

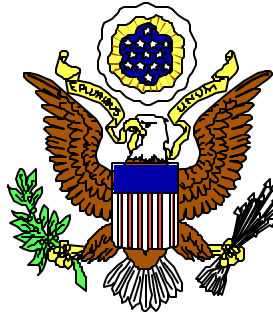
PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

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November 18, 2002

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) had a telephone conference call with the Commission Staff on October 31, 2002 to discuss the directives recently passed in the Sarbanes-Oxley bill resulting in the proposed emergency amendments for Corporate Fraud and Campaign Finance Reform. The following is POAG's position on these proposals:

Proposed Amendment: Corporate Fraud

Based on the material submitted to POAG, the members unanimously chose Option 1 which expanded the victims table in USSG § 2B1.1(b)(2). Currently, there is no distinction in large telemarketing fraud cases which involve fifty-one victims versus hundreds of victims, yet the impact a defendant has on the number of lives he/she defrauded warrants an increase in punishment. Members firmly believe that Option 2 involving upward departures would be used infrequently by the Courts as evidenced by the current statistics published by the Commission. The proposed increase of two levels if the offense involved 250 victims or more would not pose any application difficulties for officers and should not result in any increased litigation at sentencing hearings.

Regarding the proposal pertaining to offenses endangering the solvency or financial security of a substantial number

of victims, POAG supports an enhancement that avoids probation officer determination as to whether the offense endangered the solvency or financial security of each individual victim as this would be extremely cumbersome, time consuming, and problematic both in preparing the presentence report and resolving objections filed by counsel. POAG supports extending the enhancement to include other organizations involving 200 employees. The working definitions in the application note are much appreciated and provide officers direction in application of this enhancement. Additionally, POAG realizes that harm caused by an individual of an organization which is not publically traded could still undermine public confidence.

POAG also supports the new two-level enhancement pertaining to fraud offenses committed by officers or directors of publicly traded corporations, although, the group has not reached consensus on whether it should also apply to a broker or dealer. Overall, members believe that it may be a fact based determination for each case as to whether a registered broker or dealer abused their position when committing the crime, similar to a bank employee committing a bank fraud. However, if it is shown that the broker or dealer abused a heightened position of trust to their investors, then a Chapter Three enhancement could be applied. POAG does recognize that if this application is applied in this manner, then a corporation would not receive this enhancement. At this time, POAG does not have an opinion on whether a minimum offense level should be established.

Members of POAG have consistently advocated for an increase in the loss table. We strongly support an increase in the table for losses exceeding \$100,000,000 and more than \$250,000,000. In addition, we also encourage the Commission to either increase the base offense level for this guideline and/or increase the loss table at the lower end. Traditionally, white collar offenders have been treated very leniently by the guidelines and this pattern has continued with the changes implemented to the lower end of the loss table this past year. With the change in the statutory maximum penalties for wire fraud and mail fraud, this seems to be the appropriate time to expand, not only the upper end of the loss table, but also the rest of the table. Based on past sentencing statistics, it appears that the majority of the fraud cases prosecuted involved loss figures of less than \$70,000. These cases, while not high profile like the recent events involving Enron and Arthur Anderson, have a greater impact on the public as a whole.

POAG supports the directive for a new two level enhancement pertaining to U.S.S.G. § 2J1.2, Obstruction of Justice and agrees this enhancement should also be made to perjury offenses. Perjury undermines the foundation of our court system and the current SOC at U.S.S.G. § 2J1.3(b)(2) does not address this issue, especially if the defendant is smart enough to insulate themselves from being directly involved in this conduct. In addition, POAG agrees that sentencing proportionality between the two types of offenses should be maintained.

The group agrees that a new guideline should be promulgated to address offenses cited in 18 U.S.C. § 1520 with cross reference application to cover fraud and obstruction of justice offenses.

Proposed Amendment - Campaign Finance Reform

A new guideline for these offenses should be promulgated rather than amending an existing guideline. POAG supports a base offense level of eight which would appear to be proportional to the guidelines involving some form of public corruption (e.g. U.S.S.G. § 2C1.5, Payments to obtain Public Office). In addition, by cross referencing the dollar amount to the fraud loss table, discrepancies between the guidelines are minimized. Commentary notes regarding definitions are extremely helpful to probation officers in making decisions on whether an enhancement should apply. The current version references certain code sections in the Federal Election Campaign Act which may not be easily accessible to the officer. This same situation has posed difficulty in application of U.S.S.G. §

2D1.1(b)(5)(A) where three acts are referenced and no specifics are provided. Therefore, POAG would recommend including the actual definitions in the commentary and/or providing examples of the definitions. This would ease the application process of the new guideline.

As always, the Probation Officers Advisory Group appreciates the opportunity to respond and to address issues pertaining to the Sentencing Guidelines.

Sincerely,

Cathy A. Battistelli
Chair