without countable criminal history points, regardless of prior convictions. While the Commission did not include a breakdown in its most recent recidivism report, an earlier report found that 29.8 percent of citizen offenders with zero criminal history points had no arrests, 8.4 percent had no convictions and only 1.5 percent had § 4A1.2(c)(2) non-countable convictions.¹⁸ The Commission considered such “never count” minor offenses as not altering one’s first offender status as their presence did not alter predictions.¹⁹

While first offenders with non-countable priors had higher rearrest rates, their most serious charges were public order offenses, which they shared with the no-prior-contact first offenders.²⁰ The two groups of first offenders also had similar median times to rearrest.²¹

One incarcerated FAMM member with non-countable priors was convicted of wire fraud and identity theft for filing tax returns using the names of others. He had two prior non-countable convictions: one for driving with a suspended license and the other for driving under the influence of alcohol. One was a non-countable offense under §4A1.2(c) and the other was not counted because it was time barred, being nearly 25 years old at the time of sentencing. His instant offenses, while serious, were unconnected to these insignificant priors. It is difficult to distinguish him as less deserving of relief than other first offenders. He was the loving father of eight children who had worked 18 years in the trades. When he found himself out of work options after relocating his family, he filed for bankruptcy. After falling into further debt, he and a friend hit upon a scheme to falsify tax returns using others’ social security numbers. When caught, he admitted to his conduct and pled promptly. He was subject to a variety of cumulative enhancements under the fraud guideline that ensured he received a significant prison term, even taking into account adjustments and reductions. His conduct was serious but we can see nothing to distinguish him from other first offenders with no prior conduct whatsoever and we can see no reason why his extremely old and relatively minor priors should bar him from first offender status.

Another concern we have with a proposal that would provide relief only to first offenders with no convictions whatsoever is that it might give rise to demographic disparities in awarding the adjustment. Take, for example, the issue of non-countable petty and misdemeanor offenses. A number of studies have focused on the disparate impact on racial minorities of policing and prosecution choices. In one 2014 report by the Vera Institute of Justice, race was found to play a significant role at every stage of the criminal prosecutions.²² The study examined 222,542

¹⁸ *Recidivism and the First Offender* at 5.

¹⁹ *Id.* at 5, n. 14.

²⁰ *The Past Predicts the Future* at 9.

²¹ *Id.*

²² Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County*, Vera Institute of Justice (Jan. 31, 2014) (*Prosecution and Racial Justice*), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>.

prosecutions in New York City, including all misdemeanor prosecutions.²³ The study examined the demographic picture with respect to charging for a number of felony and misdemeanor offenses. Relevant to non-countable convictions for guideline purposes, blacks and Latinos made up fully 84.3 percent of persons charged with gambling misdemeanors; 53.2 percent of those charged with prostitution; and 77.9 percent of those charged with offenses against public order.²⁴

The study found that blacks and Latinos were more likely than whites to be incarcerated post-arraignment for misdemeanors or unable to make bail.²⁵ Defendants with prior misdemeanors that are not counted under § 4A1.2(c)(1) might very well have been affected by pre-trial detention. Jail detention statistics reveal racial disparity. “Nationally, African Americans are jailed at almost four times the rate of white Americans.”²⁶ Once jailed, those charged with crimes, plead guilty in 97 percent of cases. “[M]uch of the decision making powers in disposition remains with prosecutor, who can leverage the initial charge decision and the amount of money bail requested to bring a case more quickly to a close with a plea deal. Particularly for defendants on low-level charges – who have been detained pretrial due to an inability to pay bail, a lack of pretrial diversion options, or an inability to qualify for those options that are available – a guilty plea may, paradoxically, be the fastest way to get out of jail.”²⁷

One researcher found, also in New York, that while blacks and Hispanics comprised 51 percent of the population, they made up fully 82.4 percent of all misdemeanor arrestees.²⁸ The high percentages of “quality of life” misdemeanor arrests . . . that occur in heavily minority or poor neighborhoods are . . . cause for great concern. . . .”²⁹

We suspect, in light of these and other studies, that racial differences and disparity might be evident with respect to non-countable prior convictions under § 4A1.2(c). The Commission should be able to determine from its own first offender research whether defendants of color would be adversely affected by the proposed exclusion. Before adopting the proposed exclusion, the Commission should examine the matter.

We also urge that defendants with convictions from foreign, military and tribal courts should not be excluded from first offender consideration. There are inherent concerns about these convictions that led the Commission to exclude them from criminal history consideration entirely. For example, the Indian Civil Rights Act, 25 U.S.C. § 1301(2), which provides for certain procedures in tribal courts, nonetheless does not require that defendants in those courts be

²³ *Id.* at v.

²⁴ *Prosecution and Racial Justice* at 50. (Those listed offenses were the only ones tracked that resembled non-countable offenses in § 4A1.2(c)).

²⁵ *Prosecution and Racial Justice* at 94-96.

²⁶ Ram Subramanian, Ruth Delaney et al., *Incarceration’s Front Door: the Misuse of Jails in America* 11, Vera Institute of Justice (Feb. 2015) available at <http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

²⁷ *Id.* at 38.

²⁸ Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* 48, HUMAN RIGHTS WATCH (Dec. 2010).

²⁹ *Id.* at 47-48.

afforded certain constitutional protections.³⁰ Above all, it does not provide tribal court defendants the right to appointed counsel. Uncounseled convictions are suspect, not just from a due process perspective, but substantively as well. According to the Commission's Tribal Issues Advisory Group, many tribal courts have court officers who lack a law degree or formal training and/or are politically appointed, raising concerns about impartiality.³¹ These features led the TIAG to recommend the Commission continue its ban on counting tribal court convictions under USSG § 4A1.2.³²

The same concerns that led the Commission to exclude such convictions from counting toward criminal history should inform the first offender decision. In any event, if a conviction from one of the currently uncounted courts does trigger a first offender reduction, an upward variance or departure could be used if the court found the criminal history was underrepresented.

The Commission also asked if the proposed reduction should be limited by offense level. We urge the adjustment not be limited by offense level. First offenders populate the entire sentencing table from top to bottom. There are roughly twice as many first offenders at offense level 16 and above than at level 15 and below. Of the first offenders analyzed by the Commission, only 4,550 triggered final offense levels of 15 or lower; more than twice as many were found at offense level 16 and above and the 4,710 drug offenders in the second category accounted for the majority of the difference in numbers.³³ Drug offenders, who face some of the longest sentences in the guidelines, are especially well represented. Drug offenders make up the largest concentration of first offenders and they are concentrated at offense level 16 and higher. They are followed, at a distance, by offenders sentenced under § 2B1.1.³⁴ Almost half of all drug traffickers are in Criminal History Category I.³⁵

We know that drug offenders are assigned guideline levels based on drug quantity, a measure of blameworthiness that has come under a great deal of scrutiny and criticism, including from the Commission itself, which recognized in 2011 that drug quantity is only one of many important factors in establishing an appropriate sentence for drug offender.³⁶ The Commission knows very well that drug quantity overwhelms other important considerations, overstating culpability in many cases. Its work to reduce that reliance has been laudable, most recently with respect to drugs minus two. Nonetheless, it is the quantity of drugs rather than the first offender status that continues to drive these sentences.

If the Commission wishes to recognize and adjust for first offender status, it should not categorically limit the adjustment based on offense level, given how large a part simplistic

³⁰ U.S. Sentencing Comm'n, Tribal Issues Advisory Group, *Report of the Tribal Issues Advisory Group* 10 (May 16, 2016).

³¹ *Id.* at 11.

³² *Id.* at 12.

³³ U.S. Sentencing Comm'n, *Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment* (Public Data Presentation) (December 2016), Slide 15.

³⁴ *Id.*

³⁵ U.S. Sentencing Comm'n, *Quick Facts: Drug Trafficking Offenses* (May 2016).

³⁶ U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 350-351 (2011).

metrics such as drug quantity or, in the economic crime arena, loss, have in determining final offense levels. Moreover, in its most recent study on recidivism, the Commission concluded, “[t]here is not a strong correspondence between final offense level and recidivism.”³⁷

It is not uncommon to see first offenders with extremely high base offense levels drawn from relevant conduct quantity or loss assessments. Ms. L. L. had no prior offenses when she became dependent on methamphetamine. She was in a tragically typical downward spiral when she fell in love with her meth supplier. She was arrested with him when she drove him to what turned out to be a drug sale. The purchaser was a confidential informant. Her car was searched and drugs and a gun were found. More drugs were found in her home and despite her boyfriend’s assertion that she was not involved, Lisa was charged with all the drugs attributed to him and his supplier. She was sentenced to a whopping 151 months, more time than the dealer who supplied the drugs to her boyfriend, later reduced to 121 months by drugs minus two. A first offender reduction of two levels would result in a sentence of 97 months.

Ms. C.R. was in the grips of a severe gambling addiction when she began embezzling money from the credit union that employed her. She would deduct funds from credit union member accounts and then reimburse, as it were, those members, from the credit union’s corporate account. While individual depositors were not harmed by her conduct, the credit union sustained a significant shortfall. When confronted, she admitted her conduct and cooperated in the investigation of her conduct. She was ordered to pay restitution to cover the funds she withdrew and sentenced to a 78-month term of incarceration. She is a mother, grandmother and great grandmother who at 69 years old suffers from significant health problems, including macular degeneration. She is receiving no mental health treatment for her addiction. She reports that she did all she could to help in her own prosecution and writes “I am a sick person that got caught up in the stress and lies and nightmares.” She is a true first offender with a final offense level of 27 driven primarily by loss of between \$1 million and \$2.5 million and enhanced for sophisticated means, and jeopardizing the soundness of a financial institution.

