Statement of Michael Caruso
Before the United States Sentencing Commission
Public Hearing on Bipartisan Budget Act
February 8, 2018

I am Michael Caruso, the Federal Public Defender for the Southern District of Florida. I also am the Chair of the Federal Defender Sentencing Guideline Committee. I thank the Commission for holding this hearing and providing me the opportunity to testify on behalf of Defenders today.

My statement will be brief because Defenders have previously submitted comment on this issue that I support and attach.[1] Defenders support the proposal in Part A to amend Appendix A to reference three statutory provisions to §2X1.1 in addition to §2B1.1. Defenders, however, oppose the proposal in Part B to add yet another specific offense characteristic to §2B1.1 for certain convictions under three specific statutes.[2]

Defenders have long urged the Commission to fix §2B1.1 because the super-sized guideline is complicated and too often recommends unduly long sentences.[3] The proposed amendment to add a new specific offense characteristic will only exacerbate these problems.

No evidence shows such additional complication is necessary. Data show courts find the current guideline ranges more than sufficient to address the offenses at issue.[4]

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[1] Attached are relevant portions of the Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Oct. 10, 2017), and the Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Nov. 6, 2017).

[2] 42 U.S.C. §§ 408, 1011, & 1383a.

[3] *See*, *e.g.*, Statement of Michael Caruso Before the U.S. Sentencing Comm'n, Washington, D.C. (Mar. 12, 2015). The rate of within guideline sentences under §2B1.1 is only 44.6%. USSC, *2016 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2016).

[4] In the last three years, almost 60% of 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. USSC, *FY 2007-2016 Monitoring Dataset*. In the last three years, 39.6% of defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1 received sentences within the guideline recommended range and only 2.2% received a sentence above the guideline recommended

And no evidence shows that adding a 20th specific offense characteristic to §2B1.1 will deter individuals from committing these offenses.[5]

Any concern that the current version of §2B1.1 is not alone adequate for these offenses is addressed with available Chapter Three adjustments such as §3B1.3 and §3B1.1. In the past, responding to Defender concern about enhancements under §2B1.1 recommending sentences that are unduly and disproportionately long, the Commission questioned: "is it the better approach, consistent with the first principles in our manual to work on role."[6] A similar question is appropriate here—whether the better approach is not to change §2B1.1, but to turn to Chapter Three. If the Commission makes any change to the guidelines in response to the Bipartisan Budget Act, the best option is the suggestion in the Commission's Issues for Comment 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."[7]

If, however, the Commission chooses to add a 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.

We appreciate the Commission's consideration of Defenders' comment on this issue and the opportunity to testify today.

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range. *Id*. In the past decade, no one has even been convicted of violating 42 U.S.C. § 1101. USSC, *FY 2007-2016 Monitoring Dataset*.

[5] *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 3 (Nov. 6, 2017) (attached).

[6] Transcript of Public Hearing Before U.S. Sentencing Comm'n, Washington, D.C., at 125 (Mar. 12, 2015) (Commissioner Friedrich).

[7] 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017).

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October 10, 2017

Honorable William H. Pryor, Jr.
Acting Chair
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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 statutes[2] 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,

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[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).

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November 6, 2017

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Re: Reply Public Comment on Proposed 2017 Holdover Amendments

Dear Judge Pryor:

Defenders are pleased to have this opportunity to reply to issues raised in the original comment period for the proposed 2017 holdover amendments.[1]

I. Proposed Amendment #1: Bipartisan Budget Act

The comment submitted to the Commission[2] contains no evidence that the current guidelines are inadequate to address the 10-year statutory maximum sentence for a subgroup of people convicted of violating the three statutes at issue.[3] Instead, the Department of Justice (DOJ) turns to a hypothetical "Defendant X" to assert the guidelines are too low,[4] but omits the Chapter Three upward adjustment it later claims would apply to "most defendants" who would fall in the subgroup of people identified in the Bipartisan Budget Act.[5] And in the only named case in the

[1] 82 Fed. Reg. 40,651 (Aug. 25, 2017).

[2] October 2017 Public Comment Received on Proposed Amendments in Response to 82 FR 40661 (listing comment by Department of Justice; Social Security Administration, Office of the Inspector General; Federal Public and Community Defenders; Practitioners Advisory Group; Probation Officers Advisory Group), https://www.ussc.gov/policymaking/public-comment/public-comment-october-10-2017.

[3] 42 U.S.C. §§ 408, 1011, & 1383a.

[4] Letter from Zachary C. Bolitho, Counsel to the Deputy Attorney General & Department of Justice *Ex Officio*, U.S. Sentencing Comm'n, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 4 (Oct. 10, 2017) (*DOJ Holdover Comment*).

