PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

June 23, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following comment pertaining to the United States Sentencing Commission's request for comment regarding whether Parts A and B, relating to "status points" and certain offenders with zero criminal history points, should be included in the Guidelines Manual as an amendment that may be applied retroactively to previously sentenced defendants.

As public servants, probation officers fulfill their role within the justice system both at the time of sentencing, as well as during post-sentencing matters, including resentencing upon appeal, resentencing in response to case law, and resentencing based upon retroactive amendments. Our role related to a case after the initial sentencing hearing is part of the judicial process. As such, POAG does not take a position whether either amendment should be applied retroactively. POAG respectfully defers to the Commission's discretion on this matter after having considered testimony and comments from the public and various stakeholders, as well as their own expertise in this area.

Nonetheless, as the Commission formulates its decision on this matter, POAG provides the following analysis based upon the provisions under USSG §1B1.10, which provides that the retroactivity analysis should contemplate the purpose of the amendment, the magnitude of the change, and the difficulty in applying the amendment retroactively.

In the event either amendment is made retroactive, it would be essential that each district receive a list of incarcerated defendants who may be potentially eligible, as well as each defendant's anticipated discharge dates to assist districts in preparing and prioritizing their workload. Given the anticipated number of impacted individuals, as well as the number of anticipated motions filed by defendants who do not qualify under this amended guideline, and the need to allocate time and resources in assessing each case individually, POAG would respectfully request ample time before

retroactivity becomes effective. POAG suggests that, if retroactivity is adopted, the implementation of retroactivity be delayed by at least three to six months past November 1, 2023. Any such delay would not only assist with the resources needed to assess all of the motions while also maintaining their current caseloads, but it will allow for more time to prepare for the release of defendants with varying criminal histories as they transition to supervised release. The resources needed to incarcerate these individuals will transition to resources needed to safely supervise them in the community. The release planning includes identifying and verifying housing; coordinating any treatment needs, including sex offender treatment, mental health treatment, and substance abuse treatment; and assessing if any additional special conditions are relevant given the change in circumstances. Even temporary caseload swells of defendants on supervised release presents public safety concerns if it results in caseloads that exceed resource capacity.

Part A: Status Points

Part A eliminates status points under USSG §4A1.1(d) for those assessed with up to six criminal history points, that is, Criminal History Category II and III. Further, it reduces the status points from two points to one point for those assessed with seven or more criminal history points, that is, Criminal History Category IV, V, and VI. Therefore, this amendment will require all defendants still incarcerated to be assessed for potential impact, other than those assessed with a Criminal History Category of I. Of course, a reduction in criminal history points may not actually reduce the Criminal History Category. The reduction in points may not be sufficient to reduce the Criminal History Category or the Criminal History Category could be based on another consideration, such as USSG §4B1.1 (Career Offender) and USSG §4B1.4 (Armed Career Criminal). As such, the number of points assessed at sentencing regains new significance, but it presents a potential application issue in the event this amendment is made retroactive.

POAG identified a concern that such a retroactive amendment will result in requests for the court to consider objections to the probation office's original analysis and assignment of criminal history points, an issue that POAG anticipates will be litigated within each Circuit and potentially produce varying results. Declining to consider those arguments when addressing this matter on a retroactive basis takes away the opportunity for each party to advocate for their position based upon the current criteria, rather than the criteria that was in effect at the time of the original sentencing.

Further, either party may not have objected to, or may not have strongly pursued an objection to a particular scoring issue if it did not have an impact at that time. In fact, the guidelines are structured in such a way so as to reduce the amount of litigation at sentencing, allowing the court to decline to address objections in cases where it does not have an impact. Retroactive application of USSG §4A1.1(d) was not something the court could have foreseen when determining which objections to rule on at the time of the original sentencing hearing and in making the sentencing record. For example, consider a case where a defendant or the government objected to the scoring of one criminal history point, but the court either did not address the objection or did not make a finding on the matter because it did not have an impact on the determination of the Criminal History Category. This may also present as an issue in cases where there was a binding stipulation to a sentence that the court accepted or if the applicable mandatory minimum sentence was greater than the otherwise applicable guideline range. However, in the event this amendment is made

retroactive, because the sentencing court is responsible for resolution of any disputes which may impact the sentence imposed, resolution of this issue becomes relevant now that the number of points assessed within a category will impact application of USSG §4A1.1(d).