It is precisely because sentences driven higher by relevant conduct and multiple enhancements can be very long that the adjustment to reflect first offender status should be at its most generous in the higher offense levels. At a minimum, the Commission should provide for a two-level reduction for *all* first offenders.

b. First Offender and Non-Incarceration Presumption

Once having defined first offender, the Commission will consider whether to include a presumption of non-incarceration first offenders who fall within Zones A and B – and expand Zone B to include existing Zone C.

FAMM supports the proposal to the extent that it furthers congressional intent as expressed in 28 U.S.C. § 994(j). That statute directed the Commission to “insure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in

³⁷ *Recidivism Among Federal Offenders* at 20.

which the offender has not been convicted of a crime of violence or other serious offense.” (Emphasis added). The proposal asks whether the Commission should, in addition to limiting the relief to defendants with non-violent crimes as directed by the statute, also exclude prisoners who were found to have credibly threatened or used violence or possessed a firearm in connection with the offense.

The proposed exclusions should not be adopted. They go beyond anything contemplated by Congress and would bar objectively non-violent prisoners, such as those whose personal conduct did not involve any hint of violence or weapon possession, from the presumption.

Take, for example, the firearm enhancement under § 2D1.1(b)(1). The relevant conduct rule directs judges to assess a gun bump in the case of a firearm possessed by another within the scope and in furtherance of the conspiracy and reasonably foreseeable to the defendant.³⁸ First offenders assessed a gun bump due to the conduct of others or whose weapon possession was so de minimus that it did not result in a conviction, should not be barred from a first offender adjustment.

The Commission’s 2004 first offenders’ report revealed that the vast majority of first offenders (87.1 percent) had no violence or weapon enhancements.³⁹ Moreover, limiting the relief to Zones A and B, even if the latter is combined with Zone C, means that the number of defendants who present with such low final offense levels – ones that include the enhancement for firearm or violence – will be quite small.

FAMM also opposes excluding so-called “white collar” offenses from those eligible for other than incarceration sentences under amended § 5C1.1. That exclusion would fly in the face of the statutory directive to ensure that first offenders convicted of other than a crime of violence be considered under a guideline that would impose a sentence other than incarceration. Of the 6,986 offenders sentenced under § 2B1.1 in 2016, the majority – 70.1 percent -- were located in Criminal History Category I,⁴⁰ which is itself composed primarily of first offenders.⁴¹ More than two-thirds of economic crime offenders, 70.1 percent, were sentenced to prison terms.⁴² The same recidivism rates for defendants with prior convictions for fraud offenses are very low, well under the average for all offenders.⁴³

Because the guidelines assess relevant conduct to include conduct not directly engaged in by the defendant, many otherwise deserving defendants would be excluded from this relief, notwithstanding congressional intent that they receive non-incarceration sentences. We can see no reason to exclude such defendants and doing so was not contemplated by Congress.

³⁸ U.S.S.G. § 1B1.3(a)(1)(B).

³⁹ *Recidivism and the First Offender* at 24, Ex. 4.

⁴⁰ U.S. Sentencing Commission, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (Aug. 2017) (“*Quick Facts*”).

⁴¹ *Public Data Presentation* at 7.

⁴² *Quick Facts*.

⁴³ *Recidivism Among Federal Offenders* at 10, fig. 2. In 2004, the Commission found the overall recidivism rate for fraud and larceny offenders was 18 percent. See U.S. Sentencing Comm’n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* 30, Exhibit 11 (May 2004).

c. Retroactivity

FAMM encourages the Commission to study retroactivity of the first offender amendments should they be adopted. We believe they fit the criteria for retroactivity. First offenders who might benefit from retroactivity would nonetheless face important hurdles. The court considering retroactivity will need to determine that early release will not impair public safety and will consider a variety of factors including the offense conduct and the prisoner's behavior while incarcerated.⁴⁴ The reductions will of course be limited to that authorized by the Commission to one, or hopefully two, levels.

The Commission considers the purpose of the amendment, the magnitude of the change, and the difficulty of applying the change when making an amendment retroactive. To the extent we have information; all of these considerations weigh heavily in favor of retroactivity.

As discussed above, recognizing first offenders is long overdue and that more than justifies retroactivity for those prisoners whose sentences should have been adjusted had the Commission acted earlier on the matter. The proposals are welcome, even more so because overdue. Prisoners should benefit for the same reason that defendants will.

While the Commission has not indicated how many prisoners would be affected by the first offender adjustment and is considering alternative approaches, there is no question of the magnitude of the adjustment. According to the Commission's 2016 released figures, 44.3 percent of the criminal history sample of the 2014-sentenced population was first offenders.⁴⁵ Of those, 60.3 percent had no prior convictions and an additional 21.8 percent had non-countable prior convictions.⁴⁶ In 2014, 75,836 defendants were sentenced.⁴⁷ If the statistics hold, then over 20,000 prisoners could be eligible first time offenders from 2014 alone, minus prisoners whose sentences were short enough that they have already been released or were never subject to incarceration in the first place.

At least as to the one- or two-level adjustment, assessing magnitude will be enhanced by an impact study from the Commission that could provide numbers of eligible prisoners, sentence length, and expected reductions. However, it is safe to say that given the large number of first offenders, the impact of retroactivity on the prison population would be significant, saving bed spaces and tax dollars.

While those on the front lines of the system – prosecutors, judges, probation officers and federal defenders – bear the brunt of implementing retroactivity, we think it is safe to say that it could be done with relative ease. Three significant reductions have taken place, with Commission leadership, starting in 2008. The resources developed over those years include

⁴⁴ U.S.S.G. § 1B1.10, App. Note 2 requires the judge to “consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the . . . term of imprisonment.”

⁴⁵ *Public Data Presentation* at 6.

⁴⁶ *Id.* at 7.

⁴⁷ U.S. Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, Introduction.

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knowledge, good will, and experience in handling reductions. That collaborative framework will be readily available to the parties handling first offender retroactivity.

Applying a one- or two-level reduction should be quite straightforward. Using Presentence Investigation Reports, the parties can determine easily who has qualifying zero points. Motions similar to those fashioned in the last three rounds could be used.

Of course the Commission can help answer whether these considerations are met by providing a retroactivity impact report. We ask that it vote to study retroactivity at the same time it votes for the amendment, should it do so.

1. Conclusion

Thank you for considering our views. We look forward to working with the Commission this year.

Sincerely,



Kevin A. Ring
President



Mary Price
General Counsel



October 10, 2017

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The Honorable Ralph Erickson, Chair
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Dear Judge Erickson:

This correspondence is in response to the letter of August 28, 2017 from the Tribal Issues Advisory Group ("TIAG"), seeking consultation with and comments from tribal nations regarding proposed amendments to the Federal Sentencing Guidelines that would affect defendants who are enrolled members of a federally-recognized tribe.

Regarding use of tribal court convictions in federal sentencing, the Kalispel Tribe of Indians supports leaving tribal court convictions out of the base criminal history calculation, and instead consider tribal court convictions for a potential upward departure from the recommended sentencing range. The Kalispel Tribe shares the concerns of TIAG with regard to tribal court record access. If tribal court convictions were included in the base calculation of a defendant's criminal history score, then members of tribes willing to share court records would be treated more harshly by having a higher criminal history score than members of tribes not willing to share court records. While there is some concern this disparity may occur by including tribal court convictions at all, the use of such records in justifying an upward departure from the recommended sentencing range provides less of a risk than automatically including tribal court convictions in a base calculation.

However, in reviewing the proposed amendments to the policy statement in using tribal court convictions, the Kalispel Tribe objects to inclusion of the first relevant factor. This language instructs sentencing judges to consider whether the defendant "received due process protections consistent with those provided to criminal defendants under the United States Constitution." The Kalispel Tribe objects to inclusion of this language for two reasons. First, the United States Supreme Court recently ruled a defendant's uncounseled tribal court convictions for domestic violence may be used as predicate offenses for the federal charge of being a habitual domestic violence offender. (See *United States v. Bryant*, 579 U.S. ____ 2016.) The Supreme Court specifically found that tribal courts are not bound by the United States Constitution, rather by the Indian Civil Rights Act, which affords some but not all of the same protections as the Bill of Rights. By adding this relevant factor into the policy statement, a sentencing judge could give less credence to a tribal court conviction where the defendant was not represented by an attorney, even though the Supreme Court has said

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representation by an attorney is not required in tribal courts. Second, under the terms of enhanced sentencing of the Tribal Law & Order Act of 2010 (TLOA) or the special domestic violence jurisdiction of the Violence Against Women Act of 2013 (VAWA), a tribe must afford a criminal defendant with nearly all of the due process protections outlined in the United States Constitution. Thus, in these cases, the first relevant factor is made irrelevant if a tribe has purposely chosen to adopt either the enhanced sentencing under TLOA 2010, the special domestic violence jurisdiction under VAWA 2013, or both.

Regarding the proposed revision of the sentencing guidelines to clarify the definition of “court protection order” by incorporating references from 18 U.S.C. § 2266(5) and 18 U.S.C. § 2265, the latter of which requires automatic full faith and credit of court protection orders issued by courts in all 50 states, all United States territories and all tribal jurisdictions, without requiring prior registration of the protection order. It is logical to adopt this language as the purpose of these sections is to erase the jurisdictional lines that have prevented court protection orders from providing widespread protection outside the issuing court’s jurisdiction. The Kalispel Tribe therefore supports the proposed revision to the definition of “court protection order.”

Thank you for your time and attention in this matter.

Sincerely,



Glen Nenema, Chairman
Kalispel Tribe of Indians

GN/tsf



National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

October 10, 2017

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The Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Pryor:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the proposed amendments to the Sentencing Guidelines made public on August 17, 2017, regarding first time offenders and challenges to relevant conduct.

