PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 20, 2017

Hon. William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Response to Request for Comment on Proposed Amendments to the Sentencing Guidelines Issued on December 19, 2016

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's request for comment on proposed Guideline Amendment Numbers 1 through 8.[1]

A. Proposed Amendment Number 1 - First Offenders/Alternatives to Incarceration

The PAG supports the Commission's efforts to reduce terms of incarceration and encourage alternatives to incarceration for "first offenders" but recommends specific modifications which we believe are consistent with the policy objectives of this amendment.

1. First Offenders

Part A, at § 4C1.1 (First Offenders), sets forth a new Chapter Four Guideline that would provide lower Guideline ranges for "first offenders" and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (as compared with other offenders falling within Criminal History Category I). This amendment is consistent with

[1] The PAG has no comment on proposed Amendment Number 9 – Technical.

both the Commission's empirical analysis of recidivism data and first offenders,[2] and the mandate of 28 U.S.C. § 994(j) which directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

The new Chapter Four Guideline would define first offender to include defendants who (1) do not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2) have no prior convictions of any kind. The proposed amendment then sets forth two offense level adjustment options:

> ***Option 1*** provides a decrease of [1] level from the offense level determined under Chapters Two and Three.
>
> ***Option 2*** provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

The PAG offers the following comments and suggested modifications.

a. Definition of First Offender.

The PAG recommends that the Commission should broaden the scope of the term "first offender" to include defendants who have a criminal history score of zero and who have no prior *felony* convictions. In its most recent recidivism study, the Commission found that an individual's criminal history, as calculated under the federal sentencing Guidelines, "was closely correlated with recidivism rates."[3] Re-arrest rates were also at their lowest for those in the lowest criminal history category. *Id.* Where the Commission's ongoing research continues to support the conclusion that an individual's criminal history score is a reliable predictor of recidivism, only prior felony convictions should preclude first offender status when an individual's criminal history score is zero.

The Commission's earlier research supports this position. In 2004, the Commission evaluated three proposed first offender groups: one with offenders having no prior arrests, the second with offenders previously arrested, but not convicted; and the third with offenders with prior convictions which did not count towards criminal history. The Commission found that individuals in the three proposed first offender groups:

> are readily distinguishable from offenders with one or more criminal history points...They are more likely to have committed a fraud or larceny instant offense.

---

[2] *See* U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" ("2016 Study") at 18 (2016), *available at* http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview.

[3] *Id*. at 5.

> They have less violent instant offenses, receive shorter sentences, and are less likely to go to prison. They are less likely to use illicit drugs, more likely to be employed, more likely to have a high school education (or beyond), and more likely to have financial dependents. Finally, offenders in groups A, B, and C, compared to other Guideline offenders, have instant offenses that are less culpable and less dangerous.[4]

The Commission's recent data analysis also provides support for the PAG's position. Individuals with no criminal history at all had only a 14.7% reconviction rate; the reconviction rate for those with prior criminal justice contact without a conviction counting toward criminal history was only slightly higher, at 21.8%. Re-incarceration rates were 4.1% and 7.4%, respectively.[5] Finally, defining "first offender" as a person with no criminal history points and who has never been convicted of a felony finds support in state first offender statutes.[6]

b. Application of the First Offender Adjustment.

The PAG recommends that the first offender adjustment reduction not be limited to defendants under a specified offense level as determined under Chapters Two and Three. The Commission's recidivism studies show that length of incarceration has relatively little effect on recidivism. Except for very short sentences (less than 6 months), the rate of recidivism changes very little by length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, and 55.5% for sentences between 5 to 9 years).[7] This data is consistent with earlier research showing that long prison terms have little impact on public safety outcomes. The National Research Council, for example, concluded in a 2014 report that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."[8]

---

[4] U.S. Sentencing Comm'n., "Recidivism and the 'First Offender'" ("2004 Study") at 11 (2004), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

[5] U.S. Sentencing Comm'n., "Public Data Presentation for First Offenders and Alternatives to Incarceration Amendment" ("2017 Data Presentation") at 20 (2017), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20161209/20160109_DB_alternatives.pdf.

[6] *See*, *e.g.*, Georgia First Offender Act 42-8-60 (a "first offender" is defined as, *inter alia*, a person who has never been convicted of a felony or previously sentenced as a First Offender); Wyoming §7-13-301.

[7] *See* 2016 Study at 22.

[8] National Research Council, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" at 156 (2014), *available at* https://www.nap.edu/download/18613.

