Before the

UNITED STATES SENTENCING COMMISSION

Public Hearing

Wednesday, February 16, 2011

Meachem Conference Center

Thurgood Marshall Federal Judiciary Building

One Columbus Circle

Washington, D.C. 20002-8002

The hearing was convened, pursuant to notice, at 9:04 a.m., before:

JUDGE PATTI B. SARIS, Chair

MR. WILLIAM B. CARR, JR., Vice Chair

MS. KETANJI BROWN JACKSON, Vice Chair

CHIEF JUDGE RICARDO H. HINOJOSA, Commissioner

JUDGE BERYL A. HOWELL, Commissioner

MS. DABNEY FRIEDRICH, Commissioner

MR. JONATHAN J. WROBLEWSKI, Ex-Officio Member of the Commission

PANELISTS:

Panel I: Fraud Offenses

PREET BHARARA, Department of Justice, United States Attorney, Southern District of New York

CARMEN M. ORTIZ, Department of Justice, United States Attorney, District of Massachusetts

MATTHEW T. MARTENS, Securities & Exchange Commission, Chief Litigation Counsel, Division of Enforcement

Panel II: Fraud Offenses

HECTOR DOPICO, Federal Public Defenders, Assistant Federal Public Defender, Southern District of Florida

ERIC TIRSCHWELL, Practitioners Advisory Group, Partner, Kramer Levin Naftalis & Frankel

SUSAN HOWLEY, Victims Advisory Group, Director, Public Policy, National Center for Victims of Crime

PANELISTS (Continued):

Panel III: Fraud Offenses

JAMES E. FELMAN, American Bar Association, Co-Chair, Criminal Justice Section Committee on Sentencing

MICHAEL ANDERSON, National Association of Mortgage Brokers, Chair of Government Affairs

THOMAS S. CRANE, Member, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., Health Care Fraud and Abuse Practice Group

Panel IV: Illegal Reentry, Supervised Release, and Other Proposed Amendments

SALLY QUILLIAN YATES, Department of Justice, United States Attorney, Northern District of Georgia

JANE McCLELLAN, Federal Public Defenders, Assistant Federal Public Defender, District of Arizona

DAVID DeBOLD, Practitioners Advisory Group, Partner, Gibson Dunn

TERESA M. BRANTLEY, Probation Officers Advisory Group, Supervisory Probation Officer, Central District of California

SUSAN HOWLEY, Victims Advisory Group, Director, Public Policy, National Center for Victims of Crime

P R O C E E D I N G S

(9:04 a.m.)

CHAIR SARIS: Good morning. My name is Patti Saris. I'm a judge in Massachusetts, and I am the new chair of the United States Sentencing Commission. I am thrilled to be here this morning for my first hearing.

It is good to see smiling out from me the United States attorney in our district, and I know so many other people here.

So we have a lot of witnesses today, and I am almost embarrassed to say it because it's like the First Circuit does it, we will be following a time — we are going to go for about ten minutes, and then hopefully lots of questions from everybody. But before we get going, I wanted to introduce my fellow and sister commissioners who are so much more experienced than I am, and whose experience I rely on every day so far in my six weeks.

So let me get going. To my right is Mr. Will Carr who has served as vice chair of the Commission since December 2008. And previously he

was an assistant United States attorney in the Eastern District of Pennsylvania, from 1981 until his retirement in 2004.

Ms. Ketanji Jackson, on my left, is also a vice chair of the Commission, but just since February 2010. She's got lots of energy. She was a litigator at Morrison & Foerster, and was an assistant federal public defender in the Appeals Division of the Office of the Federal Public Defender in D.C.

Judge Ricardo Hinojosa, over here (indicating), I asked and confirmed that the orange tie has something to do with his home town team. He was the former chair of the Commission from 2004 to 2009, and is chief judge of the United States District Court for the Southern District of Texas, and has served on that court since 1983.

The newest judge here, Beryl Howell, who just started as a judge, but she served on the Commission since 2004. She is a judge on the United States District Court of the District of Columbia, and was nominated to that position this July, and she was confirmed in December.

Dabney Friedrich, way over here, almost hidden there, has served on the Commission since December 2006. She previously served as associate counsel at the White House, as counsel to Chairman Orrin Hatch at the Senate Judiciary Committee, and assistant U.S. attorney in the Southern District of California and the Eastern District of Virginia.

And far over there to the right is Jonathan Wroblewski, who is an ex-officio member of the Commission, representing the Attorney General of the United States, and he currently serves as director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice.

Now I wanted to, before I get going, did anyone else want to make any comments before we get going on these very important topics this morning?

(No response.)

CHAIR SARIS: So seeing no one wants to, but we will all jump in with questions, as I mentioned, the format for the hearing is the ten minutes for a statement, and then the Q&A which should last about five minutes. We have this light

system set up here. So the green is when you get going, the orange for about a minute left, and then red when you stop. And I will be hopefully monitoring the questions so that everyone will have a chance.

Our first panel is on fraud, and it involves the proposed guideline amendments for the health care and financial fraud offenses. And these were very important topics that were addressed in the legislation enacted during the last Congress.

So I think I would call up the first panel: Preet Bharara is the United States — welcome — Attorney for the Southern District of New York, and has been so since 2009. He previously served as an assistant U.S. attorney in that district's General Crimes, Narcotics, and Organized Crime and Terrorism units; as a staff director of the U.S. Senate Judiciary Committee's Subcommittee on Administrative Oversight in the Courts; and as a litigation associate at Swidler Berlin Shereff & Friedman, and Gibson, Dunn & Crutcher in New York. Welcome.

So our second is Carmen Ortiz, U.S.

attorney in the District of Massachusetts. She previously served as an assistant U.S. attorney in the district's Economic Crimes Unit; and as an assistant district attorney in Middlesex County, Massachusetts; as a senior attorney, trial attorney at Morisi & Associates, and as a program associate at the Harvard Law School's Center for Criminal Justice. It's good to see her here.

And Matthew Martens, welcome, is the chief litigation counsel of the Enforcement Division at the SEC, the Securities and Exchange Commission. Previously he served as an assistant U.S. attorney in the Western District of North Carolina; as the chief deputy — as the deputy chief of staff to Assistant U.S. Attorney General Michael Chertoff; and as a litigation associate at Latham & Watkins. Welcome.

So why don't we get going, and we can start with Mr. Bharara.

MR. BHARARA: Thank you, Madam Chair, members of the Commission.

Thank you for the opportunity to let me testify on behalf of the Department of Justice and

federal prosecutors all around the country. It is a real honor to be here.

As everyone in this room knows, the lingering economic crisis has had devastating effects on mortgage markets, credit markets, the banking system, and virtually every citizen in America. Whatever the cause or causes of the financial crisis, it has certainly laid bare criminal activity across a wide spectrum of our financial markets and financial sectors.

I see it every day in my own district, whether in connection with billion dollar Ponzi schemes like Bernard Madoff's, or in mortgage fraud scams that have led in my district to over 100 arrests in the past 18 months alone.

As a result, you should know, and everyone should know, the department has redoubled its efforts to combat every manner of financial fraud. Our mission has been to prosecute wrongdoers, recover stolen money, make financial crime victims whole, and in so doing protect taxpayers.

Prosecuting fraud remains a top priority

for federal prosecutors everywhere, not just in the Southern District of New York, as we pursue criminals who steal from the pockets of the American people to line their own, and who would undermine the integrity of our markets.

Critical to effective fraud enforcement for purposes of punishment and deterrence is a strong sentencing policy that leads to consistent, tough, and fair sentences. There is concern, based on the experience of some districts, that more and more, particularly in high loss, large-scale fraud cases, there are not consistently tough and fair sentences.

We have observed, and the Commission's data have confirmed, that district courts are relying less and less on the sentencing guidelines, which are now advisory. Some are concerned that the fraud guidelines counsel sentences that are inappropriate to the crime committed, either too high, or too low. Others are frustrated that the guidelines, not withstanding their name, do not provide adequate guidance in certain white collar cases.

And not withstanding these concerns, our

view is that across-the-board penalty increases are not warranted for all fraud offenses covered by section 2B1.1

Indeed, it is our experience that in cases involving large-scale financial harm the guidelines generally speaking provide for commensurately stiff punishments. But what the guidelines sometimes do not offer is meaningful guidance for differentiating between and among financial criminals and accurately gauging their relative culpability, which is something that a lot of people I think agree about.

The crimes covered by the fraud guidelines are complex and evolving, and therefore the department fully supports the Commission's plan for a thorough review. We further agree that amendments, if they are to be thoughtful and effective, will require study beyond the 2010-2011 cycle.

So in that spirit, we have a number of specific, if preliminary, amendment proposals that we hope the Commission will examine as part of its review. They are by no means exhaustive, but we believe that the twin goals of fairness and

deterrence can be furthered through amendments like these and, time permitting, I would like to mention just a few.

First, in the securities fraud context. In that context we would propose two potential sentencing enhancements: one for sophisticated insider trading conduct and the other for engaging in a course or pattern of insider trading, especially where such criminal conduct has not resulted in financial profit, despite the defendant's best efforts.

In the Southern District of New York, we have had considerable historical and recent experience with insider trading cases. In the past 18 months alone, we have charged 46 individuals with participation in insider trading schemes.

We have observed during the course of those investigations that insider trading has become increasingly complex and difficult to detect. Today's insider trading cases often involve networks of illegal activity conducted on a global basis using technologies that make the crime more difficult to

detect and employing sophisticated measures to conceal that criminal activity.

Based on our experience, the nature and scope of insider trading activity has evolved substantially, but the guidelines — specifically 2B1.4 — have not completely kept up. The guidelines, as they stand, may be letting some defendants in some cases off with lighter sentences than they may deserve.

Some examples of this new age of insider trading involve the passing of insider information by transmitting heavily coded e-mails, employing anonymous prepaid cell phones, to using portable flash drives instead of company servers, creating "cover" documents to make it appear that trades are based on legitimate public information; and engaging in strategic and pretextual trading in and out of stocks to create false patterns and thereby mask illegal trading.

Pushing the level of sophistication even further, in many recent cases in our district traders have employed the cover of so-called expert

networking firms, ostensibly for the purposes of gaining generic and legitimate information from "experts" in certain industries, but in reality for purposes of creating thinly veiled covers for illegally pending still-secret revenue and earnings' information before public announcements.

So while the fraud guidelines found at 2B1.1, which is generally applicable to securities fraud offenses, includes a two-level enhancement for use of "sophisticated means," no such enhancement exists in 2B1.4. And some of the insider trading rackets that we have seen in our cases would seem to warrant a "sophisticated means" enhancement.

The intricate techniques that many of today's insider traders use to perpetrate those schemes, in our view, should fairly expose them to increased penalties under the guidelines, as with other kinds of complex fraud schemes.

The second suggestion we would make with respect to insider trading is with respect to profitless insider trading. We have observed in a number of cases individuals who clearly trade on the

basis of material nonpublic information but do not profit because the market does not react to the disclosure of the information in anticipated ways. Sometimes because other countervailing or unforeseeable market forces arise — as, for example, when an unexpected upward stock swing, upon disclosure of unexpectedly high earnings for an oil company, does not materialize because of a sudden political crisis in the Middle East.

In that hypothetical case, a trader might have clear criminal intent and expect to profit handsomely from an illegal advance tip about earnings, but because of external forces and happenstance beyond that perpetrator's control, does not ultimately realize a profit from the position. And he would be subject to just a minimal sentence under the guidelines.

For insider trading defendants, in our experience, who are trading professionals and who therefore trade often, this can unfortunately happen with some frequency.

Section 2B1.4 of the guidelines, however,

currently offers really no mechanism for differentiating culpability other than by the amount of trading gained as a result of the value realized in trading in securities. This creates the potential for a defendant to commit multiple and brazen acts of insider trading, and yet face only the base offense level of eight prescribed by 2B1.4.

So for those reasons we propose an enhancement that allows for incrementally higher punishment for a defendant based on some measure other than net trading gain to capture culpability. We don't specify exactly what those enhancements might be, but some possibilities would be: the number of times a defendant trades on inside information; the size of the positions taken; the number of different stocks in which inside trades took place; or some other measure that ensures that the extremely culpable insider trading defendants do not avoid serious punishment simply because of the vagaries of the very market whose integrity their conduct has undermined.

Now I will briefly turn to mortgage fraud,

the other area where there are some suggestions.

In contrast to the securities and corporate fraud context, the mortgage and financial institution fraud guidelines tend to more accurately address relative culpability, because the amount of loss to victims resulting from that kind of fraud generally speaking is a fair and appropriate basis to weigh relative culpability. That is, the loss amount most often does accurately capture the nature and seriousness of the mortgage or financial institution fraud.

Not withstanding that, establishing the amount of loss in these types of cases is the difficulty in many instances, and we suggest a few proposals in connection with those guidelines.

The first mortgage fraud proposal addresses the frequent difficulty of calculating the loss amount, as I've said, in mortgage fraud schemes. The guidelines determine loss in mortgage fraud cases as the amount of the fraudulently obtained loan minus either the amount the victim has recovered, or the fair market value of the asset pledged for the loan.

But that does not always do the trick. Oftentimes the property is in default or foreclosure, but the bank has not yet sold the property and thereby has not yet sustained a measurable loss. So there is no easy and efficient way in those cases to determine the fair market value of the property without the considerable expense of an appraisal, which can be extremely unwieldy in cases involving multiple loans. And we regularly see cases in our district involving dozens and dozens of loans.

Often there are also loans that are flips of properties in which one defendant through fraud is able to sell a property without causing a loss to the bank. Under the guidelines as currently drafted, if a bank does not actually suffer a loss there is no loss under the loss table, of course, and the defendant's sentencing range can be inappropriately low.

So we would propose amending Application Note 3(F) — which lays out "special rules" for calculation of loss — to set a default loss amount of, for example, 30 percent of the value of the loan

fraud cases as a floor for the loss amount. That number doesn't have to be 30 percent. In our experience, based on testimony from cases that we have had, the amount of loss or loss severity based on the experiences of certain lenders has been about 35 to 40 percent. So something in the nature of 30 percent, if the Commission so thought it made sense, seems to be a sensible floor.

That type of approach, by the way, has worked well in connection with access device fraud, for example, where the guidelines provide for a floor of $500 in loss per access device. So in our view, establishing such a floor for fraudulent loans seems sensible, efficient, and fair in certain circumstances.

A second suggestion is to hold a defendant responsible for injury to individuals who are induced, through the defendant's mortgage fraud scheme, to purchase in their own name properties that they cannot afford; or for inquiry caused to non-culpable straw purchasers who are sometimes tricked into entering into a scheme through a false

representation by the defendant. At times, the purchasers of the properties in mortgage fraud schemes are unknowing victims of the schemes themselves — not always, but sometimes — and the purchaser or straw buyer's good credit is used by the bad actors to buy the properties. And in those cases they have been sold a bill of goods.

And my time is up?

CHAIR SARIS: Yes.

MR. BHARARA: They have been sold a bill of goods just like the ultimate victim. The rest of my testimony is in the record, and I am happy to answer questions now or later.

CHAIR SARIS: Thank you. Why don't we go through all the testimony and then we will come back and ask questions, unless someone has something urgent?

(No response.)

CHAIR SARIS: No? All right.

MS. ORTIZ: Good morning, Madam Chair, and members of the Commission.

I would like to thank you for the

opportunity to appear before you today and to discuss some of the Commission's proposals for guideline amendments pursuant to the Patient Protection and Affordable Care Act.

As United States attorney for the District of Massachusetts, and also the chair of the Health Care Fraud Working Group of the Attorney General's Advisory Committee, it is an honor to speak to you today on behalf of the Department of Justice and federal prosecutors nationwide.

As most of you are probably aware, federal and state spending on Medicare and Medicaid exceeds over $800 billion per year and is expected to double over the next ten years. Various estimates indicate that tens of billions of dollars per year will be lost to waste, fraud, and abuse.

In addition to ensuring that affordable health insurance is available to millions of Americans and protecting them against potentially catastrophic medical expenses, the Patient Protection and Affordable Care Act supports the efforts of federal prosecutors to prevent and crack down on

health care fraud, waste, and abuse.

Meeting this challenge head on remains a top priority of the administration, and certainly is a top priority in the District of Massachusetts, and we are taking strategic approaches to combating the sophisticated white collar criminals who would steal from the health care till — regardless of whether they are providers, equipment suppliers, corporate wrongdoers, or simply fraudsters.

The assistant United States attorneys of the 93 United States Attorney Offices, in partnership with trial attorneys and the Criminal Division, with special agents from the FBI, with the men and women from the Department of Health and Human Services, are strategically working together to prosecute entities and individuals who steal from Medicare, Medicaid, and other health care systems by billing for unnecessary and nonexistent services and other crimes as well.

As a result of this effort, interagency effort — which in part uses strike forces to quickly identify, investigate, and prosecute those who steal

from our health care systems – the government has recovered over $4 billion in taxpayer dollars in fiscal year 2010 – $4 billion in stolen proceeds that went back to the Medicare Health Insurance Trust Fund, the U.S. Treasury, and others in this past year.

Despite these results, still much remains to be done. We applaud the Commission's – the amendments that they're considering to the federal sentencing guidelines that we believe fairly and appropriately implement and support the goals of the Affordable Care Act.

First we want to state that we support the Commission's response in the newly proposed section 2B1.1(b)(8) to the Act's directive to amend the federal sentencing guidelines to provide for a tiered sentencing enhancement based on the loss amount associated with an offense involving a "Government health care program." This provision, which is especially mandated by the Act, is essential to combating health care fraud and reflects an appropriate measure of a health care fraud

defendant's culpability.

We also support the Commission's response through a new special rule in Application Note 3(F) to the directive that you provide that the aggregate dollar amount of fraudulent bills submitted to a "Government health care program" shall constitute prima facie evidence of the "intended loss" by the defendant.

Now we would like to make two specific recommendations for the Commission's consideration:

First, we would recommend that the tiered enhancement proposed for losses "involving a Government health care program" at 2B1.1(b)(8) be expanded to apply not only to government health care programs, but to losses to privately funded health care benefit programs as well.

In this way, the reach of the federal sentencing guidelines would mirror the broader reach of the criminal statutes that are referenced to this guideline for sentencing purposes.

We believe that federal health care offenses involving privately funded health care

programs should also be subjected to the proposed tiered enhancements where you get certain pointage enhancements depending upon where the loss is more than $1 million, $7 million, or $20 million, which is in line with congressional direction that the Sentencing Commission review these enhancements as they are applicable to persons convicted of any "Federal health care offenses".

Health care offenders often use the same fraudulent billing scheme to defraud not only government programs but private sector health benefit programs simultaneously as well. And as currently proposed, limiting the application of 2B1.1(b)(8) to health care offenses involving a government health care program solely in the calculation of the loss amount to "bills submitted to [a] Government health care program", particularly in cases where perhaps the majority of the losses may be attributable to privately funded programs, health care programs, could in practice require the separation of government and private losses for guidelines offenses involving the private sector programs with

significantly — the sentences will be lower than they would if the fraud had been perpetrated upon a government health care program. And this despite no meaningful difference in the defendant's culpability.

We believe that the failure to broaden the ambit of the proposed loss-related amendments will only result in greater sentencing disparities and unnecessary legal battles regarding whether the Commission intended the courts to treat public and private health care programs so differently, and it could essentially be an accounting nightmare in terms of figuring out losses and how they should be attributed.

