

**PROBATION OFFICERS' ADVISORY GROUP**  
**to the United States Sentencing Commission**

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September 30, 1997

The Honorable Richard P. Conaboy, Chairman  
U.S. Sentencing Commission  
Thurgood Marshall Building  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Dear Judge Conaboy,

On behalf of the Probation Officers Advisory Group, I would like to thank you for inviting us to the Commission to have input into the current deliberations of the Commissioners in regard to fraud, circuit conflicts, and manslaughter. After being briefed on these issues, the Advisory Group made several suggestions with regard to possible amendments and/or modifications to the Sentencing Guidelines. The attached is our position paper in regard to the issues discussed.

Besides making recommendations to the Commission about the above mentioned issues, the Probation Officers Advisory Group also raised a couple of issues that concerned probation officers throughout the country. In addition, we also made some recommendations as to administrative matters. We hope that the Commission will consider our suggestions and recommendations.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Gregory A. Hunt, Chairperson  
D.C. Circuit Representative

**Statement of  
United States Probation Officer Gregory A. Hunt  
Chairperson, Probation Officers' Advisory Group  
To the United States Sentencing Commission**

October 15, 1997

The Probation Officers' Advisory Group thanks Judge Conaboy and the Sentencing Commission for allowing me to testify today in regard to possible modifications in the Sentencing Guidelines concerning loss issues.

**Introduction**

The Probation Officers throughout the country believe that the loss issue is a very complex and contentious issue, and resolving issues surrounding loss have to be approached with great trepidation as changes will have a dramatic impact on the Courts and the defendants being sentenced. It is for this reason that Probation Officers believe that any changes in the definition of loss should be directed towards simplification and more clearly defining the terms used in the application notes. Any changes that would result in greater complexity of the guidelines are opposed by Probation Officers for fear of greater misinterpretation and disparity in their application. We firmly believe that unusual circumstances should not be addressed by the guidelines, except to enunciate that such circumstances should be resolved through departures. It is with these thoughts in mind that the Probation Officers' Advisory Group responds to the Commissions' request for our input in regard to problems associated with loss.

First, at our recent meeting, Probation Officers did not raise the issue of loss as one of their principle concerns. On the other hand, during discussions, they expressed some concern about the complexity of determining loss in some cases and the disparity that occurs through the different interpretations of the guideline's commentary. Of greater concern to Probation Officers was fact bargaining in fraud cases. Probation Officers described numerous circumstances in which facts were stipulated to by the defendant and the Government, when in actuality the losses were greater than the stipulation. The results of such stipulations were to circumvent the harsher sentences that the guidelines required. Probation Officers acknowledge that such stipulations are often the result of the Government's avoidance of pursuing a complex and expensive trial. On the other hand, such stipulations often handcuff the Court and the Probation Officer and belie the guidelines. However, the Probation Officers understand the limited ability that the Sentencing Commission has to effectuate any change in regard to the plea bargaining process. This is an issue that might be pursued with the Department of Justice.

In regard to the proposed modified loss table, the Probation Officers were quite effusive about the streamlining and increased severity of the loss table and they whole heartedly support its adoption. Most Probation Officers believe that the guidelines are too low for white collar offenders. In addition, "more than minimal planning" is an issue that is often disputed, but

appears to apply in every case in which there is a substantial fraud. However, Probation Officers also believe that the Commission should also consider simplification of the definition of loss at the same time. Although the Probation Officers believe that changing the two at the same time would be beneficial, the officers acknowledge that modifying both at this time may be impractical. Therefore, they support the adoption of the proposed table. They also recommend that the current table be maintained in the guidelines for other guidelines that refer to the loss table. Adopting the new table for the referring guidelines would increase sentences for offenses that do not need increases, such as bribery.

Second, the Probation Officers were unified in their opinion that unusual cases should be addressed through departures. So often unusual cases are the ones that cause litigation and disputed issues. However, the Sentencing Guidelines cannot possibly address all of them and such decisions should be left to the District Court.