Other research has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects."[9] Any "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," *i.e.*, there was no basis to connect severity of a sentence with deterrence.[10]

It follows that wholesale elimination of eligibility for first offender status based on overall offense level is unwarranted. First offender offense level reductions should apply to all offense levels to allow the sentencing judge flexibility in selecting an appropriate punishment. While certain cases may merit a more significant term of incarceration based on the analysis of all § 3553(a) factors, the sentencing court is best positioned to make that determination on a case-by-case basis, as allowed by the rebuttable presumption in the Guideline.

c. Amount of First Offender Adjustment.

The PAG supports Option 2 but **the PAG recommends** that a larger deduction be granted to first offenders when the offense level is 16 or higher. Specifically, the PAG suggests a 2-level reduction for offense levels less than 16, and a 3-level reduction for offense levels at and greater than 16. This would expand the pool of defendants eligible for alternatives to incarceration at the court's discretion.

2. Consolidation of Zones B and C in the Sentencing Table

The proposed amended § 5C1.1(g) provides that the court ordinarily should impose a sentence other than a sentence of incarceration if: (1) the defendant is determined to be a first offender under § 4C1.1 (First Offender); (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense]; and (3) the Guideline range applicable to that defendant falls within Zone A or Zone B of the Sentencing Table.

a. Availability of Alternatives to Incarceration.

The PAG supports the expansion of Zone B as proposed, but **the PAG recommends** that § 5C1.1(g) be clarified to avoid the presumably unintended result of fewer offenders being

[9] Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) ("Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence."); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.").

[10] Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, at 1-2 (1999), *summary available* at http://members.multimania.co.uk/lawnet/SENTENCE.PDF.

potentially viewed as eligible for alternatives to incarceration. As noted above, Criminal History Category I includes defendants with convictions that do not result in any Criminal History points. Because the proposed definition of "first offenders" is limited to those with no convictions of any kind, § 5C1.1(g) can be read to exclude from alternatives to incarceration Category I defendants who are not "first offenders" under this proposed definition. Of course, limiting availability to those with no convictions of any kind, whether or not scoreable, would produce a relatively small pool of eligible offenders. It would result in less use of alternatives to incarceration, rather than more. **The PAG recommends** adding an Application Note to § 5C1.1 clarifying that § 5C1.1(g) is not intended to restrict a court's consideration of alternatives to incarceration only to "first offenders."

b. Application of Rebuttable Presumption.

The PAG recommends that the Commission should not limit the application of the rebuttable presumption by excluding certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenses should be excluded from the benefit of a first offender reduction, as violent offenders recidivate at higher rates and sooner than their non-violent counterparts,[11] there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.[12]

The "implementation of a first offender provision will not only impact a large percentage of the federal caseload, [] it will proportionally benefit offenders in certain demographic, social, personal, and offense categories."[13] However, this can only be so if the provision is applied to all categories of non-violent offenses. Wholesale exclusion of certain categories of offenses would only serve to significantly limit the application and concomitantly the benefits of the first offender provision.

The Commission's research shows that almost half of the individuals eligible for first offender status are sentenced under the fraud or theft Guidelines.[14] Additional lines drawn between categories of non-violent crimes neither is indicated nor would it serve the intended

[11] S*ee* 2017 Data Presentation at 20-21.

[12] *See* Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 Southern Ill. U. L. J., 485, 495 (Winter 1999); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995).

[13] 2004 Study at 11.

[14] 2004 Study at 9.

purpose of the first offender provision, as alternatives to incarceration are already underutilized.[15]

B. Proposed Amendment Number 2 - Tribal Issues

1. Tribal Court Convictions

The PAG supports the Commission's recognition that tribal court convictions should not be assigned criminal history points and that only some, and certainly not all, tribal court convictions may warrant consideration for an upward departure. The PAG supports the amendment of § 4A1.3, as recommended by the TIAG, to provide guidance and a more structured framework for courts to consider when determining whether a departure is appropriate.

The PAG makes the following comments and recommendations regarding the proposed amendment:

a. **The PAG recommends** that proposed Application Note 2(C) be modified to the effect that a threshold finding either of (1) the absence of due process or (2) a conviction based on the same conduct that formed the basis for another conviction which is counted for criminal history points would bar the use of a tribal court conviction for an upward departure.

b. **The PAG recommends** that the last clause of the preamble to proposed Application Note 2(C), which currently reads "….and in addition, may consider relevant factors such as the following:….", be modified to read:

> "…and, in addition, **should** consider **the presence or absence of** relevant factors such as the following:…."

The PAG makes these recommendations to emphasize that because tribal convictions may not be a reliable basis for departure, the sentencing court *should* first consider whether these factors exist.

c. The PAG recognizes the importance of tribal government communication regarding the weight to be given to tribal convictions. How, when and with whom this should be done is unclear. If this provision is to remain within the proposed amendment, **the PAG recommends** that the Commission encourage the development of a protocol by which a tribal government could satisfy this provision with timely notice to all parties and the sentencing court.

