MEMORANDUM

TO: Bill Smith, Esquire
Attorney for John Doe

FROM: Meredith Patti, Esquire
Mary Cate Rush, Chief Statistician

DATE: June 13, 2019

SUBJECT: **DOE – USSG §2B1.1 FEDERAL SENTENCING DATA ANALYSIS (FSDA)**

Title 18 U.S.C. §3553(a)(6) directs that the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" be considered when imposing sentence. To this end, we were retained to prepare a data analysis to determine comparative sentences imposed on defendants most similar to Dr. Doe.

Dr. Doe pleaded guilty to Health Care Fraud in violation of 18 USC §1347 and will be sentenced in United States District Court for the Eastern District of New York. Dr. Doe is a Criminal History Category I (zero criminal history points) and is not receiving a substantial assistance downward departure pursuant to USSG §5K1.1. According to his Presentence Investigation Report (PSR), Dr. Doe is scored according to USSG §2B1.1 as follows: 6-level increase for Base Offense Level; 14-level increase for Loss; 2-level increase for Abuse of Trust/Special Skill under USSG §3B1.3; and 3-level decrease for Acceptance of Responsibility. Therefore, according to his PSR, Dr. Doe's Total Offense Level is 19 (30-37 months of imprisonment).

THE USSC DATABASE

The United States Sentencing Commission (USSC) maintains a comprehensive, computerized data collection system of federal sentencing information. Pursuant to 28 USC § 994(w) each chief judge of a district is required to ensure that within 30 days after entry of judgment in a criminal case the sentencing court submits a report of the sentence to the Commission that includes: (1) the judgment and commitment order; (2) the statement of reasons (including the reasons for any departures or variances); (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report; and (6) any other information the Commission needs.

This collection contains information on federal criminal cases sentenced under the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act of 1984. The data files included in this study contain all cases received by the USSC that were sentenced between October 1, 1998 and September 30, 2017. United States Federal Courts handled over 1.3 million criminal cases between the fiscal years 1999 and 2017.[1] The USSC estimates that 99% of all cases are included in this dataset.

DATA ANALYSIS

STEP 1:   For purposes of this analysis, we utilized the data sets for fiscal years 2002-2017 (see Step 3 for detailed explanation).

STEP 2:   Selected cases to include only those where the information related to a defendant's guideline calculation(s) represented known court findings. That is, only those cases where the court either agreed with the probation officer's calculations of the sentencing guidelines or where the court clearly documented any changes it made to a defendant's guideline calculation. Total cases = 1,046,195. (This represents approximately 87% of all cases.)

STEP 3:   Beginning in the November 2001 Guidelines Manual significant changes were made to USSG §2B1.1. Most notably, there were numerous changes made to the loss table in USSG §2B1.1(b)(1). In order to capture those cases most similar to the guideline under which Dr. Doe is scored, we selected only those cases where the defendant was scored according to USSG §2B1.1 using a 2001 or later Guidelines Manual.

> ➢ **930,075 cases Deleted**
> ➢ **116,120 cases Remain**

---

[1] The FY 2017 data was the most recent available when this analysis was completed. Data is now available through FY 2018.

STEP 4:   Dr. Doe is a Criminal History Category I and has no criminal history points. Deleted those cases where the defendant was not a Criminal History Category I or was a Criminal History Category I but had a criminal history point.

> ➢ **47,739 cases Deleted**
> ➢ **68,381 cases Remain**

STEP 5:   Dr. Doe entered into a plea agreement. Deleted those cases where the defendant was convicted after trial or the mode of conviction information was missing.

> ➢ **3,427 cases Deleted**
> ➢ **64,954 cases Remain**

STEP 6:   Dr. Doe's statute of conviction does not require a mandatory minimum sentence. Deleted those cases where the defendant's statute(s) of conviction required a mandatory minimum sentence or the information related to a mandatory minimum sentence was missing.

> ➢ **2,321 cases Deleted**
> ➢ **62,633 cases Remain**

STEP 7:   Examined each case to determine if it contained missing or incomplete sentencing information. Deleted those cases that contained missing or incomplete sentencing information.

> ➢ **54 cases Deleted**
> ➢ **62,579 cases Remain**

STEP 8:   Examined each case to determine if it contained missing or incomplete loss information. Deleted those cases that contained missing or incomplete loss information.

> ➢ **25 cases Deleted**
> ➢ **62,554 cases Remain**

STEP 9:   It is not expected that Dr. Doe will receive a substantial assistance downward departure pursuant to USSG §5K1.1. Deleted those cases where the defendant received a USSG §5K1.1 downward departure.

> ➢ **9,134 cases Deleted**
> ➢ **53,420 cases Remain**

STEP 10:   Dr. Doe pleaded guilty to violating 18 USC §1347. Deleted those cases where the defendant violated a statute other than 18 USC §1347 or violated 18 USC §1347 but also violated another statute.

> ➢ **52,667 cases Deleted**
> ➢ **753 cases Remain**

STEP 11:   For these 753 cases, calculated how many defendants were sentenced to a term of imprisonment versus those receiving a probationary/fine only sentence or a sentence of time served and determined the average sentence imposed for each loss category (see Table A).

