

February 21, 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: SSA OIG Comments on the Proposed Amendments to the Federal Sentencing Guidelines Related to Social Security Fraud**

Dear Judge Pryor:

On behalf of the Social Security Administration (SSA) Office of the Inspector General (OIG), we submit the following views, comments, and suggestions regarding the Bipartisan Budget Act of 2015 (BBA)<sup>1</sup> proposed amendments to the Federal sentencing guidelines and issues for comment, as it relates to Social Security fraud, published in the Federal Register on December 19, 2016.<sup>2</sup>

We thank the Commission for considering our prior comments, dated March 11, 2016, to the initial proposal to amend the guidelines, published in the Federal Register on January 15, 2016.<sup>3</sup> We stand by our prior comments, which we are attaching, and respectfully request incorporation by reference.<sup>4</sup>

We appreciate the opportunity to provide the following additional comments for your consideration. In brief, 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 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) and §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)), particularly if the guidelines are amended to address those individuals in a position of trust that defraud SSA (discussed below).
- Supports the Commission's alternate proposal to create a general specific offense characteristic<sup>5</sup> within § 2B1.1 with an enhancement of 4 levels and a minimum offense level of 14<sup>6</sup> for cases in

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

<sup>2</sup> U.S. Sentencing Commission, *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 92003 (Dec. 19, 2016).

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

<sup>4</sup> We note the Chairmen of the House Ways and Means and Judiciary Committees, and the Senate Committee on Finance, and the Department of Justice, also submitted comments in support of amending the guidelines to reflect the new and stronger penalties for Social Security fraud included in the BBA.

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.<sup>7</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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

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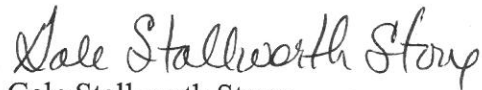
<sup>8</sup> These cases are time-consuming and complex – often involving reviews of voluminous SSA records, surveillances, and undercover operations. However, there is a great need to prioritize these fraud investigations given the serious impact they have on SSA, Social Security trust funds, Treasury's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

<sup>9</sup> 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,<sup>10</sup> 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

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