---

[15] *See* U.S. Sentencing Comm'n., "Alternative Sentencing in the Federal Criminal Justice System" at 3 (Jan. 2009), *available at* http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

2. Court Protection Orders

The PAG supports defining "court protection order" to clarify that the phrase includes tribal court protection orders which meet certain due process requirements. To accomplish this, **the PAG recommends** a slight change in the language of the proposed amended Application Note 1(D),which currently reads "**court protection order**" means any "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)," be modified to read:

> "**court protection order**" means any "protection order" that meets the definition of 18 U.S.C. §2266(5), as long as the protection order also meets the requirements of 18 U.S.C. §2265(b)."

The PAG does not support a general Chapter 3 adjustment for violations of protection orders. Such an adjustment is not needed for the bulk of cases in which a protection order violation may be of concern. The assault and threat-related Guidelines, found for example in §§ 2A1.4, 2A1.5, 2A2.1(b), 2A2.2(b)(3), (b)(4) and (b)(6), 2A2.3(b)(1), 2A6.1(b)(3), 2A6.2(b)(1), already either have extremely high offense levels, an applicable adjustment for degree of injury or injury to a partner, or an adjustment for violation of protection orders.

The PAG recommends further consideration by the Commission of other Guidelines in which a violation of a court protection order as a specific offense characteristic should replace existing specific offense characteristics that are less predictive of recidivism. For example, the Commission might eliminate the specific offense characteristic currently at § 2 G2.2(b)(6) (use of a computer to view child pornography) that applies to almost every defendant and that has no connection to recidivism, with an adjustment for possessing an image of a child who is the subject of a court protection order (which tends to suggest a more likely chance of recidivism). The PAG believes that further study would be warranted, however, to determine which, if any other Guidelines should be considered for such an adjustment.

C. Proposed Amendment Number 3 - Youthful Offenders

The PAG supports Proposed Amendment 3 which eliminates consideration of juvenile adjudications for any purpose. The PAG also supports the downward departure language proposed for the Commentary. The Amendment reflects the scientific consensus, cited by the Supreme Court, that even normal adolescents "have less control, or less experience with control, over their own environment" than adults and that because of that immaturity, their "irresponsible conduct is not as morally reprehensible as that of an adult."[16]

However, **the PAG recommends** that the Amendment should be more expansive per the recommendations set forth in the PAG's *Response to Request for Comment on Proposed*

[16] *Ropers v. Simmons*, 543 U.S. 551, 569-570 (2005) (citations omitted); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *see Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

Priorities for the Guideline Amendment Cycle Ending May 1, 2017 at 25 (July 25, 2016). For the following reasons, **the PAG recommends** that any offense committed prior to age 18 – whether sentenced as a juvenile or as an adult – should not be included in calculating a defendant's Criminal History score:

- First, assigning criminal history points when a juvenile is sentenced as an adult in the underlying jurisdiction ignores the substantial evidence that, regardless of whether the proceeding was "adult" or "juvenile," those under 18 bear lesser culpability for their actions.[17]

- Second, state jurisdictions have different practices with respect to when individuals under the age of 18 are sentenced as "adults."[18] As a result, similarly situated defendants may end up with substantially different criminal history scores, simply by virtue of different state rules concerning the treatment of juvenile offenses. Unwarranted disparities in sentencing are precisely what the Guidelines were designed to avoid.

- Third, juvenile offenders in many state jurisdictions are technically sentenced as adults – triggering points under Chapter 4 – but are nonetheless subject to the protections of the state's juvenile court system.[19]

Further, for the same reasons that the PAG does not support using such convictions for calculating criminal history points, the PAG does not support adding an upward departure for juvenile convictions under § 4A1.3. Without a similar amendment that addresses youthful age as a mitigating factor when sentencing an offender, the PAG believes that permitting such upward departures would disregard the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late 20's.

---

[17] *Gall v. United States*, 552 U.S. 38, 58 (2007).

[18] *See, e.g., United States v. Moorer*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 F. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina has no analogous statutory provision").

[19] *See, e.g., United States v. Jones*, 260, 264 (2d Cir. 2005) (noting that "[y]outhful offender status carries with it certain benefits, such as privacy protections," and "New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing," yet federal courts have "still found it appropriate to consider the adjudications for federal sentencing purposes").

Finally, if the Commission accepts the PAG's position seeking the elimination of all criminal history points for offenses committed before the age of 18, and opposing an upward departure based on such offenses, there would be no necessity for a downward departure for cases in which a juvenile has been sentenced as an adult, because those offenses would never be counted. In sum, the PAG supports the elimination of counting juvenile adjudications, but urges the Commission to eliminate the counting of any sentence for an offense committed before the age of eighteen.

