PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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The Honorable William K. Sessions III, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20008-8002

Re: Notice of Proposed Priorities

Dear Judge Sessions:

The Probation Officers Advisory Group ("POAG") met in Washington, D.C. between July 21 and 22, 2010, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. POAG comments on the following selected Proposed Priorities and proposes additional issues for consideration.

Proposed Priority No. 2

In connection with the Commission's review of the "safety valve," POAG offers two comments. First, POAG urges that the two-level safety valve reduction specified at U.S.S.G. §2D1.1(b)(11) be added to U.S.S.G. §2D1.11. Without this change, a defendant convicted of an offense involving a precursor chemical, such as pseudoephedrine, could end up with a higher offense level than the defendant convicted of an offense involving the actual chemical, such as methamphetamine.

Second, POAG believes that the Commission should consider whether the safety valve should also be applied to defendants in Criminal History Category II. For example, if a defendant is convicted of driving with a suspended license and is placed on probation for more than a year, that defendant would end up with three criminal history points and would become ineligible for the safety valve (if the offense occurred while the defendant was on probation). In comparison, another defendant who is also convicted of driving with a suspended license but instead is sent to jail for 45 days would end up with one criminal history point and would be eligible for the safety valve. Is that the result intended? If not, perhaps safety valve eligibility could be expanded to include defendants with up to three criminal history points, so long as the points all stem from a single conviction.

Proposed Priority No. 4

POAG would like to see greater clarification of the definition of intended loss with respect to health care fraud. The new legislation states that *prima facie* evidence of loss is the billed amount. It is unclear to POAG whether Congress meant that all billed amounts (even when legitimate expenses are combined with illegitimate expenses) are to be considered as intended loss. Did the burden shift to the defense to prove the legitimacy of some of the expenses? If so, POAG is concerned that often, all of the defendant's records have been seized by the time of sentencing. If the burden to reduce loss shifts to the defendant are there any fairness issues raised when much, if not all, of the defendant's records have been seized?

Further, for health care fraud offenses, POAG has learned there is an inconsistent application among the districts, if not circuits, in applying a role adjustment for defendants dealing in Durable Medical Equipment (DME) with respect to U.S.S.G. §3B1.3 abusing a position of trust. The 5th Circuit has found such an application does apply (see U.S. v. Miller, 607 F.3d 144) while districts in other circuits never apply the adjustment. Due to a greater emphasis on health care fraud, the Commission may wish to address this inconsistency.

Proposed Priority No. 6

POAG agrees that the Commission should continue its review of child pornography offenses, including the incidences of, and reasons for, departures and variances from the guideline sentence and an analysis of recidivism by child pornography offenders.

POAG discussed, at length, the cumulative effect of the specific offense characteristics (SOCs) associated with the child pornography guidelines, specifically, U.S.S.G. §2G2.2 and the disproportionally high sentencing ranges resulting from these enhancements. In sum, POAG believes that for "possession only" cases, the guidelines may be too severe. Further,

many judges seem to share this belief, based on the departures and variances granted during sentencings on these cases and the recent judges' survey.

In the recent Appellate Court's decision, United States v. Dorvee, 2010 WL 1852930 (C.A.2), the Court discussed the "irrationality" of §2G2.2. Specifically, the Court found that many of the §2G2.2 enhancements apply in nearly all cases and routinely result in sentencing ranges near or exceeding the statutory maximum. The Court noted that an ordinary first-time offender is likely to qualify for a sentence of at least 168 to 210 months, based solely on enhancements that are all but inherent to the crime of conviction. Consequently, adherence to the Guidelines results in virtually no distinction between run-of-the-mill defendants, and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories. The Court then noted that this result is fundamentally incompatible with 18 U.S.C. §3553(a). Furthermore, the Court pointed out that had Dorvee actually engaged in sexual conduct with a minor, his applicable guideline range could have been considerably lower.