POAG also notes that, in the June 2022 Revisiting Status Points publication, the Commission determined that criminal history was cited as a reason in 13.3% of below range sentences and that there was no substantial difference in that statistic for offenders who received status points and those who did not. Given the limited details historically noted on the Judgment and Commitment Orders, absent the transcript from the original sentencing hearing and absent the court knowing this issue would be a relevant part of the record, POAG is concerned about the difficulty in discerning whether status points were already considered in the imposition of non-guideline sentences under 18 U.S.C. § 3553(a).

POAG also questions what the implication of the safety valve availability will be in cases in which one's criminal history category is reduced based upon the elimination of status points. POAG understands that, pursuant to USSG §1B1.10, proceedings under 18 U.S.C. § 3582(c)(2) do not constitute a full resentencing of the defendant. However, where safety valve eligibility is directly tied to the determination of one's criminal history category, POAG believes there will be litigation regarding safety valve for those persons whose criminal history is reduced to Criminal History Category I as a result of the retroactive application of this amendment. That litigation may be further complicated by the circuit split as to the interpretation of the First Step Act (FSA) statutory safety valve language, which will be incorporated into the corresponding guideline, USSG §5C1.2, via the November 1, 2023, amendment, as well as the fact that a defendant likely would not have engaged in a safety valve proffer prior to the original sentencing if he or she was not then eligible. Furthermore, there will likely be litigation relating to whether the safety valve criteria to be used should be that in effect at the time of the original sentencing or that in effect as a result of the First Step Act.

Furthermore, retroactive application of USSG §4A1.1(d) will also be relevant for those at the revocation stage. For those pending revocation, the parties may take the position that the criminal history computation would need to be re-calculated before USSG §7B1.4 could be applied to determine the correct imprisonment range that corresponds to the Grade of Violation. As a result, POAG also anticipates inquiries as to whether those presently incarcerated upon revocation are also eligible for retroactive application of USSG §4A1.1(d) to determine their amended imprisonment range and have their sentence adjusted accordingly. Given that revocation sentences are comparably shorter than sentences imposed at the original sentencing hearing, these cases would take precedence in the event the amendment is made retroactive. Additionally, while a retroactive effort is underway, individuals under supervision could commit violations of probation or supervision that necessitate a more immediate response on how a retroactive application of this guideline could impact them. Therefore, POAG recommends the Commission consider the above issues and provide guidance regarding whether this amendment would also pertain to those pending revocation and those currently incarcerated based upon a revocation proceeding.

And finally, POAG finds it highly relevant that, when the Commission eliminated a provision similar to status points, recency points under the former USSG §4A1.1(e), in 2010, based on a

similar study that focused on recidivism, that amendment was not made retroactive. POAG would suggest the basis for not making that amendment retroactive are likely equally relevant at this time in relation to USSG §4A1.1(d), weighing the minimum impact of this reduction, the fact that the 18 U.S.C. § 3553(a) factors were considered for those sentenced under an advisory guideline system, the resources needed to assess each motion and amend each sentence while maintaining the current docket, and the reason for the amendment all remain true. POAG recommends these factors be considered as the Commission makes their retroactivity determination.

Part B: Zero Point Offenders

With regard to Part B, POAG has identified the following practical obstacles that would result from retroactive application of USSG §4C1.1. While POAG also acknowledges there are certain exclusionary criteria under USSG §4C1.1 where additional fact-finding may not be necessary, one of the main challenges with applying the zero-point offender reduction under USSG §4C1.1 retroactively is that there would need to be additional fact-finding in relation to several of the exclusionary criteria.

