

STATEMENT OF
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FOR THE NORTHERN DISTRICT OF OKLAHOMA
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
UNITED STATES SENTENCING COMMISSION

**FOR A PUBLIC HEARING ON PROPOSED AMENDMENTS TO
THE FEDERAL SENTENCING GUIDELINES CONCERNING
TRIBAL COURT CONVICTIONS AND PROTECTION ORDERS,
IMPLEMENTATION OF THE BIPARTISAN BUDGET ACT AS IT
RELATES TO SOCIAL SECURITY FRAUD OFFENSES, AND
WHETHER A DEFENDANT WHO FALSELY DENIES
RELEVANT CONDUCT SHOULD BE ELIGIBLE FOR
ACCEPTANCE OF RESPONSIBILITY**

PRESENTED
FEBRUARY 8, 2018

I. Introduction

Judge Pryor and members of the Sentencing Commission, thank you for the opportunity to present the Department of Justice's views on several of the Commission's proposed amendments, more specifically, proposed amendments concerning the Bipartisan Budget Act of 2015, the treatment of tribal court convictions and tribal court protection orders, and the circumstances under which a defendant may challenge relevant conduct yet still receive an adjustment for acceptance of responsibility.

II. Amendments Concerning Social Security Fraud Schemes and the Bipartisan Budget Act of 2015

As noted in its October 10, 2017 comment letter,¹ the Department agrees with the Commission's proposal to enhance the guidelines range for those defendants who face the increased 10-year statutory maximum provided by the Bipartisan Budget Act for Social Security fraud. A defendant faces this increased statutory maximum if he or she "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

¹ Letter to Judge William H. Pryor, Acting Chair, U.S. Sentencing Commission, U.S. Department of Justice (October 10, 2017), 3, available at <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/DOJ.pdf>.

care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination.”²

The very title of Subsection 813(b) of the Act, “Increased Criminal Penalties for Certain Individuals Violating Positions of Trust,” makes clear that Congress intended for the identified class of defendants to receive increased sentences. Members of Congress who were influential in the passage of the Act have specifically 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.”³

In response, the Commission has proposed amending the fraud guideline, §2B1.1, by providing either a 2- or 4-level enhancement for defendants who face the newly created 10-year statutory maximum. The Department believes the 4-level enhancement is the better option. It would be consistent with other, similar 4-level enhancements that are already set forth in §2B1.1. For example, a 4-level enhancement applies to defendants committing theft of medical products while serving as an employee in a pre-retail medical product’s supply chain.⁴ A 4-level enhancement applies to defendants committing securities fraud while serving as a director of a publicly traded company, as a registered dealer or broker, or as a person associated with a broker or dealer, or as an investment advisor or a person

² See Sec. 813(b) of Bipartisan Budget Act of 2015, Pub. L. No. 114-74 (Nov. 2, 2015).

³ 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), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/Goodlatte-Hatch-Brady.pdf>.

⁴ U.S.S.G. §2B1.1(b)(8)(B).

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associated with an investment advisor.⁵ A 4-level enhancement applies to defendants committing violations of commodities laws who are officers or directors of a futures commission merchant, or who are introducing brokers, or who are commodities trading advisers or commodities pool advisers.⁶ And a 4-level enhancement applies to defendants who intentionally damage protected computers in violation of 18 U.S.C. 1030(a)(5)(A).⁷ These enhancements involve fraudulent conduct comparable to that at issue today. Indeed, a fair argument can be made that the class of Social Security fraud defendants targeted by the Bipartisan Budget Act are worse offenders because they have defrauded a government program that is essential to millions of Americans.

The Department also supports the Commission's proposal for a minimum offense level for defendants who face the 10-year statutory maximum under the Act. As between the two options of a minimum offense level of 12 and a minimum offense level of 14, the Department supports the minimum offense level of 14. Most of the defendants targeted by the Bipartisan Budget Act will be defendants with little or no criminal history, and thus even with an offense level of 14, they will receive a recommended guideline range of 15-21 months. In practice, most defendants plead guilty, which would typically result in a 2-level reduction, and a Zone C guideline range of 10-16 months. As noted in the Commission's published notice of proposed amendments, the guidelines recommend imposing a split

⁵ U.S.S.G. §2B1.1(b)(19)(A)-(B).

⁶ *Id.*

⁷ U.S.S.G. §2B1.1(b)(18)(A)(ii).

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sentence for Zone C (for all Zone C guideline ranges, the guidelines recommend an alternative to incarceration, such as probation, for up to half of the minimum of the applicable guideline range). So, even with a minimum offense level of 14, many defendants would still receive a 5-month “within Guidelines range” sentence of imprisonment.

Regarding whether the addition of an enhancement to §2B1.1 should affect the availability of the 2-level adjustment for abuse of trust under §3B1.3, the Department would not object to precluding the abuse of trust adjustment if the Commission adopts the proposed 4-level enhancement. However, if the Commission adopts the 2-level enhancement, the Department would oppose precluding the abuse of trust adjustment. After all, the adoption of a 2-level enhancement and the preclusion of the 2-level abuse of trust adjustment would result in a net offense level increase of zero in many cases. Thus, most of the defendants targeted for increased sentences by the Bipartisan Budget Act would likely receive the same sentencing range as they do today. This outcome would be inconsistent with congressional intent. Finally, regarding the conspiracy offense added by the Bipartisan Budget Act, the Department has no objection to the Commission’s proposed reference to §2X1.1. Adding such a reference would be consistent with the Commission’s typical treatment of conspiracy provisions.