POAG therefore proposes that for possession only cases, there be a cap set in the Guidelines (similar to U.S.S.G. §2K2.1 offenses), in order to achieve a "reasonable sentence." The Commission might consider either including language in the Guidelines that addresses a "pattern of activity," (i.e. two or more incidents of possession) with respect to possession only cases that would trigger a higher base offense level or add a new SOC.

Proposed Priority No. 7

POAG discussed incorporating evidence-based criteria in U.S.S.G. §§ 5H and 5K. As the Commission has noted, there is an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased reliance on variances. POAG postulated that providing evidence-based reasons for departures would assist Courts in formulating departures based on specific offender characteristics. Risk of recidivism and public safety were noted as considerations of Courts in deciding the appropriateness of a departure and POAG believes that evidence-based research would prove helpful in these considerations. The Commission may consider making evidence-based data available on-line, so that it can be kept up-to-date and is readily available as needed.

Proposed Priority No. 8

POAG believes the simplification of U.S.S.G. §2L1.2 remains an important concern. POAG encourages the Sentencing Commission to continue examining U.S.S.G. §2L1.2 and work toward simplifying this guideline and its definitions. Additionally, POAG encourages the Commission to continue to examine the possible consideration of an amendment to provide

an alternative approach to the "categorical approach" for determining the applicability of guideline enhancements.

Across the United States, Probation Officers are struggling with the application of the 16-level enhancement pursuant to U.S.S.G. §2L1.2(b)(1)(A)(ii), "crime of violence." Given recent Circuit Court opinions, Probation Officers are conducting a cumbersome, detailed, difficult legal analysis to determine if a predicate conviction would qualify as a "crime of violence" under U.S.S.G. §2L1.2. Many circuits are challenged to decide whether to apply a purely "categorical approach" or the "modified categorical approach" when making such a determination. The current definition of a "crime of violence" at U.S.S.G. §2L1.2 is interpreted much more narrowly, perhaps too narrowly, than the definitions, for example, of an "aggravated felony" or "crime of violence" at 18 U.S.C. §16; "crime of violence" at U.S.S.G. §4B1.2(a)(1) and (2); and "violent felony" at 18 U.S.C. §924(e).

An examination of the enumerated offenses listed at U.S.S.G. §2L1.2, Application Note 9(B)(iii) has also become quite cumbersome. Recent case law in various circuits has dictated that state law must be compared to a generic definition for an enumerated offense to qualify as a "crime of violence" under U.S.S.G. §2L1.2.

POAG also asks the Commission to consider whether the time limitations in U.S.S.G. §4A1.2(e) (Definitions and Instructions for Computing Criminal History) should apply for purposes of determining the applicability of enhancements in U.S.S.G. §2L1.2. For ease of application (and in keeping with the similar application in U.S.S.G. § 2K2.1(a)(2), Application Note 10), POAG recommends that such time limitations should apply. This change would mean that predicate offenses in illegal reentry cases would also have to receive criminal history points under the criminal history section just as they do in firearms offenses.

Furthermore, POAG members urge the Commission to contemplate an amendment to either add a new Specific Offense Characteristic or restore[1] an encouraged departure to U.S.S.G. §2L1.2 that takes into account multiple re-entries.

Proposed Priority No. 9

POAG does not agree with a possible amendment to provide a reduction in the offense level for certain deportable aliens who agree to a stipulated order of deportation. In many Circuits,

[1]Earlier versions of the Guidelines Manual contained an application note in U.S.S.G. §2L1.2 that read as follows: "In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.1 (Adequacy of Criminal History Category)."

defendants already receive a benefit by entering into plea agreements containing stipulations in which the defendant agrees not to contest the reinstatement of a prior deportation order. In other Circuits this is a prerequisite to the application of U.S.S.G. § 5K3.1 (Early Disposition Programs).