The Sentencing Commission's Analysis of the Impact of the 2023 Criminal History Amendment (Parts A and B) if Made Retroactive report dated May 15, 2023 ("Impact Analysis Report"), presents information regarding the Instant Type of Crime for Offenders Eligible Under Part B that is found at Table 5B. This chart reflects that drug trafficking and fraud/theft/embezzlement were the most common offenses eligible for the reduction for zero-point offenders. In the Commission's Impact Analysis Report, certain methodological assumptions to approximate such fact-finding were used to determine the impact of this amendment if it was made retroactive. Appendices A through E reflect the various methodological assumptions used to determine to which offenders the reduction may apply. However, as the Commission notes in footnotes 55 through 59, "That methodology should not be considered as the Commission's interpretation of how this criterion should be applied in all cases. The courts may apply this eligibility criterion differently." As such, POAG notes that this notation seems to acknowledge the potential litigation and disparate application of the new criteria under USSG §4C1.1. This is further exacerbated by the fact that the provisions under USSG §4C1.1 are newly established criteria that will present the court with first impression issues, which ideally are addressed at the original sentencing hearing, rather than retroactively applied as part of a limited resentencing hearing and without the benefit of case law as guidance.

There are criteria where additional fact-finding will likely be necessary. These include the criterion at USSG §4C1.1(a)(3), if the defendant did not use violence or credible threats of violence in connection with the offense; USSG §4C1.1(a)(4), if the offense did not result in death or serious bodily injury; USSG §4C1.1(a)(6), if the defendant did not personally cause substantial financial hardship; and USSG §4C1.1(a)(7), if the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense. These criteria are usually more present in drug trafficking and fraud/theft/embezzlement cases, which were the most common offenses eligible for the reduction for zero-point offenders, based on the Commission's Impact Analysis Report.
In the Impact Analysis Report, the Commission applied the criteria in USSG §4C1.1(a) on existing guideline language and their correlating guideline subsections. However, the language does not

perfectly align with the existing language. These differences become important and require additional fact-finding in retroactivity. For instance, the criterion at USSG §4C1.1(a)(4) precludes the adjustment if "the offense did not result in death or serious bodily injury," meaning it encompasses relevant conduct. However, for drug trafficking offenses, this language differs from the language in USSG §§2D1.1(a)(1) through (4) where the "offense of conviction establishes death or serious bodily injury," meaning it only encompasses the offense of conviction. Consider a case where a defendant may have been identified as a drug trafficker after a victim died due to a fentanyl overdose. In this case, text message conversations may have alerted law enforcement to drug transactions between the defendant and the victim. Since the defendant was a zero-point offender, the defendant may have already received some consideration by being charged without the enhanced penalty where death or serious bodily injury was established in the count of conviction. Even if the presentence investigation report identified the victim's death as causal to initiate the investigation, additional fact-finding may be necessary to determine if the drugs that the defendant sold caused that death.

Further, the criterion at USSG §4C1.1(a)(7) allows for this adjustment if "the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." Appendix E of the Commission's Impact Analysis Report excluded the adjustment if an enhancement under USSG §2D1.1(b)(1) was applied. The enhancement under USSG §2D1.1(b)(1) is offense based and differs from the standard under USSG §4C1.1(a)(7), which is based on the defendant's conduct. An individualized assessment is necessary in these cases. Similarly, the criterion at USSG §4C1.1(a)(7) more closely, though imperfectly, tracks the "safety-valve" language referenced in USSG §§2D1.1(b)(18) and 5C1.2(a)(2), which provides that the "defendant did not… possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." However, USSG §4C1.1(a)(7) includes additional acts - receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) – which are not captured under USSG §§2D1.1(b)(18) and 5C1.2(a)(2). As such, an individualized assessment is necessary in these cases.

Regarding financial cases, the criterion at USSG §4C1.1(a)(6) allows for the adjustment if "the defendant did not personally cause substantial financial hardship." Appendix D of the Commission's Impact Analysis Report excluded the adjustment if an enhancement under USSG §§2B1.1(b)(2)(A)(iii), (b)(2)(B), or (b)(2)(C) was applied. The enhancement under these subsections is offense based and differs from the standard under USSG §4C1.1(a)(6), which is based on the defendant's conduct. Further, there may have been an enhancement applied under USSG §2B1.1(b)(2)(A)(i) for an offense involving 10 or more victims, but the offense may have also resulted in a substantial financial hardship to one or more victims. An individualized assessment is necessary to determine if the defendant personally caused this hardship. These individualized assessments will often be heavily reliant on information provided by the victim.