D. Proposed Amendment Number 4 – Criminal History Issues

The PAG supports the Commission's proposal to amend § 4A1.2(k) to provide that:

> Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

The PAG believes that the current regime, which increases offenders' criminal history points based on revocation sentences, can result in excessive terms of incarceration. The Commission's proposed amendment is a well-informed change in accord with the findings of its multi-year study on recidivism in the federal justice system[20] and the Commission's study of revocation sentences.

The *Introductory Commentary* to Chapter Four, Part A, emphasizes patterns of *criminal* behavior in discussing criminal history:

> A defendant with a record of **prior criminal behavior** is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that **repeated criminal behavior** will aggravate the need for punishment with each recurrence. . . . **Repeated criminal behavior** is an indicator of a limited likelihood of successful rehabilitation.
>
> The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and **patterns of career criminal behavior. (**emphasis added).

By contrast, many revocations result from violations of conditions of release that do not constitute criminal conduct (*e.g.*, failure to report, failure to fulfill financial obligations, failure to comply with instructions of probation officer, association with prohibited persons, etc.). Indeed, the 2016 Study revealed that most individuals who were re-arrested for revocation of supervision

[20] U.S. Sentencing. Comm'n., "Recidivism Among Federal Offenders: A Comprehensive Overview" (2016), *available at* http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview.

were not convicted of any crime. Since many revocation sentences are not imposed upon criminal convictions, accounting for them in computing criminal history points is inconsistent with the Commentary. Therefore, the PAG does not support an approach that would count revocation sentences in determining criminal history points.

With one modification, the PAG also supports the portion of the proposed amendment that would provide that revocation sentences may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). **The PAG recommends** that the Commission limit consideration of revocation sentences under § 4A1.3(a) to those which are based on criminal conduct. Consideration of revocation sentences based on criminal conduct is consistent with the types of information currently listed in § 4A1.3(a)(2) *(e.g.,* prior similar adult criminal conduct not resulting in a criminal conviction, and prior sentences resulting from foreign and tribal convictions).

The PAG also recommends that § 2L1.2 should be amended to conform to the proposed amendment to § 4A1.2(k). Specifically, the last sentence of Application Note 2, defining "*Sentence imposed,"* should be deleted.

For several reasons, the PAG also supports Part B of the Commission's proposed amendment to § 4A1.3, which would amend the Commentary to provide that a downward departure from the defendant's criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. First, this would encourage recognition of the fact that the severity of a defendant's prior conduct may be more accurately measured by the length of time actually served rather than by the length of the sentence imposed, without putting the onus on probation officers to determine actual time served in each case. Second, the time a prisoner serves for a particular sentence varies wildly from state to state. Judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using time actually served in custody, rather than the sentence imposed, may reduce "unwarranted sentencing disparities"[21] when sentencing offenders with identical prior convictions from different states.

The PAG thinks it is impractical to exclude from downward departure consideration cases in which the time served by the defendant was substantially less than the length of the sentence imposed for reasons unrelated to the facts and circumstances of the defendant's case. The PAG believes that this is an administratively unworkable distinction, because time served is inextricably intertwined with the facts and circumstances of a defendant's case. For example, if an institution granted inmates early release in order to minimize overcrowding or due to state budget concerns, the criteria used to identify the individuals to be released would in all likelihood have some nexus to the facts and circumstances of the inmates' particular cases.

[21] 28 U.S.C. § 991(b)(1)(B).

E. Proposed Amendment Number 5 – Bipartisan Budget Act

The Bipartisan Budget Act of 2015 amended 42 U.S.C. §§ 408, 1101 and 1383a, to add new conspiracy offenses to each statutory provision. *See* 42 USC §§ 408(a)(9), 1011(a)(5), 1383a(a)(5). The Commission proposes to reference these new conspiracy offenses to § 2X1.1. The PAG agrees.

The Act also increased the statutory maximum from five years to ten years in prison for a person "who receives a fee or other income for services performed in connection with" a determination for Social Security benefits, or "is a physician or other health care provider who submits or causes the submission of medical or other evidence in connection with any such determination . . . ." 42 U.S.C. §§ 408(a), 1011(a), 1383a(a).