In regard to specific loss issues, the following are Probation Officers' responses to these issues.

#### **Actual Loss**

First, in regard to causation, Probation Officers do not believe the guideline commentary should be modified to reflect "unforeseen losses." We do believe that the commentary should be amended to include a statement that such circumstances should be addressed through departures.

In regard to consequential damages, Probation Officers take the stance that consequential damages should only be considered in procurement fraud and product substitution cases as already provided for in the guidelines. Again the Probation Officers are supportive of an amended commentary that would state that consequential damages should not be used to determine loss and that in cases in which there is minimal loss, but severe consequential damages, an upward departure is appropriate.

Probation Officers do not believe that interest should ever be considered part of loss. The Probation Officers believe the guideline's commentary should be more clear that interest should not be considered.

Probation Officers, in regard to credits towards loss, believe the Commission should clarify in the commentary whether loss is net or gross loss. They agree that the Commission should provide "a general principle that the amount of loss shall be reduced by the money, property, ..., or pledged to, the victim in connection with, and prior to discovery of, the offense." In making this determination, Probation Officers recommend that the Commission focus on the "heartland" of cases. The Probation do not believe that the defendant in Ponzi schemes should receive credit for moneys that the earlier victims received from the scheme. On the other hand,

this money should be credited towards determining restitution. The Officers do not feel that “services” rendered should be used to offset losses. Finally, the Probation Officers believe, in crediting loss with the value of pledged collateral, the value of the collateral should be determined by the value of the collateral at the time of the offense. This determination should not be prolonged or complicated by the Court considering subsequent fluctuations to the value of the collateral based on the changing market conditions.

In regard to diversion of government benefits, the Probation Officers believe the court should be granted great deference in making such determinations, both in the determination of loss and gain, and in the decision to depart.

#### **Alternatives to Actual Loss**

In regard to intended loss, the Probation Officer agreed that such circumstances should be treated in the same manner as drug and counterfeit cases. In those cases, the defendants are held accountable for the amount that they negotiated or attempted to negotiate unless there is a more exact amount.

In regard to whether gain should be considered as an alternative analysis when loss is difficult to determine, the Probation Officers felt that the guidelines should explicitly state that gain may only be used if there is a loss (i.e. gain cannot be used if loss is zero) and it is difficult to estimate. If gain exceeds the loss, it may be grounds for departure. The guidelines should also clarify that gains usually means net gains and not gross proceeds. The Probation Officers believe that this option will clarify the use of gain as an alternative measure to loss.

Probation Officer do not believe any amendment is needed in regard to risk of loss.

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September 30, 1997

### **POSITION PAPER: PROBATION OFFICERS' ADVISORY GROUP**

The Probation Officers' Advisory Group (POAG) met at the U.S. Sentencing Commission on September 10 and 11, 1997. The Commission presented several issues for the POAG to consider. Issues that were raised by the Commission staff concerned the newly created Fraud Table, the definition of "loss," increasing or changing the guidelines for Manslaughter, and resolving several circuit conflicts. In addition, the POAG members raised and discussed some of their own issues concerning the guidelines. The following are the results of our discussions.:

## FRAUD

### FRAUD TABLE

One of the first issues presented to the POAG representatives was the Fraud Table. The members of the POAG unanimously supported the change in the Fraud Table, especially incorporating “more than minimal planning” into that table. Members also believed that the definition of “loss” should be addressed simultaneously with the dissemination of the table. However, if the Commission does not revise the definition of “loss” at this time, the POAG members supported the revision in the Fraud Table. In a related issue, the POAG members believed that the current Fraud Table should be maintained in another section of the guidelines to ensure that the changes in the Fraud Table will not affect the referring guidelines, i.e. bribery, etc.

### LOSS

In regard to loss issues, the POAG reviewed the eight issues that were presented to them in regard to possible changes in determining loss issues. The first issue the group considered was the issue of causation. The group indicated that it generally feels that the guidelines need to be simplified, and introducing causation would greatly increase the complexity of the guidelines. Therefore, the group was strongly opposed to the introduction of causation into the determination of loss.

