PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 2, 2012

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

Dear Judge Saris,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 22 and 23, 2012, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to the Proposed Amendments to the Sentencing Guidelines published on January 19, 2012.

1. Dodd-Frank/Fraud

POAG discussed the issue of harm to financial markets, which is raised by the two directives relating to cases involving securities fraud and similar offenses, and cases involving mortgage fraud and financial institution fraud.

(A) Harm to Financial Markets

POAG is concerned about the difficulty faced by probation officers in determining whether financial markets were impacted, and if so, to what extent. Financial markets fluctuate radically on their own. Analyzing whether a specific act committed in a fraud offense impacted a financial market is a determination best made by professionals with extensive knowledge and experience in this area. POAG is also concerned about the definition of "substantial disruption." It raises the same concern about knowledge and expertise, and adds

another layer of complexity as to whether the disruption was *substantial*. For these reasons, POAG believes that an upward departure provision in § 2B1.1 is a better means to account for nuances in offenses such as this, rather than a specific offense characteristic or enhancement at § 2B1.1(b)(14).

(B) Securities Fraud and Similar Offenses

POAG supports the proposed addition of specific offense characteristic § 2B1.4(b)(2), an enhancement if the offense involved sophisticated insider trading, as it does not appear to present any significant application issues. However, we note the following application issues relating to the proposed application note:

> POAG suggests that the proposed Application Note 1 be re-worded to mirror the wording of Application Note 8(B) of § 2B1.1, which defines the phrase "sophisticated means," by including the first sentence and examples correlating to insider trading. The term "sophisticated" has been used in § 2B1.1 for some time and districts have learned how best to apply it. By changing the wording at § 2B1.4 to define "sophisticated insider trading," POAG worries that the community of users will interpret it differently and open the door to additional confusion for application in connection with § 2B1.1.
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> Also, subsections (A) through (D) of proposed Application Note 1 should be deleted as POAG believes these are factors already accounted for by the loss table and will raise objections about double counting.
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> If the proposed specific offense characteristics at § 2B1.4(b)(2) is adopted, POAG believes the second sentence in the ***Background*** note should be removed. The sentence reads, "Insider trading is treated essentially as a sophisticated fraud." Defendants may argue that this note shows that the guideline already accounts for the sophisticated nature of the offense, thus an enhancement based on "sophisticated insider trading" is double counting.

POAG supports the proposed addition of specific offense characteristic § 2B1.4(b)(3), an enhancement if the defendant held a specific role such as an officer of a publicly traded company, as it does not appear to present any significant application issues.

In discussing this issue at length, POAG concluded that using gain, not loss, presents the fewest application issues and is the method most often used. Perhaps the Commission might consider setting out a rule specifying that gain should be used for stock frauds.

Issues for Comment: 2. Calculation of Loss in § 2B1.1

POAG believes options (A) and (B) present what appear to be the simplest methods for calculating loss in securities fraud and similar offenses. POAG is not able to comment as to how effectively either captures the harm caused by these offenses. They come the closest to establishing static, identifiable, figures from which to calculate loss and thus present the fewest application difficulties. Options (C) and (D), on the other hand, present methods which are too difficult for probation officers to implement.

POAG is aware that there are differences among circuits in calculating loss and that the issue should be addressed. But probation officers have neither the experience with these cases as a whole, nor the expertise to determine potential or actual harm to the public and the financial markets. While POAG does not take a position on these four options, we would like to see one method chosen as guidance in these cases. However, POAG does not recommend a causation standard similar to the civil loss causation standard articulated in *Dura Pharmaceuticals, Inc. v Broudo* due to its complexity.

With respect to Ponzi type fraud offenses, POAG believes that the current guidelines and method for calculating loss is sufficient and adequate to capture the harm. POAG believes that § 2B1.1(b)(15) and § 2B1.1(b)(18) are sufficient and no change is necessary.