The National Association of Assistant United States Attorneys represents the interests of 5,400 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our system of justice. Our primary responsibility is to protect the innocent and convict the guilty.

NAAUSA takes no position on the majority of the proposed guideline amendments, but rather has chosen to voice our opposition to those amendments we believe would be most harmful to the fair application of the guidelines. As the nation's federal prosecutors, we will be affected on a daily basis by the real consequences of these amendments, as detailed below.

1. Creation of a New "First Time Offender" Status Under §4C1.1

The proposed amendment adding a special category of criminal history for "true" first time offenders would create a set of special new benefits for offenders who have no prior conviction, including further offense level reductions of one or two levels. Yet the new guideline would go even farther, providing that for "first offenders" of an offense that is "not a crime of violence" or where the "defendant did not use violence or credible threats of violence or possess a firearm" who fall within Zone A or B of the Sentencing Table, the court "ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline."

The Sentencing Commission's own report, entitled *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016), does not support the reasoning behind this proposed amendment. In fact, according to that study, offenders with no conviction still reoffend at a rate of over 30%, and the average rate of recidivism for all those in Criminal History Category I (including individuals with zero or one criminal history point) is only slightly higher, 33.9%.

One area where the proposed amendment would wreak particular havoc involves the prosecution of individuals who supply a large number of the firearms utilized by violent felons. As has been well documented, the majority of firearms used to commit serious felonies were either stolen, or were obtained through the use of a non-prohibited "straw purchaser" by the convicted felon or firearms trafficker. Due to the need for the straw firearm buyer to pass a federal background check, this person is, of necessity, a "first time offender." These straw buyers are most typically prosecuted under Title 18, United States Code Sections 922(a)(6) or 924(a)(1)(A).

As it is now, the guideline range for providing even dozens of firearms to a felon or felons typically falls within only 12 to 18 months' imprisonment. Adoption of the proposed guideline recommending non-incarceration of these "first time offenders" would effectively result in no specific or general deterrence of these precursor offenses to crimes of violence.

In the white collar crime context, creating this new category of offender would render the sentencing factors of Title 18, United States Code, Section 3553(a)(2) meaningless. Many, if not most, white collar offenders have no prior scoreable offenses for sentencing purposes, and come to federal court for the first time having committed serious and significant fraud. By further reducing their guidelines, the Commission would reduce the disincentive to defraud others by reducing the penalty.

If, however, the Commission intends to move forward with this proposed amendment despite our objection, we make the following recommendations. We strongly recommend the use of Option 2 to award first offender status only where the offender has "no prior convictions of any kind," since offenders with "stale" prior criminal convictions obviously present a higher recidivism risk than true first offenders. With regard to the decrease in offense levels, we urge the Commission to adopt Option 1, providing a one-level reduction to this category of offenders.

Finally, if the Sentencing Commission moves forward with the amendment to §5C1.1, regarding a recommendation of a non-prison sentence for "first time offenders," we highly recommend the definition in the second option be used, "where the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense." We urge the Commission to avoid using the term "crime of violence" in this context due to the problems associated with the categorical approach.

Carving out an entirely new category for offenders with zero criminal history points would unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who already are subject to sentencing at the lowest range available for their offense conduct. Given the fact that judges already have the discretion to vary downward in extraordinary cases of uncharacteristic criminal conduct, NAAUSA believes this new class of low level offenders is not warranted and should be rejected.

2. Allowing Defendants to Challenge Relevant Conduct While Still Receiving a Reduction for Acceptance of Responsibility Under §3E1.1

NAAUSA recommends against the change to the Application Notes to §3E1.1 to allow challenges to relevant conduct without the loss of credit for acceptance of responsibility, as this change is wholly unnecessary and weakens the incentive for a defendant to take responsibility for his or her actions.

Under the guidelines, the reduction in sentence allowed for a defendant's acceptance of responsibility is significant because the timely notification of a guilty plea permits the government "to avoid preparing for trial" and permits "the government and the court to allocate their resources efficiently." §3E1.1(b). *As it is currently written*, only those who falsely deny or frivolously contest relevant conduct which the court finds to be true are penalized. This change to the application notes would water down the level of acceptance required of a defendant and lead to increased litigation in the sentencing phase over challenges to relevant conduct. The cost of this increased litigation is precisely one of the societal costs that was sought to be avoided by encouraging defendants to accept responsibility for their actions.

By way of example, the proposed amendment will affect drug prosecutions where a defendant contests the relevant drug weight attributed to him. In many cases, this will necessitate a multi-day sentencing hearing and require the government to produce witnesses. In a typical wiretap case, for instance, the government may now be required to produce testimony from the representative of a phone company, surveillance agents, chemists, and cooperating defendants in a de facto bench trial on this sentencing issue. This will result in a large expenditure of time and money, and is not markedly different from having to prepare for a jury trial, the precise burden that this guideline was designed to prevent.

NAAUSA sees no compelling reason to inject unnecessary uncertainty into the question of acceptance of responsibility, and recommends that the proposed revision of the application notes to §3E1.1 be rejected.

Conclusion

In summary, NAAUSA urges the rejection of the proposed changes described above. We appreciate your consideration of these comments in finalizing your proposed amendments to the Guidelines.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lawrence Leiser". The signature is written in a cursive style with a large initial "L" and a distinct "Leiser" ending.

Lawrence Leiser
President



THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

October 10, 2017

United States Sentencing Commission
Tribal Issues Advisory Group
Attn: Public Affairs
One Columbus Circle N.E. Suite 2-500
Washington, D.C. 20002-8002

Re: Comments on Use of Tribal Convictions and Court Protection Orders

Dear Tribal Issues Advisory Group

On behalf of the Navajo Nation (the Nation) this letter provides comments on whether the Chapter Four, Part A of the United States Sentencing Guidelines (USSG) should be amended to include sentences from tribal court convictions under §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

We would like to thank the United States Sentencing Commission for establishing the Tribal Issues Advisory Group (TIAG). We are pleased to see the TIAG addressing this issue and consulting with the tribes on a government-to-government basis on this matter.

The Nation spans 27,000 square miles and is roughly the size of West Virginia. The Nation has a Judicial Branch with eleven district courts and a Navajo Nation Supreme Court. This branch interprets and applies laws from the Navajo Nation Code, as well as Diné Fundamental Law. The Office of the Prosecutor has six attorneys and seven prosecutors/tribal advocates. The Public Defender's Office has seven public defenders. Given our land size, population, and staff numbers, the Nation has not yet implemented expanded jurisdiction such as the Tribal Law and Order Act or the Violence Against Women Act's Special Domestic Violence Criminal Jurisdiction. However, we are working towards implementation.

The use of tribal convictions as the basis for an upward departure in sentencing will be an effective means to deter Navajo citizens from committing crimes, and any form of deterrence is greatly needed and appreciated given the high rates of crime on the Nation. I thus support the use of tribal convictions in upward departures in federal sentencing. For that same reason, I also support the use of tribal convictions in calculating criminal history in federal sentencing.

The Nation will be launching the Tribal Access Program (TAP) on November 13, 2017, which allows us to share certain tribal convictions through agreements. We understand that by using TAP, we implicitly agree to have tribal convictions shared through TAP to be used in upward departures in federal sentencing, and we do not object to that so long as the convictions shared through TAP are formally approved by the Nation. Similarly, for Navajo Nation convictions not shared through TAP, I strongly urge the Commission to respect Navajo

sovereignty by obtaining a formal expression of policy from the Navajo Nation authorizing upward departures for those specific convictions.

I imagine other tribal nations will have their own laws governing who their formal expression of consent should come from. Those laws should be respected in determining which body within each tribe has the authority to make that expression. Indeed, tribal law should provide the criteria used in determining when a tribal government has “formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.” The tribe’s attorney general or general counsel can provide confirmation that the appropriate body has provided this expression and can also provide confirmation that the appropriate form of expression has been secured. The form of expression will likely be a council resolution or a formal letter.

Below are comments provided by the Nation’s Attorney General and Chief Prosecutor. Our Attorney General and Chief Prosecutor are very familiar with the state of public safety on our Nation, and are well-equipped to provide comments regarding the use of factors.

Navajo Nation Attorney General & Chief Prosecutor Comments

The proposed amendment to the federal sentencing policy statement at §4A1.3 regarding departures based on inadequacy of criminal history is an equitable and prudent approach to include certain tribal court convictions in the computation of criminal history points. Under the current policy statement, tribal court convictions are not counted for purposes of calculating criminal history points and the amendment does not change that. The proposed amendment to §4A1.3 itself is minor, striking out one word. The greatest change to §4A1.3 is to the commentary section. The decision to leave §4A1.3 intact and to provide more guidance to federal courts via the commentary is a judicious approach considering the great variety of tribal court systems and procedures. The guidance provided in the commentary section provides a non-exhaustive list of factors the court can consider in determining whether an upward departure based on a tribal court conviction is appropriate, which gives the federal court a great deal of discretion.

With regard to those factors, a non-exhaustive list is provided in the commentary:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution. *This factor is largely focused upon due process concerns, of which the Tribal Issues Advisory Group was most concerned because of the variety of due process protections and procedures provided by the various tribes. What may keep Navajo Nation tribal convictions from being counted is that not all defendants are represented by counsel, though they have a right to counsel, a right to a jury trial, and other due process protections. **This is an appropriate factor.***
- (ii) The Tribe was exercising expanded jurisdiction under the *This factor would not necessarily weigh against the Navajo Nation given the due process protections*

Tribal Law and Order Act and the Violence Against Women Reauthorization Act.

