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Firearms Offenses Testimony February 27, 2023

Part A: Bipartisan Safer Communities Act

An overwhelming majority of POAG is in favor of Option 1, which adds references to 18 U.S.C. §§ 932 and 933 in USSG §2K2.1 at subsections (a)(4)(B)(ii)(II) and (a)(6)(B). The consensus focused on the ease of application by having most of the considerations occurring in the same section of the guideline. POAG observed that, by having all the considerations happening in one location, it resolved any concerns that it gave the appearance of double counting. However, POAG is in favor of some changes to Option 1. POAG suggests collapsing (b)(5)(A) and (b)(5)(B) into a single subsection. POAG also suggests some adjustments to the language in (b)(8) to allow for the guideline to have wider applicability.

POAG proposes that subsections (b)(5)(A) and (b)(5)(B) be combined and a two-level specific offense characteristic increase be applied for those who qualify under the new combined subsection (b)(5)(A). The combination of these two adds to the ease of application. The conduct involved in a conviction under 18 U.S.C. §§ 933(a)(2) or (a)(3) is often closely associated or similar to that described in the proposed (b)(5)(B). Additionally, POAG supports a five-level specific offense characteristic increase for those who qualify under proposed subsection (b)(5)(C). The reduced level increase at the proposed (b)(5)(C) (our proposed (b)(5)(B)) would also balance well with the language changes suggested at (b)(8) that would allow (b)(8) to be more widely applicable. Subsection (b)(5)(C) would be changed to subsection (b)(5)(B) as a result of combining the previous two subsections into a new (b)(5)(A). POAG's suggested subsection (b)(5) would read as follows:

(5) (Apply the Greatest) If the defendant—

(A) (i) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3); (ii) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (iii) attempted or conspired to commit the conduct described in clause (ii), increase by **2** levels; or

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **5** levels.

As noted previously, for subsection (b)(8), POAG proposes several adjustments to the language in this section. POAG proposes the pre-subsection language to be broadened, support for the “subsection (b)(5)” option under (b)(8)(A), adjustments to the (b)(8)(B) language, and a removal of the (b)(8)(C) subsection.

POAG respectfully recommends using the language “If the offense involved-” rather than “If the defendant-,” as it would make more sense for the increase to be based on the offense conduct rather than the specific actions of the defendant. This nuanced adjustment would allow for the straw purchaser to have the same aggravating factors reflected in his guidelines as the person who has solicited the straw purchaser’s assistance. They have both acted to circumvent the legal protections put in place to prevent convicted felons from purchasing firearms. By making this pre-subsection language offense-based, all participants in a straw purchasing conspiracy could receive the enhancement. This is especially important when the issue of criminal organizations is considered. While a straw purchaser may be solicited by a gang member to purchase a firearm, that gang member may be engaged in further distribution of the firearms throughout the criminal organization.

Additionally, for subsection (b)(8)(A), POAG supports the use of the language “receives an enhancement under subsection (b)(5),” as this would facilitate the inclusion of 922(g) offenses and “false statement” cases in which the defendant transferred weapons to a prohibited person. POAG supports this option in both the (b)(8)(A) and the (b)(9)(A) proposed amendments.

In subsection (b)(8)(B), POAG proposes the use of the language “affiliated with” rather than “participated,” and the removal of the “five or more persons” language, as this language is considered too restrictive. The use of the word “participated” seems to create the need to show the defendant had a high degree of engagement with the criminal organization. POAG believes “affiliation” is a more appropriate standard for this enhancement because often times gangs have regimented structure related to identifying members, but there can be many criminal affiliates to a criminal organization. Additionally, a straw purchaser’s role may only be to arm these gang

members and “participated” suggests that they may have had to have a more significant role in the group, club, or organization. POAG also supported the removal of the “five or more persons” component, as that may also prove very limiting. A straw purchaser often works with a specific individual contact without expansive interaction or knowledge of the criminal organization’s membership and structure.