The next issue concerned consequential damages. The POAG indicated that they concurred with the language developed by the staff of the Commission. The language explicitly directs that consideration of consequential damages may only apply to contract procurement and product substitution cases. In regard to interest, the group indicated that interest should never be considered as part of loss.

In regard to whether gain should be considered as an alternative analysis when loss is difficult to determine, the group felt that the actions suggested by the working paper were appropriate. In that option, the guideline would explicitly state that gain may only be used if there is a loss (i.e. gain cannot be used if loss is zero) and it is difficult to estimate. If gain exceeds the loss, it may be grounds for departure. The guidelines should also clarify that gain usually means net gain and not gross proceeds. The POAG agreed with this option and indicated that this will clarify the use of gain as an alternative measure to loss.

In regard to risk of loss, the group concurred with the option presented in the working paper which is that no amendment is needed.

Concerning using determination of credits to reduce loss, the POAG indicated that the

Commission should clarify whether loss is net or gross. In making this determination, the POAG indicated that the Commission should focus on the heartland of cases. The group also indicated that, in regard to Ponzi schemes, money paid to earlier victims should not be credited to determine the guideline loss amount. On the other hand, this money should be credited for purposes of determining a restitution figure. The POAG indicated that losses should not be offset by “services” rendered. With regard to the options in the working paper, the POAG indicated that both options should be added to clarify this issue. The group believed in regard to crediting loss with the value of pledged collateral, the value of the collateral should be determined by the value of the collateral at the time of the offense. This determination should not be prolonged or complicated by the Court considering subsequent fluctuations to the value of the collateral based on the changing market conditions.

In regard to intended loss, the POAG felt that the position adopted by the seventh circuit in the case of *U.S. v. Sung*, 51 F. 3<sup>rd</sup> 92, in which intended loss encompasses only those losses that stood a realistic chance of occurring, is the appropriate position.

The last issue raised with regard to loss was diversion of government benefits. The POAG adopted the position of the working paper. The working paper gives the court great deference in making such a determination in these cases, both in the determination of loss and gain, and in the decision to depart in special cases.

### **MANSLAUGHTER**

The POAG members discussed the issues raised by the presentation provided to us by the staff of the Commission in regard to possible amendments to the manslaughter guidelines. The members felt that they had too little information from the field (i.e., Probation Officers) to make a recommendation to the Commission about possible amendments. None of the representatives had a personal knowledge about the manslaughter guidelines as none of them was involved in any such investigations. The group decided that it needed to receive input from the probation officers located in areas where Native Americans reside and that we should survey those district’s offices.

### **CIRCUIT CONFLICTS**

In regard to the circuit conflicts, the first issue that the POAG members addressed was a departure for aberrant behavior. The group supported the draft language by the Judges’ Committee with regard to this issue. The group felt that a “single act” was hard to define, but it did agree that a “single act” is the most appropriate definition of aberrant behavior. In addition, the group suggested that the language be changed in the first paragraph to include “all relevant conduct.” The group suggested the rephrasing would be as follows: “If the conduct comprising the offense of conviction and *all relevant conduct* represent a single act of aberrant behavior by

the defendant...” The POAG also recommended that the identification of aberrant behavior as a potential grounds for departure be moved from Chapter 1 and placed in Chapter 5 of the Guidelines Manual.

The second circuit conflict issue that the group discussed was whether falsifying bankruptcy schedules constitutes a “violation of any judicial...order” under 2F1.1 (b)(3)(B). The POAG did not believe that this enhancement should apply to bankruptcy fraud as the false statement to the Bankruptcy Court is the basis for the offense of conviction. However, the group recommended that the Commission provide clarifying language to address this circuit conflict.