The Commission proposes to amend § 2B1.1 by adding 2 or 4 levels and/or an offense level floor of 12 or 14 for defendants convicted under §§ 408(a), 1011(a), or 1383a(a) who are subject to the 10-year statutory maximum, *i.e.*, defendants who receive a income for services performed in connection with any determination Social Security benefits, or who are health care providers who submit, or cause the submission of, evidence in connection with Social Security benefits determinations. The Commission seeks comment on whether the applications notes should be amended to address interaction between these proposed specific offense characteristics and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

The PAG recommends that the Commission not adopt either this additional offense characteristic or offense level floor. The Guidelines already adequately address the subset of Social Security fraud cases that are subject to the higher statutory maximum. In addition, there is no need to create additional specific offense characteristics in § 2B1.1, where the § 3B1.3 adjustment for abuse of trust or special skill already exists to further penalize – if applicable – defendants who are paid to provide Social Security benefit-related services or health care providers who submit Social Security benefit-related evidence. As recognized by myriad stakeholders, § 2B1.1 already is overly complicated, unwieldy, and, due to Guidelines "creep", can result in harsh sentencing range calculations.[22] With regard to these Social Security

[22] *See, e.g.*, *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of "substantially overlapping 39 enhancements" at the high end of the fraud sentencing table); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (Guidelines in security fraud cases "are patently absurd on their face" due to the "piling on of points" under § 2B1.1); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (Guidelines in fraud cases have "so run amok that they are patently absurd on their face," and describing enhancement for "250 victims or more," along with others, as "represent[ing], instead, the kind of 'piling-on' of points for which the Guidelines have frequently been criticized"); *accord* Alan Ellis, John R. Steer, Mark Allenbaugh, "At a "Loss" for Justice: Federal Sentencing for Economic Offenses," 25 Crim. Just. 34, 37 (2011) ("the loss table often overstates the actual harm suffered by the victim," and "[m]ultiple, overlapping enhancements also have the effect of 'double counting' in some cases," while "the

offenses, the PAG is unaware of any research or sentencing data suggesting that the Guidelines fail to recommend sufficiently lengthy sentences. To the contrary, analysis of the Commission's data indicates that Guideline recommendations in this area are frequently too high.[23]

Given the absence of data suggesting that sentences are too low for this category of cases, further tinkering with § 2B1.1 is unnecessary. If, however, the Commission feels a need to differentiate these new cases from other forms of Social Security fraud, changes to the Guidelines should be, at most, incremental. In that case, **the PAG recommends** that the Commission only adopt the proposed 2-level enhancement and make clear that: (a) it applies only to those defendants who are convicted of committing the offenses subject to the 10-year statutory maximum; and (b) if applied, 3B1.3 would not be applicable. This would allow the Commission to isolate and analyze cases brought under the new provisions and use that information to tailor any further proposals to actual experience and demonstrated need.

F. Proposed Amendment Number 6 – Acceptance of Responsibility

The PAG supports the Commission's view that § 3E1.1 should be amended to clarify that a defendant who pleads guilty, and accepts responsibility for the offense of conviction, nonetheless may make a good faith challenge to the inclusion of relevant conduct without risking the loss of acceptance of responsibility credit under that Guideline. The proposed amendment would add the following new sentence at the end of Application Note 1(A):

> "In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)."

The PAG believes, however, that the specific wording of the proposed amendment has the potential for ambiguity and recommends a modification below.

1. Justification for the Amendment Generally

Part of the need for the proposed amendment is apparent from a tension within the Guideline itself. On the one hand, the focus of § 3E1.1 and its Commentary appears to be on

---

Guidelines fail to take into account important mitigating offense and offender characteristics."); Justice Stephen Breyer, "Federal Sentencing Guidelines Revisited," 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *11 (1999) ("false precision").

[23] In 2016, the Federal Public and Community Defenders analyzed sentencing data collected and maintained by the Commission for sentences imposed under each of the statutes at issue. *See* Comments, Federal Defender Sentencing Guidelines Committee (Mar. 21, 2016) at 13-14, available at http://www.ussc.gov/policymaking/public-comment/public-comment-march-21-2016. Between 2012 and 2014, 54.7% of sentences for defendants convicted under § 408(a) were within the recommended guideline range, 43.7% were below the recommended range, and only 1.6% were above. For defendants convicted under § 1383(a), 53.5% received a within-guideline sentence, 46.5% received a below-guideline sentence, and none received an above-guideline sentence. According to the Commission's data, no one has been convicted of an offense under § 1011(a) over the past ten years.

truthful admission of the offense conduct. *See* Application Note 1(A) ("a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction…."). Yet, the same Note also provides that a defendant can lose acceptance of responsibility credit not only for "falsely denying" relevant conduct, but also for "frivolously contesting" relevant conduct, and the Guideline and the Application Notes do not define the line between "not admitting" and "contesting." This is not a theoretical issue. A challenge involving the lack of an admission may be equated to "frivolously contesting" relevant conduct.[24]

Even greater than the problems caused by the facial conflicts within the Guideline are the real dilemmas posed by the current Guideline in practice. The PAG shares the concern articulated by the Commission in its Synopsis: that the current suggestion in the Commentary that a defendant who "falsely denies" or "frivolously contests" relevant conduct is ineligible for acceptance of responsibility credit creates a significant risk that any unsuccessful challenge to relevant conduct will result in a denial of acceptance of responsibility credit.