As you may know, large losses suffered by privately funded programs, such as employee health benefit plans or private insurers and associations, are likely to have a substantial negative impact on those programs, the individuals that are covered by such programs, and the health care industry as a whole, resulting in increases in the costs and premiums charged by private-sector programs.

As I alluded to earlier, the goal of the

Act was not only to ensure the availability of health care to American citizens, but to ensure that available health care remains affordable. And that is in part by eliminating waste and graft.

As our nation is recovering from an economic crisis, we must be mindful that in the health care context that we must protect not only the public's fisc, but take smart measures to reduce the ways that sophisticated criminals similarly steal from private programs, cheating and ushering higher health care costs upon citizens.

In the event that the Commission does not broaden the applicability of the loss-related proposals to include all privately funded health care programs, federal prosecutors would favor the inclusion of various health care programs within the coverage of the new enhancement.

I believe there was a proposal to consider to define it to Option 1 and Option 2, and what we would recommend is a hybrid of that approach to cover any plan or program that provides

health care benefits, whether directly through insurance or otherwise, which is funded directly in whole or in part by the U.S. government, meaning Medicare and Medicaid; any state care health care program, as defined under title 42, 1320; any group health plan, as defined in title 29; any multiple employer welfare arrangement; and any insurance defined under title 18, United States Code, 1033. And that is more noted in the testimony. I won't take up time to go into the details of it.

But we would ask that there be a broader definition to include more programs. But that being said, we would urge the Commission to consider our proposal that it expand the definition to incorporate both government and private health care programs, which will dispense with the need for defining "Government health care program" and will promote deterrence in private as well as in the government health care context.

Second, we propose that the guidelines be amended with respect to the application to health care offenses involving so-called "stand-alone

kickback cases" under title 42, United States Code, 1320a-7b.

Presently, sentencing guideline 2B4.1 is the guideline that applies to such offenses, and the loss enhancement contained therein is either the kickback amount, or the "value of the improper benefit to be conferred."

The latter is defined by reference to 2C1.1, Note 3, which states that "'the benefit received or to be received' means the net value of such benefit[,]" not the gross revenue.

Generally, courts have used the gross revenue or billing amount, but only where they found, or the government was able to prove corruption of medical judgment such as prescribing unnecessary procedures, or some other type of fraud. And as a consequence, in many kickback cases the government has been limited to using the value of the kickback that was paid, resulting in lower level ranges, including frequent probationary sentences that do not adequately reflect the nature of the offense and the true culpability of the defendant. For example, you

can pay kickbacks, take a doctor on a trip where the kickback may be $5,000. In essence the benefit of that gesture, that act, and then the physician can then bill and require services to the lab, if it's a sales rep who was taking the physician on a trip, and then the doctor can bill the lab for millions of dollars of lab services, or whatever services. And you see the disparity in that arena.

We urge the Commission to amend the guidelines so that even, absent fraud, 2B1.1 applies to the sentencing of kickback cases, and with respect to such offenses the loss is defined expressly as the amount of the submitted claims that are influenced by the kickbacks.

In closing, I thank the Commission again for this opportunity. Thank you.

CHAIR SARIS: Thank you.

MR. MARTENS: Madam Chairwoman and members of the Commission:

Thank you for the invitation to testify today on behalf of the U.S. Securities and Exchange Commission on the topic of potential amendments, in

response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, to the provisions of the sentencing guidelines covering securities fraud offenses.

The SEC welcomes the opportunity to lend its expertise in the area of securities fraud enforcement to the Sentencing Commission as it reviews and, if appropriate, amends the sentencing guidelines to better account for the facts and circumstances present in various types of securities fraud offenses.

I should state at the outset of my testimony that my purpose today is not to opine on the various policy judgments that the Sentencing Commission must make in determining the appropriate criminal sentence, whether of incarceration or otherwise, for securities fraud offenses.

As I am sure you're aware, the SEC does not have criminal enforcement authority. The SEC does, however, have considerable experience and expertise in the interpretation, application, and enforcement of the federal securities laws.

My testimony today will therefore focus on some observations about securities fraud offenses, the various fact patterns that often occur with regard to these offenses, and how these fact patterns are accounted for in the sentencing guidelines as currently written.

I will attempt to identify issues that you may wish to consider in evaluating the need for amendments to the guideline provisions governing securities fraud offenses.

It should go without saying that securities fraud is a serious offense. Congress most recently recognized this in the passage of the Dodd-Frank Act. At the core of the SEC's mission is a recognition that securities fraud poses a serious threat to individual investors, the securities markets as a whole, and the financial well-being of our nation.

Over the last few decades, securities fraud schemes have taken a variety of forms, including but not limited to insider trading scandals of the 1990s, the accounting fraud schemes of the

early 2000s, the mutual fund timing, analyst conflict, and stock options back-dating schemes that came to light a few years later, the massive Ponzi schemes at the end of the last decade, and most recently the insider trading schemes that have re-emerged.

And of course there has been the continuous threat of pump-and-dump schemes, boiler room operations, smaller-scale Ponzi schemes, and affinity fraud schemes, to name just a few.

The SEC, in conjunction with the Department of Justice, pursues schemes like these and many more as part of our constant effort to ensure the integrity of our financial markets and to protect individual investors.

Section 1079A(a)(1)(A) of the Dodd-Frank Act directs the Sentencing Commission to "review and, if appropriate, amend" the sentencing guidelines applicable to "persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and

policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses."

In carrying out this directive, it is important to recognize that the anti-fraud provisions of the federal securities laws apply to a wide range of misconduct. The various types of misconduct violating the federal securities laws can produce different types of "harm to the public," such as harm to individual investors, harm to the securities markets, or harm to both.

Some securities fraud offenses may be directed primarily to individual investors, inflicting harm that impacts individual investors in large amounts. Some securities fraud offenses might primarily affect the integrity of the securities markets, inflicting harm in a widespread way that impacts individual investors in small amounts but undermines the markets as a whole.

Other securities fraud offenses may inflict harm on both individual investors and the securities markets. The anti-fraud provisions of the

federal securities laws reach this entire range of misconduct.

The extensive reach of the anti-fraud provisions of the federal securities laws is a function of, among other things, first the absence of a requirement that actionable claims be limited to securities traded on a national securities exchange, and second, the expansive definition of a "security."

For example, a central anti-fraud provision of the federal securities laws, section 10(b) of the Securities Exchange Act of 1934, broadly applies to fraud in connection with the purchase or sale of securities, whether such securities are registered on a national securities exchange or "not so registered."

With regard to securities not registered on a national securities exchange, section 10(b) and Rule 10b-5 thereunder extend the reach of the anti-fraud provision prohibition to fraud schemes in connection with the purchase or sale of a security and through the use of the mails or by "any means or instrumentalities of interstate commerce."

The courts have interpreted the use of "any means or instrumentalities of interstate commerce" to include the use of bank checks, interstate highways and airspace, and the intrastate use of the interstate telephone system by investors to purchase securities.

Furthermore, the federal securities laws define a "security" to include any "investment contract," whether oral or written, a term that has been given a far-reaching definition by the Supreme Court. The definition of "security" also includes a "note," which has also been given a broad reading by the Court.

The result is that the federal securities laws as written and interpreted by the courts have an appropriately wide reach. Section 10(b), which is the securities fraud offense most frequently prosecuted criminally, serves as a multi-purpose tool that the SEC and the Department of Justice can employ to combat a wide array of securities frauds schemes.

Each year the SEC brings a significant number of cases under section 10(b), and these cases

are directed at varying fraudulent conduct covered by that provision. Some of that misconduct is directed at investors, some of it at institutions, some of it at markets, and some of it at a combination of the above.

None of this is to suggest that any of the conduct covered by the federal securities laws is not serious. Indeed, all of this misconduct is expressly made criminal if committed with the requisite criminal intent.

My point is rather that the misconduct covered by the anti-fraud provisions of the federal securities laws, including section 10(b), can vary widely. Some of the fraudulent conduct committed in violation of the securities laws causes a more direct and substantial harm to the markets as a whole, while other misconduct causes a more direct and substantial harm to individual investors.

The sentencing guidelines as currently written may not fully distinguish among the differing types of harm resulting from fraudulent conduct addressed by the broad reach of section 10(b) and

other anti-fraud provisions of the securities laws.

For example, by focusing on the number of victims of an offense — defined as those who suffer loss proximately caused by the offense — the guidelines can at times overlook the manner in which individuals were victimized, which can bear on culpability as well.

In addition, one can imagine a securities fraud scheme that, while not harming a large number of individual investors directly and proximately, causes harm to and uncertainty in the financial markets as a whole.

The sentencing guideline, however, do not always account for these distinctions between various methods of committing securities fraud offenses and the effects therefrom, even though such distinctions may be significant factors in determining appropriate sanctions.

Thus, in considering amendments to the guidelines to address "securities fraud" offenses, it may be more helpful to think of the various types of securities fraud offenses and differing factual

scenarios that violate the securities laws. In this way, the Sentencing Commission can ensure that the guidelines appropriately "account for the potential and actual harm to the public and the financial markets from the offenses."

It is also worth noting that this is not the first time the Sentencing Commission has been called upon to consider the propriety of the guideline provisions applicable to financial crimes such as securities fraud.

As a result of the financial scandals involving Enron, Worldcom, Adelphia, and other entities in the early part of the 2000s, Congress passed the Sarbanes-Oxley Act of 2002.

Among other things, the Sarbanes-Oxley Act called on the Sentencing Commission to modify the guidelines in certain respects with regard to financial crimes. This was on the heels of amendments to the guidelines in November of 2001 that substantially increased the penalties for financial crimes.

The Sentencing Commission responded to the

Sarbanes-Oxley Act by amending the guidelines in 2003 to, among other things: raise the base offense level to 7 for offenses carrying a maximum statutory term of imprisonment of 20 years or more; revise the loss table; provide for a 6-level enhancement for offenses that involve 250 or more victims; include a 4-level enhancement for an offense that substantially jeopardizes the safety and soundness of either a financial institution or a publicly traded entity with more than 1,000 employees; and provide for a 4-level enhancement for offenses committed by certain corporate officers and securities professionals.

The results of these modifications to the guidelines with regard to securities fraud offenses was dramatic. The SEC's experience has shown that securities fraud offenses, by nature, frequently involve large dollar amounts, large numbers of victims — whether they be holders of publicly traded stock or investors in a Ponzi scheme — sophisticated means, and in the case of a publicly traded company an officer of the company.

Thus, while the Dodd-Frank Act calls on

the Sentencing Commission to consider whether provisions should be made for an upward departure "in a case involving a securities fraud or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market," the capacity to make meaningful upward departures in the case of the most serious securities frauds may be limited.

In a case of a securities fraud offense that results in disruption to the financial markets, the adjusted offense level would likely already be a 43, thus leaving the Sentencing Commission and the courts with little further ability to punish the offender for market disruption that his or her offense may have caused.

There is, however, an area in which the Sentencing Commission may be able to consider the congressional directive with regard to securities fraud offenses. And that is the area of "loss" and insider trading, which I've detailed in the testimony that I have provided today.

I see my time is up.

CHAIR SARIS: Finish your sentence. Is there something you wanted to say?

MR. MARTENS: No, I think that's fine. Thank you.

CHAIR SARIS: Okay. Great. Questions?

COMMISSIONER HOWELL: Thank you all for being here today. What struck me as interesting when I reviewed the testimony, both from this panel and other people we are going to hear from later, is the general agreement or consensus on a couple of things.

One, that this should be a multi-year review; that the fraud guidelines need a lot of improvement. And I mean that was an interesting perspective to hear from department and enforcement representatives, as well as from other people who are going to be testifying.

The second thing I thought that there was consensus on was — and I'll quote you, Mr. Bharara — that one of the problems with the fraud guidelines is that they don't offer meaningful guidance for differentiating among culpability.

And part of that problem is that there is

a huge reliance on the loss table, which can raise up to 30 additional points in the offense level.

So one of the things that I wanted to ask the department representatives is that I looked forward to seeing in your testimony, after that big setup, to see what suggestions you would have for addressing perhaps the over-reliance on the loss table or some of the piling on of the SOCs, with perhaps some suggestions for either caps on the loss table or combining some of the SOCs that are there, with the addition of perhaps some SOCs that would help guide judges on how they should evaluate the differentiating culpability among fraudsters. And I didn't see that in your testimony. And in fact you just called for additional enhancements.

What would you suggest, as we look at the problems with over-reliance on the loss table, piling on of SOCs that are creating what judges are viewing as draconian sentences and are therefore finding this guideline not helpful?

What would you suggest that we look at in terms of dealing with those two issues?

MR. BHARARA: It is always easier to diagnose the problem than to offer a perfect solution.

COMMISSIONER HOWELL: Yes.

MR. BHARARA: You know, from our perspective we are attempting to do, in connection with my brief testimony and I think Ms. Ortiz's brief testimony, and the department's position generally, is to suggest that it will take a multi-year review to look at all aspects of the sentencing guidelines in the fraud area to make sure that there is an appropriate balance struck between providing specific instances where specific offense characteristics are needed, because in certain cases, as in the insider trading cases that I mentioned, there's a possibility of too lenient a sentence — which is a thing that I focused on in my testimony. I think it is perfectly appropriate, speaking for myself and from my experience in my district, that the Commission consider during its multi-year review other things also that might bring down the sentences in those kinds of cases where there is agreement in a lot of

quarters that the sentencing guidelines almost automatically call for a life sentence in cases where that may not be warranted because there's no differentiation between the relative culpability of the person — of various people who have fallen into that category of when you do a quick guidelines calculation they are level 43 or above.

The fact that I didn't provide specific instances of where that might be the case for the Commission to consider does not mean that the Commission should not be considering those things.

Off the top of my head, given your question, and speaking for myself, it strikes me that there are certain things judges consider when they're going below the guidelines. One of those issues is personal gain to the defendant. There are cases in which, in Ponzi schemes for example, the defendant has personally pocketed funds, in addition to causing loss to victims that come out of the victims' pockets. In other kinds of cases, accounting fraud cases, it is sometimes the case that the defendant was perpetrating a fraud for the benefit of the

company and no personal gain directly accrued to that defendant. I think that is not an illegitimate area for the Commission to take a look at.

It just strikes me, generally speaking, given that I as a U.S. attorney for 18 months in one district, don't have the benefit of data from 93 districts and over a long period of time, having been the U.S. attorney for only 18 months, the Commission is in the best position to look at I think the various instances where judges have departed from the guidelines downward to see if there are patterns in those departures.

Is it the case? I don't know, because I haven't reviewed the data. Is it the case that when judges are departing downward and saying that the guidelines offer no guidance when they prescribe a life sentence, is it more often the case where there's no personal gain? Or is it more often the case where the person only had a tangential role in the fraud?

I mean, I don't know. Anyway, I am agreeing with your general premise that, yes, it is

worth looking at.

COMMISSIONER HOWELL: Right. I would just hope that the department, when we move forward with our multi-year review, will be brave enough to actually suggest some changes to the fraud guideline that might be perceived as lowering sentences, when in fact it is actually providing a more accurate measure of culpability in differentiating among culpability among defendants.

I will admit, for myself I was a little disappointed in your testimony that you didn't provide any sort of preview of the department's willingness to do that hard work.

CHAIR SARIS: Judge Hinojosa, and then Ms. Jackson.

COMMISSIONER HINOJOSA: One thing that I always find interesting when we talk about the fraud guideline is, as you all know, it is one of the four that makes up 80 percent of the federal felony criminal docket, but much less than drugs and immigration.

And when you look at the actual numbers of

how the fraud guideline is used, and public statements are made, whether from the department or others, about how judges are departing and varying in large numbers from the fraud guideline, the point that is missed is that it is a very, very small number of cases that do get to the Level 43.

Those are the cases that make the newspapers. But most of the cases, the vast majority of the cases under the fraud guideline, are sentenced at much lower levels. And it is such a small number that gets to those Level 43s. Those do make the newspapers because there are many victims and they are newsworthy because of the people who get arrested doing them. Those are at Level 43 to a large extent based on congressional statements and directives to the Commission, as well as from the Justice Department with regards to where those levels should be. As well as from the thousands of victims that are involved in those cases when they feel that somebody has hurt thousands of people with large amounts of money, and that is why those are at that level.

So I think it is important to keep in perspective that when we talk about the fraud guideline not really working, we are talking about a very small number of cases. And I didn't see much direction in the statements that are made here as to, since this comes from the viewpoint of the public through the Congress, and in many ways from the Justice Department, what would you do to change this.

You know, you made some suggestions in some places where you think it is too low in some of these cases because there are no losses, when somebody is involved in a lot of different insider trading situations, but the question is: How do we then change these to ignore the requests of the public and the Congress, and in many ways the Justice Department, with regards to where these should be?

You know, there is a departure variance rate in these, because when somebody sees them on an individual basis they have a different viewpoint, but I didn't get any direction as to what the Justice Department thinks should be done with regards to that. Because it isn't a departure variance rate

that goes across the board on the fraud guideline. It is those cases.

CHAIR SARIS: Does anyone want to respond? Do you want to jump in first?

VICE CHAIR JACKSON: Yes. I had a specific follow up that is related to Judge Howell's point, and Judge Hinojosa's point, but in the health care fraud scenario.

In the other testimony that we've received, and that we will be hearing from a little bit later, we received statements about the way in which the law now impacts office clerks, and nurses, and other low-level participants in a scheme to defraud the government health care programs.

We had this directive from Congress that is requiring us to have a graduated scheme of loss related to these kinds of health care programs. And a suggestion has been made that some kind of carve-out or exception be made with regard to minor participants in regard to those kinds of fraud so that they don't feel the full brunt of the graduated increased penalties.

And I am wondering what the department's position is with respect to that particular issue. Should we try to target these increased penalties in the health care realm to people who are the masterminds of the fraud? Or somehow minimize the impact on minor, very minor participants?

MS. ORTIZ: I think that I can agree with you in what you want to really focus on is the key and more culpable parties, especially in the scheme to defraud where you have varying, differing groups. When you look at nurse, or say an office clerk who is part of the scheme to defraud, it's almost similar to the straw buyer in a mortgage fraud case. And I think those are factors that can be taken into account.

I don't think that this is the time to specifically carve out an exception, but rather to see how it actually plays out. Because I think those arguments are already made, especially in light of the fact that the guidelines are advisory, especially in light of the fact that every defendant and prosecutor looks to 3553(a) to present to the court

other mitigating factors.

I think if you have someone who is very low-hanging fruit in a particular scheme, if you look at the loss of a certain amount, there are going to be certain mitigating factors that are not going to put that individual in the highest ranges of what the loss amount may automatically call for, because I don't think it's that black and white. And I think we need to see how it plays out and see if it actually — I think if we were in the era of mandatory guidelines, it would be a different situation. But I do think that those factors are taken into account.

CHAIR SARIS: The Dodd-Frank bill calls on the Sentencing Commission to consider whether provision should be made for an upward departure in a case involving a securities fraud, or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market.

What I'm sort of hearing you say is they are already high enough. And I was wondering whether or not — and since that is what everyone has been so

worried about — is that some way of thinking about an alternative way to this loss table which just keeps ratcheting it up based on loss, rather than actually what it does to the market?