(C) Mortgage Fraud and Financial Institution Fraud

POAG discussed the recent increase in cases involving mortgage fraud and the complexity of determining loss. During our discussion, POAG discovered that districts are not determining the loss consistently. Some districts excluded properties from loss calculations because either the determination of the loss was too burdensome or the available information was insufficient. Some districts used the entire amount of the inflated loan price, regardless of the value of the collateral property. Some districts used the assessed value of the property which led to confusion, especially when there was conflicting information from more than one source. Additionally, some districts determined the loss by subtracting the property's foreclosure sale price[1] from the inflated loan price. We also noted that the issue of loss determination has caused some confusion even among AUSAs in some of the districts and has led to the Government using various methods to determine loss.

[1] POAG members expressed concern that, using this figure, the loss would essentially be based on the bank's efforts (or lack thereof) to foreclose on a property.

POAG members noted the logistical difficulty in determining the assessed value of the property at the time of sentencing, especially in cases involving multiple properties. We discussed concerns regarding inconsistencies in the application of role adjustments for the various individuals involved in these offenses, including straw buyers, real estate brokers, straw purchasers, and attorneys.

POAG's consensus was that officers need a specific directive for determining loss in mortgage fraud cases. We also ask the Commission to consider amending the "at the time of sentencing" language from the last line of Application Note 3(E)(ii) and replacing it with "at the time the offense is discovered," and to offer guidance as to the applicability of role adjustments for each class of defendant.

Many mortgage fraud cases involve dozens of properties, whose "fair market value" fluctuates in an ever-changing market. Repeatedly recalculating the loss to accommodate this application note is difficult, time-consuming, and often requires multiple revisions to the presentence report, especially for defendants whose sentencing hearings are continued multiple times.

POAG recommends that the Commission adopt one definition for the determination of loss in mortgage fraud cases. While a number of methods were discussed, POAG's consensus was that the best, most practical method, should include static figures that are easy to obtain. We recommend that loss be determined by the difference between the loan amount and the foreclosure sale price and that the application notes following § 2B1.1 be amended to direct that if the foreclosure sale price is not available, then use the tax assessed value of the property *at the time the instant offense was discovered.* Typically, these figures are readily available either from the government, the sales agent, or the mortgage company, or from public information websites such as county recorders. POAG believes this would result in a more consistent application of the guideline loss determination, and a more accurate picture of the housing market and property value at the time of the offense. This recommendation is made to reduce the complexity of the ever-changing market and to eliminate the need for multiple revisions to the presentence report. We speculated that this change might also provide more stability for the parties by giving them a clearer directive for loss determination.

POAG believes that if this method of determining loss results in over- or under-representing the harm, it can be adequately addressed through the use of departures (see § 2B1.1, Application Note 19) or variances or both.

POAG members recommend that the Commission decline to add Application Note A(IV). Administrative Costs should be excluded from the loss, as these figures are often difficult to ascertain or verify. It would add even more confusion to the process because similar costs,

such as interest, finance charges, or late fees, are already excluded from loss computations (see Application Note 3(D) to § 2B1.1). Further, if such costs were included, POAG believes that a great deal of litigation will occur over what costs constitute administrative costs. POAG members also discussed the fact that mortgage companies or lending institutions are often unable to provide, or unwilling to provide, even the basic information and documentation for loss determination under the current process, so including additional costs for consideration would complicate an already complex loss determination. In addition, POAG members were concerned with the language "exercised due diligence." This seems so general and subjective, POAG is certain it will result in additional complications and objections by the parties.

(D) Impact of Loss and Victims Tables in Certain Cases

POAG would rather see the impact of loss and victims tables in certain cases be addressed through departure provisions than changes to the loss or victim tables in § 2B1.1. For those defendants who realize little gain in these offenses, this concern could be addressed through departure or role adjustment in Chapter 3.

POAG further recommends that the Commission decline to include a specific offense characteristic in § 2B1.1 to limit the impact of the loss table on the defendant who realized relatively little gain relative to the loss. POAG is concerned that the gain to the defendant might be difficult to determine and that determining such figure requires another step in an already complex loss calculation. It could also result in additional litigation and objections, as the defendant's gain (or the method for determining the same) might be in dispute. POAG members do not believe that this extra step is necessary. POAG believes that any need to adjust the defendant's advisory guideline range could be adequately addressed through departures (see § 2B1.1, Application Note 19) or variances or both.