III. Amendments on Tribal Issues

The Commission has proposed two amendments based on recommendations made by the Tribal Issues Advisory Group (TIAG) in its 2016 report.⁸ The first amendment lists factors for district courts to consider when deciding whether to depart upward under §4A1.3 based on the exclusion of tribal court convictions from the criminal history score. The second amendment defines the phrase “court protection order” in a manner intended to provide consistency regarding the treatment of tribal court protection orders.

Although tribal court convictions do not currently receive criminal history points, a court may depart upward based on a finding that the defendant’s criminal history category is inadequate due to the exclusion of one or more tribal court offenses.⁹ The Commission has proposed changing the current language in the guidelines from “tribal court offenses” to “tribal court convictions,” and amending the commentary at §4A1.3 to include five non-exclusive factors that a court may consider when deciding whether to grant an upward departure in such cases. Arguably, changing the word “offense” to “conviction” may narrow what courts typically consider in this context. Nevertheless, the Department does not object to this change, and we support the first four factors set forth in the proposed amendment. The Department, however, has concerns with the fifth proposed factor, which asks the court to consider whether “[a]t the time the defendant was

⁸ REPORT OF THE TRIBAL ISSUES ADVISORY GROUP (May 16, 2016), *available at* <https://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

⁹ U.S.S.G. §4A1.3(a)(2)(A).

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.”

This fifth factor may lead courts to conduct an inquiry for which there is no clear answer based on the language of the proposed amendment. The fifth factor actually raises more questions than it answers. For example, what would be required to constitute a formal expression of tribal intent? Would a statement by the tribal court suffice? If so, could it vary from judge to judge within one tribe? Or perhaps from case to case with the same judge? If not the tribal court, then would a resolution by the tribal government be required? If so, by the tribal executive or the tribal council? What if the tribal judiciary, legislature, and executive branches did not agree as to how tribal convictions should be considered by federal district judges? Even where answers are forthcoming, this fifth factor would lead to disparate application from tribe-to-tribe and potentially from tribal administration to tribal administration. The approximately 573 federally recognized tribes vary dramatically in size, governmental structures, and sophistication. These differences among tribes will render it nearly impossible for courts to apply this fifth factor with any degree of uniformity. Accordingly, the Department respectfully requests that the Commission adopt the remainder of its proposal, but omit the fifth factor.

With respect to the Commission’s request for comment on how the factors should be balanced, sentencing courts should consider these factors as part of a totality of the circumstances analysis. Assigning weights to the individually listed

factors would undercut the idea that the factors are non-exclusive considerations that the sentencing court may consider.

With respect to the Commission’s proposed amendment to define the phrase “court protection order” as it appears in the commentary to §1B1.1, the Department supports the proposed definition. This definition will help alleviate confusion regarding whether violating a tribal court protection order triggers an enhancement under §§ 2A2.2, 2A6.1, and 2A6.2.

IV. Amendment Regarding Challenges to Relevant Conduct and Acceptance of Responsibility

The Department strongly objects to the Commission’s proposed amendment concerning a defendant’s ability to falsely deny relevant conduct at sentencing without losing the downward adjustment for acceptance of responsibility. We object to both of the options proposed, because both options raise the same concerns.

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.”¹⁰ 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.”¹¹ It bears mentioning at the outset that—albeit for dramatically different reasons—the proposed amendment has been criticized by both the Department and members of the defense

¹⁰ U.S. SENTENCING COMM’N, 82 Fed. Reg. 40651 at 47-48 (August 25, 2017), https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

¹¹ *Id.*

bar. At least a portion of the defense bar believes the proposed amendment does not solve the alleged problem,¹² and the Department believes the proposed amendment is unnecessary and will spawn further litigation.

First, as the Department noted in its comment letter, the proposed amendment is unnecessary. The Commission has not identified a circuit split regarding the interpretation of the current language nor has the Department experienced problems with the current language. Put simply, the proposed amendment seems to be a solution in search of a problem. On the other hand, it is a virtual certainty that if the Commission enacts either of the proposed options, litigation will commence almost immediately. Defendants and their attorneys will likely read the new language as providing them with an opportunity to plead guilty, broadly and aggressively challenge relevant conduct, and then nonetheless seek an acceptance of responsibility adjustment, regardless of whether the sentencing court finds these challenges to have merit. Litigation will then ensue over whether the challenges made to relevant conduct are “non-frivolous” or “lack an arguable basis in either fact or law.” 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—to allow the parties to avoid litigation costs and to conserve scarce judicial resources. Instead, it would effectively turn sentencing

¹² See PUBLIC COMMENT OF PRACTITIONERS ADVISORY GROUP 3 (Oct. 10, 2017), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/PAG.pdf> (“The PAG does not support either of these options, as each severely undermines defense counsel’s ability to make legal challenges to relevant conduct that could impact a defendant’s final Guidelines range.”).

hearings into mini-trials, consuming judicial resources while allowing defendants to reap the benefit that was designed to conserve those very resources.

On that point, we agree with the Victims Advisory Group 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.¹³ A defendant has no right to receive an acceptance of responsibility reduction, and it is a defendant’s burden to prove that he has “clearly demonstrated acceptance of responsibility.”¹⁴ The current guidelines appropriately recognize that a defendant cannot meet that burden if he falsely denies relevant conduct. In those cases where a defendant has a legitimate concern about relevant conduct, the current guidelines permit him to raise that concern without losing the acceptance of responsibility reduction. While the ground rules for the current provision are well settled, the proposed amendment will create confusion and generate litigation. Thus, the Department believes the risks and downsides of the proposed approach far outweigh any potential benefits.

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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.

¹³ 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>.

¹⁴ *United States v. Torres-Rivas*, 825 F.3d 483, 486 (8th Cir. 2016).