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 year[15] 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 history[19]—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 Catetgories (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.ussc.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.ussc.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.ussc.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.ussc.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.ussc.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