I was just curious as to whether you just basically think nothing else needs to be done in that area.

MR. BHARARA: It could be. I think what our inference is, and I think what Mr. Martens' inference is, based on the premise of the question — the direction from Congress is: If you're talking about a scenario in which criminal conduct has caused the kind of doomsday scenario — in other words, a really serious and substantial debilitating disruption to the markets — it is hard to imagine, given our experience with the guidelines, that operation of the existing guidelines wouldn't already result in the maximum penalty that you could have. In other words, a life prison term.

So if it becomes the case during review and study that one could imagine a circumstance in which that kind of effect can happen, and yet by

operation of over-emphasis on the loss calculations somehow such a person who is culpable in that way would be subject only to a few months in prison, then we don't agree that there's not something that should be done.

In our time since the direction came to us in learning about testifying here, I have not been able to come up with a scenario that makes a lot of sense in which you would have that scenario.

CHAIR SARIS: And the SEC seems to agree with that, right?

MR. MARTENS: Well with a slight nuance, which is that I think we are not suggesting whether they are high enough, I think were your words. I don't want to express a policy judgment on what is an appropriate height or non-height of the guidelines. I think our point was similar, though, which is that in a scenario where the markets were debilitated to that effect as Dodd-Frank suggests, it would be hard to, as Preet said, imagine a situation where the guideline calculation would not be a 43. And so it would be hard to imagine how you would have an upward

departure from what is already a Level 43.

MR. BHARARA: I mean I suppose you could have a catch-all such that if there was a scenario, you automatically get a 43. But it seems to us, based on the scenarios we can conjure up, that you would almost always be at a 43.

CHAIR SARIS: Jon.

COMMISSIONER WROBLEWSKI: Mr. Martens, as you can see, at the Commission and the Justice Department we're struggling to do this differentiation between different types of securities fraud; that there may be cases where someone commits a large loss and that a 43, a life sentence, may be appropriate, as there have been a number of cases where people have gotten life sentences, and I think the public and judges have said that's okay. And there are other cases where, again there were securities frauds involving large losses, there's at least some concern that the guidelines don't make the proper differentiation.

In the SEC when there's a determination of the kind of recovery that you're going to go after,

do you have — does the SEC as an institution have any policies, guidelines, to make this differentiation that might be helpful to the Commission as we are looking to make those differentiations?

MR. MARTENS: Well I think as I said in the part of the testimony that I didn't get to because it took a little longer than I expected, our loss calculations, so to speak, are done a little differently.

It's not calculated based on loss. What we can recover is based on gain to the individual, because we pursue a disgorgement theory. So our method of addressing harm, so to speak, our remedies, are really two-fold in the monetary side.

We have the ability to pursue disgorgement, which is the monetary gain to the individual. And then also we have penalty guidelines which have tiers — first tier, second tier, and third tier — based on usually the degree of culpable intent, and also driven by the amount of gain, again.

And then we have a multi-factors that we consider in each case in determining what the

appropriate resolution is in a given case. And we would certainly be willing to share those with the Commission, if it would be of assistance.

COMMISSIONER WROBLEWSKI: I think it would be very helpful. And then also, take the sort of prototypical accounting fraud involving securities where a corporate officer misreports earnings from one quarter to another. The officer, the company, has no gain. There are losses because once it's announced the stock goes down and there's movement.

How does the SEC approach that in terms of trying to get a recovery where there is no gain, or very little gain, or very little identifiable gain?

MR. MARTENS: Well in those type of case, sometimes there is a gain. For example, someone's bonus, or contingent compensation in a particular quarter could be affected. So if for example they moved earnings from first quarter of year 2011 back to last quarter of 2010, it could result in an increase in bonus. And that's a scenario that we often face. And so in that instance you can show that there was an increase in that individual's bonus

through expert testimony or otherwise that would provide a basis for us to get disgorgement.

And then our penalty provisions on top of that would be available in a given situation to, you know, up to a maximum of I think $130,000 for a third-tier penalty, per violation. So, you know, you have a per-violation approach on the penalty side, and then you could look to things like bonus or otherwise to determine the gain.

COMMISSIONER WROBLEWSKI: So as I understand it there's both the disgorgement piece, and then there is some sort of penalty piece that's independent of gain or loss just based on the violation? Is that right?

MR. MARTENS: Correct. The penalty provisions provide for a statutory maximum dollar amount, or alternatively the gross amount of pecuniary gain. And so in the instance where there's no gain, you could still have a penalty. In the instance where there is a gain, the penalty could be more than the statutory figure.

CHAIR SARIS: One more question. Dabney.

COMMISSIONER FRIEDRICH: Mr. Bharara, your colleague, Sally Yates, testified before us last May about the problem with these high-dollar fraud cases, insider trading being among them. Using her words, she described them as simply "unhinged from the guidelines," and that's the existing guidelines. The judges just simply aren't following them.

And our statistics certainly show a large number of departures and variances. But it's not just departures and variances, it's a freefall down to probation. And the recent news article that indicated in the Southern District of New York in the last two years nearly half of the insider trader cases where sentenced to probation.

So my question for you is: As Ms. Yates suggested to us, the department has the view that with certain serious offenses, modest mandatory minimum penalties would be appropriate. And my question to you is: Are there certain insider trading cases for which a modest — and let me be clear, I'm not talking five, ten-year mandatory minimum — I'm talking something along the lines of the identity

theft, two-year, one-year mandatory minimum penalty would be appropriate? Wouldn't that come closer to fixing the bigger problem that you're dealing with in New York, versus fine-tuning these guidelines that judges aren't following anyway?

MR. BHARARA: I'm not sure about that. You know, I think the department's view is that in certain instances, based on study and review and synthesizing the data, that modest mandatory minimums might be appropriate.

There are not that many mandatory minimums in the white collar context. Perhaps there should be. With respect to what happens in insider trading cases, insider trading cases are not those in which generally speaking you have people at a Level 43, because the amount of gain in cases that have come to resolution so far don't typically fall into that category.

Also, the study that you referred to, if it's the one I think it is, may have been skewed somewhat because it included in it not only defendants who pled guilty without a cooperation

agreement, but also included people who were cooperating with the government who obviously, through the 5K process, got special dispensation because of their cooperation.

But I think it is worth taking a look over a longer period of time, based on experiences not only from my district but from other districts, to see whether or not a modest mandatory minimum would be appropriate. I wouldn't rule it out, but I'm not sure it necessarily will do a better job than some of the other kinds of differentiations we've talked about with respect to 4B1 — [2B1.4].

CHAIR SARIS: So I thank you all. Our time is up. If this has sort of generated any thoughts and follow-on and you want to send us a letter, that would be terrific and I thank you. We are hoping to work with you for the long term on these issues.

MR. BHARARA: Thank you.

MS. ORTIZ: Thank you.

MR. MARTENS: Thanks very much.

(Panel one is excused.)

CHAIR SARIS: Will the next panel move up, please.

(Pause.)

Welcome to our second panel. I would like to start with Mr — I'm going to say this wrong — Dopico?

MR. DOPICO: Yes.

CHAIR SARIS: All right. A supervisory assistant federal public defender in the Southern District of Florida, where he began as a trial attorney in 2002. He served in the Miami-Dade County Public Defender’s Office, and as an associate with Cadwalader, Wickersham & Taft in Washington. Welcome.

Eric Tirschwell, vice chair of the Sentencing Commission's Practitioners Advisory Group, I've come to learn as PAG; and a partner at the New York Law Firm of Kramer Levin Naftalis & Frankel, where you practice primarily in the area of white collar criminal defense and complex civil and constitutional litigation. He has previously served as an assistant AUSA in the Eastern District of New

York.

And Susan Smith Howley — welcome — currently the chair of the Commission's Victims Advisory Group. Ms. Howley has been with the National Center for Victims of Crime since 1991, and presently serves as the director of public policy where she manages and coordinates public policy assistance and advocacy efforts.

And so I want to welcome you all. We will sort of follow the same format that we did the last time, and why don't we start with you, Mr. Dopico.

MR. DOPICO: Thank you. And I want to thank you, Madam Chair, and members of the Commission, for the opportunity to speak on behalf of the defenders from the Southern District of Florida, and for defenders throughout the country.

I think if I convey anything to you this morning, I think the most important thing I want to convey is that the current guidelines and the amendments that are proposed, although justified in many circumstances, will have an impact on certain individuals — Ms. Jackson brought those up

before — individuals that are lower-level individuals that sometimes are called "nominee owners" or "straw owners." Sometimes they're nurses, sometimes they're clerks, but they do have an impact.

So I want to take a little time to kind of explain some of the cases we see in the Southern District. I know the Commission is very knowledgeable, but just to give a little bit of a bird's eye view from where we're sitting.

Second is to give you some ideas of examples of how we think you can mitigate loss-based sentencing on these individuals, because I think ultimately what the Commission wants, what the Department of Justice wants, and what defenders and practitioners want, is for justice to be done and for people to be punished relative to culpability, not just to loss.

But to give a little background, the typical Medicare fraud case we see in South Florida is a one-defendant case, a singular person charged in an indictment. And usually the way the Department of Justice, or the U.S. Attorney's Office in the

Southern District finds that person is their name is on the paperwork.

They are the persons who own a clinic, usually, or a DME business, a durable medical equipment business, and they fill out articles of incorporation, or they sign them, really, usually someone else filling them out. They open bank accounts, or they go to the bank and sign when someone takes them.

They often sign on a lease. They often maybe get a phone put in their name. But they tend to be individuals of low socioeconomic means, usually limited education, that are approached by someone. And it runs the spectrum. There's obviously some that are more sophisticated than others, but someone comes to them and says I want to put this company in your name.

And sometimes they are in on the fraud from the beginning and they're like, look, we're going to be pulling this scam. I think we'll do it for a few months and we'll get away with it. But very often what happens is they're told: I can't

have so many companies in my name, so I'm going to put this new DME clinic in your name. I owe child support, and if I make money then my wife's going to get it and the kids are going to get it, so that's why I want to do this.

They are given some excuse to why their name is put on the company. But they're not usually told, we're going to defraud Medicare of millions of dollars. And usually the first time, in my experience and the experience of most of my colleagues, the first time they even hear the term "a million dollars," or "over a million dollars," or "$300,000," is when they're sitting down with us, or when they're in magistrate court and the indictment is read to them. And they stare at you like what are you talking about a million dollars? I was paid $10,000. I was paid $5,000. Or I was paid my salary.

So they tend to be people that they're not that sophisticated. They are brought in I think precisely for that to ultimately be the person that the buck stops there. When the government goes

looking for someone, they're going to look for them.

And they do wrong. There's no doubt. I'm not here to say that nominee owners have no culpability. But the culpability in their mind they usually have is they're agreeing to put a company in their name, pose as that president, even though they're really usually not doing much. And in some of the cases, what they do is far from what a president of a company would do, far from what anyone who is the true mastermind behind it would do.

The problem that ultimately happens is, even though the Sentencing Commission has put in place protections for individuals like nominee owners, just as they have for drug couriers, is it is almost impossible, at least in the Southern District, to get a "minor role" reduction for someone who is a nominee owner.

And the problem ultimately comes, first probation will say well they're part of this scheme, and they billed millions of dollars. How could they be a minor participant?

They don't really recognize what it means

to be a nominee owner. And it is something that, in part that is our job to educate them and educate district judges about that, but it is an initial hurdle.

Prosecutors, some in severe cases, or extreme cases, can be compassionate and say, look, I think "minor role" is appropriate here. But even where that happens, very often we have probation come back and say, no, it's not.

But ultimately when we go in front of a district judge in a jurisdiction that's known as the capital of Medicare fraud, no one wants to be the nice judge saying, well, it's only a few million dollars, I'm going to vary downward and give you probation, or I'm going to give you a year and a day. Usually you're facing a judge who, for very good reasons, is staring at your client and saying how could you have believed that you were president of this company?

I don't really understand how you're telling me now you didn't realize the fraud was so extreme.

You're in a very difficult situation. And that's why I think giving the judges some guidance in recognizing these lower-level participants is important, because then you will have a PSI where probation will reflect, although they are the nominee owners, or the owners on paper, or the straw owners, however you want to call them, based on information we have from the government the true owner of this clinic is this person. They haven't indicted them yet. They may never indict them, because they may not have enough, but they are the true controllers.

That is something that I think is important. In the written testimony, I have several examples of individuals that were nominee owners, or lower participants, or nurses, and you can see the impact of using "intended loss," what it's had on them, and the fact that it's very difficult in those cases to get "minor role". But I want to tell you in particular about a case I had.

This woman's name was Mercedes Yanes. And she was basically the chauffeur for another woman who owned her own clinic, and so smart, and started

putting clinics in other people's names.

So one day the woman came to her and said: I need to put this business in your name. And she was like, well, why? And she's like, because I'm only allowed to have a certain number. So now I need to put this one in your name, but you're not going to have any problems.

Well maybe a smarter person, a more experienced person, would have said that doesn't make any sense and said no, but she was worried about losing her job. She wasn't making a lot of money. And she agreed.

Now all she was ever paid throughout the entire time, with the government conceding that, was her salary, as basically a chauffeur, as a housekeeper, as a very like menial employee for this woman.

And so when I first got her case, the first thing I did is I had her polygraphed, because I found it unique just how removed she was from being able to understand what happened. And she passed the polygraph with a 97 percent, maybe up to 97 percent

accuracy as far as probability to predicting her truthfulness.

And I went to the prosecutor with that and initially tried to get the case dismissed, then tried to get a plea to what's called a 1001 count, or a count for making a false statement, because ultimately she did say, look, I'm the president of the company. She did lead Medicare to believe she was the president, and that she was in charge, when she wasn't.

And that didn't work. But what happened is they came back and said, look, we will offer her "minor role." And the big issue in that case is you can't really test on a polygraph whether someone suspects something. And there was no doubt she had red flags going up. She should have known better. Under deliberate ignorance, she was guilty without a doubt.

And so ultimately she pled guilty. She was debriefed. You know, she gave information about how she got involved. The government in fact indicted the true owner and another woman that was

also involved as a nominee. But when it came to sentencing, probation said, you know, "minor role" is in the plea agreement. We disagree. She is involved in the scheme to bill the government, you know, over a million dollars. She can't get "minor role."

And I went in front of the district judge, and he looked at me in the same way. Well, she's the president of the company. Over a million dollars. How can you even be asking for "minor role" in this case? This isn't some drug courier.

You know, and I brought out the polygraph, and we kind of explained the role, and the government, to their credit, were very good about telling the judge: Judge, she was for all intents and purposes a glorified housekeeper. They put her name on this company. She did wrong, but...

And so ultimately the judge gave her "minor role." When I moved on to saying, Judge, maybe a more appropriate way to calculate her sentence should be looking at the actual loss, which was about $300,000, or perhaps what she got paid, which was about $300-something a week over the course

of a year.

The judge looked at me as if I had two heads and said: She got "minor role"; that's enough. And I understand from where the judge is sitting he had no guidance to say why should I do that. This is the amount billed. This is the intended loss.

So ultimately she received a 25-month sentence, which is not a horrible sentence in the scheme of things, but based on what she did versus what the owner who ended up with several clinics and billing millions of dollars and profiting — the owner lived in a mansion, had a boat, had several cars. My client lived in a little utility apartment behind another person's house and, you know, didn't even own her car, lived with her elderly mother.

So when you saw the difference, I think the owner got a sentence of maybe 70 months; she got 25 months. So the disparity in sentences really didn't account for the disparity in profits.

But if I could just have a minute, because I don't want to not answer the question I think you're going to ask me, the idea — and it's in the

written material that we proposed — is creating some language to give judges guidance on lower-level or nominee owners in these cases, perhaps using what the Commission has done in [2D1.1] and created a graduated system so that when the sentences get higher, if you are a nominee owner, or a lower-level participant, they either cap the increases or come up with a tiered approach — maybe using actual loss or the amount the person profited as a proxy for culpability — creating a safety valve in these cases where if the person goes to the government and says, hey, this is who really got me involved, they get a reduction.

And the reason I think that is important, in a lot of these cases the person tries to cooperate and does their best and says this is who got me involved, and the government simply doesn't have the evidence to put it together.

And finally, if nothing else, to consider that maybe the best thing is, if the Commission is going to increase these guidelines, to increase them for individuals that also receive aggravating role

enhancements. Because then, at least if nothing else, only the people that are really running several clinics and are the masterminds are more heavily punished. And that is really where deterrence will work best. Because just like you could replace a drug courier who gets paid $5,000 to swallow cocaine, you could replace a chump that's going to sign some paperwork and get their $10,000.

Thank you very much.

CHAIR SARIS: Thank you.

MR. TIRSCHWELL: Good morning. On behalf of the Practitioners Advisory Group, the PAG, I want to thank you for the opportunity to address the Commission with respect to the important issues under consideration during this amendment cycle.

As you know, the PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We very much appreciate the Commission's willingness to listen to us and consider our thoughts.

Let me start with the Dodd-Frank Act. The

Practitioners Advisory Group certainly understands why, in the wake of the worst financial crisis our nation has seen since the Great Depression, Congress saw fit to put to the Commission the question of the adequacy of federal criminal penalties for large-scale financial frauds. But we most respectfully submit that — and from what I've heard this morning, it sounds like there's some degree of consensus on this — that the fraud guideline as it now stands more than adequately allows sentencing judges to appropriately punish and deter large-scale frauds.

Given the deferential phrasing of the Dodd-Frank fraud directive, the Commission could fulfill its obligation to review these provisions by advising Congress that the guideline already meets the needs identified by the Act.

To the extent the Commission believes any changes may be warranted, as we do — and I will talk about that in a minute — we certainly wholeheartedly support the Commission's plan, or suggestion of a comprehensive multi-year review as stated in the proposed amendments.

In those same materials, it is made clear that over the past several years the provisions of 2B1.1 have been expanded. Enhancements have been added. The loss table has been, as we've heard this morning and we all know, racheted up quite significantly. And the result is that there are dramatically increased sentences for large-scale fraud offenses.

As one recent commentary notes, without considering all of the guideline enhancements the adjusted total offense level for a fraud offense causing over $20 million in loss has been increased in the last decade from a Level 19 which equated to a sentencing range of 30 to 37 months, to a Level 29 or 87 to 108 months.

Stated differently, the amendments to the loss table since 1989 have effectively tripled sentences for large-scale fraud offenses.

For these reasons, the PAG very strongly believes that the current fraud provisions are more than adequate to allow sentencing judges to consider and appropriately punish and deter potential and

actual harm to the public and the financial markets.

Just to take a specific example, in securities fraud cases — again as we've heard earlier — the harm to the public typically is already captured, often in a very severe manner, by the increases set forth in the loss table based on the magnitude of the loss, in value of the stock of a publicly traded company, or other measures of individual investor or institutional losses.

A large loss amount also often endangers the solvency or financial security of an organization, or the financial security of a hundred or more victims, resulting in further increases. And to the extent the defendant is an officer or director, or a registered person, and as is typically the case in large-scale frauds uses sophisticated means, the sentence is increased still further.

Through these many inter-related and, at times, overlapping enhancements, not to mention role adjustment and other specific offense characteristics, again we believe judges have more than adequate tools at their disposal to address the

full range of large-scale fraud cases brought in the federal courts.