[5] *Id.* at 4, 6.

October letter from the Social Security Administration Office of the Inspector General (SSA OIG),[6] the defendant was not convicted of any of the statutes at issue, and the government agreed to a within guideline sentence.[7]

Instead of relying on evidence, DOJ seeks to support its preference for a 4-level enhancement,[8] and a floor of 14,[9] by pointing to three specific offense characteristics (SOCs) in §2B1.1,[10] all three of which were the product of congressional directives.[11] By pointing to these SOCs, and ignoring others, DOJ reveals how added complexity makes it challenging, if not impossible, to ensure proportionality within a single guideline, let alone across the manual.[12] For example, DOJ points to the 4-level enhancement at §2B1.1(b)(8)(B),[13] but fails to note it is a tiered enhancement, and that the defendant's status as an employee is really a 2-level enhancement above the 2 levels that attach for any offense involving "conduct described in 18 U.S.C. § 670." Nor does DOJ even mention §2B1.1(b)(12), which provides a 2-level enhancement, and a floor of 12, for "conduct described in 18 U.S.C. § 1040 [fraud in connection with major disaster or

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[6] Letter from Gale Stallworth Stone, Acting Inspector General, Social Security Administration Office of the Inspector General, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 2 n.7 (Oct. 6, 2017) (referencing Luis Escabi-Perez) (*SSA OIG Holdover Comment*).

[7] *See United States v. Escabi-Perez*, Nos. 15-039, 15-040, 15-041, 15-045 (D.P.R.), Plea Agreement, Dkt. No. 30 (filed July 29, 2015) at 9. Cases named in earlier submissions by SSA OIG similarly provide no evidence that the guidelines need to be complicated. As Defenders noted, of the individuals named by the SSA OIG, only three were convicted under the statutes at issue, and in at least two of those cases the government recommended a sentence within the guidelines. *See* Letter from Marjorie Meyers Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 12 (July 25, 2016).

[8] *DOJ Holdover Comment*, at 5.

[9] *Id.* at 6.

[10] *Id.* at 5.

[11] *See* USSG App. C, Amend. 772, Reason for Amendment (Nov. 1, 2013); *Id.* at Amend. 654, Reason for Amendment (Nov. 1, 2003); *Id.* at Amend. 647, Reason for Amendment (Jan. 25, 2003). This highlights the problem of "factor creep," and illustrates why the Commission should resist requests to further complicate the guidelines without evidence that additional complexity is necessary to serve the purposes of sentencing. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

[12] *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 4 (Oct. 10, 2017) (providing examples showing that a floor of 12 here is disproportionately high compared with other guidelines) (*Defender Holdover Comment*).

[13] *DOJ Holdover Comment*, at 5 & n.10.

emergency benefits]," where § 1040 sets a statutory maximum of 30 years. Moreover, none of the 4-level provisions the government picks as comparisons contain floors.[14]

Finally, no evidence supports that further complicating the guidelines through the addition of a 20th SOC to §2B1.1 will deter individuals from committing these offenses.[15] Research shows that "knowledge of sanction regimes is poor."[16] "[D]ecisions to refrain from crime are based on the mere knowledge that the behavior is legally prohibited or for other nonlegal considerations such as morality or fear of social sanctions."[17] In addition, "*certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent."[18]

Absent evidence that it is necessary to serve the purposes of sentencing, Defenders urge the Commission not to further complicate the guidelines. If, however, the Commission feels compelled to change the guidelines, Defenders urge the Commission to keep it simple and, as the Commission suggested in the issue 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."[19] If the Commission feels compelled to add the 20th SOC, 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.

II. Proposed Amendment #2: Tribal Issues

The range of comment on this proposed amendment reveals the complex issues associated with considering tribal convictions at federal sentencing.[20] Because of this complexity, Defenders

[14] *See* §2B1.1(b)(8)(B), (b)(18)(a)(ii), and (b)(19)(A)-(B).

[15] *See, e.g.*, *DOJ Holdover Comment*, at 5 ("the Department believes an enhancement will help ensure that the penalties are sufficient to deter fraud and abuse").

[16] Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 204 (2013).

[17] *Id.* And even for those "for whom sanction threats might affect their behavior, it is preposterous to assume that their perceptions conform to the realities of the legally available sanction options and their administration." *Id.*

[18] *Id.* at 201-202.

[19] As Defenders have noted, the Commission has taken this approach in other guidelines. *See Defender Holdover Comment*, at 3.

[20] October 2017 Public Comment Received on Proposed Amendments in Response to 82 FR 40661 (listing comment by Department of Justice; Federal Public and Community Defenders; Practitioners Advisory Group; Probation Officers Advisory Group; Tribal Issues Advisory Group; Victims Advisory