POAG is also concerned that such a reduction would be problematic to apply because it presents enforcement issues given the involvement of both District Court Judges and Immigration Judges. For example, a defendant might agree to be deported or removed immediately, but until an Immigration Judge signs the order, the defendant could remain in the United States. How would such an agreement be enforced in that situation? What would be the supervising Probation Officer's role in enforcing the District Court's Order in that situation?

Finally, POAG again urges that if the proposed priority is pursued, it must also address defendants with multiple re-entries. (See comments regarding Proposed Priority No. 8.)

Proposed Priority No. 11

POAG encourages the Commission to continue to study alternatives to incarceration and how such information can be incorporated into the Guidelines.

Proposed Priority No. 12

POAG encourages the Commission to continue to resolve circuit conflicts whenever possible.

Other Issues

Amend the definition of "Trafficking" as used in U.S.S.G. § 2K2.1.

POAG is concerned that the definition of "trafficking" in the enhancement under U.S.S.G. §2K2.1 (b)(5), is so narrow that it is very difficult to apply. Even if a defendant sells multiple weapons, he is not eligible for a trafficking enhancement unless it can be shown that the defendant knew these weapons were going to an individual with a specific type of criminal history or knew the weapons were to be used for an unlawful purpose (Application Note 13).

A recent unpublished 5th Circuit opinion found that absent any other evidence, smuggling weapons to individuals in Mexico is not enough to show the defendant knew the weapons were to be used for an unlawful purpose. (See U.S. v. Green, 360 Fed. Appx. 521, 2010

WL 28501 (C.A.5 (Tex.)).

One example of this issue arose in a recent case in Houston, Texas, which involved 23 straw purchasers who obtained 336 assault-type firearms; 88 of the firearms were later seized by authorities in Mexico[2], including one recovered from the "Acapulco Police Massacre." Many of the straw purchasers (some of whom recruited each other) were instructed to limit their purchases to 20 assault weapons each. Due to the narrow definition of the trafficking enhancement, the adjustment could not be applied to the straw purchasers, despite the Government's argument that it was egregious trafficking conduct. Another example is a recent case in Los Angeles, California, in which firearms were sold by the defendant to a confidential informant (CI). The offense involved the sale of three "pen guns," meaning literally guns concealed as writing pens, which met the definition of firearms within the meaning of 26 U.S.C. §5845(a). The trafficking enhancement was not applied because the only thing the defendant knew was that the CI's "people" wanted the weapons. This result puts investigators in the unenviable position of having to coach either undercover agents or CIs in what words to say to enable the trafficking enhancement to apply. POAG believes the definition should be eased enough to allow the application in circumstances such as these.

Another way to address this might be to broaden the definition of trafficking, but identifying an encouraged downward departure if the exchange of firearms was for the purpose of obtaining usual and customary things like automobiles, services or household or personal items. This is a similar approach to U.S.S.G. §2K2.1(b)(2) which provides for a reduction if the firearm at issue was possessed solely for lawful sporting purposes or collection.

Another idea might be to further define what it means to "dispose of the firearm unlawfully" by concluding that an unlawful purpose is presumed in certain circumstance. Such circumstances might include whether the weapons are to be smuggled somewhere (like Mexico), or involve weapons that have little justification for lawful possession (like pen guns) or involve particularly dangerous weapons (like armor piercing firearms or ammunition).

<u>Amend Drug Offense Guideline to address a concurrent conviction for gun possession so it is handled in similar fashion to the Gun Possession Guideline.</u>

U.S.S.G. §2K2.1(b)(6) and (c)(1) provide for enhancements when the firearm facilitated another offense. POAG suggests that the Commission consider adding commentary to U.S.S.G. §2K2.1, Application Note 14, similar to that provided at U.S.S.G. §2K2.4,

[2]The adjustment was applied to those in Mexico selling directly to the cartel.

Application Note 4[3].