Indeed, it is our view that the changes in the fraud guideline over the past decade too often lead to advisory guideline ranges that are overly severe in many fraud cases. And as the Commission has noted, we are not alone in this perspective. The relatively high rate of non-government sponsored, below-range sentences for high-loss fraud cases we believe is powerful evidence that many in the judiciary share the view that the fraud guidelines' calculations often produce excessively long advisory prison terms.

We believe that if the Commission were to ratchet up or further increase the complexity of the fraud guideline, the result would be more, not less, variance and more, not less, departure from guidelines-recommended sentences.

The PAG also does not believe that there is any need to add specific departure authority for, quote/unquote, "disruption to a financial market" or "losses that may have resulted but for Federal

government intervention."

We believe that trying to assess and quantify such amorphous and immeasurable harms will make an already overly complex fraud sentencing regime even more unpredictable and inconsistent in application.

And we note, just as an observation, that, while the recent report or reports of the Financial Crisis Inquiry Commission cite to multiple, wide-ranging causes of the financial crisis, including many regulatory failures, we are unaware of any suggestion that inadequately severe federal criminal penalties played any role in what we have all just lived through.

So we encourage the Commission to undertake the comprehensive review of 2B1.1 that the proposed amendments outline. Any guideline changes responsive to the Dodd-Frank Act concerns should, in our view, be considered in that larger framework.

And in terms of specific suggestions, we believe that much greater consideration should be given to factors such as the defendant's motivation

for the offense, the extent to which the offender profited from the offense, and whether other factors beyond the offender's control contributed to the amount of loss.

And in response to some questions that were raised earlier in terms of specific suggestions, one idea is to simply recalibrate the relative weighting of loss, as opposed to other specific offender characteristics, including some characteristics that are now not expressly taken into account in the fraud guideline.

And another idea would be, instead of having every two levels on the Fraud Table calibrated very precisely to dollar increases, to have broader ranges. And within those broader ranges, give judges greater discretion, again depending on a list of enumerated factors that the court can consider to adjust an offense in part based on loss, but even the loss adjustment we think should be informed by all of the facts and circumstances of the particular case.

In my remaining time, let me turn to the Patient Protection Act for a minute.

In terms of the rebuttable presumption with respect to the aggregate dollar amount of fraudulent bills submitted to the government, our review, consistent with what was expressed earlier by some, was that this new rule should be limited to the minimum necessary to comply with Congress's directive.

In our experience, the dollar amount of a fraudulent bill submitted to a health care program often gives an inaccurate view of the loss that was in fact intended, and does not always provide a fair measure of the seriousness of the offense.

We suggest that it may be helpful for the Commission to address some of the specific reasons why this is so. And we include as our observations that health care programs routinely pay only a percentage of the bill submitted, and that many fraudulent bills are inflated rather than fabricated altogether. For example, a bill for a more involved service than the one performed.

Our suggestion is that examples like these and others could be enumerated by the Commission as a

nonexhaustive list of potential ways for defendant to rebut the presumption that the total amount billed was the intended loss.

We believe the same considerations in terms of an individual's personal level of participation in the offense, whether they personally profited, their motivations, and any efforts they may have undertaken to minimize the harm from the fraud should also be taken into account with respect to these health care fraud offenses.

With respect to the three-tiered loss enhancements, we echo again some of the views expressed earlier that the Commission should limit these increases to exclude individuals who — certainly individuals who play a minor or minimal role, and from our perspective, even for individuals who play sort of an average role. And that the adjustment could be limited only to those who find themselves in the category of having an aggravated role, or organizer or leader, and that would be one way to manage again this sort of ratcheting up across the board with respect to fraud offenses.

Why don't I end there, and the rest of our comments are in the written testimony.

CHAIR SARIS: Thank you very much.

Ms. Howley.

MS. HOWLEY: Good morning, Madam Chair and members of the Commission.

On behalf of the VAG I would like to thank you for inviting us to testify this morning on the proposed amendments relating to the Dodd-Frank Act.

As you know, the Victims Advisory Group was established by the U.S. Sentencing Commission in part to provide the Commission with its views regarding the Commission's activities as they relate to victims of crime.

The proposed amendments under consideration result from the Dodd-Frank Wall Street Reform and Protection Act and its directive to this Commission that it re-examine guidelines that would apply to securities fraud, bank fraud, and mortgage fraud.

The Commission specifically asked whether the current guidelines adequately address the issues

in the Dodd-Frank bill, and whether a more comprehensive review of guideline 2B1.1 is warranted.

We urge the Commission to undertake a broad review of 2B1.1, not only with an eye to the Dodd-Frank Act, but to reconsider sentencing for serious property offenses, along the line of other testimony that you've heard today.

The VAG is concerned that the current guideline regarding theft, embezzlement, and fraud and other property offenses is based primarily on the amount of the dollar loss. This emphasis fails to take into account the true extent of the harm to victims.

The offense of securities fraud illustrates this issue. Many victims of securities fraud are elderly, and the proportion of victims who are elderly is expected to grow. This is largely because, as a group, they hold more assets and are thus targeted most frequently.

However, because of their age, specifically because these victims are beyond their

prime earning years, the extent of the harm cannot be captured by the monetary value of the loss alone.

A reading of the victim impact statements in the Bernie Madoff case reveals the scope of harm that his victims suffered. Victim after victim testified about the way in which the loss of their nest eggs, whether carefully accumulated retirement funds or funds realized after the sale of long-time residences, or profits realized after selling businesses built up after a lifetime of investment and hard labor, impacted not only their financial security but their mental and emotional state, their ability to live independently and with dignity, and even their physical health.

In reading through these statements you find elderly people in their 70s and 80s having to look for work as meat cutters in grocery stores, or as groundskeepers on golf courses, and many unable to find any work and absolutely devastated by the loss of what may seem by a mere look at the dollar table in the guidelines to be minimal.

Mortgage fraud too can involve substantial

life-altering loss to the victims. While the crime takes many forms, it can include foreclosure rescue schemes which take advantage of desperate people trying to avoid the loss of their home; reverse mortgage schemes, which often target seniors; and identity theft involving mortgages, which can strip people of their homes or equity with no involvement on their part.

Just last week I spoke to a victim advocate in Florida who was working with seven elderly victims of identity theft involving their mortgages. She had already been unable to prevent one 80-year-old woman from losing her home, and was concerned that she wasn't going to be able to help the other six, either.

Other fraud offenses can also cause more extensive harm than the mere loss of dollars. For example, the FBI recently reported a rise in market manipulation cases involving computer intrusion. In such cases, perpetrators hack into victims' online personal brokerage accounts, use those accounts to purchase shares of a penny stock to drive up its

price. Once the price of the stock has risen to a certain point, the perpetrators dump their shares to take their profit, and the victims are harmed not only by the theft, which itself may have ramifications beyond the dollar loss, but are left with a fear of conducting investment activities online.

Because the use of the Internet to conduct investing is on the rise and will continue to be so, victims who are now reluctant to use this tool will be at a disadvantage for the rest of their investment years.

Furthermore, a recent study by the Bureau of Justice Statistics highlighted the impact of identity theft beyond mere dollars lost. Over a quarter of the victims spent more than a month trying to clear up problems related to that identity theft.

The BJS study also found that identity theft takes an emotional toll on victims, as well as a property toll. About 11 percent of victims of credit card misuse, and about 30 percent of victims who experienced fraudulent misuse of their personal

information, described their experience as "severely distressing." Something that they had assumed was safe and worked for them is suddenly upended and they don't know how to conduct their continuing business affairs going forward.

It is true that this guideline takes into account other harms, including the numbers of victims harmed and the effect of financial loss. For instance, with [section] 2B1.1, [subsection] 14. However, those elements currently operate as additional enhancing factors rather than determinants of the base of the sentence.

The VAG agrees that reconsideration of 2B1.1 and related guidelines should involve a more comprehensive review. As part of that review, we would encourage you to look broadly at the treatment of cyber crime with an eye to creating a degree of uniformity.

Use of the Internet, computers, and other technology is not only an issue under 2B1.1, but also constitutes an enhancement under other guidelines, including those for sexual abuse and

interception of communications.

Special treatment of computer-enhanced crimes is warranted because such crimes can be easier to commit, more difficult to detect and prove, and impair the ability of individuals to conduct their online lives.

We recognize that such an examination could not be completed within the current review period.

In summary, thank you for giving the VAG the opportunity to express our views this morning. We stand ready to offer our assistance as you move forward in reviewing amendments related to securities fraud, mortgage fraud, banking fraud, and related offenses.

Thank you.

CHAIR SARIS: Thank you. Yes.

COMMISSIONER HOWELL: Thank you all for testifying, and particularly to our Victims Advisory Group and our Practitioners Advisory Group. You all give us very constructive advice, and I look forward to working with you as we consider the fraud

guideline in particular.

Mr. Dopico, I have two questions for you. First, you suggest in your testimony at page ten that, contrary to Ms. [Ortiz's] suggestion, that we should limit the "Government health care program" definition to not include state health care programs or private insurers. She was very clear in her testimony that we should opt for a broader coverage for that definition.

And that is one of the things that clearly the Commission is going to have to decide, since it is undefined in the statute. One of the issues that Ms. [Ortiz] raises, and I wondered if you could respond to this concern, was that since some fraud cases involve both federal health care programs, or federal health care programs as well as private and state programs all at the same time, that if we don't cover — if we don't offer a broad definition of "Government health care program," that it is going to complicate — I can't remember her exact words — it was going to complicate the measurement of the loss, and it was going to complicate the guideline calculation

in those mixed cases.

Do you have a response to that?

MR. DOPICO: I mean I think that complicating the definition will probably complicate things further. I think keeping the definition simple will help. I think the loss would still be covered under 2B1.1 in either case, so I'm not sure that courts couldn't quantify the loss even if a simpler definition is used.

So I think keeping a definition that goes with what Congress has always done is probably a better practice. And I think, at least from where we're sitting as defenders, the vast majority of the health care fraud cases we get are based on Medicare and Medicaid fraud. There are not very many involving private companies.

COMMISSIONER HOWELL: Or private companies simultaneously?

MR. DOPICO: Right. The vast majority are just government-related.

COMMISSIONER HOWELL: Does anybody else on the panel have a response to that?

(No response.)

COMMISSIONER HOWELL: My next question for you, Mr. Dopico, has to do with the beginning of your testimony where you suggest to the Commission in our implementation of directives in the Patient Protection Act that we state something along the lines that there's no empirical evidence supporting the need for higher sentences in health care fraud. And that we should state that in our reason for amendment, and also state that the courts should know that the increases were not the result of the Commission's expert research, but instead another example of signal-sending by Congress.

I think assumed, or presumed within that suggestion to the Commission, to basically say, you know, we're just puppets of Congress here, basically, there's no empirical evidence supporting this, is that Congress also had no empirical evidence. I mean, in coming on the heels of your reference and your citation to a congressional hearing for this, it puzzles me on how you think the Commission can ignore all the hearings and empirical evidence collected by

Congress in support of its directive to us in order for us to be able to make such a broad statement —

MR. DOPICO: I —

COMMISSIONER HOWELL: — and instead should, would — are you suggesting that the Commission instead look through all of the hearings that Congress held in connection with the Patient Protection Act, summarize all of the policy underpinnings and empirical evidence that Congress collected before it made its directive to us, and put that into the reason for the amendment? Because we certainly can't say what you're suggesting, that there was no empirical evidence.

MR. DOPICO: I think that — I mean, I'm not familiar with any specific empirical evidence between sentences and deterrent effect in these types of cases. I can speak only as to my own experience, that I have not seen very many Medicare fraud cases where anyone gets involved, doesn't get involved, is concerned about the ultimate sentence.

I think getting caught is the ultimate concern. And I think what's interesting in this

case — and I understand the Sentencing Commission has a difficult job, and a very difficult job — but I think in a sense Congress is pushing onto you something that probably the best way to limit health care fraud would be to improve the administrative side so that when someone sends a bill to Medicare, they put it in the computer — hey, wait, this is the 20th wheelchair this patient's gotten this year. That's a problem.

And I think in a sense the Commission is put in a position where you're trying to solve a problem with guidelines that really needs to be solved at the forefront of administration and enforcement.

But if I worded things in a way that were unduly harsh, I apologize, but I think from where we're sitting I have yet to see a case where, especially for these low-level individuals, the concern of getting 24 or 36, 48 months is what's really driving whether or not they get involved in something. And I think the bigger concern is, do they get caught? And for the masterminds, which were referred to before, those are the people that know

they can game the system. And I think the best way to stop them from gaming the system is to fix the system, and guidelines aren't always something that can be done.

But I appreciate the Commission's position.

CHAIR SARIS: Everyone here has been struggling with relative culpability, and how do you capture that in a guideline. That's what I'm hearing. And the kingpin, or the mastermind versus the nurse, or the nominee.

And I'm wondering, you all talk about the difficulty in getting "minor role" and the like — different judges see things differently — there is a sanctions departure here that I just looked up to make sure I wasn't misremembering it, that "There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense."

It's so hard to capture. I mean, sometimes the loss table may get it wrong. Sometimes, hopefully a lot, most of the time we get

it right. But in those cases, are you all experiencing an inability to use that departure? You want it all to go into a guideline? Is that what you're telling us?

MR. DOPICO: I mean, from our perspective I think the problem is judges that are faced with, you know, hundreds of thousands, or millions of dollars in loss, don't really see why there's any reason to depart or to vary. They see it as, well, your name is on this company. You're president of this company. This company billed X amount of money. And it's that simple.

And so I think in the same sense that the Commission has given guidance to judges on couriers, and even though a courier might be only held responsible for 700 grams of heroin, that doesn't preclude them from getting "minor role."

That guidance to judges from where we're sitting is invaluable, because judges often will have probation officers, especially in our district, that will write under *De Varon*. They are only held responsible for their loss. So there's really no

reason to give "minor role" here.

But when you point out that guideline to that judge, they will say back to probation, well the guideline says even if that's all they're held responsible for, you could still give them "minor role."

And so I think it is a matter of — and part of the fault lies in that as defenders we need to really help judges understand what a nominee owner is. And sometimes that's difficult. But I think it would be helpful for them to see some language giving them the authority, if not the Commission's blessing, that in certain cases you need to mitigate loss-based sentences.

CHAIR SARIS: Did you want to —

VICE CHAIR JACKSON: Yes. I have a question about billing in the health care fraud context. I am trying to weigh the need for having the type of language that talks about, you know, in regard to the rebuttable presumption, whether bills are inflated versus fraudulent in terms of determining the aggregate dollar amount. And I just

wanted to know, from your experiences how often do you find that the fraud involved an inflated bill as opposed to a completely fraudulent one?

MR. TIRSCHWELL: My own experience is that it's at least as often, if not more often, an inflated bill as opposed to just a completely fraudulent one. But I mean I think it varies widely, but I think there are a substantial number of cases in which that is the scenario.

VICE CHAIR JACKSON: And the suggestion would be that there were legitimate services rendered.

MR. TIRSCHWELL: Absolutely.

VICE CHAIR JACKSON: To some extent, and so the aggregate cost of that, or the dollar amount for that should not be included in the —

MR. TIRSCHWELL: Absolutely, right. And we think other sections' commentary and notes within the fraud guideline and other guidelines are consistent with that idea, that you — when assessing loss you back out the value that's actually received.

MR. DOPICO: I would agree with that. From where we're sitting, most of our cases involve lower-level individuals and indigent individuals, obviously, that aren't the doctors or the higher-ups that might have also billed for legitimate things. Most of the cases we get of Medicare fraud, especially the ones we get in the last couple of years, it tends to be more situations where patient lists are traded between these fraudulent clinic owners. And so it is very infrequent where there's actually much of any service provided in the cases we see.

And I think in the older days we saw DMEs and clinics where there were both individuals that were legitimate patients mixed in with, you know, the made-up or the fraudulently obtained lists.

CHAIR SARIS: Judge Hinojosa.

COMMISSIONER HINOJOSA: Yes. getting back to your Mercedes Yanes example —

MR. DOPICO: Yes.

COMMISSIONER HINOJOSA: — I guess the

judge limited her fraud to the amount that she was involved in, and that's why there's a difference between the 70 and the 25 months? Because if it was just the two minor-level law offense reduction, they would be a lot closer to the 70 months.

MR. DOPICO: The other woman involved, her name was Cora Shay [phonetic], had three different clinics. So she was hit for the loss on all three. Mercedes was only hit for Multimed [phonetic], which was her specific clinic. So that was a big part of the difference between them.

COMMISSIONER HINOJOSA: The 25 months, obviously that was in the middle of the range? Or what was that?

MR. DOPICO: That was one month above the bottom of the range. And I mean I think it's just an example of someone where, from where a judge is sitting they look at a person and they're like, your name is all over this paperwork. But from where she was, one day she's driving, you know, chauffeuring this woman around, cleaning her house, doing all these menial things, and the woman says: Put your

name on this stuff.

And she never sees hundreds of thousands, tens of thousands of dollars; she just keeps getting paid her $300 a week to keep doing her job. And yet, ultimately she was to be punished for that.

And I think when you're looking at deterrence, I mean I come from Miami. Something you see in Miami is you'll see people get out of cars, and you'll look at them, and you wonder how did they get that car? And they're driving very fancy cars. There's a lot of — whether it's drug money, whether it's health care fraud money — there's a lot of money down there.

But I think the best way you punish and deter is when you hit the people at the top. And unfortunately in the drug, you know, context, it's very hard to do that. And it's great that there's "minor role" because usually the clients we get are the mule that comes in with pellets, or the person with a suitcase. It's not usually the guy in Colombia. Sometimes we do get those, but it's not usually that person.

In the same sense, the people we most get as clients are these people that are told: Put your name on this. So when they come calling, it's going to be you. And the very sophisticated masterminds are the ones that they get the person to sign the checks out for cash. They never have money transferred to their own accounts. They then use that cash to open other clinics in other people's names. So again they're insulated.

And it's very hard for the government to get to them. And some prosecutors will be very frustrated, but at the end of the day, you know, you'll have your client debriefed and the prosecutor will say their name is not on anything. I completely believe them, and other people have told me the same thing, but other than just defendant's words, I'm not going in front of a jury with that. And so those people get off scott free sometimes.

COMMISSIONER WROBLEWSKI: Can I just follow up just quickly? The guidelines are intended to capture — to address the problem that you're talking about.

So, for example, you mentioned a case — the Commission's relevant conduct guideline, for instance, is supposed to limit the accountability of a particular defendant to the conduct that they were involved in, even if it's a course of conduct, and so forth.

I take it that in the cases that you've described, that is happening? Or is it not happening?

MR. DOPICO: Well the conduct they're involved in, though, if their name is on the company as president and the company bills a million dollars, I mean the rules will apply that to them.

COMMISSIONER WROBLEWSKI: And I take it that in your arguments to say, look, her name was on the incorporation document, but she did not file the claim. She had nothing to do with the patient. She didn't know the patient. Her name is not on any — I take it that falls flat?

MR. DOPICO: Yes.

VICE CHAIR CARR: You lose the "reasonably foreseeable" argument.

MR. DOPICO: Exactly.

COMMISSIONER WROBLEWSKI: Okay. And then finally, are you familiar with the testimony that was given before Congress about the impact that the Miami Strike Force has had on the total billings for Medicare and Medicaid in the Miami area?