Our concern arises as much from the collective experience of the PAG as from reported cases. Unsurprisingly, there are few reported cases dealing with denying acceptance of responsibility credit on relevant conduct grounds, for it is our experience is that many pleas have been thwarted (or reluctantly accepted) because of the risk of losing acceptance credit when the probation office or the prosecutor include relevant conduct that is subject to good faith, legitimate legal and factual attack. Defense counsel frequently must discuss with clients the risk of bringing good faith arguments against conduct that is believed to be irrelevant, unproven, or legally inconsequential, but which, if accepted by the court, would dramatically increase the defendant's sentencing range exposure. We face this dilemma daily, in contexts such as the amount of loss, whether a firearm was actually used in the offense, or whether a defendant's conduct constituted leader and organizer activity. Under the current Commentary, lawyers now frequently feel compelled to advise clients to abandon good, creative, and potentially valid legal arguments, and to not present facts or challenge government witnesses that put the allegations in the proper perspective, for fear of losing acceptance of responsibility credit for the underlying offense, even though the defendant quite clearly has not opposed or contested the facts of the offense of conviction.

---

[24] *See, e.g., U.S. v. Smith*, 13 F.3d 860, 866 (5th Cir. 1994) (affirming denial of acceptance credit because "….even though [defendant] admitted the conduct comprising the offense, she steadfastly refused to admit any connection, even vicarious, with the additional cocaine found in the floor of the house."); *United States v. Edwards*, 635 F. App'x 186 (6th Cir. 2015) (affirming district court's decision to deny acceptance credit because drug defendant had "frivolously denied conduct relevant to the leadership-role enhancement"); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) (affirming district court's decision to deny acceptance credit because defendant contested the factual basis for a four-level enhancement based on relevant conduct). In none of these cases did the defendant testify at sentencing. Rather, relying on the language of the application note, courts characterized appropriate sentencing arguments as "frivolously contesting" or a "falsely denying" relevant conduct and denied the acceptance credit.

The PAG believes that the proposed amendment (with the modification recommended below) will strengthen and clarify the right of a defendant to "put the government to its burden of proof" as to relevant conduct.[25]

2. The PAG's Recommended Modification

The PAG is concerned that the proposed amendment may unintentionally create confusion regarding the circumstances under which a defendant might lose a potential reduction under § 3E1.1 when the defendant raises both legal and factual challenges to the inclusion of certain relevant conduct. While the PAG supports the goal of including language that affirmatively acknowledges the right of a defendant to challenge factually a relevant conduct proposal in a presentence report or a government submission, we think it equally important to acknowledge that many challenges to the inclusion or consideration of relevant conduct are legal, not factual, challenges.

The amended Guideline should allow broad deference to defense counsel to assert legal challenges without causing their clients to risk acceptance of responsibility credit. After all, such legal defenses are almost always attributable to the lawyer, not the client, and say nothing about the client's acceptance of responsibility. Equally important, much of what is now considered established law was once considered novel legal argument, which perhaps some judge even would have characterized as "frivolous" in an earlier era (*e.g.*, the right to exclude a statement in the absence of *Miranda* warnings, the advisory nature of the Guidelines, etc.). Thus, the PAG proposes that the Commission modify the Application Note to make clear that a defendant's eligibility for acceptance of responsibility should not be tied to the perceived quality of his lawyer's legal arguments, and instead, to clarify that the reference to potentially "frivolous" challenges that might entitle a judge to deny acceptance of responsibility credit is limited to "frivolous" factual challenges.

Accordingly, **the PAG recommends** the following modification to the wording of the proposed new sentence in Application Note 1(A) to clarify that both legal challenges and non-frivolous factual challenges should not lead to the loss of acceptance of responsibility credit:

> "In addition, a defendant who makes a **legal challenge or** a non-frivolous **factual** challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a)."

G. Proposed Amendment Number 7 – Miscellaneous

1. PART A. Transnational Drug Trafficking Act of 2015

The Transnational Drug Trafficking Act of 2015 targets extraterritorial drug trafficking. Included in the Act is an amendment of 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services) which replaces the term "counterfeit drug" with the phrase "drug that uses a counterfeit

[25] *U.S. v. Jimenez-Oliva*, 82 Fed. Appx. 30, 34 (10th Cir. 2003) (affirming grant of acceptance of responsibility credit after defendant's unsuccessful challenge to the adequacy of the government's evidence that the defendant was an organizer or leader).

mark on or in connection with the drug;" the Act also revised § 2320(f)(6) to define only the term "drug" instead of "counterfeit drug." The term "counterfeit mark" then is defined in § 2320(f)(1). Pursuant to the statutory index, the applicable sentencing Guideline for § 2230 is § 2B5.3 (Criminal Infringement of Copyright or Trademark).