In formulating the suggestion, POAG considered the following scenario: A defendant is convicted of a drug offense, a § 924(c) offense and a §922(g) offense. The drug offense and the §922(g) offense group and U.S.S.G. §2K2.1 is used to compute the Total Offense Level. The §924(c) offense is addressed separately. Due to the instruction at U.S.S.G. §2K2.4, Application Note 4, the four-level increase is not applied at U.S.S.G. §2K2.1(b)(6). This can be an easy-to-miss instruction because U.S.S.G. §2K2.1 controls the computation but does not contain the application instruction. Having an Application Note which addresses the issue at both guidelines would make both easier to apply and reduce the chance of erroneous application of the enhancement.

More Clarification for Loss Calculation in Mortgage Fraud Cases

POAG discussed the recent increase in cases involving mortgage fraud and the complications experienced when computing the loss in these cases. During its discussion, POAG also discovered that districts are not determining the loss consistently: some districts exclude properties from loss calculations because the determination of the loss was too burdensome and/or because of limited information about loss; some districts use the entire amount of the inflated loan price, regardless of the value of the collateral property; some districts use the assessed value of the property, although this is not always available or there may be more than one source for the assessment; and some districts determine the loss by subtracting the property's foreclosure sale price from the inflated sale price. POAG expressed concern that, with respect to the latter, the loss would essentially be based on the bank's efforts (or lack thereof) to foreclose on a property. POAG also noted the logistical difficulty in determining the assessed value of the property at the time of sentencing, especially in cases involving multiple properties.

In addition, POAG discussed concerns regarding inconsistencies in the application of role reductions for straw purchasers and questioned if U.S.S.G. §2B1.1 should have a cap on the offense level if a mitigating role applies, similar to the cap identified at U.S.S.G. §2D1.1(a)(5).

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[3]U.S.S.G. §2K2.4, Application Note 4 states that "if the explosive or weapon that was possessed, brandished, used or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under . . . U.S.S.G. §2K2.1(b)(6) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct . . . that forms the basis for the conviction under 18 U.S.C. §844(h), §924(c) or §929(a)."

Given the above, POAG requests that the Commission consider providing clarifying application notes directing the manner in which officers should be determining mortgage fraud loss, to consider amending the "at the time of sentencing" language from the last line of Application Note 3(E)(ii), and to offer guidance as to the applicability of role reductions for straw purchasers.

Offenses Involving Naturalization and Passports

The suggestion to expand the table in §2L2.1(b)(2)[4], which provides enhancements based on the number of documents involved, was brought to the POAG meeting for discussion. It initiated in a district dealing with cases involving significantly more than 100 fraudulent documents. Anecdotally, the information provided to POAG was that one case involved upwards of 100,000 documents, two others involved at least 7,000 documents; sentences for these defendants were handled with upward departures. POAG recommends that the Commission monitor these cases to determine if there is an upward trend in the number of documents involved and determine if U.S.S.G. §2L2.1(b)(2), needs to be amended to account for such a trend.

POAG also recommends that, for the sake of consistency, U.S.S.G. §2L2.2(b)(1) be expanded to include an unlawful alien who has unlawfully remained in the United States as similarly defined at U.S.S.G. §2L1.2, Application Note 1(A)(iii).

Cross References and Guideline Simplification

POAG acknowledges that "Guideline Simplification" has been discussed in recent years and believes the issue should remain on the Commission's agenda. Ongoing training and daily use of the Guidelines provide the opportunity for practitioners to master the majority of application issues. Application of cross references, however, is problematic to many experienced users and remains worthy of the Commission's review. As noted in previous POAG position papers, cross reference provisions are generally thought to be confusing and appear to result in numerous objections by counsel, especially if the application results in "jumping" from guideline to guideline. The following are examples of areas of difficulty. Any simplification of these applications could ease application and possibly result in less misunderstanding by the parties when anticipating plea agreements.