MR. DOPICO: I am not very familiar with that at all. Sorry.

CHAIR SARIS: Anything else anybody wants to ask?

(No response.)

CHAIR SARIS: I want to thank everybody. Thank you. We will take a 15-minute break and be back here at 11:00 sharp. Thank you very much.

(Whereupon, a recess was taken.)

CHAIR SARIS: Okay, we are going to get going on our third panel. Welcome to our third panel. I am going to introduce first James Felman, who serves as the ABA liaison to the Commission. He is currently a partner in the Tampa, Florida law firm of — I'm going to say Kynes?

MR. FELMAN: That's right.

CHAIR SARIS: Okay, Kynes, Markman & Felman, and serves as a co-chair of the ABA Sentencing Committee. And is a member of the Governing Council of the ABA's Criminal Justice Section.

Next will be Michael Anderson — hello, I saw you sitting out there — who serves as a member of the board of directors of the National Association of Mortgage Brokers, and chairs both its Government Affairs Division and its Political Action Committee. He is the president of Essential Mortgage, a Latter & Blum Realtors company, and previously served on both the Residential Lending Advisory Board for the Office of Financial Institutions, and the Community Development Advisory Task Force for the State of Louisiana.

And last, but by no means least, is Thomas Crane from Boston, a member of the Mintz, Levin, Cohn, Ferris, Glovsky and Popeo law firm, where he is in the health care section and health care enforcement defense practice group. His clients include hospitals, physicians, medical device and

pharmaceutical manufacturers, pharmacy benefit management companies, home care providers, the American Medical Association, the Association of American Medical Colleges, the Federation of American Hospitals, and the Pharmaceutical Research and Manufacturers of America.

So welcome to you all. Mr. Felman, let's get going.

MR. FELMAN: Thank you, Chair Saris, members of the United States Sentencing Commission.

It is an honor to appear before you on behalf of the American Bar Association. As Judge Saris said, since 1988 I have been engaged in the private practice of criminal defense law in Tampa, Florida.

I was also a co-chair of your Practitioners Advisory Group from 1998 to 2003, or 2002, somewhere in there, when we did the economic crime package before. Although as I look around, I think other than Wroblewski and Courlander, I'm not sure anybody else was in the room. So I think maybe the three of us need to go and get a life.

(Laughter.)

MR. FELMAN: So this is an issue that is of keen interest to me, and I am privileged to be here today on behalf of the American Bar Association, the world's largest voluntary professional organization with a membership of more than 400,000 lawyers.

I appear today at the request of ABA President Stephen Zack to present to the Sentencing Commission the ABA's position on the implementation of the Dodd-Frank Act and the Patient Protection and Affordable Care Act.

The ABA's position, as with all of our policies, reflects the collaborative efforts of representatives of every aspects of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates.

The ABA is keenly interested in the topic of today's hearing not only as to those specific acts, but also as a part of our broader concerns regarding the economic crimes guidelines as a whole, especially in those cases involving high loss.

As the Commission is no doubt aware, recent judicial decisions have criticized these guidelines as, quote, "patently absurd on their face," end quote, quote "a black stain on common sense," end quote, quote — and one of my favorites — "of no help."

The reason is that they are a result of simply a relentless upward rachet. The initial Commission studied the practices of the federal judiciary before the guidelines as a whole, and generally pegged the guidelines to those practices, with the exception of economic crimes where they gave an initial bump. The other exception was the drug crimes which have intervening mandatory minimums involved.

It only took two years for the Commission to increase it over that with a new loss table in 1989. And from '89 to 2001, a blizzard of new specific offense characteristics that described and targeted specific types of things that were of interest at that time, followed by what I referred to earlier as the comprehensive two-year, or almost

three-year economic crime package that the Commission began working on in 1998 and culminated in the amendments in 2001 that included yet a new loss table that, although it lowered some penalties on the very low end, overall increased severities. Which was then followed by the Sarbanes-Oxley Act.

So we are now at a point where life without parole is relatively routine in high-loss cases, as even the SEC said this morning. I recall sitting in this room in 2001 and predicting that history would judge what the Commission was doing as the beginning of an experiment in the incarceration of nonviolent, first-time offenders for periods of time previously reserved only for those who had murdered someone. And I believe I was right.

Since the initial set of the guidelines — in the initial set of the guidelines, the loss could only impact the sentence by a factor of five. So no matter how much loss there was, you could only get five times as much time.

The current guidelines provide for up to 40-fold increases in sentencing based on loss. And,

as we heard earlier from Mr. Tirschwell, the overall sentencing ranges have roughly tripled.

And the judicial reaction is what one might expect. In those cases — and I agree with what Judge Hinojosa has said, wholeheartedly. I think that we are talking about probably statistically a minority of the cases, but they are important cases. They are cases that are in some sense the flagship for federal prosecution efforts of economic crimes, and it is what we look at to see how well they're working in important cases.

And the judicial reaction has been mixed. Some of the judges have looked at the guideline range and the advisory guideline and have said they're just simply too high; I'm not going to follow it; I'm going to do what I think is right.

Of course there have been other judges who have not done that. They have simply said, well, that's the guideline range, and I'm not much for second guessing the Sentencing Commission and the Congress, and I'm going to give out the sentence that's called for by the guidelines.

So there's actually a fair amount of disparity there, and I think that is why there is consensus among not just the American Bar Association but apparently the Department of Justice, and the Securities and Exchange Commission, even the victims; we are all here saying this is a problem and it needs to be fixed, and it probably can't be fixed in this cycle.

So we look forward to working with the Commission in the coming cycle, and perhaps the one after that, and maybe another one after that, if that's what it takes to get this right, to very carefully recalibrate these guidelines.

And it's not just a question of severity; it's also a question of being smart about it and making sure that the right people are getting the right sentences. In some instances, we would advocate lower sentences. I don't know that you're ever going to hear the ABA advocating higher sentences because in this area we think they're already too high. But I'm not sure we're calling for an across-the-board reduction, either.

What we're saying is that we need to better target and better measure culpability so that we're using our limited resources better.

With respect to the Patient Protection Act, you know, I heard what Commissioner Howell said about the fact that the Congress held hearings before it enacted the statute, but I don't think that I'm aware at least anyway of any careful consideration of the specific directive that the Commission received. I think that's a disappointing aspect of the process. I think that we would all be happier if the Congress would hold a hearing like that, indicate in more general terms its concerns, and then leave it to this body to conclude exactly how the table should be changed or not changed.

But one of the results of the new Act is just simply a dramatic increase with respect to certain types of health care frauds. And it's easy to say, well, the more the loss, the higher the culpability, but in my experience at least that's not always the case.

You can have huge losses with a public

company. I currently represent the board of a public company that's a health care company. Now the management is under criminal investigation, not the board, but the issue that's being looked at is so complex I can't even describe it for you. It's about, you know, whether or not the capitation rate was correctly looked at, and whether all the costs were accounted for properly. And I mean the complexities.

So the people that are being looked at are the officers of a significant public company, where it's all or nothing. If it's wrong, it's life. If it's right, it's not a crime. I can't imagine, you know, if there were some suggestion that the board were involved. One of my board members is a former United States Senator and governor of my state. And to even have to be in a situation where you are on such a grey area, the complexities of the health care regulations are significant.

And so one of the consequences of the new amendment is that if you have more than $20 million of loss and any significant accounting issue like the

one I'm talking about, that's where you're going to be, it otherwise would have been a Level 35, which of course is quite high, 14 to 17-1/2 years; but now you have to add another 4 levels to that. And this is assuming a base offense level of 7, a loss of more than $20 million which is what the directive says, a sophisticated means which is always going to be there, and I'm talking about a leadership role, because presumably we're talking about targeting the people that are in charge.

Now we're at 39, with 21.8 to 27.25 years in prison, a roughly eight- to ten-year increase, a roughly 60 percent jump in the penalty, and it means that the loss now is effectively multiplied by a factor of between five and ten.

So this is treating the health care fraud identically — you know, a $20 million health care fraud is now the same as a $100 to $200 million other fraud. And I don't know anything about health care fraud that makes it so bad that we should multiply the loss by ten.

So I think it's quite disappointing that

this is what the Commission "must" now do. And I think it illustrates, frankly, the dynamic that has led us to this point, where the Congress just says raise it again, and the Commission really doesn't have that much option on this one so they do. And the judges get these cases, and they look at them and they say, this makes no sense.

So the only concrete suggestion that I think I can make about that relates to the application note about the new definition of "loss." Because as everything I think has agreed here, there are cases of health care fraud where you just submit the bill and it's totally bogus and you steal the money and, you know, that's pretty easy.

In my judgment I haven't seen many of those. Most of the ones I've seen — now, you know, I don't have a high volume of these cases — but most of the ones I've seen have either been a kickback case where the services were completely legitimate, they just paid a kickback in order to get the patient; or it's an upcoding, or an overbilling, or some sort of a miscalculation about cost basis, or some complexity

in some formula somewhere that results — there's no question the services are legitimate. The problem is that the bill was inflated, usually by a small amount, sometimes by more than that.

The idea that we are going to treat those two cases identically, that we're going to treat the person who didn't even have a clinic and didn't have any patients and provided no services and just sat in their basement and submitted claims and got paid and took the money, in an identical fashion to the executive of a real company who has made a misjudgment, or maybe an intentional misjudgment about, you know, getting $110 instead of $100. You know, this is not about severity. It's about rationality.

And I would only suggest that the Commission could accompany the new definition with an application note observing that this is simply a presumption. It's not a — it's a rebuttable presumption.

Is that red light for me? Am I already up? Okay. Well, I had more to say, but —

CHAIR SARIS: You can finish your sentence.

MR. FELMAN: Okay. YOu know, the point I was going to try to make is that if you look through the rest of the guideline manual, and I could give you a list of examples — of course Jonathan would probably use them as just examples of what needs to be raised — but we've lost perspective with the rest of the manual.

We've gotten to the point where you can poison a public water safety system and have an unlimited number of victims and score lower than a $2.5 million health care fraud. These are things that the Commission has the expertise at and the Congress doesn't, and I hope that the Commission will use as it reviews the economic crime penalties as a whole.

Thank you.

CHAIR SARIS: Thank you.

MR. ANDERSON: Good morning, Chair Saris, and Members of the Commission:

I think I'm the only person here who is

not a lawyer.

CHAIR SARIS: Well, welcome double.

(Laughter.)

VICE CHAIR CARR: And you'll probably be brief.

(Laughter.)

MR. ANDERSON: Yes, I am brief.

Anyway, thank you very much for allowing me to testify today. I'm a 30-year veteran of the mortgage industry, and I am also a practicing mortgage broker in the State of Louisiana, in New Orleans. And believe it or not, I still take loan applications and meet with borrowers face to face. So I see them face to face.

But anyway, basically — there are basically two common categories of mortgage fraud. There's fraud for profit, and then there's fraud for profit — or fraud for property, and then fraud for profit.

The typical fraud for property involves minor misrepresentations by mortgage applicants for the purpose of purchasing a home for their primary residence. It usually involves falsification of

income and assets. This might include manufactured pay stubs, W-2s, tax returns, or bank statements. But the people involved in this type of fraud almost always intend to repay their loan.

Fraud for profit is very different. Fraud for profit generally involves multiple loans and elaborate schemes perpetrated to gain elicit proceeds from the purchase and the sale of property. The people involved in this type of fraud typically use gross misrepresentations concerning appraisals, loan documents, and frequently participate in the fraud with others, like straw buyers for example, including insiders like loan originators, processors, underwriters, and, yes, managers.

And according to recent studies, mortgage fraud is down by about 25 percent from its peak during the boom years of subprime and exotic loan products from 2005 to 2007. You know, that's the days when we had what they called the "liar loans." They're gone. This is largely the result of the industry's self-policing.

For example, today every loan requires a

tax transcript from the IRS to verify the income reported by the applicant. Additionally, lenders are combatting fraud by stepping up employment verification at the time of closing, requiring backup credit reports, and utilizing both SARs, Suspicious Activity Reports, and MARIs, the Mortgage Asset Research Institute, all of which have proven to be effective in discovering potential mortgage fraud.

However, despite these efforts and marked improvements, there has been a disturbing increase in fraudulent activities surrounding short sales, foreclosure rescue schemes, and loan modification programs.

This is in large part due to the high rate of troubled homeowners across America today, but it is also the result of typically lax enforcement of mortgage fraud statutes unless large sums of money or large numbers of people are involved in the fraud.

Additionally, appraisal fraud has more than doubled since 2006. This is despite the establishment of the Home [Valuation] Code of Conduct, the HVCC, that took effect in May of 2009. Although the

HVCC was designed to reduce the instance of appraisal fraud, it has instead sparked major controversy, decreased competition in the appraisal industry, and eliminated virtually all checks and balances historically associated with home appraisals.

NAMB believes that strict enforcement and rigorous prosecution are the key ingredients to preventing fraud in mortgage transactions. However, we are confident that this Commission can also independently take significant steps towards curtailing mortgage and financial services fraud by amending the guidelines.

Letting perpetrators read, hear, and see that mortgage fraud will not be tolerated and will be met with substantial punishment will help in stabilizing the housing market. Although mortgage fraud is a serious offense and should be treated as such in the guidelines, not all mortgage fraud is created equal.

NAMB believes that the guidelines should also be amended to accurately account for and reflect the difference in the nature of the crime and the

criminal involvement in mortgage fraud for property, as opposed to mortgage fraud for profit.

Thank you.

CHAIR SARIS: Thank you.

MR. CRANE: Madam Chair, can I have his extra time?

(Laughter.)

MR. CRANE: Thank you, Commissioners, Judge Saris, and congratulations on your swearing in today, Judge Saris.

I want to first talk about the potential for serious disparities in health care fraud cases with similarly situated individuals, depending on the nature of the conviction; and then I want to talk about two problems I see with what I call the aggregate loss directive and how that gets calculated in health care sentences.

The vast majority of health care providers and manufacturers are honest and devote significant efforts to comply with the complex body of health care laws and regulations under which they operate. They support and need aggressive enforcement of our

health care laws.

Health care fraud can drain the public fisc, it can harm patients, and erode our confidence in public health care programs. Nothing I say here today should in any way be seen as qualifying the importance of vigorous enforcement of these laws.

The problem, however, is that health care providers and manufacturers operate in one of the most highly regulated segments of our society. Because of the scope and complexity of these laws in this area and the operation of certain health care fraud statutes, there's very real potential that some convicted health care defendants facing sentencing under the guidelines for health care offenses may be subject to the same penalties, even when their conduct and culpability is very, very different.

Just for example I want to focus on the operation of the anti-kickback statute. Starting in 1985, there was a Third Circuit court opinion in which it held the anti-kickback statute was violated if one purpose of the payment was to induce referrals. It's become known in the health care

industry as the "one purpose rule."

One of the problems with this rule is that it has been interpreted by many, including by public statements regularly by the Office of Inspector General, that there is no scienter requirement at all, that as long as there is one element, one purpose is to induce referrals, they could be guilty.

So health care providers who are not steeped in the understanding of criminal law could misinterpret such statements to mean that without any showing of criminal intent, he or she could be convicted or jailed if the provider had any hope or expectation of referrals as part of a financial arrangements with a party that could refer patients to increase their business.

Congress and the Office of Inspector General has understood that the health care — the anti-kickback statute is very broad. For example, directing the Office of Inspector General to promulgate safe harbors specifying payment practices that will not be subject to criminal prosecution under the anti-kickback statute.

As a result, since the original promulgation in 1991, there are now 24 major category areas of financial arrangements that cover over 26 pages of the Code of Federal Regulations that providers need to wade through.

Because these regulations are written deliberately to be very tight, for many circumstances health care providers who have an arrangement that cannot fit into one of these safe harbors need to conduct an analysis typically with expert fraud counsel to determine if their arrangement, even though it is not within a safe harbor, is nevertheless lawful.

Taking this a step further, there have been several challenges under the anti-kickback statute that it should be put aside as void for vagueness. The First Circuit in a decision, *United States v. Bay State Ambulance*, however, looked at the intent standard under the anti-kickback statute and said, "[t]he unusually high scienter [standard] mitigates any vagueness" challenge.

Now the next problem, though, we have with

that analysis is that the intent standard has been weakened in the Patient Protection Act. It is now said that, irrespective of all those health care laws, the safe harbors that they have to need to understand, a person can be convicted. The new scienter standard says "a person need not have actual knowledge of [the anti-kickback statute] or specific intent to commit a violation of this section." Hopefully with a jury instruction that still the *Bryan* standard of willfulness would still apply. We frankly don't know how jury instructions will be crafted under this. I find this a highly problematic scienter standard to be using on a go-forward basis.

But given the *Bay State*'s clear directive that the unusually high scienter standard protects it against the void for vagueness challenge, I think there could be constitutional infirmity in several cases under the anti-kickback statute where defendants are found guilty and brought before judges for sentencing.

I think these disparities — this could result in significant disparities, as opposed to some

of the kinds of conduct that Congress heard regarding in South Florida with the health care strike force team where there was no semblance of even providing legitimate service whatsoever.

I do want to turn in my remaining time to talk about the aggregate loss calculation. I do want to note, importantly for me, and what drives much of what I want to say, is the *prima facie* burden now on the prosecution is they have to put into evidence "the aggregate dollar amount of fraudulent bills" submitted to government health care programs.

Please note it does not necessarily say the aggregate amount of dollars submitted where there's fraud. The focus is on the fraudulent bills submitted to health care programs. I think this could lead to very problematic situations in two areas, which I'll try to talk about and more extensively are in my written remarks.

One is just how you operationalize this in the health care context. We have talked about this. Several other witnesses talked about this. I think in particular I am going to focus on anti-kickback

violations where it really is very much a square peg in a round hole.

In addition, in my experience I am very concerned that when judges have complicated health care cases before them, even though, yes, I understand the standard is really just a standard for *prima facie* evidence for a prosecutor, that judges and the government could invite a court to really just use this as a decision rule even when they have competing evidence. It's sort of, well, they still have it in mind, well what about the aggregate loss? Isn't that really all I need to worry about?

And I have a very significant concern this could become a decision rule. As a result of all these concerns, I have recommended in my testimony additional language to be used in the section, the Application Note 3(F)(viii), and I would hope you would read it closely.

Just turning very quickly to how you operationalize this — and I don't have time in my remarks here today to go over the myriad of ways that the health care system calculates dollars submitted,

and amounts submitted, let alone how that could be computed into fraudulent bills submitted.

I think the biggest problem, however, as I said is in anti-kickback cases, which as the Commission knows has been incorporated in the Patient Protection Act as a health care offense, and so this guideline does apply to anti-kickback cases.

The problem fundamentally is that it's a different sort of economic crime. It's not intended to, you know, go after and submit fraudulent bills to the government. It's intended to steer patients, or to get one provider to get preferential treatment if that person gets the work, as opposed to someone else.

So when you think about the whole nature of an anti-kickback crime, and then you're looking about how do you apply this in this aggregate loss calculation, really as I said it's a square peg in a round hole. And in particular, then the question is where the government — because there's no requirement of proof typically in these cases of medically unnecessary services where the services have been

provided anyway. Do they just throw in the aggregate amount that was billed by the provider pursuant to that referral? In that case that could be many, many millions of dollars if you have a high referring cardiologist, for example.

I gave one example of how that would work. But the amount of the illegal remuneration could be very, very small.