Also, POAG supports the removal of the language in subsection (b)(8)(C) entirely, as the *mens rea* component would make subsection (b)(8)(C) extremely restrictive in its application. One of the POAG members had recently reviewed a couple cases in which defendants had acted as straw purchasers of large caliber semi-automatic firearms. These firearms were purchased for cartel members and transferred across the country. Even within these cases, applying the proposed (b)(8) enhancement would have been difficult, if not impossible, because there would have to be direct evidence that the transfer of these firearms to the cartel was intended to promote or further the felonious activities or done with the intent to maintain or increase a person’s stature therein. As long as the straw purchaser was paid, it is too easy to argue that they did it for money rather than the promotion of the felonious activity or intent to raise personal stature within a group. Removing the proposed (b)(8)(C) language provides that defendants who are engaged in this more egregious conduct are subject to an enhanced sentence. Often times the evidentiary burden on *mens rea* based enhancements is extremely difficult to obtain. We would need the defendants to not only articulate their rationale for committing the offense, but that articulation needs to be both clearly within the language of the guideline and in a format that could be captured or documented. POAG unanimously supports a two-level specific offense characteristic increase for those who qualify under subsection (b)(8). POAG’s suggested subsection (b)(8) would read as follows:

(8) If the offense involved—

(A) conduct that resulted in an enhancement under subsection (b)(5); and

(B) affiliation, at the time of the offense, with a group, club, organization, or association that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity;

increase by **2** levels.

Third, as stated previously, for subsection (b)(9)(A), POAG supports the use of the language “receives an enhancement under subsection (b)(5).” For subsection (b)(9)(C), POAG is in favor of using “and” not “or” in both of the bracketed locations at the ends of subsections (i) and (ii). POAG also favors using the language “*had no reason to believe* that the firearm would be used or possessed in connection with further criminal activity” (not “*had minimal knowledge*”) under subsection (iii). POAG unanimously supports a one-level specific offense characteristic decrease for those who qualify under subsection (b)(9). POAG suggests subsection (b)(9) would read as follows:

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; and (ii) received little or no compensation from the offense; and (iii) had no reason to believe that the firearm would be used or possessed in connection with further criminal activity;

decrease by 1 level.

Finally, for Proposed Amendment #3, Part A, under the Commentary section, Application Note 13, Part (C), POAG recommends that a definition be provided for “an unusually large amount of ammunition.”

Part B: Firearms Not Marked with Serial Number (“Ghost Guns”)

POAG unanimously supports the revision to USSG §2K2.1(b)(4)(B) to account for a four-level enhancement for any firearm not otherwise marked with a serial number [i.e., ghost guns]. Nonetheless, POAG proposes expanding USSG §2K2.1(b)(4) and the subsequent Application Note 8(A) and (B), to read:

(4) If any firearm (A) was stolen, increase by 2 levels; or (B)(i) had an altered or obliterated serial number; or (ii) was not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(16) or a firearm manufactured prior to the Gun Control Act of 1968), increase by 4 levels.

“...not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968), apply subsection (b)(4)(B)(i) or (ii).

“...not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968), apply subsection (b)(4)(A) or (B)(ii).

“...not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(a)(16) or a firearm manufactured prior to the Gun Control Act of 1968).

In addition, similar to the response to Part A, Bipartisan Safer Communities Act, POAG believes revision of the enhancement at USSG §2K2.1(b)(4) to include a mental state (*mens rea*) requirement would allow for limited liability, thereby reducing the applicability of the enhancement.

Part C: Issues for Comment on Further Revisions to §2K2.1

An overwhelming majority of POAG is in agreement that the conduct involved in burglary of a firearm licensee is already being well accounted for under USSG §2K2.1. When defendants

commit these types of offenses, their aggravating conduct is already captured in a myriad of ways (proximity to high-capacity magazines, number of firearms, stolen firearms, and the “in connection with” enhancements).

POAG supports increases in the guidelines to account for prior Felon in Possession of a Firearm or Ammunition convictions (state or federal), but not for previous convictions for misdemeanor crimes of domestic violence. We propose that prior convictions for Felon in Possession of Firearms or Ammunition offenses be treated the same as prior convictions for “crimes of violence” and “controlled substance offenses,” as the basis for applying base offense levels. This would appropriately capture the seriousness of these offense and danger represented by individuals who repeatedly engage in these types of offenses.

An overwhelming majority of POAG is in agreement regarding amending the definition of “firearms” in Application Note 1 of §2K2.1 to include devices which are “firearms” under 26 U.S.C. § 5845(a) but not 18 U.S.C. § 921, for purposes of clarity. POAG supported this alteration because it is agreed it would bring a higher degree of clarity to the definition.

Finally, POAG understands the reasoning behind increasing penalties for defendants who transfer firearms to minors. However, POAG is in favor of accounting for these increased penalties through departures or variances. This is due mostly to the perceived rarity of these cases. No one on POAG could recall ever having seen one.