FINDINGS

Table A					
Guilty-Pleading, Criminal History Category I Defendants (zero points) **Scored According to USSG §2B1.1** **Who Violated 18 USC §1347 (only)** **(Excludes Defendants Who Received a USSG §5K1.1 Departure)** **National – FY 2002-2017**					
Level Increase for Loss	**Total Cases**	**Probation**	**Prison**	**Time Served** (term unspecified)	**Average Sentence**[2]
0-4	n=147	132 (89.8%)	15 (10.2%)	0 (0.0%)	0.5 MO
6	n=102	66 (64.7%)	35 (34.3%)	1 (1.0%)	2.4 MO
8	n=68	25 (36.8%)	43 (63.2%)	0 (0.0%)	6.1 MO
10	n=68	26 (38.2%)	42 (61.8%)	0 (0.0%)	9.0 MO
12	n=68	19 (27.9%)	49 (72.1%)	0 (0.0%)	13.0 MO
14	n=108	12 (11.1%)	96 (88.9%)	0 (0.0%)	21.4 MO
16	n=118	4 (3.4%)	114 (96.6%)	0 (0.0%)	32.9 MO
18 and Over	n=74	0 (0.0%)	74 (100.0%)	0 (0.0%)	47.9 MO
All Cases	n=753	284 (37.7%)	468 (62.2%)	1 (0.1%)	15.9 MO

NOTE: Percentages may not equal 100% due to rounding.

---

[2] Defendants sentenced to Time Served (term unspecified) were excluded. The USSC data files do not contain the precise amount of time these defendants served and therefore cannot be included in the calculation of an average sentence. Further, for purposes of this calculation, defendants sentenced to probation are counted as zero months.

FINDINGS

- As shown in Table A, there were 108 defendants who violated 18 USC §1347 (only) and received a 14-level increase for loss. Of the 108 defendants, 12 of these defendants (11.1%) received a probationary sentence and 96 defendants (88.9%) were sentenced to a term of imprisonment. The average sentence imposed on these 108 defendants was 21.4 months of imprisonment.

    - Of the 108 defendants who violated 18 USC §1347 (only) and received a 14-level increase for loss, 10 of these defendants were sentenced in the **Second Circuit**. Of these 10 defendants, 2 defendants (20.0%) received a probationary sentence and 8 defendants (80.0%) were sentenced to a term of imprisonment. The average sentence imposed on these 10 defendants was 15.9 months of imprisonment.

    - Of the 10 defendants sentenced in the Second Circuit who violated 18 USC §1347 (only) and received a 14-level increase for loss, 3 of these defendants were sentenced in the **Eastern District of New York**. Of these 3 defendants, 1 defendant (33.3%) received a probationary sentence and 2 defendants (66.7%) were sentenced to a term of imprisonment. The average sentence imposed on these 3 defendants was 11.3 months of imprisonment.

- For the 108 defendants who violated 18 USC §1347 (only) and received a 14-level increase for loss we tallied the total number of cases where the defendant received a sentence below the applicable guideline range, within the applicable guideline range, or above the applicable guideline range. Table B illustrates these findings.

Table B **Guilty Pleading, Criminal History Category I Defendants** **(Zero Criminal History Points)** **Scored According to USSG §2B1.1** **Who Violated 18 USC §1347 (only)** **Who Did Not Receive a USSG §5K1.1 Downward Departure** **14-Level Increase for Loss** **National – FY 2002-2017**		
Category	**No. of Cases**	**Percentage**
Below Guideline Range	52	48.1%
Within Guideline Range	55	50.9%
Above Guideline Range	1	0.9%
Total	**108**	**100.0%**

NOTE: Percentages may not equal 100% due to rounding.

- For the 52 defendants who received a sentence below the advisory guideline range, courts departed on average 55.9% below the guideline minimum.

Precise Guideline Calculation

- Of the 108 defendants who violated 18 USC §1347 (only) and received a 14-level increase for loss, 17 of these defendants had the following guideline scoring: 6-level increase for Base Offense Level; 14-level increase for Loss; 2-level increase for Abuse of Trust/Special Skill under USSG §3B1.3; and 3-level decrease for Acceptance of Responsibility. Of these 17 defendants, 2 defendants (11.8%) received a probationary sentence and 15 defendants (88.2%) were sentenced to a term of imprisonment. The average sentence imposed on these 17 defendants was 16.6 months of imprisonment.

  - Of these 17 defendants, 3 defendants were sentenced in the **Second Circuit**. All 3 of these defendants were sentenced to a term of imprisonment and the average sentence imposed was 19.0 months of imprisonment.

  - Of these 3 defendants sentenced in the Second Circuit, 1 defendant was sentenced in the **Eastern District of New York**. This defendant was sentenced to 22.0 months of imprisonment.

Precise Guideline Calculation – Focus on Possible Downward Variance/Departure

- It is our understanding that Dr. Doe will request that he be sentenced below the guideline minimum because he has made significant efforts toward satisfying his restitution obligation. Of the 17 defendants scored precisely the same as Dr. Doe, 1 defendant had **"Restitution"** listed as a reason for downward departure/variance. This defendant was sentenced to 1 year and 1 day of imprisonment. This defendant was sentenced in the Eighth Circuit.

- Additionally, it is our understanding that Dr. Doe will request that he be sentenced below the guideline minimum because he suffers from psychological issues. Of the 17 defendants scored precisely the same as Dr. Doe, 1 defendant had **"Mental & Emotional Conditions"** listed as a reason for downward departure/variance. This defendant was sentenced to 1 year and 1 day of imprisonment. This defendant was sentenced in the Eighth Circuit.

- Finally, it is our understanding that Dr. Doe will request that he be sentenced below the guideline minimum because he will lose his medical license. Of the 17 defendants scored precisely the same as Dr. Doe, 2 defendants had **"Lost Job/Punishment Enough"** listed as a reason for downward departure/variance. Of these 2 defendants, 1 defendant (50.0%) received a probationary sentence and 1 defendant (50.0%) was sentence to 1 day of imprisonment. Neither of these defendants were sentenced in the Second Circuit.