Finally, in closing, as I said in my experience these health care cases — and I know, Judge Saris, in the civil context you have dealt with this many, many times — these are very hard.

I think we cannot skate over that hard work and just allow a prosecutor to throw in the aggregate amount of bills, even though some amount may be fraudulent in the case of an upcoding example. I think let's be true to the concept that the prosecutor still has the burden to prove the amount of loss.

I close my remarks. Thank you.

CHAIR SARIS: Thank you.

VICE CHAIR JACKSON: I have a question.

CHAIR SARIS: Commissioner Jackson.

VICE CHAIR JACKSON: Just following up on that, given the complexity of this area of the law and of the frauds that are associated with it, do you have an opinion on this question of limiting the definition of "Government health care program"? In other words, you know, do you have an opinion as to whether or not the penalties should apply only to federal Medicaid, Medicare, and CHIP programs? Or should it be extended to private health care plans, as well?

MR. CRANE: I'm going to divide that question two ways. One is, for the purposes of the guidelines calculation, Congress was very clear it should just apply to government health care programs. And so I ask the Commission to be true to that part of Congress's —

VICE CHAIR JACKSON: Defined as "federal programs" in your view?

MR. CRANE: Correct. Government health care programs, as opposed to private health care programs.

However, then, just to switch it a little bit, there's nothing whatsoever that would stop the prosecution in their Sentencing Memo to put forward evidence that testimony earlier said that a scheme could relate not just to Medicare but to an overall payer — I'm sorry, to an overall provider.

So, for example, the kickback could be to get all the business, as opposed to just the Medicare and Medicaid referrals. Clearly if the prosecution puts in evidence that the scheme relates to a wider course of conduct than just government health care programs, I don't think there's anything you need to do in the sentencing guidelines that would prohibit a judge from looking at the entire course of conduct.

My only point is I would ask the government to do their work, if that's what they want to prove, let them prove it, but not have a sentencing guideline that automatically allows all this stuff to come in.

I hope I've answered your question.

VICE CHAIR JACKSON: Thank you.

COMMISSIONER WROBLEWSKI: I've got a

couple of questions, Mr. Crane.

First of all, you suggested I thought in your testimony that if a defendant was convicted of just a kickback offense, not a fraud offense, that that person would, under the proposed amended guidelines, be sentenced under 2B1 rather than 2B4? Is that what you suggested? And if so, why do you think that's the case?

MR. CRANE: Well I would hope the more narrowly applicable 2B4 would be looked at by the judge, but in health care reform, kickback offenses were incorporated as health care offenses. And the guideline directives that we're talking about applies to health care offenses. So anti-kickback violations are health care offenses.

COMMISSIONER WROBLEWSKI: But help me out a little bit, just because I'm struggling with this a little bit. The guidelines still are based in part on the offense of conviction; that if you're convicted of a particular offense, regardless of the definitions in the application notes, if you're convicted of a kickback offense, the guideline under

which you're going to be sentenced I believe is going to be determined by that statute, not by the fact that somewhere else there's a definition that says government health care program.

So right now under Appendix A of the guidelines, you're sent to this 2B4.1. Do you think that's going to change, or that will change under the proposal?

MR. CRANE: I do. I prefer your analysis, and I would certainly welcome clarification from the Commission. But if you're convicted of an anti-kickback violation, you're also convicted of a health care offense.

COMMISSIONER WROBLEWSKI: Okay. And let me ask you the second question, which has to do with fraudulent billings.

MR. CRANE: Yes.

COMMISSIONER WROBLEWSKI: You also suggested in your testimony that the amount of loss under this new presumption that the Commission is required to put in will now include all the billings made by a health care provider, regardless of whether

only a small portion were fraudulent. Is that the way you read it? Because, again, I may be reading it too narrowly. But the way I read it is, all the fraudulent billings, regardless of what Medicare or Medicaid services might reimburse, they have to still be fraudulent billings.

So if you have a fraudulent scheme involving ten percent of a company, and the company is going on and on, and 90 percent there's no suggestion that there was fraud, you're not suggesting that the entire amount of billings would now be presumed to be fraudulent?

MR. CRANE: No, but the problem, I think the best example might be upcoding where within that bill, and typically the vast majority of the amount of that bill is completely legitimate and the government never intends to prove that the legitimate part of the bill should be, up to now, part of the loss calculation, but it's all folded together into one, if you will, CPT code. And then separating out the —

CHAIR SARIS: "CPT" means?

MR. CRANE: Is "Current Procedure Terminology." Thank you.

Some amount of that is inflated or upcoded. And what I'm suggesting is, I think the government, as part of its overall proof of loss, should be able to identify what is the amount upcoded. It's really a very substantial burden on a defendant to have access to the government billings to even do the calculation of, you know, what part of that bill is legitimate.

See, the government has access to all of that. That's where the problem is.

VICE CHAIR CARR: So your suggestion would be that if the government says this is a fraudulent bill, and the defense says, yeah, but I did some services, now it's back on the government to prove what part of that bill is upcoded or fraud?

MR. CRANE: Well that would certainly be one way to do it. You know, again, the point being that the defendant not have to prove that calculation. Your approach would be one way that I think would be acceptable to me. Technically, you

know, in my proposal what I was saying is where the government knows that part of the bill is legitimate, the aggregate fraudulent part is, you know, this amount, as part of their initial burden they have to prove what is the fraudulent amount there in that bill.

COMMISSIONER HINOJOSA: Mr. Crane, wouldn't it be the defendant who would know that better than the government, since the defendant himself created the bill? I mean, is that a fair burden to place on the government?

Yes, they have it in their custody now, but certainly the defendant kept a copy of it and would know what actually part of that bill was really correct and the rest is fraud.

MR. CRANE: They may or may not, Your Honor. It is not always that simple. And in particular, the calculation of what is, you know, the proper CPT code that would be the allowable billings in that example I would submit to you that's not always the case.

CHAIR SARIS: Just — oh, go ahead.

COMMISSIONER FRIEDRICH: You know, my problem with your suggestion is we're following a very clear directive from Congress. It says we should amend the guidelines to provide that the aggregate dollar amount of fraudulent bills submitted to the government health care program shall constitute a *prima facie* evidence of the amount of intended loss to defendant.

And we go on in our proposal to make clear that this is evidence sufficient to establish the amount of the intended loss, if not rebutted, which I think clarifies that we're certainly not saying aggregate amount submitted by the government stands without any opportunity for the defendant to rebut it.

And Mr. Tirschwell and I think federal defenders also recommended that we perhaps should enumerate specific examples to guide the court. But our problem with that is always whether the court is going to interpret that as an exhaustive list.

Mr. Tirschwell said it would be a nonexhaustive list, but that's what we always

struggle with when we provide specific scenarios. And you've come up with a number of different ones that can make the guidelines' application notes very complicated, to go through each potential iteration.

And so in light of the existing case law that makes clear that Medicare is billed at 80 percent, and that bills that aren't completely fraudulent but that some services have been provided, that's discounted from fraudulent amount, why is this not sufficient to address your concerns?

We're tracking the directive and we're making clear that the defendant can rebut it. We can't rewrite the statute.

MR. CRANE: I understand that, and I appreciate the concern. I would just say two reactions.

One is the additional language I have proposed trying to cover several points, and I hope at a point in time when you can look at this more closely you will see that the additional paragraphs I am proposing try to accomplish several points.

Only one of them really has to deal with

the question of when does the burden switch, and what do you do? I was trying to raise the issue that there can be situations like for example in kickback cases where the aggregate amount of fraudulent bills may not make any sense, and then the government has not met their burden, and then this application note just doesn't apply. I think that should be clearly set out.

As I said, you know, I ran out of time, but I think it is very important for the Application Notes also to include language — my last sentence — that this should not become a decision rule when there's competing evidence.

CHAIR SARIS: Anybody else?

VICE CHAIR JACKSON: I wanted to ask a mortgage-related question, Mr. Anderson.

The government suggested in its testimony this morning, at least maybe the written comments, that there be an increase in penalties for mortgage fraud cases in which the defendant participated as a real estate agent, or mortgage professional, including appraisers, mortgage brokers, et cetera.

And you delineated for us very clearly that there are different kinds of fraud — fraud as to property, and fraud as to profit. And I was just wondering the extent to which these kinds of mortgage professionals are involved in both of those types of fraud. Do you find that in fraud as to property, the one that you suggested was less serious an offense, that it deals with people who are not industry professionals?

MR. ANDERSON: Actually, in the fraud for property sometimes it does involve an originator who might advise the client what they have to do to qualify. I mean it certainly was a lot easier before; the mortgage fraud was pretty rampant.

The involvement of real estate agents and everybody, I mean it's actually coming down, because like what I said about the self-policing. It's pretty difficult right now to try to get something through because of all the checks and balances that we're doing.

But the biggest issue that I see, I mean I can just tell you from personal experience in

Louisiana, I've been an expert witness on several cases on mortgage fraud, and when I say there's a lack of enforcement, there is a lack of enforcement. It's pretty well known in our state agency, the Office of Financial Institutions, unless there's a million dollars or more involved, the FBI won't get involved. I mean, we've seen this.

I mean, so there is — so the bad guys out there know that they can get away with a certain amount of fraud with nothing happening to them.

VICE CHAIR JACKSON: And you feel that those people, the bad guys, are those the mortgage professionals? I mean, would you be in support of stiffer penalties for those people?

MR. ANDERSON: Yes. Yes, I would. Yes, we would.

VICE CHAIR JACKSON: Thank you.

CHAIR SARIS: I want to go to Mr. Felman. So you're very critical: the piling on, disastrous, but what I'm not seeing here is a good set of proposals as to how you think we sort out culpability better.

Obviously that's a very difficult problem. You say here, "A fraud that resulted in a $100 loss to 250 victims does not necessarily warrant a sentence six levels higher than a fraud that caused $25,000 loss to a single victim."

That's not self-evident. And so when you have — you know, if you were to ask should more of the victims get the higher the sentence, even if it's a lower amount, it's not clear to me that it shouldn't get a higher sentence.

And so I hear your point, as well. But what I don't have is an alternative.

MR. FELMAN: Yes. And I agree with you that more victims might increase the severity of the crime. The question is: Does a six-level adjustment? You know, that's going to more than double the sentence. It's going to increase the sentence by maybe 150 percent.

But let me try to get to the specific question you asked. The American Bar Association two days ago approved a specific policy resolution that calls on the Commission to re-evaluate the emphasis

on both monetary loss and multiple specific offense characteristics that in combination tend to overstate the seriousness of some offenses.

The resolution calls on the Commission to place greater emphasis on *mens rea* and motive in relation to an offense, the defendant's role in the offense, whether and to what extent the defendant received a monetary gain from the offense, and the nature of the harm suffered by the victims.

The point on gain is one that I think cannot be overstated. This is a point that was made during the economic crime package in '98. The Commission published for comment some pretty interesting proposals on how the guidelines could —

CHAIR SARIS: When was this?

MR. FELMAN: In 1998. There are a number of specific amendments that were published for comment and application notes dealing with the issue of gain. And — and this is purely my judgment — the reason it didn't go forward was because it applied in too many cases. And so there was a concern that there would simply be too many departures, and the

overall compliance rate with the then-mandatory guidelines would unduly suffer if judges were authorized explicitly to depart where the defendant's gain varied significantly from the loss.

But I think that now that we are in an advisory regime, this is an appropriate comment for the Commission to make. And I suspect that if the Commission reviews the cases in which the judges are varying significantly from the guidelines, I suspect that a very large number of them will be instances in which the defendant's gain is significantly lower than the loss.

Somebody told me early on — I think it was an agent — when I first started in doing white collar criminal defense, you follow the money, stupid. That's what he says to me. You know, where the money went is generally where the bad guy is. And the guidelines treat people who gain zero and people who gain the full amount of the loss identically. That is a concrete suggestion.

The victim table I think is just overblown. I think that 6 is just too far to go,

just counting heads. It's just — I think that the Commission needs to revisit the victim table.

I think that the specific offense characteristics, as I think Commissioner Howell, described, could probably be looked at again from a whole, because they just reflect a hodgepodge of plus 2s. And a plus 2 can really matter, especially when you stick it on top of another plus 2, because the table proceeds arithmetically.

So I suspect that a lot of these SOCs frankly are somewhat overstated. The Commission over the years has never been happy about doing a plus 1. Everything is always a plus 2. And many of them kind of reflect some of the same sorts of considerations, so that by the time you are done you hardly recognize the thing. And I have issues where I have had some success with judges arguing, look, this is the crime, or this is the guideline level for just the loss.

Now is this crime really that much worse because of A, B, C, D, & E? And now we've just tripled the sentence based on these things. And oftentimes it just doesn't make sense. So I think that the SOCs,

there's a lot there that could be done.

I like the idea of a mitigating role cap, like you have in the drug instance. I think there are a lot of similarities between the difficulties with quantity overstating severity in the drug context as in the fraud context. So I think that the Commission could sensibly make some headway for these really sympathetic people who, you know, played a mitigating role but the loss result is enormous, they got nothing out of it. Maybe we could look at a mitigating role cap.

So I probably rambled on for too long, but those are some of the specific suggestions I think that could be accomplished.

COMMISSIONER HINOJOSA: Mr. Felman, I guess your example here raises the issue of how a defense attorney is different from the judge and the Sentencing Commission. Because the $1 million loss, for example, as opposed to making $100,000 from a loss, but you also have a victim there who says I don't care who took the $1 million. This person caused me to lose $1 million.

So the victim actually lost $1 million, and it doesn't matter who made the profit from it. And so you have that viewpoint of the person who actually was defrauded, or the company that was actually defrauded and lost that, as opposed to the defendant who is saying, well, but I only made a profit of so much. So you have that cross-current.

The other thing is, you know, you and I have discussed this in the past, when you look at these guidelines it's about ten percent of the ones that are over $1 million as far as racheting up, as some people call it. When then you look at the other SOCs, it is in such a small amount of cases that these are applied that that should be the issue as to whether they should be in there. And I guess they're SOCs, because when the base offense level doesn't actually include them, then you should consider them as SOCs.

But getting back to the point I made again, which you and I have had discussions on in the past, that the fraud guideline gets a lot of comments, but it's in the small amount of cases that

the issues develop. And any suggestions that we can get on those would be helpful. And that's where we hear the feedback from the departures and the variances, but as far as the $1 million example, you know, when you're the judge or the Sentencing Commission, you've got not only the defendant to worry about but the whole public forum and the public in general.

MR. FELMAN: Well let me try to be clear that we are not suggesting that you use gain instead of loss, or that loss is not a critically important measure of culpability. It probably is the starting point. The harm caused by the offense probably is appropriately the starting point.

So I think I agree with everything that you've said. You surely should be looking at loss, and that's from the perspective of the victims. But what I'm trying to add to the discussion is that in weighing out the relative culpability of a number of different defendants who each caused the same amount of harm, the defendant who got the $1 million needs to be treated more harshly than the defendant who got

none. And I don't know exactly what percentage of the cases are that we're talking about. I agree with you, it's probably a minority.

My only point is that these are very important cases. They are sort of the flagship of federal enforcement efforts in a very important area. So we ought to try to do our best to get it right. And I think we're relying on the departure provision, as the chair asked about earlier. I mean, it's wonderful that that departure language is there, but I think we ought to try to do this by guideline to the extent that we can so you're not relying on departures.

Because some judges depart, and some don't. It's just, I think you're going to get overall a smoother and a tighter grouping of decision making and less disparity if you're trying to capture these things in an advisory guideline regime rather than saying these are the guidelines up here, depart if you want to.

CHAIR SARIS: Anything else?

(No response.)

CHAIR SARIS: Let me say thank you very much. We will read all your testimony with care, and thank you for all the help in this very difficult area. I am sure we will be working together a lot over the coming year or two.

(Whereupon, at 11:52 a.m., the hearing was recessed, to reconvene at 1:00 p.m., this same day.)

AFTERNOON SESSION

(1:05 p.m.)

CHAIR SARIS: Welcome, and good afternoon. So this afternoon we're not talking about fraud but we're talking about other very important issues involving illegal re-entry, supervised release, and other matters.

With us is the following panel: Sally Quillian?

MS. YATES: Quillian, yes.

CHAIR SARIS: Yates, the United States attorney for the Northern District of Georgia. Previously she was an AUSA, and she was chief of Fraud and Public Corruption Section, and the first assistant U.S. attorney. She also practiced as an associate with King & Spalding's Atlanta office. Welcome.

Then we have Jane McClellan, an assistant federal public defender in the District of Arizona. And she served on the United States Sentencing Commission as a visiting public defender in 2004, so you know us well. And you previously worked as an

associate at Wilmer Cutler & Pickering in Washington.

Not quite in the same order, but we have Ms. Teresa Brantley, who — well, I'll go, David Debold who represents the Commission's Practitioners Advisory Group, PAG, who is with us today. And we have Teresa Brantley, who is a member of the Commission's Probation Officers Advisory Group, and she is a supervisory U.S. probation officer in Presentencing in the U.S. Central District of California. And you've practiced as a civil law attorney — woah, and as a manufacturing engineer. So welcome. And welcome back, Susan Howley, representing the Commission's Victims Advisory Group.

So thank you to all of you. I don't know if you all were here this morning, but we have this procedure here where we have these little lights. You each get ten minutes. It goes on green, yellow, when there's a minute, red when it's stop, and then I start getting antsy. And then at the end of all of the comments, we will come back and ask questions.

So why don't we begin with you, Ms. Yates.

MS. YATES: Thank you, Madam Chair, members of the Commission.

Thank you for the opportunity to appear before you today and to testify on behalf of the Department of Justice and federal prosecutors across the country regarding the Commission's proposals for guideline amendments relating to supervised release and illegal re-entry.

We know that the Commission is committed to ensuring that the resources of the judicial system are used most efficiently and effectively, and the Department of Justice shares that commitment.

On behalf of the department, I am here today to urge that the Commission not promulgate the particular amendments it has proposed with respect to supervised release and illegal re-entry, because they have an unintended negative impact on enforcement, they create difficulty and uncertainty in application, and are unnecessary in light of existing guideline provisions that address the concerns that prompted the Commission's proposals.

In connection with supervised release, the

Commission has published three proposals for consideration.

First, adding a provision to 5D1.1 that states that ordinarily alien defendants who are likely to be deported and barred from lawful return should not be placed on supervised release.

Second, revising 5D1.1 and 5D1.2 to narrow the class of cases in which a guidelines presumption for the imposition of a term of supervised release is triggered.

And third, revising 5D1.2 either to lower or eliminate entirely guidelines-based minimum term of supervised —

CHAIR SARIS: I think we just lost your mike here.

MS. YATES: Oh. Usually I'm so loud I can be heard anyway.

(Pause.)

That's not a great start for me, is it?

(Laughter.)

MS. YATES: Is this working now?

CHAIR SARIS: Perfect.

VICE CHAIR CARR: Could you start over?

(Laughter.)

MS. YATES: Sure. We'll take it from the top. Let's see, I'm not entirely sure where I was.

I think, third, it was revising 5D1.2 to either lower or entirely eliminate guidelines-based minimum terms of supervised release for any offense.

The department opposes each of these proposals. The Commission has indicated its intention in revising the supervised release guidelines is to focus the limited supervision resources on offenders who need supervision.