The proposed amendments include two changes to §2B5.3 in light of the Act:

i. Section 2B5.3. Currently, §2B5.3(b)(5) includes a two-level enhancement if the offense involved a "counterfeit drug." The proposed amendment modifies this enhancement in line with the Act, by replacing the term "counterfeit drug" with "drug that uses a counterfeit mark on or in connection with the drug." The PAG has no objection to this amendment.

ii. Commentary to Section 2B5.3. In line with the Act, the proposed amendment adds to the Definitions section of § 2B5.3 (*i.e.*, note 1 of the Commentary), the following definition: "'Drug' and 'counterfeit mark' have the meaning given those terms in 18 U.S.C. § 2320." The PAG agrees that this amendment is necessary in light of the provisions of the Act.

2. PART B. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

The Sex Offenders Registration and Notification Act (SORNA, 42 U.S.C. § 16914) requires sex offenders to provide a wide range of information to authorities, including name, Social Security number, residence and employment addresses, etc. The International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act ("International Megan's Law") added a new notification requirement, requiring sex offenders to provide detailed information related to intended international travel – dates and places of departure and return, carrier and flight numbers, destination country, and "any other itinerary or other travel-related information required by the Attorney General."

A violation of SORNA's registration requirements remains punishable at 18 U.S.C. § 2250(a). The International Megan's Law added a new crime at 18 U.S.C. § 2250(b) for failure to provide the now-required travel-related information. The law punishes the knowing failure to provide the information by a SORNA-restricted individual who travels or attempts to travel in foreign commerce. Section 2250(a) offenses are currently covered by § 2A3.5 (Failure to Register as a Sex Offender). Included in § 2A3.5 are enhancements for a defendant who, while in a "failure to register status," commits a sex offense against an adult (6 levels), a sex offense against a minor (8 levels), or a non-sexual felony against a minor (6 levels). § 2A3.5(b)(1)(A)-(C).

In light of the new criminal provision, the Commission proposes amendments:

i. Statutory Provision and Appendix A Amendments. Currently, § 2250(a) offenses are covered by § 2A3.5. The proposed amendment clarifies that § 2250(b) offenses will also be covered by § 2A3.5. The PAG has no objection to applying § 2A3.5 to § 2250(b) offenses.

ii. Application Note 2 to § 2A3.5. The proposed amendment adds an application note to § 2A3.5 to the effect that a defendant shall be deemed to be in a "failure to register status" during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b). The PAG does not object to this proposed amendment.

iii. Clerical Changes to § 2A3.6. The proposed amendment makes clerical changes to § 2A3.6 to reflect the re-designation of 18 U.S.C. § 2260(c) by the International Megan's Law. The PAG does not object to this proposed amendment.

The PAG recommends one modification in this regard. Under the proposed amendment, § 2A3.5 addresses conduct of two distinct reporting statutes (SORNA and International Megan's Law). However, § 2A3.5 also deals by way of specific offense characteristics with conduct violative of additional criminal statutes, providing enhancements for the commission of sex offenses against minors and adults. *See* § 2A3.5(b)(1). The commission of such sex offenses, however, is addressed by other Guideline sections in Part A(3) (§ 2A3.1 *et. seq*.) and Part G (§ 2G1.1 *et. seq*.) of the Sentencing Guidelines. This could raise confusion about the application of the grouping provisions of §§ 3D1.2 and 3D1.3. Because § 3D1.2(d) does not list all of the different sex offense conduct provisions that are covered in the enhancement provisions of § 2A3.5(b)(1), inconsistent application of grouping provisions could result.

For this reason, **the PAG recommends** that the Commentary to § 2A3.5 be amended to clarify that a count of conviction for a violation of § 2250(a) and/or (b) *(i.e*., a conviction for a SORNA registration violation and/or an International Megan's Law reporting violation), including any enhancement that is applicable under § 2A3.5(b)(1), be grouped together with any other count that addresses the same underlying sexual offense conduct, pursuant to § 3D1.2(c) (Groups of Closely Related Counts). Such an amendment would be consistent with the many "grouping" paragraphs contained in the commentaries of different Guideline sections. *See, e.g*., § 2A6.2 (Application Note 4); § 2K2.6 (Application Note 3); and § 2P1.2 (Application Note 3).