2. Drugs

(A) BZP

Benzylpiperazine (BZP) is listed as a Schedule I controlled substance in Title 21, § 1308.11 of the Code of Federal Regulations. There appear to be at least two schools of thought as it relates to BZP. The first is that BZP is analogous to amphetamines or methlylphenidate, which is the scientific name for Ritalin. The second is that BZP is most analogous to methylenedioxymethamphetamine (MDMA), commonly referred to as ecstasy, if the BZP is tested and found to contain the hallucinogenic property, 1-3-trifluoromethylphenyl-piperazine, "TFMPP." It makes a very big difference to the determination of the sentencing range depending on which analogous drug is used. POAG takes no position regarding which analogous drug should be used, but POAG requests referencing BZP in the Drug quantity

table located in § 2D1.1. Although the number of BZP cases are small nationwide, this issue will continue to result in sentencing disparity across the nation.

(B) "Safety Valve" Provision in § 2D1.11

POAG endorses adding the safety valve provision to § 2D1.11.

3. Human Rights

(A) Human Rights Offenses

POAG discussed the proposed two-part amendment pertaining to human rights offenses and concluded that Option 2 under Part A, establishing a new Chapter Three adjustment at § 3A1.5, is preferable to Option 1, establishing a new Chapter Two offense guideline at § 2H5.1. "Serious human rights offenses" such as genocide, torture, war crimes and recruitment or use of child soldiers are already accounted for in the guidelines; however, they are rarely used, as these offenses typically occur on foreign soil. For that reason, POAG believes that it would be difficult to obtain the necessary information to properly apply the specific offense characteristics enumerated in Option 1. Therefore, POAG believes Option 2 would be easier to apply. POAG discussed the possibility of double-counting issues that might surface for a new Chapter Three adjustment and § 2H1.1; however, we concluded probation officers will be able to distinguish different aspects of the offense covered by the two guidelines.

(B) Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

POAG believes that the proposed specific offense characteristics at § 2L2.1(b)(6) and § 2L2.2(b)(4) present significant application issues.

First, the proposed language uses the phrase "reflected an effort" without providing any definition. POAG believes this wording is vague and will be difficult to apply. POAG is not aware of any phrasing like this elsewhere in the guidelines.

Second, the phrase "if the *offense* reflected an effort to avoid detection or responsibility for . . ." is problematic. Would this allow one defendant to be held accountable for the actions of another? In other words, if Defendant 1 was buying false identification documents to avoid detection for a serious human rights offense, would the defendant who sold them to Defendant 1 be held accountable for that? If this proposed amendment is adopted, POAG suggests that this phrase be replaced with the phrase "if the *defendant* committed the offense to avoid detection..."

4. “Sentence Imposed” in § 2L2.1

This section proposes two options to resolve a circuit conflict involving the application of the phrase “sentence imposed” in § 2L1.2. Option 1 specifies that a post-revocation sentence increase is included, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States. Option 2 specifies that a post-revocation sentence increase is included without regard to whether the revocation occurred before or after the defendant previously was deported or unlawfully remained in the United States. POAG did not reach consensus and, therefore, did not choose an option.

Representatives from the border districts find that the primary reason for a defendant having supervised release or probation revoked was the fact of returning to the United States. With this as the backdrop, their perspective was that Option 2 is too harsh and Option 1 is the better approach.

Representatives from non-border districts find that new criminal conduct was typically the reason for revocation. With this as the backdrop, their perspective was that Option 1 fails to adequately account for criminal behavior and Option 2 is the better approach.

Ultimately, the group concluded that application of Option 2 is consistent with how criminal history is determined under Chapter Four; however, the double-counting concerns of adding revocation time to increase the criminal history score and increase the offense level negated a clear decision by the group.

5. Categorical Approach

In order to have consistency, POAG believes the “categorical approach” should apply throughout the guidelines when the nature and category of the offense or a prior conviction must be determined. Therefore, POAG supports either Option 1A, which includes the list of *Shephard*-approved documents in § 2L1.2, or Option 2A, which places it in § 6A1.3. Although districts across the country already use the “categorical approach” and the “modified categorical approach,” there is benefit to actually having the method and referenced documents listed in the guidelines. Either Option 1A or 2A would provide consistency and give officers the guidance they crave.