Moreover, prior to the November 1, 2015, edition of the Sentencing Guidelines, "substantial financial hardship" under USSG §2B1.1 was not included as a specific offense characteristic. The facts establishing this enhancement may not have been presented in the presentence report as such definition was not included in the applicable Guidelines. Thus, some courts may be having to consider this issue for the first time with regard to certain defendants.

POAG also acknowledges there are certain exclusionary criteria under USSG §4C1.1 where additional fact-finding may not be necessary. This is because certain factors at USSG §4C1.1 reference specific enumerated guidelines or statutes which exclude application of this adjustment. These include the following criteria at USSG §4C1.1(a), as follows: USSG §4C1.1(a)(2) if an adjustment under §3A1.4 (Terrorism) is applied; USSG §4C1.1(a)(5) if the instant offense is a sex offense; USSG §4C1.1(a)(8) if the instant offense is not covered by §2H1.1 (Offense Involving Individual Rights); USSG §4C1.1(a)(9) if the defendant did not receive an adjustment under §3A1.1(Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and/or USSG §4C1.1(a)(1) if the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaging in a continuing criminal enterprise, as defined in 21 U.S.C. § 848. In these circumstances, if the defendant was a zero-point offender, and the court already made a finding as to the enumerated guidelines or statutes listed in above-referenced sections, then additional fact-finding would not be necessary to preclude the defendant from this adjustment.

Additionally, there may be difficulty in applying this adjustment in cases where the parties entered into a binding plea agreement pursuant to Federal Rules of Criminal Procedure 11(c)(1)(C).

Another significant concern is that there will be disparities in the application, lack of certainty, and circuit splits when determining how the adjustment may be applied in cases where additional fact-finding is necessary. Applying an amendment retroactively does not constitute a full resentencing. Some districts may look solely at the information presented in the presentence investigation report, which may not have included these facts, while other districts may request a hearing regarding specific facts relevant to the criterion in question. In this regard, litigation of the facts at this juncture may not be possible given the unavailability of discovery or victim statements.

As another whole and separate consideration, the court may have already considered some of these factors enumerated under USSG §4C1.1 when determining the original sentence. The creation of USSG §4C1.1 appears to create a formalized assessment of what courts have historically considered at sentencing. As such, these are factors that very likely received weight at sentencing already. The record may not adequately reflect that these factors were or were not considered as part of the 18 U.S.C. § 3553(a) considerations. This may result in unintended outcomes based on whether a court already considered some of the factors at USSG §4C1.1(a) when determining the original sentence for a zero-point offender. If the court already weighed these factors when imposing a sentence, a defendant may receive an additional benefit that the defendant would not have otherwise received.

In summary, POAG recognizes that if this adjustment is applied retroactively, the primary challenges include additional fact-finding, litigation of these facts, and determining the weight these factors had on the original sentence.

Other Considerations

In addition to the issues outlined above specifically for Parts A and B, this section addresses broader issues related to these amendments being made retroactive, such as the practical implications of implementation. These amendments do not intend to correct mistakes, but instead

attempt to make retroactive a new perspective based upon data that suggests that the factors are not as relevant (status points) or a way to account for no criminal history for a defendant beyond a departure or variance (zero point offenders). In that sense, prior retroactive amendments are not comparable to the present amendments as a majority of the cases resentenced as part of prior retroactive amendments were sentenced pre-*Booker*. In contrast, approximately 93% of the defendants potentially eligible under Part A and approximately 98% of defendants potentially eligible under Part B were sentenced within the last decade. During that period of time, application of 18 U.S.C. § 3553(a) evolved and continues to carry more weight at the time of sentencing. The sentences imposed for these defendants included an analysis of the facts and circumstances of the offense, the history and characteristics of the defendant, and the need to protect the public. POAG does not anticipate that minor adjustments to the offense level or criminal history score would have impacted the final sentences imposed.