The Commission also notes that a high percentage of supervised releasees are non-citizens and that the deportation of a vast number of them is virtually inevitable, implying that these non-citizen releasees are a drain on scarce resources.

While on its face this may make sense, in reality alien defendants do not place an unwarranted burden on the courts or U.S. probation.

Typically, alien defendants are deported following completion of their terms of incarceration,

and consequently they are not supervised by the courts post-incarceration unless and until they illegally return to the United States.

If such re-entry does occur, it is often the probation department that is notified first, a notification that would not occur if the defendant were not on supervised release.

Revocation proceedings are then often initiated. The defendant's return to the United States violates the mandatory condition of release that he or she not commit any new criminal offense, and often a specific condition of release not to return to this country without the permission of the Secretary of Homeland Security.

While some resources are expended in the revocation process, it is a streamlined expeditious and cost-efficient mechanism for holding the defendant to account for his violation of the law, and deterring him from future violations.

Revocation of supervised release is a particularly important tool in the southwest border districts in combatting immigration offenses. Aliens

convicted by the southwest border districts sometimes quickly return to the United States following their deportation or removal.

This is especially true with respect to aliens convicted of illegal re-entry and nonaggravated illegal re-entry under 1325 and 1326. The turnaround time for these aliens to enter and re-enter, be prosecuted, sentenced, and deported, and then illegally returning to the United States can be very short when compared to 1326 cases for aggravated felons for which the sentences are considerably longer.

Alien defendants are sometimes found in the United States within days, weeks, months, or a few years following their deportation. It is most efficient simply to revoke their supervised release and to sentence them, as opposed to being required to institute a new prosecution.

Now all U.S. attorney offices must establish priorities and preserve resources for serious offenses. In border districts that are overwhelmed with immigration offenses, that means

that some have been forced to adopt policies that focus prosecutive resources on defendants with multiple violations and those with aggravated criminal histories.

In these districts, they often don't even file charges without multiple voluntary returns or removals. Eliminating supervised release revocations as an efficient tool to address immigration offenses unnecessarily takes an important arrow from our quiver and would have the unintended effect of making prosecution more — excuse me, making prosecution less, not more, efficient.

Eliminating supervised release for offenders removed or deported would also undermine the important law enforcement objective of deterrence. In addition to curtailing the possibility of separate punishments for the new re-entry offense and the violation of supervised release, eliminating supervised release would have the unintended consequence of effectively lowering the sentence for a new re-entry offense because the two-level enhancement that applies under 4A1.1 for

commission of a new offense while on supervised release would no longer be applicable.

The proposed amendment to 5D1.1 that disfavors imposition of supervised release where a defendant who is "a deportable alien who will likely be deported after imprisonment" is flawed for another reason, as well, because sentencing courts do not make the ultimate determination as to the likelihood of deportability, nor do they control deportation proceedings.

Even if an alien appears to be deportable, that doesn't necessarily mean that he or she will be deported. This decision-making function resides with the ICE Detention and Removal administrative authorities.

Further, even when ICE initially represents to the court and law enforcement and to the AUSA that an alien will face deportation, that is not a guarantee that deportation will occur.

As to the application of the proposed supervised release amendments more broadly to citizen and alien defendants alike across the spectrum of

criminal offenses, a few observations are warranted from the department's perspective.

First, while we share the Commission's desire to preserve the resources of the probation department, there are already mechanisms available to accomplish this goal.

Probation offices have undertaken a program of evidence-based risk assessment of supervised releasees. And these offices tailor the intensity of supervision to the perceived need, concentrating their efforts on those at greatest risk to recidivate.

In addition, judges have the ability to terminate supervised release for those defendants who have demonstrated that further supervision is unnecessary. And at least in my district, this happens with some frequency.

The fundamental principle undergirding the Commission's proposals seems to be that the benefits of supervised release simply don't warrant the resource expenditures and, thus, fewer and shorter terms of supervised release is the stated goal.

We disagree with this premise. The Justice Department believes strongly that we are not going to jail our way into safer communities, and that enforcement alone is not enough.

We have used supervised release as an important component of criminal prevention by improving the chances of successful prisoner re-entry.

Additionally, implicit in this proposal to eliminate supervised release for defendants receiving relatively short sentences is the notion that these defendants are unlikely to re-offend. But again, at least in my district, that is not the case.

Indeed, our probation office reports that it is the fraud defendants who oftentimes have relatively short sentences that are most likely to re-offend because fraud has become something of a way of life for them. Their crimes were not crimes of opportunity, but rather was the product of significant planning and thought. It is a hard habit to break, and supervision often helps them in that process.

Moreover, the imposition of supervised release plays an important role in supporting the collection of restitution from offenders once they've been released from prison. A tax offender who is incarcerated for 12 months, for example, is likely to owe restitution — or at least the cost of incarceration — upon release.

We submit that post-release supervision of offenders — even in cases where imprisonment was for less than 15 months — provides a benefit that is well worth the limited expenditure associated with efficiently managed supervision.

Further, we agree that efforts need to be made to ensure that supervised release is as effective as it can be in assisting defendants to transition from incarceration to a productive and law-abiding existence within society.

But we believe that this is best accomplished by tailoring adjustments to supervision to the individualized needs of the defendant, rather than eliminating supervision or substantially reducing the periods of supervision for broad

categories of defendants.

We are unaware of any data suggesting that the current system, with its flexibility for individual defendants, is problematic. Nor is there a groundswell of concern from judges around the country. In fact, quite the contrary. And if I can finish this one point?

CHAIR SARIS: Absolutely.

MS. YATES: And I'll skip all the illegal re-entry stuff.

CHAIR SARIS: I think we've all read everything anyway.

MS. YATES: The Commission's 2010 survey of district judges reflects that only seven percent of the judges thought that the number of cases in which the guidelines provide for supervised release was too low, only seven percent.

With respect to the length of supervised release, only six percent thought that the terms provided by the guidelines were too high.

In short, we don't believe that the current system is broken and consequently we believe

that the proposed amendments are unnecessary and unwarranted.

Thank you.

MS. McCLELLAN: Good afternoon, Madam Chair and Commissioners.

Thank you for asking me to come here today and give me the opportunity to speak to you on behalf of the federal defender organizations.

I am here to address the proposed amendments to the illegal re-entry guideline and the supervised release guidelines. We wholeheartedly support the proposed changes that the Commission has proposed, with some minor changes.

First, in regard to the amendment to 2L1.2, we support the change that stale convictions should not be given the same weight as recent convictions, for the same reasons that we do not score these under the criminal history score. Such defendants pose a lower risk of recidivism and less of a danger to the community because they have remained free of a serious conviction for usually ten to 15 years for these convictions to have become

stale.

We have proposed a minor modification to this change. And instead of giving an 8-level increase for what would have been the 16- or 12-level increase, we have proposed that instead of giving the 8-level increase the court would give either an 8-level increase if it is aggravated felony, and a 4-level increase if it is a non-aggravated felony.

We think that this revision would make the guideline easier to apply, and more simple. This is already a complicated guideline, and efforts to simplify it are helpful for the probation office and for the courts.

This is especially true for these stale convictions because by definition these are going to be old cases, and the documents can be difficult for the probation office to find.

We think that this proposed change is also warranted because it still recognizes the statutory scheme that imposes higher punishments for defendants with aggravated felonies and felonies.

In regards to the amendments to the

supervised release guideline, we very much support the Commission's change that language should be added stating that deportable aliens should not ordinarily receive a sentence of supervised release as part of their sentence.

We think this is a good idea for several reasons. Supervised release is not supposed to be imposed for punitive or punishment reasons. Of course aliens are not going to actually be "supervised" if they're residing in a foreign country. They're not going to take advantage of any rehabilitation services or re-entry into the community services, so supervised release serves no purpose for that reason.

We do not think that it serves a purpose of deterrence; that the threat of additional punishment for the supervised release violation is minimal; that that does not deter them from returning. They may be deterred by the threat of another prosecution for illegal re-entry, but any additional punishment they may receive for supervised release violation has no deterrent, or little

deterrent factor, in our opinion.

And also for the practical reason, we think that supervised release is not appropriate for aliens. It is an administrative nightmare in our experience to litigate both the supervised release violation and the new charge of illegal re-entry. And it is difficult to transfer those proceedings from one district to another.

Districts are inconsistent about whether they will transfer it, how long it takes to transfer it. Some districts will not file the new supervised release violation, and others do. And so that really presents a big problem.

In response to some of the arguments the government gave regarding why supervised release would be appropriate for aliens, we would state that in my experience in the District of Arizona the government does not forego prosecution of a new illegal re-entry instead of a supervised release petition. In fact, the opposite is true.

Occasionally they will not pursue a supervised release petition, especially if the

defendant has been on supervised release for more than a year, but in my experience they never forego the prosecution for illegal re-entry.

In my experience, it is not a streamlined, expeditious, or cost-efficient procedure to do both proceedings at the same time, even when they're in the same district. It is a cumbersome proceeding, a change of plea, because you have to also have a deny, you have to have a disposition report prepared by probation, in addition to a presentence report, and it causes many problems and it is more complicated.

And as I said before, I do not believe that having the additional threat of a supervised release violation deters aliens from coming back to the United States, at least illegally.

I would like to note that it is not really easier in the fast track districts to litigate these cases. We still have to determine the offense level. We still file objections to presentence reports. And we still prepare full presentence reports with full interviews. So it is not any easier in the fast track districts to litigate these cases.

In regards to the argument that some aliens may not be deported, and because that's unknown, we need to impose the supervised release, I would say this is present in very few cases. For instance, in 2009 the statistics show that of the 35,000 federal cases where there were aliens, about 24,000 of them were immigration cases. So you know that those defendants are going to be deported. Another 7,000 of them are drug cases. So in those cases it's probably mandatory that supervision be imposed.

So it's not a very large class of cases where you might — where you don't have to impose supervised release, and you're not sure if they're going to be deported. And if that is the case, then perhaps the courts should impose supervised release. But I don't think that's a large class of cases.

So for all those reasons, we wholeheartedly agree that deportable aliens should not normally receive a sentence of supervised release.

Now in regards to the amendments to 5D1.1

and 5D1.2, we recommend Option 1B for 5D1.1 because we believe courts should have as much discretion as possible. Regarding whether to impose supervised release for a defendant, when the guideline states that the court shall impose supervised release, even though they may not have to statutorily impose it, they probably feel compelled to impose supervised release, so we think that the courts should have complete discretion regarding whether to impose it in a case.

And then in regard to the length of the supervision to be imposed, we recommend Option 2B, that there should be no minimum term. For many of the same reasons, we believe the court should have as much discretion as possible to determine what is the proper length of the term of supervised release.

Supervised release should be reserved for the defendants who need transitional services, who need rehabilitation and re-entry services. For practical reasons, it is very difficult for the courts to have to litigate so many technical violations and Grade C violations for all of the

numerous supervised release cases that are there.

We really should reserve our resources for the defendants who need it, and also for when they need it, which is in the beginning of the term of supervised release. The statistics show that most defendants do violate during that first year of their supervised release, so perhaps these longer terms of supervised release are not always what's necessary.

We think this is a good change for the Commission to include. Although most judges are probably still going to be imposing terms of supervised release, maybe it is something they need to start thinking more about, and whether it is appropriate in every case, and whether they need to impose the longest term of supervised release in every case.

And then lastly, we also support the Commission's effort to encourage judges to terminate defendants who are successful on supervised release before their term is expired. And we have proposed additional language to the application note at 5D1.2 which would guide the judges regarding when it is

appropriate to terminate a defendant's supervised release.

Thank you.

CHAIR SARIS: Thank you.

MR. DEBOLD: Thank you, Madam Chair. On behalf of the Practitioners Advisory Group, as Eric Tirschwell told you this morning, we very much appreciate the opportunity to offer our input on proposed amendments, as we have in the past.

I would like to speak today about two of those proposed amendments: the illegal re-entry and the supervised release provisions.

I also want to say at the outset that I am particularly grateful for the assistance of two of our members, our Fifth Circuit representative, Mike Torres, who is in the Western District of Texas, and our Tenth Circuit Representative, Jacquelyn Robins in the District of New Mexico, who were able to give me some very helpful insights into both of these provisions as they relate to noncitizens.

First for the illegal re-entry proposal, as our written testimony indicates we do support an

amendment in this area. We think that this proposal does address one of the most significant upward enhancements that you will find anywhere in the guidelines, and whether it should be applied to individuals whose prior convictions otherwise are too old to count under the Chapter Four provision dealing with criminal history points.

As proposed by the Commission, the 16-level and 12-level enhancements would not apply if a conviction was too old to count for criminal history purposes. And with most serious prior sentences — that is, sentences of 13 months or more — that means convictions for which the sentence was imposed, or the release from that sentence occurred, whichever is the latest, at least 15 years before the defendant's instant offense.

We support this approach, but we also suggest that to maintain consistency with how prior convictions are handled for enhancements to the offense level and the firearms guidelines, that the Commission should consider going a step further and adopting the approach there of not counting prior

convictions at all if they are too old to count for criminal history points.

As for the provision that the Commission has proposed, if the Commission does maintain the use of some prior convictions that are too old to count for criminal history points in the illegal re-entry guideline, we suggest that the court — or that the Commission, rather, adopt a provision that does not allow for the older convictions to count, unless we are talking about the provisions that are listed in (b)(1)(C), (D) or (E). That is, the 8-level increase for aggravated felonies, the 4-level increase for any other felony, and the 4-level increase for three or more qualifying misdemeanors.

By using a provision, or adopting a provision that would allow a stale conviction to count if it also met the definition in subsections (A) and (B) — that is, the 16-level and the 12-level — it is going to create a very fine kind of distinction that courts are going to have to draw between whether a case qualifies as a prior conviction that is more than 15 years old, almost

always is going to qualify as an aggravated felony within the definition provided in the Immigration Act; or if it meets the more nuanced definitions that the Commission has for both those provisions.

And you can see, and we give an example on our written testimony, how drawing those fine lines can be very difficult. And it can create a lot of confusion, and certainly we believe will create unnecessary litigation in trying to distinguish between those different categories.

So our aim is to avoid overly complicating the process. In almost every case, the court is already going to have to decide whether the prior conviction is an aggravated felony within the meaning of the statute, because that will trigger a higher statutory maximum. And therefore it minimizes the number of distinctions the courts need to draw.

The other benefit is that it allows the courts in cases where it is an unusual circumstance, where the prior conviction even though very old should count against the defendant for more than what it counts under the other provisions in [2L1.2], is

that the court can then consider that as a reason to depart or vary upward.

On the supervised release provisions that the Commission has proposed, we also agree with this approach of trying to make the supervised release grant something that is less automatic and more something that the court considers based on a number of factors. And we think the Commission has adopted, or has proposed a provision that would adopt most of the factors that are relevant.

With respect to the Department of Justice's position about noncitizens — and this is in part where some of the input I got from Mr. Torres and Ms. Robins has been very helpful — what I am told is consistent with what you just heard from Ms. McClellan about what happens in the District of Arizona. And that is, that in almost every case where someone has illegally re-entered the U.S. after being deported, after having a conviction for a federal offense for which they might have supervised release, the government not only charges them with the supervised release violation but also charges

them with the new crime of illegal re-entry. And it creates a lot of complications, especially here in the Western District of Texas, where at least one judge does not transfer her supervised release violation proceedings.

So if someone is arrested in another state and prosecuted there for illegal re-entry after deportation, there is a proceeding in North Carolina, if that's where the arrest occurred, and there is also a proceeding in the Western District of Texas, one for the criminal conviction, one for the supervised release violation. It creates complicated proceedings, and it does not improve the efficiency of the process, and it adds very little in terms of what we get out of our resources by having two separate proceedings and often the government is agreeable to having the sentences run concurrently.

So that is the reality that our members are seeing in terms of how that operates.

As for the general approach to individualizing supervised release, I do want to emphasize that, as I read the amendment, it would not

eliminate supervised release, or would not discourage judges from imposing supervised release in the appropriate case.

As I see the aim of the amendment, it is to individualize the decision so that judges will consider the relevant factors such as restitution, as the Victims Advisory Group recommends courts pay careful attention to, other factors that should be done on a reasoned basis, rather than a reflexive basis, and for that reason we think it is helpful for the Commission to go back to the way we believe the Sentencing Reform Act was aimed to operate here. Which is, to give the courts a set of factors to consider, and to individualize the decision about whether supervised release should be imposed more frequently, I would suggest even with this amendment, how long that supervised release term should be in order to effectively use the resources that we have in this area of the criminal justice system.

Therefore, for the reasons that we state in our written testimony, we do support this amendment with the options that we have identified in

the written testimony.

Thank you.

CHAIR SARIS: Thank you.

MS. BRANTLEY: Good afternoon, Madam Chair, and distinguished members of the United States Sentencing Commission.

On behalf of POAG as their chair I want to thank you for the opportunity to speak to you today, and I want to begin by apologizing to you for not having something to you in writing.

This cycle is a little different for us than it has been in years past because we don't get to meet together until next week. So we haven't been able to finalize our position on many issues, and we hope to do that, if not by the end of next week, then soon thereafter.

But there were a couple of things that have boiled to the surface for us, if you will, in our multiple telephone conversations and several conference calls that we felt strongly enough about to ask if we could come and mention them to you.

First, let me talk about something that

hasn't been mentioned yet, the proposed amendment No. 7, the child support circuit resolution issue.

POAG believes that an offender's failure to pay a court-ordered — to obey a court order is a separate harm that should be captured by a specific offense characteristics. And we favor applying it as suggested at [2B1.1(b)(8)]. The only application issue that POAG wanted to bring to your attention is, we are afraid that putting that note at the 2J1.1 will make it not easy to detect and easy to miss.

So for that reason, our preference is that Appendix A be updated to refer violations of 18 USC 228 directly to 2B1.1, and then for that note, that application note, to go at Application Note 7 of that section.

In the alternative, if that's not something that can be considered at this time, we suggest that it be added either to 2B1.1 Application Note 7, either instead of or in addition to the Note at 2J1.1.

With regard to proposed amendment No. 6, the illegal re-entry amendment, well in our position

paper from August of last year we asked the Commission if it might be something to consider whether convictions that receive criminal history points should be a basis for deciding an SOC. So we were pretty excited, frankly, to see this amendment.

The only issue that we have with this amendment is to suggest that the language at the proposed Application Note 1C, which reads:

"A conviction taken into account under [subsection (b)(1)] is not excluded from consideration of whether that conviction receives criminal history points under Chapter Four."

Now we realize this was there before, and we realize that under this proposal all we're doing is moving it to that application note. Nevertheless, we find this language to be imprecise and wonder if it couldn't be clarified to make it clearer that the Commission intends that a conviction can receive criminal history points and be the basis for an SOC.

We haven't finalized our suggestion on this, but we are looking at the application note under the 2K2.1 guideline that makes it very clear

that they are supposed to be intended for both.

Now we realize also that 2K2.1 is different, and that under the proposed Illegal Re-entry case it is a tiered approach, but we were hoping to come up with language that would — suggestion for language that would make that clearer.

The other amendment that we wanted to comment on is the supervised release proposed amendment. POAG's discussion about this proposed amendment have meandered in a way that I have not before experienced as a member of POAG.

We are all vocal, but the road to consensus about this amendment has been longer and fraught with more hazard than in any discussions I've ever been part of. And indeed that seems to be the sentiment of everyone on POAG at this point.