*provided in our system. A tribe exercising expanded jurisdiction under TLOA and VAWA would automatically meet certain due process and procedural requirements. **This is an appropriate factor.***

(iii) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

*This factor has both a fairness and double jeopardy element to it in that the court is advised not to penalize a defendant twice for the same conduct. **This is an appropriate factor.***

(iv) The conviction is for an offense that otherwise would be counted under §4A1.2.

*Under §4A1.2 the crimes counted include felony and misdemeanors offenses, and crimes of violence. Certain juvenile and petty offenses are not included. **This is an appropriate factor.***

(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.

*This factor is dependent upon the Tribe making its own policy statement. However, regardless whether the Navajo Nation makes a formal statement, a court is not automatically precluded from using the tribal court conviction, as this is a non-exhaustive list of factors. **This is an appropriate factor.***

An issue for comment is whether the policy statement should build in a threshold inquiry for tribal court convictions. A threshold inquiry into the due process protections provided by the Tribe is a fair inquiry to make, but it may lead to the exclusion of many tribes. The Navajo Nation has due process protections in place and would have an argument that it meets any threshold requirement. However, not all defendants in the Navajo Nation system are represented by counsel. This is a concern considering the number of tribal defendants who plead guilty at arraignment without counsel.

Factor (v) is an appropriate factor, but seems to go further than is needed. We understand that the criminal history calculation serves as the basis for any departure, and at present tribal convictions are not included in that calculation. Thus it would be unlikely that a tribe would have a formal statement in support of this as it is not presently an option for tribes. It seems the more appropriate factor, or perhaps a factor to be added in addition to this one, is whether at the time the defendant was sentenced the tribe had formally expressed a desire that convictions from its courts should serve as the basis for upward departures in federal sentencing as that is a viable option given this proposed rule change.

An additional factor the court should consider is whether the victim, if there is one, has expressed a desire that the tribal court convictions be counted. This is a concern for which the Federal AUSAs and federal victim advocates could provide some insight.

Lastly, we do not object to the definition of a court protection order deriving from 18 U.S.C. §2266(a-b) or 18 U.S.C. §2265(b). Both definitions include protection orders from tribal courts. Thank you again for allowing us to comment on an important issue concerning public safety on the Navajo Nation.





Neah Bay Public Safety

P.O. Box 192 Neah Bay, WA 98357 (360) 645-2701 Fax: (360) 645-2941

10/02/17

U.S. Sentencing Commission
Officer of Legislative and Public Affairs

Honorable Tribal Issues Advisory Group,

I am Chief of Police Jasper N. Bruner of the Neah Bay Public Safety in Neah Bay, WA. for the Makah Tribe. I have reviewed the proposed amendment and with to provide the following comments of the document.

I will first start with section (A) Tribal Court Convictions. We are bound by our own sentencing up to one year as you are well aware of. It does not appear that we are going to opt in to TLOA or PL 113-4 due to the requirements and lack of funding to support the expansion of the service.

I personally would like to see that tribal court conviction be recognized during the sentencing process and be a consideration for upward departures at the presiding judge's digression. This does not have to be a wide gap or expansion during sentencing but one that allows the consideration and opportunity for this upward departure.

At times, the only hope of any justice we have is relying on the fiduciary duty of the US Attorney Generals Office in handling severe cases. Allow the Judges that at times have a lifetime of experience to apply this wisdom and digression as warranted. A requirement that could be added is that a time line of the tribal convictions could be added, crimes committed, repeat offender, and documentation for the past convictions be present at the time of sentencing or during the review period prior to the judge's decision.

TLOA and PL 113-4 are great steps in furthering Native American Tribes Criminal Authority is still does little for the tribes that do not or cannot opt in. I understand the TAIG concern and hesitation using tribal convictions but do not agree. Should there be a simple training and monitoring process that courts could complete to address this concern, with little to no cost to the tribes.

Proposed Amendment: 4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement) (a) (B) "more than one year", this is s a reference to Tribes that have opted in to TLOA in which there jurisdiction has been expanded. This is an exclusion for the tribes that have not opted in and are still working with the up to one year conviction limitations. (3) Prohibition of considering prior arrest record for a purposed upward departure is a limitation that should be given to the Judges with its own limitations in the point calculations.

This could work in both the Upward and Downward Departures giving those options and limitations. They need not be drastic but need to be allowed. With all these



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things said, I still believe in the US Justice System and at times rely on it heavily to complete a job that we do not have the authority to exercise due to the limitations that we have to deal with.

Thank you for the opportunity to provide comment on this most important subject matter.

Sincerely,

Chief Jasper Bruner

A handwritten signature in blue ink, appearing to read "J Bruner", is written over the typed name.

ONEIDA INDIAN NATION



ONEIDA NATION COURT

October 10, 2017

Hon. William H. Pryor, Jr.
Acting Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

RE: Comments of the Oneida Indian Nation on Proposed Amendments to U.S. Sentencing Guidelines

Dear Judge Pryor:

As a sitting judge for the Court of the Oneida Indian Nation, and a former judge of the New York State Supreme Court, Appellate Division, I write on behalf of the Oneida Indian Nation (the "Nation") to offer the Nation's comments to the Commission's proposed amendments to the commentary to §4A1.3 of the U.S. Sentencing Guidelines. The Nation commends the Commission for the spirit of government-to-government cooperation and respect for tribal sovereignty that is reflected in both the work of the Tribal Issues Advisory Group and the Commission's current request for public comment.

Overall, the proposed amendments to §4A1.3 highlight the simple yet important fact that tribal court judgments and criminal convictions are integral to the exercise of tribal self-governance, and should validly be recognized as such. By providing additional guidance to U.S. courts on whether and how to consider prior tribal court convictions in sentencing decisions, the approach reflected in the proposed amendments reflects a careful balance between respect for the important role that tribal courts play in tribal self-governance, and the reality that the each tribal court, and each tribe's underlying substantive law, is unique. The proposed amendment reflects a respect for these differences between tribes by maximizing the U.S. sentencing court's ability to take the unique structure and function of each tribe into account.

Though the overall approach of the proposed amendment is prudent, the Nation has specific comments to the bracketed text currently set forth in subsection 2(C)(v) of the proposed amendment to the commentary. First, as noted by a commenter on the September 25, 2017 consultation call, the text as currently drafted appears to imply that each of the 567 federally recognized tribes must take governmental action to "formally express[] a desire that convictions from its courts should be counted for purposes of computing criminal history" in order for U.S. sentencing courts to consider making an upward departure based on the tribal court conviction. The Nation agrees with that commenter that this "opt in" provision places a significant and unnecessary burden on tribal governments. Instead of this formulation, the

commentary should reflect a presumption that the U.S. court may consider the tribal court judgment, unless a tribal government has expressed a formal desire that convictions from its courts should not be counted for purposes of computing criminal history. In the absence of tribal governmental action to express a contrary

Letter to Hon. William H. Pryor, Jr.

October 10, 2017

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desire, there should be a presumption that tribal court convictions will be accorded the dignity of consideration by the U.S. court.

Second, even if the text of subsection 2(C)(v) is revised to reflect the comment above, the current placement of this subsection as merely one factor among many for the U.S. court's consideration raises significant concerns with respect to tribal sovereignty. As currently drafted, the formal expression of a tribal government that it did or did not desire convictions from its courts to be counted under the Guidelines would merely be a non-binding factor for consideration by the U.S. sentencing court. As such, a situation could arise where a tribal government has clearly expressed a desire that convictions from its courts not be counted for the purposes of computing criminal history, but a U.S. court could nonetheless choose to ignore that desire, and count the tribal court conviction for purposes of making an upward departure on the basis of other factors. Thus, as currently drafted, the proposed amendment pays mere lip service to the idea that the Guidelines will respect the strongly held and clearly expressed wishes of tribal governments on this issue.

To resolve this concern, the proposed amendment should be revised to clarify that if the tribal government has formally expressed a desire that convictions from its courts should not be counted for purposes of computing criminal history, the U.S. sentencing court should end the inquiry there and may not count the tribal court conviction for purposes of making an upward departure. The tribal government's determination on this question should be binding on the U.S. court. To achieve this, subsection 2(C)(v) should be deleted from the proposed amendment to the commentary, and the substance of that section should be incorporated into the body text of subsection 2(C) as follows:

(C) Upward Departures Based on Tribal Court Convictions.—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall first determine whether, at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should not be counted for purposes of computing criminal history pursuant to the Guidelines Manual. If the government had made such a formal expression, the court shall not make an upward departure based on the tribal court conviction. If the court determines that the tribal government had not made any such formal expression, it shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following: [...]

Thank you for your consideration of these comments, and for your continued commitment to strengthening respect for tribal sovereignty and tribal self-governance within the U.S. Sentencing Commission and the U.S. court system.

Sincerely,



Hon. Robert G. Hurlbutt

RGH/kab

Cc: Ray Halbritter, Nation Representative
Peter Carmen, Chief Operating Officer
Meghan Murphy Beakman, General Counsel



The Honorable William H. Pryor, Jr., Acting Chair
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

October 10, 2017

RE: Public Comment on USSC's "First Offenders/Alternatives to Incarceration" Proposed Amendment

Dear Judge Pryor:

The undersigned applaud the Sentencing Commission's consideration of an amendment to increase the availability of sentences of alternatives to incarceration within the federal sentencing guidelines. The Sentencing Reform Act of 1984 which created the guideline system wisely recognized the appropriateness of non-incarceration sentences in certain cases.¹ Since that time criminological research has underscored Congress's assumptions, and evidence suggests that a broader cohort of people than at present could be sentenced within the federal system more efficiently without incarceration. Doing so would not compromise public safety, but would save tax dollars, preserve families and enhance rehabilitation.