3. PART C. Frank R. Lautenberg Chemical Safety for the 21st Century Act

The Frank R. Lautenberg Chemical Safety for the 21st Century Act added a new criminal provision to 15 U.S.C. § 2615 (the Toxic Substances Control Act), punishing any person who knowingly and willfully violates certain provisions of § 2615 and who knows at the time of the violation that the violation places an individual in imminent danger of death of bodily injury.

The proposed amendment references this new offense (§ 2615(b)(2)) to § 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining § 2615(b)(1)'s reference to § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering and Falsification; Unlawfully Transporting Hazardous Materials in Commerce).

The difference between the § 2615(b)(1) misdemeanor offense and the § 2615(b)(2) felony offense is that the felony requires proof of "knowing endangerment" (*i.e.*, knowledge that the violation places an individual in imminent danger of death or bodily injury). Since § 2Q1.1 applies to "knowing endangerment" related to hazardous or toxic substances, the application of § 2Q1.1 for § 2615(b)(2) felony offenses, along with its higher base offense level appears appropriate, and the PAG has no objection.

4. PART D. Use of a Computer Enhancement in § 2G1.3

The proposed amendment relates to a conflict within the language of § 2G1.3 and its commentary. Section 2G1.3 applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) contains an enhancement if-

> the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

The proposal notes a tension between the Guideline and the Commentary, because the Application Note fails to distinguish between the two prongs of subsection (b)(3). Application Note 4 to § 2G1.3 provides that the § 2G1.3(b)(3) enhancement is intended to apply only to the use of a computer or an interactive computer service to communicate *directly* with a minor or with a person who exercises custody, care, or supervisory control of the minor.[26] Thus, on its face, the Application Note precludes application of the enhancement where a computer is used to solicit a third party to engage in prohibited sexual conduct with a minor.

The proposed amendment would amend the Commentary to § 2G1.3 to clarify that the guidance contained in Application Note 4 refers only to § 2G1.3(b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in § 2G1.3 (b)(3)(B)). The PAG does not object to the proposed amendment.

H. Proposed Amendment Number 8 – Marihuana Equivalency

In setting offense levels for narcotics offenders, the Guidelines place heavy emphasis on the type and quantity of controlled substances involved in the offense. *See* § 2D1.1(c)(1)-(16) (Drug Quantity Tables). For the most common substances such cocaine, heroin, methamphetamine, and marijuana, the Drug Quantity Tables specifies the corresponding offense level based on the quantity involved in the offense.

Where the Drug Quantity Tables do not specifically include a particular controlled substance, § 2D1.1 includes Drug Equivalency Tables. *See* § 2D1.1, Commentary, Application

[26] For example, it would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

Note 8. The Drug Equivalency Tables use marihuana as the common currency, and have an equivalency ratio for each controlled substance. One gram of methadone, for example, is the equivalent of 500 grams of marihuana.. *See id.*, Note 8(d). Additionally, the tables "also provide a means for combining different controlled substances to obtain a single offense level." *Id.*, Note 8(B) and (C) (examples).

The Commission has received comments to the effect that using marihuana as the common denominator unit is misleading and results in confusion for individuals not fully versed in the Guidelines. Based on these concerns, the proposal would amend § 2D1.1 to replace "marihuana equivalency" in the Drug Equivalency Tables with a uniform "converted drug weight." Correspondingly, the amendment would change the term "Drug Equivalency Tables" to "Drug Conversion Tables." The Commission points out that the proposed amendment is not intended as a substantive policy change.

The PAG agrees with the proposal. PAG attorneys have found clients confused by the conversion of controlled substances into marihuana for Guidelines calculations purposes. The use of a neutral converted drug weight as a "nominal reference designation" will maintain the Commission's choice of drug type and quantity as the benchmark in determining an offense level, its use of a standardized unit of measurement for poly-substance offenses or those involving uncommon substances, and its previous determinations of the inherent danger in any particular substance as reflected in the conversion ratio.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG's input for the 2017 amendment cycle. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

Ronald H. Levine, Esq., Chair
Post & Schell, PC
Four Penn Center
1600 JFK Boulevard
Philadelphia, PA 19103
(215) 587-1071
rlevine@postschell.com

Knut S. Johnson, Esq., Vice Chair
Law Office of Knut S. Johnson
550 West Street, Suite 790
San Diego, CA 92101
(619) 232-7080
knut@knutjohnson.com

cc:
Commissioner Rachel E. Barkow
Ex-Officio Commissioner J. Patricia Wilson Smoot
Ex-Officio Commissioner Jonathan J. Wroblewski
Kenneth Cohen, Chief of Staff
Kathleen Grilli, General Counsel
All PAG members