The third issue concerning circuit conflicts was whether a representative of an agency, who misapplies or embezzles funds, should receive an enhancement for misrepresentation on behalf of a charitable organization under § 2F1.1(b)(3)(A). The POAG believed that the enhancement should not apply when the defendant is soliciting the funds personally. In other words, if the defendant was working at a charitable organization, but not soliciting funds, this enhancement would not apply. The group felt that this enhancement should only apply in those cases in which the defendant is misrepresenting that he is acting on behalf of the charitable organization. The POAG firmly believed that the victims’ point of view should be a controlling factor in determining whether to apply this enhancement.

The fourth circuit conflict issue that was discussed was whether or not abuse of a position of trust enhancement to a defendant who falsely represented himself as someone else (imposter) should be considered. The POAG felt that the imposter may be in a position of trust. Once again, the group felt that the guidelines should adopt the perspective of the victim as to whether there is a violation of trust.

The fifth issue concerning circuit conflicts was whether obstruction of justice may be applied based on conduct solely related to, but not part of, the offense of conviction. The POAG was of the opinion that this problem has not surfaced enough to warrant comment.

The sixth issue concerning circuit conflicts was whether obstruction of justice may be based on a failure to admit to the use of a controlled substance while on pretrial release. The POAG believed that this is a treatment issue and not an obstruction of justice issue. On the other hand, the defendant’s failure to disclose the use of a controlled substance could be an issue for determining acceptance of responsibility.

The seventh issue concerning circuit conflicts was whether failure to appear should be grouped with the underlying offense when the offense had been enhanced for obstruction. The group felt that this conflict is not a priority, as most judges and probation officers know how to handle these cases. The POAG indicated that if there were no incremental increase after the Multiple-Count Rules have been applied, the Court should depart upward from the guideline range.

The eighth issue discussed concerning circuit conflicts was whether a sentence to

community confinement (halfway house) qualifies as “incarceration” under §§4A1.2(d)(2) and (e)(1). The group felt that it was most important to determine the precise language of the sentence. When the defendant is sentenced to a period of custody to the Bureau of Prisons or a state Department of Corrections, the POAG believes that the sentence is a period of confinement. On the other hand, when the defendant is sentenced directly to a halfway house as part of a probation or supervised release term, this should not be considered confinement. It was recommended that the Commission more clearly define confinement and explicitly state how community confinement should be counted. While making these determinations, the Commission should take into account the issues raised in § 4A1.3 (Adequacy of Criminal History Category). For example, it is likely that a person, who is ordered directly by the Court into a community confinement center, has a less serious criminal history than someone who is placed directly into the custody of a department of corrections, and then placed into a community confinement center. The POAG suggested that the Commission review the procedures used by the Bureau of Prisons to determine credit for time served in community treatment centers. In addition, it was recommended that the Commission better define the term of incarceration, while also considering the impact to § 4A1.2(k) (revocations). There should also be consistency between Chapter 4 and Chapter 7 in regard to the definition of confinement and counting sentences involving community confinement.

The last issue, issue number nine of the circuit conflicts, concerned whether “non-violent offenses” in § 5K2.13 (diminished capacity) should be consistent with “crime of violence” under § 4B1.2 (career offender). The POAG indicated that consistency between these two sections would be appropriate.

### **THE POAG ISSUES**

As previously stated, the members of the POAG also had some issues that they wanted to present to the Commission. The first issue concerned plea bargaining and fact bargaining in cases that are pending sentencing. The members of the group felt that this is an extremely important issue that needs to be addressed by the Commission. In addition, officers are still in favor of more alternatives for first offenders, and maybe even a first offender criminal history category. In regard to administrative matters, the POAG would like to meet at least twice annually at the Commission in order to facilitate continuity, communication, and effectiveness. In addition, the group would appreciate receiving materials from the Commission well in advance of the meeting, allowing for the representatives to solicit opinions or comments from the field. Also, the POAG members would like to meet for three days. The members indicated that there was insufficient time to complete all of their work within two days. It was especially difficult for members who had to travel great distances. Many of those members missed the end of the second day’s meeting in order to catch a flight out of Washington, D.C. Lastly, the group wanted to have at least someone representing the group at each of the open meetings of the Commission. In addition, the group requested members other than the D.C. representative periodically be allowed to come to these meetings in the future.