

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 style with a large initial "G" and "S".

Gale Stallworth Stone
Acting Inspector General

Attachments

cc: Commissioners

Kenneth P. Cohen, Staff Director

Kathleen Grilli, General Counsel

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 Lavallee, 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. Lavallee, 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

Lavallee, 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

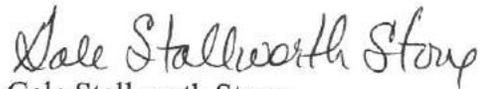
⁸ These cases are time-consuming and complex – often involving reviews of voluminous SSA records, surveillances, and undercover operations. However, there is a great need to prioritize these fraud investigations given the serious impact they have on SSA, Social Security trust funds, Treasury's general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