[4]U.S.S.G. §2L2.1(b)(2) provides a three-level increase if the offense involved 6 to 24 documents, a six-level increase for 25 to 99 documents and a nine-level increase for 100 or more documents. Application Note 5 identifies an encouraged upward departure if the offense involved "substantially more" than 100 documents.

- U.S.S.G. §2X3.1 (Accessory After the Fact) and §2X4.1 (Misprision of a Felony) are especially problematic in the determination of relevant conduct provisions and Chapter Three adjustments. Consider this example: the Obstruction of Justice guideline at §2J1.2(c), directs the user to apply §2X3.1 (Accessory After the Fact), if the offense involved obstructing the investigation or prosecution of a criminal offense. Once at §2X3.1, the user must determine the offense level for the underlying offense. Problems arise when attempting to determine the appropriate Chapter Two guideline, and the manner in which Chapter Three adjustments are to be applied. Should they be applied based on the Accessory After the Fact guideline which suggests a defendant normally should not receive a minor role adjustment? Or, are they to be applied based on the underlying offense for which the defendant was originally charged with obstructing?

- Another area of concern regarding cross reference application involves a violation of 18 U. S.C. §1001, which is referenced to U.S.S.G. §2B1.1. Application Note 15 following U.S.S.G. §2B1.1, provides a cross reference to another Chapter Two guideline, "in cases in which the defendant is convicted of a general fraud statute and the count of conviction establishes an offense more aptly covered by another guideline." Officers experience difficulty determining the appropriate Chapter Two guideline for the "count of conviction."

- A third example of cross reference application difficulty is found at U.S.S.G. §2K2.1(c), involving the interplay between §2K2.1(b)(5) and §2K2.1(c) and the determination of the difference between the two applications, possibly resulting in non-application of the cross reference.

- A final example is the cross reference at U.S.S.G. §2S1.1, Application Note 6, which instructs that counts be grouped under §3D1.2(c) and the guideline application begins with a base offense level determined by either the "offense level for the underlying offense" or " 8 plus the number of offense levels from the table in §2B1.1." This is confusing for officers and parties cannot be sure about the guideline application when considering plea agreements.

Format Change for U.S.S.G. §4A1.2(a)(2)

On November 1, 2007, U.S.S.G. §4A1.2 was amended at subsection (a)(2) to simplify the rules for counting multiple prior sentences, and to promote consistency in the application of the guideline. As written, §4A1.2(a)(2) incorporates two separate application rules in a single paragraph. In order to clarify which of the two rules is specifically applicable, POAG recommends that the Commission modify §4A1.2(a)(2), separating the two application rules,

as follows (changes noted in *italic*):

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

(1) . . . . . .

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence.

(A) Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense).

(B) If there is no intervening arrest, prior sentences are counted separately unless (I) the sentences resulted from offenses contained in the same charging instrument; or (ii) the sentences were imposed on the same day. Count any prior sentence covered by (I) or (ii) as a single sentence. See also §4A1.2(e).

For the purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) . . . . . .

Expand the definition at Application Note 3 following U.S.S.G. §2L2.2(b)(3) to include attempts to obtain a United States passport.

U.S.S.G. § 2L2.2(b)(3) provides for an increase if the defendant fraudulently obtained or used a United States Passport. Application Note 3 clarifies that the term "used" is to be construed broadly and include the attempted renewal of previously-issued passports. POAG urges the Commission to consider whether this application note should be expanded to include the attempted receipt of a newly-issued passport. In considering this suggestion,

POAG discussed sting cases where the case agent pretends to be the person at the counter handing the passport over to a defendant who has come to claim it. In this situation, the enhancement at U.S.S.G. §2L2.2(b)(3) is not applied because the defendant did not actually obtain or use the new passport. POAG questions if that was the intended result of the Chapter Two offense; otherwise, perhaps the definition at Application Note 3 could be clarified to include attempts.

Closing

POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to address issues we believe are important. Should you have any questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officers Advisory Group
July 2010