According to Commission data, approximately 10 percent of people sentenced in federal court during 2016 received a sentence of probation only or probation with conditions of confinement, often meaning home confinement or electronic monitoring, in Sentencing Zones A and B respectively.² In contrast, at the state level 31 percent of people sentenced on felony charges received a sentence of probation only or some other non-incarceration penalty such as fines, treatment or community service.³ While there are distinctions between federal and state criminal justice systems, many more people convicted of low-level federal offenses with limited criminal histories should be considered for non-incarceration sentences.

Below we address some of the Commission's specific issues for comment for proposed amendment #3 – "First Offenders/Alternatives to Incarceration."

Part A: First Offenders

1. The Commission's most recent sentencing data finds 45 percent of people sentenced in federal court had minimal or no criminal history and qualified for the lowest criminal history category (CHC I).⁴ The Commission's recidivism studies found those with a CHC I had a rearrest rate of 33.8 percent up to eight years after sentence completion compared to a rate of 80.1 percent for people with the highest criminal history category (CHC VI).⁵ For purposes of applying offense level reductions for "first offenders" as

¹ See 28 U.S.C. § 994(j).

² *2016 Annual Report and 2016 Sourcebook of Federal Sentencing Statistics* (pp. S-28, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

³ Rosenmerkel, S., Durose, M., & Farole, D., Jr., Ph.D. (2009). *Felony Sentences in State Courts, 2006 – Statistical Tables* (p. 2, Rep.). Bureau of Justice Statistics. doi:<https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>

⁴ *2016 Annual Report and 2016 Sourcebook of Federal Sentencing Statistics* (pp. S-46, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

⁵ Kyckelhahn, T., Ph.D., & Cooper, T., M.A. (2017). *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (p. 8, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf

proposed in this amendment, we suggest considering a larger cohort that includes all those in CHC I, including defendants with one criminal history point. Defendants qualifying for one criminal history point have relatively minor backgrounds that could be the consequence of a juvenile offense resulting in no detention or a misdemeanor crime resulting in as little as 30 days of incarceration.⁶ Even though Commission studies find a higher rearrest rate among those with one criminal history point compared to those with no criminal history point, the rate is still significantly lower than state rates of recidivism.⁷

2. It is noteworthy that the Commission's research did not find a strong correlation between the severity of offense levels and rates of recidivism. This finding is an important indicator for the Commission in determining how best to adjust offense level scores for those deemed to be "first offenders" under this proposed amendment. We recommend that an offense level reduction extend along the full offense level scale and that multiple offense level reductions apply to all "first offenders" sentenced to 24 months or less. This adjustment seems particularly justified given that decades of research have found that imprisonment brings about negative individual-level changes that can harm re-integration upon release.⁸
3. The Commission should revisit how it implements statutory directives that exclude people "convicted of a crime of violence or an otherwise serious offense" from qualifying for an alternative sentence. We believe the Commission's threshold for seriousness is set too low. Indeed, people previously eligible for an alternative prior to implementation of the guidelines are now excluded, including people convicted of minor property offenses or low-level bank-teller embezzlers.⁹ In addition, the broad exclusion does not adequately account for the statutory directive that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."¹⁰

Part B: Consolidation of Zones B and C in the Sentencing Table

1. The Commission should reconsider its overly restrictive approach in regard to offense level qualifications for newly proposed Sentencing Zones A and B. In this process it is important to examine the potential recidivism rates of the convicted individuals considered for an alternative sentence in the context of their presence or absence in their communities. Some studies suggest high levels of incarceration disrupt a community's stability, weakening the forces of informal social control in ways that result in more crime. Moreover, research compiled by the Robina Institute of Criminal Law and Criminal Justice reports that in comparisons of recidivism outcomes between incarceration and community sanctions either no differences emerge or "custody is associated with higher rates of re-offending than community sentences"; this is sometimes described as the "criminogenic effect" of incarceration.¹¹ While we support the Commission's consolidation of Zones B and C we recommend that newly proposed Zone B be extended to sentences of 24 months. The changes should apply to all offenses.

Additional Comments

⁶ *Primer: Criminal History* (pp. 2-8, Rep.). (2017). Washington, DC: U.S. Sentencing Commission.

doi:https://www.usc.gov/sites/default/files/pdf/training/primers/2017_Primer_Criminal_History.pdf

⁷ Hunt, K., Ph.D, & Dumville, R. (2016). *Recidivism Among Federal Offenders: A Comprehensive Overview* (pp. 8-18, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf

⁸ National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/18613>.

⁹ Tonry, M. (1996). *Sentencing Matters*. New York, NY: Oxford University Press.

¹⁰ See 28 U.S.C. § 994(g)

¹¹ Frase, R. S., Roberts, J. V., Hester, R., & Mitchell, K. L. (2015). *Criminal History Enhancements Sourcebook*. Robina Institute of Criminal Law and Criminal Justice.

1. We are concerned about the Commission’s findings of a downward trend in judges’ use of alternative sentences even among those already eligible under current guidelines. In 2014, only about 30 percent of people who were eligible to receive a non-prison sentence were sentenced to an alternative.¹² One explanation is that non-citizens account for a majority of persons whose sentence falls into the alternative sentencing zones; as of 2014 non-citizens comprised 66.7% of people sentenced in Zone A and 63.8% of people sentenced in Zone B. According to the Commission, “non-citizens, as a practical matter, are ineligible for most alternatives because of their status as deportable aliens (resulting in immigration detainers that prevent their release into the community).”¹³ We urge the Commission to examine the utility of this apparent automatic exclusion from alternative sentences based on immigration status. Research has shown that incarceration for immigration offenses - comprising 72 percent of non-citizen convictions¹⁴ - is extremely costly, is not serving its intended deterrent purpose, and is harming the basic rights of non-citizens, all of which argues for allowing some of these individuals to qualify for alternative sentencing arrangements.¹⁵ The 28 percent of non-citizens with other types of convictions¹⁶ should also be eligible for alternatives if they fall into the alternative sentencing zones. Some non-citizens in Bureau of Prisons custody do not have ICE detainers on file; importantly, a federal criminal conviction does not automatically make a non-citizen deportable under current immigration law. In addition, people serving probation sentences remain under correctional supervision. If ICE seeks to pursue the removal of such individuals, the government will be able to locate them. Implementing harsher penalties on non-citizens simply because of their immigration status, without regard to any other factors, is cruel, unfair and a poor use of resources.
2. We share in the broad concerns about safety and conditions within Bureau of Prisons facilities articulated by the Department of Justice’s Office of Inspector General.¹⁷ Moreover, recent policy shifts at the Department of Justice are likely to increase the prison population,¹⁸ which will exacerbate current conditions and increase community discontent with the federal criminal justice system. As a result, in the interest of fairness, human rights law’s recognition of the importance of retroactive application of new laws that reduce sentences, and to help address Bureau of Prisons population concerns, we support Commission action to apply any amendment to expand alternatives to incarceration and reduce offense levels retroactively.

¹² Semisch, C. R., Ph.D. . (2015). *Alternative Sentencing in the Federal Criminal Justice System* (p. 5, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

¹³ Semisch, C. R., Ph.D. . (2015). *Alternative Sentencing in the Federal Criminal Justice System* (p. 6, Rep.). Washington, DC: U.S. Sentencing Commission. doi:https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

¹⁴ *Quick Facts: Non-U.S. Citizen Federal Offenders*. (2017). Washington, DC: U.S. Sentencing Commission. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Non-Citizens_FY16.pdf

¹⁵ Human Rights Watch, “Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions,” May 22, 2013, <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions>. Grassroots Leadership and Justice Strategies, “Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border,” July 2016, <https://grassrootsleadership.org/reports/indefensible-decade-mass-incarceration-migrants-prosecuted-crossing-border>.

¹⁶ *Quick Facts: Non-U.S. Citizen Federal Offenders*. (2017). Washington, DC: U.S. Sentencing Commission.

¹⁷ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons* (Rep.). (2016). Office of the Inspector General, U.S. Department of Justice . doi:<https://oig.justice.gov/reports/2016/e1606.pdf#page=1>

¹⁸ Reinhard, B. (2017, June 8). Federal Prison Population Expected to Grow Under Trump. *The Wall Street Journal*. <https://www.wsj.com/articles/federal-prison-population-expected-to-grow-under-trump-1496953721>

3. To the extent that eligibility for alternatives to incarceration is based in part on criminal history scores there is the potential for exacerbating existing racial disparities in incarceration. African American defendants are more likely to have a criminal history than white defendants, some of which can be attributed to heightened levels of law enforcement in communities of color. We urge the Commission to monitor levels of racial disparity that may result from any new guideline adjustments and to propose strategies to address it. One policy to consider is to exclude all convictions over 10-years-old from consideration in criminal history calculations.

We believe that Commission action to lower guideline ranges and extend alternative sentencing options in cases previously excluded would be an important step in addressing system challenges and could produce increased fairness. The Commission should extend these opportunities to a more diverse cohort than is currently permissible in its issues for comment. Extending non-incarceration sentencing options to a larger group in line with the above comments would be an important step in easing the disproportionate sentencing under the federal guidelines.

Sincerely,



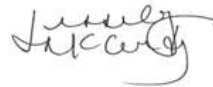
Marc Mauer
Executive Director
The Sentencing Project



Alison Leal Parker
Director, US Program
Human Rights Watch



Ana Garcia-Ashley
Executive Director
Gamaliel



Jesselyn McCurdy
Deputy Director, Washington Legislative Office
American Civil Liberties Union



Judge Nancy Gertner (Ret)
Senior Lecturer Harvard Law School



Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

October 9, 2017

By electronic mail only

Public.Comment@ussc.gov

United States Sentencing Commission

One Columbus Circle, N.E.

