STATEMENT OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

FOR A PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

PRESENTED

March 14, 2018

Judge Pryor and members of the Sentencing Commission, thank you for the opportunity to present the Department of Justice's views on the Commission's two-part amendment addressing "first offenders" and alternatives to incarceration.[1] In "Part A" of the proposed amendment, 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 collapsing Zone C of the sentencing table into an expanded Zone B. The Department opposes the proposed amendment and respectfully requests that the Commission reject it.

I. Proposed Offense Level Reductions for "First Offenders"

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 below 16 and defendants with an offense level above 16 would receive a 1-level reduction. The Department believes both options are unnecessary and ignore the reality that "first offenders" routinely engage in conduct that warrants stiff punishment.

[1] U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Aug. 25, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

The Commission's proposed amendment is no small matter. It will potentially reduce the sentencing range of more than 20,000 defendants annually—including child molesters, major drug traffickers, bank robbers, and sophisticated fraudsters.[2] And, it will disrupt a criminal history approach that the Commission's data itself shows has worked well for three decades.

One rationale offered by the amendment is that defendants with "0" criminal history points present the lowest recidivism rate (30.2%).[3] This is neither surprising nor new. The Commission's data show that the risk of recidivism generally increases as the number of criminal history points increases.[4] Each criminal history category encompasses multiple criminal history points, and, in almost all criminal history categories, there is a difference in recidivism between those defendants with the lowest points in the category and those with the highest.[5] 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 history.[6] Moreover, the simple fact that defendants

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[2] 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, 22,878 defendants (36.9%) received "0" criminal history points).

[3] U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, at 20 (citing to U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW at 5 (2016).

[4] See U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, at 5 (stating "[e]ach additional criminal history point was generally associated with a greater likelihood of recidivism").

[5] *Id*. at 18, Figure 6; *see also id*. at 27.

[6] *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").

with "0" criminal points generally recidivate less than other criminals is an insufficient justification for the proposed sentencing reduction, and that observation alone reveals nothing about underlying causality. That is, one reason that recidivism is lower among defendants with no prior criminal history points may be the deterrent effect of the current sentencing framework. In any event, there are other important sentencing principles to consider as well, such as just punishment, protection of the public, and the need to promote respect for the law.[7]

The Commission supports the proposed amendment by citing section 994(j) of Title 28.[8] Section 994(j) provides that alternatives to incarceration are generally appropriate for first offenders who have "not been convicted of a violent or otherwise serious offense."[9] There is, however, a noticeable disconnect between § 994(j) and the Commission's proposed amendment. In § 994(j), Congress speaks of offenders who have not been convicted of violent or other serious crimes. But, the Commission's proposal would reduce the offense level for *all* "first offenders." Thus, murderers, child molesters, and significant fraudsters fall outside the class of offenders contemplated by § 994(j) yet they are in the class of offenders who would benefit from the proposed amendment. It is, therefore, the Department's position that § 994(j) does not support the proposed amendment.

[7] 18 U.S.C. § 3553(a); 28 U.S.C. § 994(a)(2), (3).
[8] U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Aug. 25, 2017), at 28.
[9] *Id*.

Moreover, the label "first offender" is not synonymous with non-violent, non-dangerous, or non-serious. The proposed amendment as drafted would reduce the offense level for the entire universe of "first offenders," regardless of whether their first offense was child sexual abuse, armed carjacking, or the orchestration of one of the world's largest Ponzi schemes. On an annual basis, the proposed amendment would likely result in lower sentencing ranges for hundreds of robbers, child molesters, child pornographers, and firearms offenders, as well as thousands of drug traffickers.[10]

By the Commission's own assessment, if the proposed amendment had been effective in 2014 it would have led to lower sentencing ranges for 5,700 drug dealers, 3,600 fraudsters, 1,620 illegal reentry defendants, 1,030 alien smugglers, 940 child pornographers, 520 money launderers, and 300 robbers, among others.[11] The Commission has provided no justification for reducing the sentencing ranges for such a broad swath of defendants. The proposed amendment would ensure that some violent criminals and serious offenders are back on the streets sooner (where nearly 1 out of 3 will recidivate) than they would be currently. The Commission should not lose sight of the proposed amendment's potentially negative impact on public safety.

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[10] *See* U.S. SENTENCING COMM'N, PUBLIC DATA PRESENTATION FOR FIRST OFFENDERS AND ALTERNATIVES TO INCARCERATION AMENDMENT, 15 (Dec. 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20161209/20160109_DB_alternatives.pdf.

[11] *Id*. at 15.

One of the major beneficiaries of the proposed amendment would be white-collar defendants, most of whom would qualify as "first offenders." White-collar offenders already receive non-incarceration sentences in a large percentage of cases.[12] More specifically, 58.1% of larceny offenders, 58.6% of embezzlement offenders, 40% of tax offenders, 79% of environmental offenders, and 52.4% of antitrust offenders received probation or partial probation sentences during the 2016 fiscal year. The proposed amendment would lead to even higher numbers of probation or partial probation sentences—a result that will decrease the deterrent effect of white collar prosecutions.

The impact of the proposed amendment will be especially pronounced in the area of tax fraud. Approximately 81.5% of tax fraud defendants currently fall within Category I.[13] According to Commission data, tax fraud offenders already receive relatively low sentences. During the fiscal year of 2015, about 59% of tax offenders received sentences that included imprisonment, compared to 90.2% of all offenders.[14] The Department is concerned that lower sentences for tax fraud defendants will be insufficient to provide even a modicum of deterrence. The

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[12] *See* U.S. SENTENCING COMM'N, INTERACTIVE SOURCEBOOK "OFFENDERS RECEIVING SENTENCING OPTIONS IN EACH PRIMARY OFFENSE CATEGORY" (2016), https://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table12.