POAG does not support subsections B or D to either Option 1 or 2. POAG members are concerned with the word “uncontradicted,” and feel that multiple interpretations of the word will lead to excessive litigation.

POAG members were unable to reach a consensus with regard to subsection C of either Option 1 or 2. Some POAG members fear that by expanding the list of appropriate

documents, the reliability of documents could be questioned (for example, we talked about how a state presentence report is not typically "adopted" by the state court as it is in federal court). However, some POAG members voiced concern over the unavailability of *Shephard* permissible documents in many cases which leads to disparity across the nation as to whether the enhancements at § 2L1.2(b)(1) are applied. Thus, some POAG members feel that expanding the list of acceptable documents to include those with "sufficient indicia of reliability" would help with ease of application. POAG did not reach a consensus on what additional documents should be included, but noted that the ease or difficulty in obtaining court documents varies widely from one district to another.

As another option, POAG suggests that this concept might be better located in § 1B1.1. Application Note 1 of this section contains definitions, "frequently used in the guidelines and are of general applicability" (such as firearm, serious bodily injury, and physical restraint). Placing the definition of documents sufficient to establish whether a conviction is a crime of violence or aggravated felony here would put the analysis in the same light as other definitions used in the guidelines and may simplify matters somewhat. POAG believes an application note in the appropriate guidelines, such as § 2L1.2, § 2K2.1 and § 4B1.1, referring the reader to § 1B1.1 might further simplify the analysis.

6. Driving While Intoxicated

POAG supports the proposed amendment to Application Note 5 of § 4A1.2, which is consistent to the approaches of the Seventh and Eight Circuits. Specifically, POAG agrees that convictions for driving while intoxicated, or driving under the influence, should always be counted without regard to how the offense is classified and without regard to any exception in § 4A1.2(c)(1) or (2). The application of such a bright-line rule would be easier to apply and would result in more consistency across the nation.

7. Burglary of a Non-Dwelling

POAG attempted to reach consensus regarding the circuit conflict for when, if at all, burglary of a non-dwelling qualifies as a crime of violence. The group discussed three options. The first two options come from the proposed amendments. Option 1 tracks the Armed Career Criminal Act (ACCA) and includes all burglaries and takes into account all potential harm. Option 2 does not include burglary of a structure other than a dwelling unless the offense has as an element the use, attempted use, or threatened use of physical force against the person of another. A third option is suggested in the Issues for Comment and includes burglary of a dwelling but requires the application of the residual clause to determine if burglary of a non-dwelling is a crime of violence.

POAG was split on each option and could not reach consensus. Concerns with Option 1 include that burglary is defined in many different ways throughout the country and not all burglaries are violent or have the potential for violence (we talked about shoplifting or breaking into an unoccupied and unguarded warehouse). Option 2 does not capture all potential harm (like breaking into a guarded warehouse). The third option requires the categorical approach which some believe is limiting but could evolve into an even more complex analysis than currently required. The group concluded that in relation to comment two, consistency is preferred.

8. Multiple Counts (§ 5G1.2)

POAG supports this proposed amendment which makes three changes to § 5G1.2(b) and the Commentary. The Commentary and examples provided would assist in eliminating the circuit split in this application.

9. Rehabilitation

POAG supports Option 1, removing the Policy Statement § 5K2.19 from the guidelines.

Rehabilitative efforts in re-sentencing can easily be considered under 18 USC § 3553(a). In the majority of re-sentencings the defendants have been in custody and, while their adjustment may be significant in that setting, it is generally limited to institutional activities which do not always qualify as extraordinary. In this light, a downward adjustment would be the exception rather than the rule. On the other hand, offenders who have been released on bond pending their appeals have more opportunity to pay restitution which might be an unfair advantage over those in custody. Therefore, Option 1, removing Policy Statement § 5K2.19 is the most efficient way to address this necessary change.

Should the Commission decide to implement Option 2, POAG notes that consideration for departure on this basis could operate to support an upward departure as well if the defendant exhibits an extraordinary lack of effort toward rehabilitation.

In closing, POAG appreciates the opportunity to express concerns and the willingness of the Commission to work with POAG to provide input into the issues the Commission has raised. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Probation Officers Advisory Group
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