Suite 2-500

Washington, D.C. 20002-8002

Attention: Public Affairs

RE: Public Comment on the Proposed Amendments to the Sentencing Guidelines

Dear Sentencing Commission Chair and Members:

The Swinomish Indian Tribal Community submits these comments on the proposed amendments to the federal sentencing guidelines. First, I would like to extend my appreciation to the Honorable Ralph Erickson, District Court Judge for the District of North Dakota and Chair of the U.S. Sentencing Commission Tribal Issues Advisory Group (TIAG), for the telephonic consultation on September 25, 2017 in which the comments and concerns of many tribal representatives were received.

We can certainly all agree that fair and just sentencing of tribal members is to be expected in every case that is presented in federal court. With that, we commonly understand that a tribal member should expect the same sentence as would a non-tribal member being sanctioned for the same offence. This can be a difficult task to accomplish given the jurisdictional issues where a non-tribal member who commits the same offense is brought to justice in a state court system where sentencing guidelines tend to be more lenient than federal guidelines. I appreciate that the Tribal Issues Advisory Group is taking these issues into consideration when proposing these amendments.

The Swinomish Indian Tribal Community offers the following responses to the Issues for Comment:

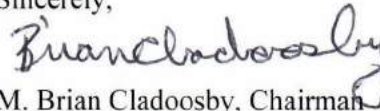
1. As written, there is a potential for disparate sentencing between tribal member defendants. The amendments allow the court to increase a sentence based on tribal court convictions. (§4A1.3, comment 2(C)). Some tribes may rightfully deny access to information concerning tribal court convictions. In contrast, some tribes utilize the Tribal Access Program (TAP) to enter tribal convictions into the National Crime Information Center database. As a result, a tribal member co-defendant who has been convicted of a crime within a tribe that utilizes TAP would have higher sentences than the tribal member co-defendant who committed possibly even more

heinous crimes, but within a tribal jurisdiction that has not granted the federal government access to the tribal conviction history. In conclusion, until such time as the sentencing court has access to *all* tribal members' criminal history from *all* tribal jurisdictions, the consideration of these convictions for upward departure at the sentencing is improper due to these disparate treatment issues.

2. If Tribal convictions are considered, the comments should be amended to allow consideration of convictions where the defendant was represented by a tribal advocate. Many tribes proudly utilize the expertise and wisdom of tribal members who have not graduated from law school, but have passed a tribal bar exam, abide by the ethical rules and are under the continued regulation of a tribal court bar association. These tribal advocates represent criminal defendants with care and integrity and ensure that all due process rights are met. These convictions should be weighed with the same integrity that all other tribal court convictions are weighed. Therefore, comment 2(C) on §4A1.3 should be amended to state: "The defendant was represented by a lawyer-defense-attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys, had the right to a trial by jury..."
3. These amendments fail to recognize the need for downward departures based on disparate treatment due to tribal membership or affiliation. In the Synopsis of Proposed Amendments it is recognized that the TIAG was tasked with studying how federal sentencing guidelines for crimes committed in Indian Country compared with similar crimes that were prosecuted in state courts. Evidence of this disparity has been widely studied. A primer to that disparity is well documented in Timonthy J. Droske's Marquette Law Review article "Correcting Native American Sentencing Disparity Post-Booker" which recounts the finding that in South Dakota, for example, the average state sentence for assault is twenty-nine (29) months in comparison to the forty-seven (47) month average a tribal member would face in federal court for the same offense. The solution to this disparity does not appear to exist in these proposed amendments. A federal court should be authorized by the sentencing guidelines to examine state statutory sentencing lengths and allow for a downward departure to correct disparities. This requires recognition that Indian status is a relevant consideration in sentencing and tribal membership can be its own grounds for a downward departure when sentencing disparities are shown among non-tribal defendants in analogous state court proceedings.

Thank you for considering these comments. We look forward to continuing to work with the Commission to address these important issues.

Sincerely,



M. Brian Cladoosby, Chairman
Swinomish Indian Senate

Honorable William H. Pryor, Jr.

Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 2002-8002
Attention: Public Affairs

Re: Public Comment, Proposed 2017 Holdover Amendments: (3) First Offenders/Alternatives to Incarceration, and (4) Acceptance of Responsibility

Dear Judge Pryor,

I wish to express my support of the entirety (Part A and Part B) of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) and Proposed Amendment 4 (Acceptance of Responsibility) to the U.S.S.C.

Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) Part A & Part B:

In the interest of furthering the goals of the Sentencing Reform Act of 1984, specifically, consistency between offenses and sentence, I support the addition of a category of literal “first offenders.” As it stands currently, the forceful conflation of those who have no prior convictions with those who do leads to an imbalance in sentencing; that is, it over-penalizes those who are truly people with no criminal history and those who generally pose the lowest risk of recidivism (per the USSC’s 2016 Report on Recidivism).

Part A. Issues for Comment:

1. Under Part A of 4C1.1 Definition of “First Offender”; I support Option 1: (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.
2. While under Part A of 4C1.1 Decrease in Offense Level for First Offenders; Option 2 improves the fairness of first offender sentencing, I support Option 2, preferable would be the larger decrease by 2 Levels for those first offenders if the offense level determined under Chapters Two and Three is Level 16 or greater. In other words, (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by 2 levels.

A larger reduction in level for those with relatively lower risk of recidivism better and more thoughtfully furthers the idea of fairness in sentencing, protects the public, and reduces the population of the Federal Bureau of Prisons. There should be no limitations to the applicability of the adjustment based upon crime or number of levels as offense levels already served to reconcile sentencing with severity of offense.

3. The Amendment of 5C1.1 under the new 4C1.1 should **not** be further limited beyond “a crime of violence.” I support amendment of 5C1.1 under 4C1.1 as proposed.

Retroactivity: Crucially, I support making Part A of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) retroactive and included in 1B1.10(d) in order that the

court may apply it retroactively under 18 U.S.C. 3582(c) (2). Sentencing Guidelines must apply evenly across the board, to future offenders and those currently serving time, as a matter of equity. The courts showed an amazing ability and capability in retroactive application of Amendment 782 to the Drug Quantity Table under 2D1.1 (commonly known as “Drugs minus 2”), while this “to be numbered” proposed amendment will generally be easier to determine to whom it applies, it will also affect a significantly smaller percentage of the current FBOP population thus alleviating the difficulty of applying the amendment retroactively to determine an amended guideline range under 1B1.10(b).

Part B Issues for Comment:

Part B’s consolidation of Zones reflects a conceptual step forward; discretionary probation in place of extended imprisonment is often the better choice for offenders, particularly those with offense levels as low as those in Zone B and Zone C. I fully support eliminating Zone C by folding it into Zone B and thereby allowing Zone B’s probation substitution to be applied to offenders who would have fallen into Zone C. I would support, as the Issues for Comment consider, a Zone B that applies to all offenses, without additional categorization, because the further breakdown would be redundant. Offense levels already serve to reconcile sentencing with severity of offense; singling out offenses (such as white-collar offenders, to adhere to the example provided in the Issues) expressly works against the goal of consistency.

I also support making Part B retroactive for the same reasons stated above in Part A Retroactivity.

Proposed Amendment 4 (Acceptance of Responsibility)

I support the commission’s REMOVAL from 3E1.1 all references to relevant conduct for which the defendant is accountable under 1B1.3, and reference only the elements of the offense of conviction; instead of adopting either Option 1 or Option 2. I further support listing Proposed Amendment 4 (Acceptance of Responsibility) in 1B1.10 (d) to be retroactively applicable under 18 U.S.C. 3582 (c) (2), as a matter of equity.

Thank you for proposing the 2017 Holdover Amendments to the Sentencing Guidelines so quickly in this cycle and bringing forward all previous data, research, and public comment collected this past winter and spring. I look forward to the promulgating of these amendments to Congress as quickly as possible. The anticipated benefits of Amendment 3 (First Offenders/Alternatives to Incarceration) are vast for currently incarcerated first and low-level offenders (Proposed Zones A & B), offenders awaiting sentencing, and future first and low-level offenders, and their families. Speedy implementation is imperative.

I look forward to your continued work and future corrections and updates to the U.S.S.G.

Respectfully,


Allen August Basso



Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 2002-8002
Attention: Public Affairs

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Part A. Issues for Comment:

1. Under Part A of 4C1.1 Definition of "First Offender"; I support Option 1: (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.
2. While under Part A of 4C1.1 Decrease in Offense Level for First Offenders; Option 2 improves the fairness of first offender sentencing, I support Option 2, preferable would be the larger decrease by 2 Levels for those first offenders if the offense level determined under Chapters Two and Three is Level 16 or greater. In other words, (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by 2 levels.

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Part B's consolidation of Zones reflects a conceptual step forward; discretionary probation in place of extended imprisonment is often the better choice for offenders, particularly those with offense levels as low as those in Zone B and Zone C. I fully support eliminating Zone C by folding it into Zone B and thereby allowing Zone B's probation substitution to be applied to offenders who would have fallen into Zone C. I would support, as the Issues for Comment consider, a Zone B that applies to all offenses, without additional categorization, because the further breakdown would be redundant. Offense levels already serve to reconcile sentencing with severity of offense; singling out offenses (such as white-collar offenders, to adhere to the example provided in the Issues) expressly works against the goal of consistency.

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I look forward to your continued work and future corrections and updates to the U.S.S.G.