[13] U.S. SENTENCING COMM'N, QUICK FACTS, TAX FRAUD OFFENSES, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf (2015).

[14] U.S. SENTENCING COMM'N, 2015 ANNUAL REPORT AND 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 12 (2016), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table12.pdf*.

Commission itself has recognized the importance of deterrence in tax fraud cases, stating the following in the Introductory Commentary of the tax guideline:

> Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.[15]

Reducing the sentencing range for a large number of tax fraudsters—as the proposed amendment would do—is irreconcilable with the stated goal of deterrence. It is also irreconcilable with the tax guideline's goal of "somewhat increas[ing] average sentence length" and reducing the "number of purely probationary sentences" for tax offenders.[16]

The proposed amendment is based on the false premise that the sentences imposed on "first offenders" are generally too long. The median sentence for all defendants in Criminal Category I is 24 months' imprisonment.[17] The Department suspects the median sentence for those with "0" criminal points is even lower. Accordingly, the Department opposes the proposed amendment.

II. Alternatives to Incarceration for "First Offenders"

The Commission has also proposed adding a new subsection (g) to §5C1.1. That provision would piggyback on the "first offender" provision discussed above by

[15] U.S.S.G., §2T1.1, Introductory Comment.
[16] *Id*. at Commentary, "Background."
[17] 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).

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 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 definition of a "crime of violence" currently used in the career offender context.[18] As the Commission is well aware, that particular definition (and the categorical approach that goes along with it) is the source of "troubling and complex issues"[19] that are heavily litigated and lead to bizarre results.[20] 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 depart downwards for exceptional circumstances under §5K2.0

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[18] U.S.S.G. §4B1.2.

[19] United States v. Sherwood, 156 F.3d 219, 222 (1st Cir. 1998) (referring to the determination of "what crimes constitute 'crimes of violence' for federal sentencing purposes" as "troubling and complex").

[20] *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").

(Grounds for Departure), as well as for other reasons, and in addition to vary downwards under section 3553(a) and impose a sentence other than imprisonment. In practice, courts exercise this authority quite often—between October 1, 2016, and September 30, 2017, the Commission reports that courts departed or varied below the guidelines without a Government motion in about 13,000 (20%) of all cases.[21] This rate is even higher in many urban districts where tax fraud and other white collar crime is often concentrated. For example, in 2016, courts in the District of Massachusetts sentenced within the applicable Guideline range in only 27.5% of cases, and gave non-government sponsored variances in 29% of cases.[22]

III. Consolidating Zones B and C

The Commission has also proposed an amendment that would increase the availability of alternatives to incarceration by consolidating Zones B and C. The Department opposes the proposed amendment. Approximately seven years ago, the Commission expanded Zones B and C of the Sentencing Table to make alternatives to incarceration more available.[23] Thus, in the recent past the Commission addressed the precise problem the Commission says it is trying to solve with the newly proposed amendment. And the Commission's previous action appears to have

[21] U.S. SENTENCING COMM'N, QUARTERLY DATA REPORT, Table 8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY17.pdf.

[22] U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2016, DISTRICT OF MASSACHUSETTS, Table 8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/ma16.pdf.

[23] U.S.S.G., App. 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 . . . .").

had an effect: in 2008 and 2009, the Department's informal analysis of Commission data indicate that 7.9% and 8.1% of defendants had guideline ranges in Zone B, and in 2011 and 2012, this number rose to 10.9% and 10.2%, respectively.

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 sentences of probation. Prior to the 2010 amendment, probation was not authorized for defendants where the minimum of the applicable guideline range was 8 months or more.[24] Following the 2010 amendment, probation was not authorized where the minimum of the applicable guideline range was 10 months or more.[25] Under the proposed amendment, the threshold would move even higher, and probation would not be authorized for defendants where the minimum of the applicable guideline range is 15 months or more.[26]

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. An across-the-board measure like that proposed by the Commission is unwarranted; it merely reduces, overall, the proportion of Zone C offenders who receive incarcerative sentences, and the Commission has pointed to no justification for that step. The proposed amendment would apply across the spectrum of offenses and without regard to the defendant's criminal history—it would go so far as to increase the availability of non-incarceration sentences for recidivists whose

[24] U.S.S.G. §5B1.1 Appl. Note 2 (2009).
[25] U.S.S.G., App. C, Amend. 738 (2010).
[26] U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Aug. 25, 2017), at 32.

current offense may carry a lower offense level but whose criminal history is substantial. There is no reason to believe that permitting more offenders in the higher criminal history categories to receive non-incarceration sentences will protect the public, promote respect for the law, or deter future criminality. In fact, the across-the-board approach of the proposed amendment would be inconsistent with the Commission's longstanding view that alternatives to incarceration are "not recommended for most defendants with a criminal history category of III or above."[27]

As with some of the Commission proposals discussed above, the proposed amendment appears to be grounded on the flawed assumption that (absent unusual circumstances) offenders at the lower end of the Sentencing Table simply should not face imprisonment. The Department sees no need for the Commission to once again alter Zones B and C in order to make even more defendants eligible for alternatives to incarceration. Accordingly, the Department opposes the proposed amendment.

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Thank you for the opportunity to share the Department's views on these important issues. I look forward to answering your questions.

[27] U.S.S.G. § 5C1.1, App. Note 7.