We start talking about what we think are clearly application issues, and we end up wondering if we're talking about policy. And we do not intend to muddy the water by taking up a policy discussion, but we do see certain application problems, and we

wanted to take the opportunity to bring them, some of our thoughts, to your attention.

In the synopsis, this proposed amendment tells us that the Commission is considering whether revisions to the supervised release guidelines would help courts and probation officers focus limited supervision resources on offenders who need it.

Our reaction to this very laudable goal was how will we know? How will we know who needs it? It would seem that we must ask ourselves, from one sentencing to the next, what does this offender need? And can those needs be addressed by supervision?

I realize that you're aware that there's no risk assessment tool for use at the sentencing stage, and that's probably as it should be, because the risk assessment tools out there are treatment based, and they don't talk about whether or for how long a person should go to prison. But when we're talking about supervised release, we start to talk about the needs of the offender. And so maybe this is a place where we might be able to go hand in hand, the guidelines, with some sort of treatment-based

supervision tool that could tell us who needs to be supervised.

Now POAG does not intend to take a — did not intend to take a position on this, but this is part of our problem. This is where we keep coming back to: Who needs it? And how do we answer the questions of a sentencing court who looks to us and says: Does this person need it? And for how long?

The other issue that keeps coming up in our discussions is the proposed Application Note No. 5 under Option 1A or Note No. 3D under 1B, either one. It contains this sentence when talking about deportable aliens: It says, "If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution."

POAG finds this language troubling. We weren't given any statistics on this topic, so all we could do is speak anecdotally with each other about our experiences. And, frankly, our collective experience was that this statement — we don't find this to be the case; that the threat of a new

prosecution would deter someone coming back to the country. That just hasn't been our experience.

But again, you know, all I can offer is that this was a troubling point for us and hopefully we will come to a consensus as to what to do about it by the end of next week.

POAG is concerned that if the guidelines take this position — which is, that in this one instance, that of deportable aliens, that deterrence and public protection are served by new prosecution — that it would be a small step onto a very slippery slope, to add one other instance, and one other instance, and one other instance, until the argument is made in the sentencing court that supervised release should never be applied then.

Other than giving voice to our concerns along these lines, though, we need to meet next week and try to better hash out just what it is that we think about this, and what we could do about it.

We also have trouble with carving out a class of people called "deportable aliens." POAG is concerned that by identifying a class of people who

should not received supervised release, and declaring that deterrence and public protection are served by the threat of future prosecution, this amendment will leave presentence officers in the precarious spot of answering the court as to what to do.

We are worried that the objections will come from offenders who are not part of that class. We understand that supervised release is intended to help people re-enter into society, and we hear the argument that if someone is not going to be returned to society then they don't need those services. We hear that. But we also hear people on the other side of that argument saying: Well, I'm not part of that class, and yet I'm going to be subject to new prison time if I don't follow these rules.

There's just something inherently unfair about that that we haven't been able to quite put our finger on.

So I guess the message that POAG wishes to convey about this particular amendment at this moment in our discussions on the topic is, as worded this amendment has a potential of impacting the sentencing

court, the community, and probation officers in profound ways that may not be intended by the proposal. We will continue to discuss this topic, and we will provide a more detailed position later on.

Thank you, very much.

CHAIR SARIS: Thank you. Ms. Howley, welcome back.

MS. HOWLEY: Good afternoon, again, Madam Chair and members of the Commission.

Again, it is my pleasure to appear before you as chair of the Victims Advisory Group, and this time to offer our comments regarding supervised release and plea agreements in the amendments pending before you.

We know that the Commission is considering whether revisions to the supervised release guidelines would help courts and probation officers focus limited supervision resources on offenders who need supervision.

We agree that refinements to supervision should be considered, and that supervision should be

targeted to those cases where it is needed. However, we remind the Commission of the importance of supervision to enforce restitution and other victim-related conditions.

The Commission has proposed two amendments — two options for amending 5D1.1. Option 1A would require a term of supervised released in any case that involved a sentence of imprisonment for 15 months or more, as well as where specifically required by statute, and Option 1B would require a term of supervised release only when required specifically by statute. Whereas, the current guideline mandates supervised release in any case involving a sentence of 12 months or more.

Thus, the current proposal, whether Option 1A or 1B, runs the risk of creating a larger window within which a particular defendant, though ordered to pay restitution or possibly ordered to have no contact, would be under no supervision that would help facilitate enforcement of such orders, whether that is under the smaller group of defendants, so that the change of 1A would involve, or the larger

group under Option 1B.

We recognize that both proposed options would retain the court's discretion to order supervised release in any case, and would add significant commentary to provide direction to the court in determining whether to impose a term of supervised release. And, that the factors to be considered include restitution ordered to the victim, as well as the nature of the offense and need to protect the public. The VAG applauds the addition of this guidance, regardless of which option you choose.

However, the VAG would urge the Commission to strengthen its commentary under this guideline to clearly state that in any case where the defendant is ordered to pay restitution to any victims of the offense, or in any case where the court has issued a no-contact or protective order against the defendant, that it should ordinarily impose a period of supervised release.

An additional point for consideration under 5D1.1 does relate to deportable aliens. While it is logical to eliminate supervised release if a

defendant is deported, those with pending deportation proceedings don't always leave the country. And those deported may return illegally. Therefore, supervised release should continue certainly until a person is actually deported, and moreover we would suggest that such defendants stay on some type of supervised release even after deportation, as you've heard earlier this afternoon, so that if they return to the country illegally during the period of supervision they can be subject immediately to detention in violation of release proceedings.

The Commission is also considering proposals relating to the length of the term of supervision under 5D1.2. Rather than limiting the possible length of the term, the VAG urges the Commission to expand its commentary regarding the extension of any term of supervised release for the purpose of enforcing a restitution order.

It is our understanding this is allowable by statute and should be contained in the commentary here.

Too often defendants are released from

confinement and supervision while continuing to order restitution to their victims. Once supervision has ended, it becomes even more difficult to collect restitution. The courts should be permitted to extend, and encouraged to extend the supervision for purposes of enforcing its own orders regarding restitution to the victim.

Next, turning to the proposed changes to the plea agreement guidelines, 6B1.2, we urge the Commission to take this opportunity to clearly incorporate into this policy statement a provision recognizing the rights of victims at the plea stage. Specifically, we urge the Commission to add a subsection (d) to the effect that, before accepting any plea the court shall ascertain whether the prosecution has conferred with the victim, and whether the victim has any views on the proposed plea.

The Commission should also add commentary referencing the strong language of the Crime Victims' Rights Act, which is 18 USC, 3771. The CVRA gives crime victims both the right to be reasonably heard

at any public proceeding in the district court involving plea or sentencing, and the reasonable right to confer with the attorney for the government in the case.

The Attorney General Guidelines for Victim and Witness Assistance already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims' views about," any proposed or contemplated plea, and this approach tracks the approach in at least 29 states, which require prosecutors to consult with the victim before a plea.

Because most criminal proceedings are resolved through a plea agreement, the plea stage represents the best opportunity for the victim to be heard in this process.

In addition, the CVRA states that under limited circumstances a victim may make a motion to re-open a plea or sentence when their right to be heard was denied. Thus, it is in the interest of the court and the working of the criminal justice system to ensure that the victim's right to be heard is afforded at the first instance, rather than trying to

wait for any fix that might come later.

Finally, we continue to recommend that the guidelines be completely reviewed and amended where appropriate to fully incorporate the provisions of the Crime Victims' Rights Act. Guideline 6B1.2 is only one such appropriate place.

While the Commission did adopt 6A1.5 a few years ago providing a policy statement reiterating the court's statutory requirements to ensure that the rights of victims under the CVRA and other federal law are followed, no commentary expands or interprets this guideline.

The VAG encourages the Commission to broadly review the guidelines and commentary, and to fully implement the provisions of the CVRA. We would be happy to provide suggested revisions to the guidelines to accomplish this goal.

In summary, thank you for providing this opportunity for the issues important to crime victims to be heard as you consider these important amendments.

Thanks.

CHAIR SARIS: Thank you. Judge Hinojosa.

COMMISSIONER HINOJOSA: Yes. I have several questions I guess on the issue of supervised release, mainly addressed to possibly different members of the panel.

I guess first to Ms. Yates as to how you would respond to Ms. McClellan's points that she has made that, with regards to revocation of supervised release, first of all a person who has been deported has received none of the benefits of the possible deterrence to commission of other offenses? There's been no supervision. There's been no drug treatment. There's been none of the other matters. It would be strictly a punishment.

And since we have eliminated parole in the United States, the view was that your sentence of imprisonment was the punishment and the portion of supervised release was to try to have you re-enter into society, as opposed to it's a way for us to make sure you get punished again.

Her other points that I would like to know how you would respond to are expense and the running

concurrent with regards to the different districts, that people get picked up at different places. Immediately they do get charged.

You expressed concerns about people coming back illegally, and not having the deterrence of a revocation. Well, if the deterrence of another prosecution is not enough, why would a deterrence of a revocation be some type of deterrence?

And are you concerned at all that there are thousands of people that get arrested on a daily basis that get just deported without any prosecution at all on the part of the Department of Justice and ICE on a pretty regular basis? And also, does it concern you that anybody who receives a sentence of less than one year at this point, it's optional as to whether we impose a supervised release term under the guidelines?

Do you find that concerning in the sense that those are usually the people that don't have any other kind of felony or aggravated felony, and all they would have is another illegal re-entry felony conviction if they came back?

And I know those are quite a few questions, but they've been addressed by Ms. McClellan and I wanted to know if you had a response, in addition to her final point, or one of her final points about it's not too hard to determine that somebody who is convicted of illegal re-entry is going to be deported. It's not too hard to determine that anybody that's got a felony conviction on a drug case by statute requires a supervised release, even if they're not citizens. And then we have that smaller number. And do you think it would be proper under the law for a judge to say I'm imposing a term of supervised release if you are not deported for this length of time, but if you are deported there would be no supervised release term?

VICE CHAIR CARR: Judge Hinojosa only sentences about 800 of these a year.

(Laughter.)

MS. YATES: Well, then I'm sure, Your Honor, you are much more familiar with these than am I. My district obviously is somewhat different than the district — that may be somewhat of an

understatement there.

COMMISSIONER HINOJOSA: That's why I was a little concerned as to some of the points that are made. Obviously they've been cleared through Main Justice, but it does appear that the points that have been made are not in touch with what's actually happening out in the places where the vast majority of these cases are being prosecuted.

MS. YATES: Well, and I'll try to go through each one of your points. If I miss something, please let me know if I haven't addressed it.

Certainly the position of the department is meant to be one that would reflect the totality of experiences in all districts. I don't pretend that it is necessarily going to be reflected by the same practice in all districts. I mean, we are all different, and we all have different priorities, and consequently we have to utilize our resources differently.

For example, in some districts, I believe the District of Arizona, when I was talking earlier,

they don't prosecute any illegal re-entries if it's not — if you don't have an aggravated felony.

That's not the case in many districts. For example, in the non-border districts where you have someone who is prosecuted and deported, supervised release is —

COMMISSIONER HINOJOSA: Well that's not the case in a lot of the border districts, either. I will tell you that in the two border districts of Texas, which have the biggest number of cases in the country, you get prosecuted even if you don't have an aggravated felony or a felony conviction, depending on how many times you've been prosecuted at the misdemeanor level.

MS. YATES: Well, and I would imagine, although I don't know exactly what their guidelines are, it would require a large number of re-entries before they would prosecute those. Would that be —

COMMISSIONER HINOJOSA: Actually, I'll just give you an example in the county division you need to have had about three misdemeanor convictions before you get to the felony level. So you've

developed quite the record already, and if you get picked up again, even if you don't have a supervised release, you're going to be prosecuted as a felon.

There will be no doubt. And it won't be — this whole condition of, special condition of you have to report to your probation officer if you come back illegally, well nobody is going to do that.

(Laughter.)

COMMISSIONER HINOJOSA: And that is not the first person they come in contact with. The first person they come in contact with is either the local law enforcement official who has made a call to ICE, or the ICE agent, the Border Patrol agent who makes the decision as to whether to prosecute those individuals or not.

The great thing now is that you immediately can find out from their fingerprint if they've been arrested before, no matter what name they have used, and if they have prior convictions. That did not used to be the case when I took the bench 28 years ago, and then it was really hard because everybody was using a different name every

time there was a stop.

But now it is easily determined what prior record is, no matter what name is used, and that decision is made immediately, not through the probation office but through the ICE agents, or the arresting officer, that this is going to be a prosecution or not.

MS. YATES: And I think that that would be a reflection sometimes of the different practices across the country. In talking with my probation office, for example, they've advised me that they are the ones who are contacted first —

COMMISSIONER HINOJOSA: By the law enforcement officials?

MS. YATES: By the locals, usually. And they don't contact ICE, they'll contact probation. Then probation will put a hold on them, and they'll come into federal custody that way, and then they work it out with ICE.

Certainly I recognize that there can be complications, depending on the type of district that you're in. But the position of the department is

that to eliminate supervised release for this broad category of defendants is unnecessarily taking away an option for most districts that use it.

COMMISSIONER HINOJOSA: I don't think it's an elimination. I think it would be optional with the court to make that decision as to whether this person would be on supervised release or not.

MS. YATES: But when the court is making that decision, the court doesn't know yet whether this is going to be someone who is going to come back again. And so for the period it would be used —

COMMISSIONER HINOJOSA: Well if they're going to come back again, they're going to be charged again.

MS. YATES: In some districts — in many districts, yes. But in some districts, not. They'll just do a supervised release —

CHAIR SARIS: Do you have statistics that would break this down as to how significant it is in various districts? Because it sounds as if a lot of districts it's irrelevant, they just prosecute. How often is the revocation used as a substitute for the

prosecution?

MS. YATES: I don't have statistics. It's more anecdotal discussion within the department when the department was generating the testimony. So I'm afraid I don't have statistics.

COMMISSIONER HINOJOSA: Would you be satisfied that those judges would make that decision in those districts to say, okay, I'm going to impose supervised release, as opposed to the judges that work in the districts where you know for a fact that they're going to be charged? Wouldn't that be the way to handle that? As opposed to across-the-board affect so many people in a way that doesn't fit what's happening in the different districts?

In addition to the other point, which is these are individuals that you would be using strictly for punishment. There has been no attempt to in any way rehabilitate those individuals. They have actually paid a higher price, which goes back to Ms. Brantley's point about how do you respond to the fact I'm being treated differently. Well we hear on a regular basis by these defendants, I'm being

treated very differently. I will be kept in detention until my deportation, past my imprisonment time. I will have had no benefit for any release time with regards to drug abuse treatment and counseling because I'm not eligible because I'm a noncitizen. I will not have a lot of the training that's available while I'm in the Bureau of Prisons. And so that cuts both ways as to where you're going to hear the argument in the courtroom.

And so are you concerned that these are people who have become recidivists but we haven't had any opportunity to help them with regards to re-entry?

MS. YATES: Well, yes, it certainly is punishment, but punishment is also deterrence. Knowing that you're going to be facing that punishment is part of what we believe helps to keep some of them from coming back again.

And just like a violation of other supervised release conditions, when someone is revoked for that, that is punishment for violation of those conditions.

So, yes, it's punishment, but from that punishment comes deterrence as well, or at least that's our position.

COMMISSIONER HINOJOSA: The other point that you made on the prior convictions that don't count for purposes of criminal history, I know you didn't get a chance to speak on that, but does it concern you, or do you think that there's an issue with regards to other places in the guidelines where they seem to be pretty serious violators, or they're not counted for enhancement purposes, when you don't count these prior convictions for criminal history?

MS. YATES: Well, I recognize that there is some symmetry to not counting the convictions in this instance, if they're too old for Criminal History, for instance. But I think, first when you look at the particular statute that we're dealing with here, it is inconsistent with the Congressional intent of 1326 for there to be an eject of these prior convictions.

Congress specifically chose not to include a provision in 1326 that would provide that old

convictions don't count, because we want to deter that particular class of defendants who have committed the worst crimes not to come back.

COMMISSIONER HINOJOSA: Right. But there would be, because instead of just an 8, there's an 8-plus there. In fact, the defenders are trying to make the point that you should lower everybody down.

There is still an enhancement of a plus-8, which is a pretty sizeable enhancement when you look at some of the other enhancements in the guidelines as to how you add points here. And so there would be the 8 plus the 8. And if it's just a felony, it's obviously a 4. And if you don't have a felony, it's no points other than the 8.

So there is still an enhancement to face up to the fact that the statute maximums are different.

MS. YATES: I think it's a question of where the default is. Yes, there is an enhancement there, but there's also a benefit in the sense that they're not getting the criminal history. And the issue from our perspective would be, do you default

to the larger, the plus-12 plus-16, and then the court has authority — and particularly in the post-*Booker* world now, and if the facts and circumstances of a particular case are one where the court doesn't believe that the 16 points are fully warranted, then the court doesn't have to impose the 12 or 16.

And I guess part of our concern —

COMMISSIONER HINOJOSA: Well, but our work as Commissioners is to make sure that the judges have guidelines that they feel satisfy all the [3553(a)] factors because certainly our responsibility as commissioners is to make sure that the guidelines satisfy all of the [3553(a)] factors.

And rather than for us to punt as a Commission and say, okay, well under the post-*Booker* world the judge can do whatever he or she wants anyway, we don't have to address this. If, considering all the factors together you feel that this is the way it should be, shouldn't we address it that way, as opposed to — we already have Application Notes about if any of this is excessive, or a criminal history representation, all those are

already there, the question is whether in the guideline manual where other serious offenses are treated differently, is there a particular reason in this case why this should be treated differently?

MS. YATES: Well I don't view it as punting, at all, because one concern I think that we have is that drawing on the age of the conviction is just one factor. And that oftentimes you will have a defendant who appears before you, and they may only have one conviction, and maybe it is an old conviction, but they may have re-entered five or six times during that time. They may have committed other offenses that don't qualify as aggravated felonies. That those are all factors that should be considered and can distinguish them between those defendants.

If the proposal does, does it take any of those factors into account? The only factor that's taken into account under the proposal is the age of the conviction. And we don't believe that that really adequately takes into account the full set of circumstances that the court can do now.

I guess, again, it's where the default —

COMMISSIONER HINOJOSA: But just to be clear, if they have any other re-entry convictions, they would be — and they are within the time periods, they will be counted in criminal history. I mean, it's just a question of whether you jump to a 16 on the really serious aggravated felony conviction when that one is really old, or any other new convictions of any other type. But obviously if they count the criminal history, you bump up your criminal history category.

MS. YATES: And so you count it on the horizontal axis on criminal history, but not necessarily then in the —

COMMISSIONER HINOJOSA: Well, new convictions would. But if one of them was a new aggravated felony, obviously you would have the plus-16 all over again.

MS. YATES: Reasonable people can differ.

CHAIR SARIS: Well does anybody — any other questions?

COMMISSIONER HINOJOSA: Did I take

everybody's time?

(Laughter.)

CHAIR SARIS: You did a good job. We've had an energetic discussion. So, anyway, thank you very much to everybody and we look forward to reading your additional remarks.

Thank you.

(Whereupon, at 2:04 p.m., Wednesday, February 16, 2011, the Commission hearing was adjourned.)