Respectfully,



EDWARD W. EWART

September 21, 2017

Amanda B. Lowe

[REDACTED]

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002

To Whom It May Concern:

I write today to express strong support for the First Offender amendment to the United States Sentencing Guidelines (the “Guidelines Manual”) included in the Proposed 2017 Holdover Amendments to the Sentencing Guidelines. Adoption of this amendment, along with its much-needed retroactive application to previously sentenced defendants, will reflect the reality that first-time offenders are at an extremely low risk of reoffending, will reduce recidivism generally, and will decrease the exorbitantly large correctional population of the United States.

I. A BROAD DEFINITION OF “FIRST OFFENDER” IS NEEDED TO FAIRLY REFLECT THE LOW RECIDIVISM RATE OF FIRST OFFENDERS GENERALLY

In response to Issue 1 for comment, a broad definition of “first offender” is needed to fairly reflect the truth that the recidivism rate for these defendants overall is remarkably low. In its 2004 report on recidivism and first offenders, the United States Sentencing Commission (the “Commission”) reported that the recidivism rate for first offenders generally was only 11.7 percent; half the rate of recidivism for offenders with even just one criminal history point.¹ Included in this category of first offenders were those with prior convictions that did not result in criminal history points under § 4A1.2(c)(2)—these offenders were even less likely to reoffend than those first offenders with prior arrests but no prior convictions.² Moreover, while the Commission’s eight-year follow-up found that the rearrest rate for those with zero criminal history points increased to 30 percent as time went on, this number remains significantly lower than the rates of rearrest for offenders with one or more criminal history points.³ This reported percentage also does not reflect actual additional *convictions* and includes alleged technical violations of the conditions of supervision, not just new crimes.⁴

¹ UNITED STATES SENTENCING COMM’N, RECIDIVISM AND THE “FIRST OFFENDER,” (2004), 13.

² Defendants with prior convictions under § 4A1.2(c)(2) had a recidivism rate of 8.8 percent, compared to 17.2 percent for those with prior arrests but no convictions. *Id.* at 5, 14. The 2005 First Offender Report also notes that the 17.2 percent rate for defendants with prior arrests but no convictions is still lower than the recidivism rate for non-first offenders. *Id.* at 14.

³ UNITED STATES SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (2016), 18.

⁴ *Id.* at 15.

As a result, **the Commission should utilize Option 1** to define a defendant as a “first offender” if the defendant did not receive any criminal history points. Broadly defining first offender in such a way ensures that the amendment will apply to all defendants with the lowest rate of recidivism, and best reflects the Commission’s goal of lowering the guideline range for those least likely to reoffend.

II. DECREASES IN OFFENSE LEVEL SHOULD NOT BE LIMITED

In response to Issue 2 for comment, decreases in offense level for first offenders should not be any more limited than an across-the-board reduction by one level from the final offense level. Any limitation to whom the reduction in level would apply would be counterproductive to achieving the Commission’s purpose of recognizing the low risk of recidivism for first time offenders. While a higher final offense level generally corresponds with greater severity of offense, the lengthy prison sentences that accompany higher final offense levels yield no benefits when applied to first offenders.⁵ Indeed, longer prison sentences likely have a negative effect on whether a person reoffends; the more time spent in prison, the higher the recidivism rate.⁶

Therefore, **the Commission should utilize an adjustment no more limited than Option 1**, a one-level decrease for all first offenders regardless of the final offense level. At best, long prison sentences for first offenders with higher final offense levels produce no tangible benefit by reducing recidivism once the offender is released; at worst, the harsh punishments imposed actually increase recidivism. The Commission—and the American public—would be best served by preventing first offenders, whose risk for reoffending is already low, from any potential pull towards recidivism generated by long prison sentences resulting from higher final offense levels.

III. THE FIRST OFFENDER AMENDMENT SHOULD BE RETROACTIVELY APPLIED

In response to Issue 4 for comment, if the Commission were to promulgate Part A of the proposed amendment, then the Commission should also amend the Guidelines Manual to apply

⁵ See Pew Center on the States, “Time Served: The High Cost, Low Return of Longer Prison Terms,” PEW RESEARCH CTR. (June 2012), 1-2, 33, http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf [hereinafter Pew Report].

⁶ This applies to offenders convicted of both nonviolent and violent crimes. See Don M. Gottfredson et al., *Four Thousand Lifetimes: A Study of Time Served and Parole Outcomes*, NAT’L COUNCIL ON CRIME AND DELINQUENCY (1973); Don M. Gottfredson, Michael R. Gottfredson and James Garofalo, *Time served in prison and parole outcomes among parolee risk categories*, 5 J. CRIM. JUSTICE 1, 1-12 (1977); Thomas Orsagh and Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155 (1988). A few more recent studies have shown that lengthy prison sentences have no significant effect on recidivism, either positive or negative; if longer sentences are not actually reducing recidivism, then shortening sentences would save tens of millions of dollars per year at virtually no social or public safety cost. See Pew Report, *supra* note 5, at 33-34, 37.

the First Offender amendment retroactively to previously sentenced defendants. The factors that the Commission considers in selecting amendments to apply retroactively under § 1B1.10(d) of the Guidelines Manual—the purpose of the amendment and of sentencing, the magnitude of the change, and the difficulty in applying it to defendants already sentenced—all point to retroactive application of the First Offender amendment.⁷

First, retroactive application will accomplish the purposes of the amendment and of sentencing of first offenders. This amendment aims to decrease the final offense level—and consequently the sentence length—of first offenders, for whom recidivism is unlikely. Including qualified, previously sentenced defendants in the scope of the amendment will ensure that lengthy sentences do not further jeopardize this tendency not to recidivate through institutionalization or other pressures that encourage even first offenders to reoffend.⁸ Moreover, one or two-point decreases in final offense level will not undermine the purpose of sentences already being served by first offenders; the change is not great enough to undercut the certainty, deterrence, punishment, or public safety rationales behind sentences imposed (particularly since long sentences also likely have a negative overall impact on recidivism for first offenders⁹).

Second, as noted in the previous paragraph, while the change will not wreak havoc on sentences already being served, it is substantial enough to justify “burden[ing] the courts with [retroactive] adjustment.”¹⁰ For many first offenders, a one or two-point decrease will reduce their sentence length by more than six months, meaning a retroactive change will not merely result in “isolated instances of sentences falling above the old guidelines” or a “minor downward adjustment.”¹¹ Retroactive application, therefore, would not only affect a significant portion of first offenders, but would also result in savings of tens of millions of dollars per year for first offenders whose low rate of recidivism means there is no need to keep them incarcerated for long periods of time.¹²

Third, because the amendment would result in a straightforward adjustment to final offense levels for first offenders, the difficulty in applying the amendment retroactively would be insignificant. The Commission has already successfully implemented a similar retroactive change via Amendment 782, reducing the final offense level by two for virtually all federal drug

⁷ See § 1B1.10 comment 8.

⁸ See, e.g., Section II *supra*.

⁹ And at best, have no impact whatsoever on preventing future crime by first offenders. See Section II *supra*.

¹⁰ See § 1B1.10 comment 8.

¹¹ *Id.* According to the Commission’s 2005 report, roughly 30 percent of first offenders were sentenced to terms of imprisonment exceeding two years; this means that a downward adjustment of even one point could result in a reduction of several years in sentence length for first offenders with higher final offense levels. See, e.g., UNITED STATES SENTENCING COMM’N, RECIDIVISM AND THE “FIRST OFFENDER,” (2004), 10.

¹² See Pew Report, *supra* note 5, at 33-34, 37. Similarly, Amendment 782 also resulted in large cost savings. See Matt Apuzzo, “New Rule Permits Early Release for Thousands of Drug Offenders,” NY TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/us/new-rule-permits-early-release-for-thousands-of-drug-offenders.html>.

crimes.¹³ A one or two-point reduction to the final offense level for first offenders would be equally implementable, and feasibility should be no obstacle to retroactive implementation.

Accordingly, **the First Offender amendment should be applied retroactively to previously sentenced defendants.**

Sincerely,

Amanda B. Lowe
[signed]

¹³ See “Frequently Asked Questions: Retroactive Application of the 2014 Drug Guidelines Amendment,” UNITED STATES SENTENCING COMM’N, https://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf.

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Public Comment, Proposed 2017 Holdover Amendments: (3) First Offenders/Alternatives to Incarceration, and (4) Acceptance of Responsibility

Dear Judge Pryor,

I write to express my support of the entirety (Part A and Part B) of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) and Proposed Amendment 4 (Acceptance of Responsibility) to the U.S.S.G.

Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) Part A & Part B:

In the interest of furthering the goals of the Sentencing Reform Act of 1984, specifically consistency between offenses and sentence, I support the addition of a category of literal "first offenders." As it stands currently the forceful conflation of those who have no prior convictions with those who do leads to an imbalance in sentencing; that is, it over-penalizes those who are truly people with no criminal history and those who generally pose the lowest risk of recidivism (per the USSC's 2016 Report on Recidivism).

Part A Issues for Comment:

1. Under Part A of §4C1.1 Definition of "First Offender"; I support Option 1: (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.

2. While, under Part A of §4C1.1 Decrease in Offense Level for First Offenders; Option 2 improves the fairness of first-offender sentencing, I support Option 2, preferable would be the larger decrease by 2 Levels for those first offenders if the offense level determined under Chapters Two and Three is Level 16 or greater. In other words, (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by 2 levels.

A larger reduction in level for those with relatively lower risk of recidivism better and more thoughtfully furthers the idea of fairness in sentencing, protects the public, and reduces the population of the Federal Bureau of Prisons. There should be no limitations to the applicability of the adjustment based upon crime or number of levels as offense levels already serve to reconcile sentencing with severity of offense.

3. The Amendment of §5C1.1 under the new §4C1.1 should NOT be further limited beyond "a crime of violence." I support amendment of §5C1.1 under §4C1.1 as proposed.

