

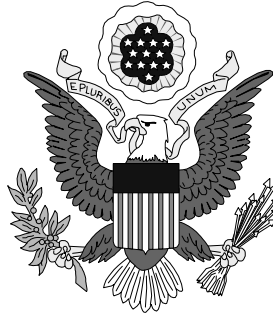
PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

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March 18, 2005

The Honorable Ricardo H. Hinojosa, 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 Hinojosa:

While the Probation Officers Advisory Group (POAG) did not have the opportunity to meet in Washington for our spring meeting, we have formulated comments and recommendations to the United States Sentencing Commission regarding the proposed amendments published for comment in February 2005. We are submitting comments relating to the following proposed amendments.

Revised Proposed Amendment: Aggravated Identity Theft

POAG does not see any application issue relative to the establishment of the new guideline, USSG §2B1.6. However, we suggest that the application notes contain a reference similar to USSG §2K2.4, comment. (n.5), explaining the rationale for not applying Chapters Three or Four to this type of offense and including references to §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and §5G1.2. As a practical manner, we propose additional language be added in the application notes regarding terms of Supervised Release and fine amounts similar to the wording found in §2K2.4 for cases in which the defendant is charged with a single count of 18 U.S.C. § 1028A.

While POAG does not see any difficulty in adding the language to §3B1.3, comment. (n.1[B]), there is a concern regarding note 5. Officers do not know whether a base offense level has incorporated a specific factor unless it is written in the guidelines. Therefore, we suggest if there are specific base offense levels that incorporate this factor, there be some mention in the applicable guidelines.

POAG agrees with and appreciates the Commission's attempt to simplify the application of §2B1.1(b)(10).

Regarding USSG §5G1.2, Issue for Comment, POAG believes that disproportionate sentences may arise from multiple convictions of Identity Theft depending on the various AUSA's charging practices. A comparison was made to cases involving smuggling illegal aliens. In some districts, the prosecutor may charge defendants per individual smuggled, thus subjecting them to multiple mandatory minimum, consecutive sentences for a small number of people. However, in other areas of the country, the prosecution charges by occasion and individuals receive lesser sentences for smuggling hundreds of people. More guidance in §5G1.2 with examples would be beneficial.

Revised Proposed Amendment: Antitrust Offenses

POAG has limited experience with this guideline and does not take a position on a specific base offense level as this is a policy decision for the Commission to determine.

Proposed Amendment: Miscellaneous Amendments Package

There are only three issues in this package on which POAG wishes to comment. While POAG appreciates the attempt to simplify the cross reference application problems which currently exist at §2B1.1(c)(3), the cross reference is still very general in nature and does not address the situation in which a defendant lies to a law enforcement agent about the underlying crime. For example, a defendant lies to the FBI about having been kidnaped and attempts to extort money from family members, but is convicted of making a false statement, a violation of 18 U.S.C. § 1001. Should this case remain in §2B1.1 or should there be a cross reference application? Perhaps, further instructions or guidance could be added to the commentary, or the cross reference provision be eliminated.

Section C of the Miscellaneous Package references the correction of the title change to §5C1.2 in §5D1.1. It was noted by some members that additional wording regarding this issue should be added to §5C1.2 as well, as many practitioners may not proceed to §5D1.2.

Finally, POAG has some concern about the proposed change in the sentencing table regarding level 43. While we do not take a position on the policy decision regarding the proposed §3F1.1, we have concern with the change in level 43 from a life sentence to 360 to life. With this change there will be no difference in a level 42 or 43 in any of the criminal history categories. This would appear to be the only situation in the sentencing table where two offense levels have the identical sentencing options.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Sincerely,

Cathy A. Battistelli
Chair