Retroactivity: Crucially, I support making Part A of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) retroactive and included in §1B1.10(d) in order that the court may apply it retroactively under 18 U.S.C. 3582(c)(2). Sentencing Guidelines must apply evenly across the board, to future offenders and those currently serving time, as a matter of equity. The courts showed an amazing ability and capability in retroactive application of Amendment 782 to the Drug Quantity Table under §2D1.1 (commonly known as "Drugs minus 2"), while this "to be numbered" proposed amendment will generally be easier to determine to whom it applies, it will also affect a significantly smaller percentage of the current FBOP population, thus alleviating the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b).

Part B Issues for Comment:

Part B's consolidation of Zones reflects a conceptual step forward; discretionary probation in place of extended imprisonment is often the better choice for offenders, particularly those with offense levels as low as those in Zone B and Zone C. I fully support eliminating Zone C by folding it into Zone B and thereby allowing Zone B's probation substitution to be applied to offenders who would have fallen into Zone C. I would support, as the Issues for Comment consider, a Zone B that applies to all offenses, without additional categorization, because the further breakdown would be redundant. Offense levels already serve to reconcile sentencing with severity of offense; singling out offenses (such as white-collar offenders, to adhere to the example provided in the Issues) expressly works against the goal of consistency.

I also support making Part B retroactive for the same reasons stated above in Part A: Retroactivity.

Proposed Amendment 4 (Acceptance of Responsibility):

I support the Commission's REMOVAL from §5E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense of conviction; instead of adopting either Option 1 or Option 2. I further support listing Proposed Amendment 4 (Acceptance of Responsibility) in §1B1.10 (d) to be retroactively applicable under 18 U.S.C. 3582(c)(2), as a matter of equity.

Thank you for proposing the 2017 Holdover Amendments to the Sentencing Guidelines so quickly in this cycle and bringing forward all previous data, research, and public comment collected this past winter and spring. I look forward to the promulgating of these amendments to Congress as quickly as possible. The anticipated benefits of Amendment 3 (First Offenders/Alternatives to Incarceration) are vast for currently incarcerated first and low-level offenders (Proposed Zones A & B), offenders awaiting sentencing, and future first and low-level offenders, and their families. Speedy implementation is imperative.

I look forward to your continued work and future corrections and updates to the U.S.S.G.

Respectfully,

Florence Sakyiana

Orozco, Garcia Reynaldo
Name and Reg. No. [REDACTED]

Date: 9-13-17

Dear Members of the U.S. Sentencing Commission: —

Re: 2018 Guideline Amendment Priorities

The U.S. Sentencing Commission is tasked by statute with ensuring that the Sentencing Guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal Prisons" 28 U.S.C. 994(g). While the federal prison population has declined in recent years, every federal prison in the nation continues to operate at levels in excess of original design and capacity.

Overpopulated prisons are less safe for staff and inmates, make the delivery of medical care and other essential services more difficult and impede the ability of the B.O.P. to provide meaningful rehabilitation programs to inmates who genuinely want to make a better future of themselves.

The current Guideline Sentencing Table is overly punitive and should be amended consistent with FAMI and Prisology's proposals. This in turn would not affect the public safety as it proved with Amendment 782 to the Guidelines and would save taxpayers billions of dollars as a result of this change.

I support the work that FAMI and Prisology is doing to reform the criminal justice system. I am writing to strongly urge the Commission to make these proposed new changes a priority during the Commission's 2018 Guideline Amendment cycle, as these changes are simple and easily administrable.

Thank you for your consideration of my comments.

Sincerely,

Orozco, Garcia Reynaldo
Name and Reg. No. [REDACTED]

9-13-17
Date

U.S. SENTENCING COMMISSION

Attn. Public Affairs Priority Comments

One Columbus Circle, NE, Suite 2-500, south Lobby
Washington, DC 20002-8002

[REDACTED]
[REDACTED] IN RE; 2018 Sentencing Amendments

Dear Sentencing Commission Members,

I want to Support the Sentencing Commissions 2018 proposed Priority Amendment to decreased the Sentencing Guidelines on an overall two point decrease. I also prefer the version of the change offered by the Prisology Group.

If made law and when retroactively applied this Amendment will not reconcile all the injustices created over the last 30 years, but is a commonsense place to start. While it is not a big reduction for any one person, it is simple, fare and easy for the Courts to implement, with no expected adverse effects.

I want to thank all the Commissioners on your dedicated work with the Sentencing Guidelines and appreciate any consideration you give on my request on the reduction in Sentencing Guidelines.

Sincerely



Tuesday 10/3/2017

Ricardo J. Arellano [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

U.S. Sentencing Commission
One Columbus Circle N.E. Suite 2500
Washington D.C. 20002-8002

Re: Proposed Amendment for First Time Offenders

I was sentence to 34 years back in [REDACTED] for arm bank robbery (U.S.C. § 2113 (a)(e)), even though I was a first time offender and I plead guilty to the bad decision I took [REDACTED] whenever I committed my crimes. This proposed amendments will help me to have an opportunity for redemption, and a chance to show society that some people do change after going to prison. Please support this bill because this is the only way some first time offenders will get some kind of relief. Thank you for your time and concern.

Respectfully,

Ricardo Arellano

Ricardo Arellano
[REDACTED]

WALTER A. STRINGFELLOW

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 2002-8002
Attention: Public Affairs

Re: Public Comment, Proposed 2017 Holdover Amendments: (3) First Offenders/Alternatives to Incarceration, and (4) Acceptance of Responsibility

Dear Judge Pryor,

I write to express my support of the entirety (Part A and Part B) of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) and Proposed Amendment 4 (Acceptance of Responsibility) to the U.S.S.C. I strongly support changes that will reduce the incarceration required of first time offenders who pose no threat to society and whose return to freedom will be of significant benefit to themselves, their families and their communities.

Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) Part A & Part B:

In the interest of furthering the goals of the Sentencing Reform Act of 1984, specifically, consistency between offenses and sentence, I support the addition of a category of literal "first offenders." As it stands currently, the forceful conflation of those who have no prior convictions with those who do leads to an imbalance in sentencing; that is, it over-penalizes those who are truly people with no criminal history and those who generally pose the lowest risk of recidivism (per the USSC's 2016 Report on Recidivism).

Part A. Issues for Comment:

1. Under Part A of 4C1.1 Definition of "First Offender"; I support Option 1: (a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.
2. While under Part A of 4C1.1 Decrease in Offense Level for First Offenders; Option 2 improves the fairness of first offender sentencing, I support Option 2, preferable would be the larger decrease by 2

Levels for those first offenders if the offense level determined under Chapters Two and Three is Level 16 or greater. In other words, (b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by 2 levels.

A larger reduction in level for those with relatively lower risk of recidivism better and more thoughtfully furthers the idea of fairness in sentencing, protects the public, and reduces the population of the Federal Bureau of Prisons. There should be no limitations to the applicability of the adjustment based upon crime or number of levels as offense levels already served to reconcile sentencing with severity of offense.

3. The Amendment of 5C1.1 under the new 4C1.1 should **not** be further limited beyond "a crime of violence." I support amendment of 5C1.1 under 4C1.1 as proposed.

Retroactivity: Crucially, I support making Part A of Proposed Amendment 3 (First Offenders/Alternatives to Incarceration) retroactive and included in 1B1.10(d) in order that the court may apply it retroactively under 18 U.S.C. 3582(c) (2). Sentencing Guidelines must apply evenly across the board, to future offenders and those currently serving time, as a matter of equity. The courts showed an amazing ability and capability in retroactive application of Amendment 782 to the Drug Quantity Table under 2D1.1 (commonly known as "Drugs minus 2"), while this "to be numbered" proposed amendment will generally be easier to determine to whom it applies, it will also affect a significantly smaller percentage of the current FBOP population thus alleviating the difficulty of applying the amendment retroactively to determine an amended guideline range under 1B1.10(b).

Part B Issues for Comment:

Part B's consolidation of Zones reflects a conceptual step forward; discretionary probation in place of extended imprisonment is often the better choice for offenders, particularly those with offense levels as low as those in Zone B and Zone C. I fully support eliminating Zone C by folding it into Zone B and thereby allowing Zone B's probation substitution to be applied to offenders who would have fallen into Zone C. I would support, as the Issues for Comment consider, a Zone B that applies to all offenses, without additional categorization, because the further breakdown would be redundant. Offense levels already serve to reconcile sentencing with severity of offense; singling out offenses (such as white-collar offenders, to adhere to the example provided in the Issues) expressly works against the goal of consistency.

I also support making Part B retroactive for the same reasons stated above in Part A Retroactivity.

Proposed Amendment 4 (Acceptance of Responsibility)

I support the commission's **REMOVAL** from 3E1.1 all references to relevant conduct for which the defendant is accountable under 1B1.3, and reference only the elements of the offense of conviction; instead of adopting either Option 1 or Option 2. I further support listing Proposed Amendment 4 (Acceptance of Responsibility) in 1B1.10 (d) to be retroactively applicable under 18 U.S.C. 3582 (c) (2), as a matter of equity.

Thank you for proposing the 2017 Holdover Amendments to the Sentencing Guidelines so quickly in this cycle and bringing forward all previous data, research, and public comment collected this past winter and spring. I look forward to the promulgating of these amendments to Congress as quickly as possible. The anticipated benefits of Amendment 3 (First Offenders/Alternatives to Incarceration) are vast for currently incarcerated first and low-level offenders (Proposed Zones A & B), offenders awaiting sentencing, and future first and low-level offenders, and their families. Speedy implementation is imperative.

I look forward to your continued work and future corrections and updates to the U.S.S.G.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter A. Stringfellow". The signature is written in a cursive, somewhat stylized script.

Walter A. Stringfellow