As most impacted sentences are post-*Booker*, retroactivity could be incorrectly interpreted as suggesting that the original sentences were inherently unfair, although the court had the discretion to sentence as it deemed appropriate under 18 U.S.C. § §3553(a) since the guidelines were advisory during this time. POAG also believes the ultimate impact, if the amendments are made retroactive, would be minimal given the number of original sentences imposed based on variances.

POAG believes the judicial resources needed to implement these amendments will be substantial, especially considering if counsel will be appointed and the resulting appeal process. Part A will most likely impact those in Criminal History Category II through VI, while Part B will most likely impact those in Criminal History Category I, meaning essentially every defendant presently incarcerated will have the option of having their sentence reassessed and potentially amended. Further, the identified number of cases affected is not reflective of the number of cases that will need to be addressed. Based upon prior retroactive guideline and statutory experiences, a significant number of motions will be filed by ineligible defendants seeking the reduction. Each of these cases must also be researched, responded to, and adjudicated.

Another resource matter for the Commission to consider is if this retroactive amendment would go into effect at the same time as the new criteria under USSG §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)), which allows defendants to file compassionate release motions based upon non-retroactive changes to the law. This would essentially require courts to potentially address three different types of retroactive analysis during the same period of time. Specifically, Part A pertaining to status points, Part B pertaining to zero-point offenders, and the new criteria established under USSG §1B1.13 related to reductions in terms of imprisonment under 18 U.S.C. § 3582(c)(1)(A) (compassionate release), all while maintaining their current docket.

In addition to the issues mentioned above, *ex post facto* analysis will have to be made, regardless of the decision on these amendments, on many presentence investigations for sentencings occurring after November 1, 2023, to determine which version of the sentencing guidelines to apply given the numerous amendments this amendment cycle. The training, preparation, and implementation of these amendments alone is expected to require adjustments to the normal process. Therefore, aside from whether the changes are retroactive, the implementation of the changes may cause adjustments and delays.

As the Commission is certainly aware, workload impact varies by district. Some districts have expressed concerns that a retroactive sentencing process at this time would be debilitating based upon their current workload levels. Specifically, border districts would be some of the most impacted under both parts according to the Impact Analysis Report. While POAG understands workload concerns alone should not be a deciding factor for this issue, it is a reality and a serious consideration that affects other aspects of the judicial process. If the court is inundated with requests based on retroactivity, other pressing matters such as sentencing hearings, trials, and civil issues would be hindered from an expeditious resolution.

USSG §1B1.10

The end goal of any retroactive amendment is the reduction of the unwarranted disparity between those previously sentenced and those pending sentencing. POAG's comments and recommendations have historically favored the concept of reducing such disparity. For that reason, POAG offers the following additional comment regarding application of USSG §1B1.10 that may require clarification in order to avoid further disparity due to inconsistent or misapplication of a guideline that is seldomly applied.

For background, POAG notes that, on December 20, 2018, the Commission issued Proposed Amendments to the United States Sentencing Guidelines, which included two proposed revisions to USSG §1B1.10. Public comment was received, but there was not a hearing to address the 2019 proposed amendments and the amendment cycle was subsequently paused until 2022 pending the nomination of a full quorum of commissioners. The public comment submitted in response to the 2019 amendment, including POAG's prior written response, can be reviewed at the following link: Public Comment from February 19, 2019 | United States Sentencing Commission (ussc.gov). Now that the instant amendment cycle includes a potential retroactive amendment, the previously proposed amendments to USSG §1B1.10 have renewed significance.

Part A of the 2019 proposed amendments addressed a possible amendment to USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) in light of *Koons v. United States*, 138 S. Ct. 1783 (2018).

In summary, *Koons* addressed application of USSG §1B1.10(c), which was added to the 2014 version of the Guidelines Manual, and is as follows:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance. If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

Specifically, *Koons* addressed application of USSG §1B1.10(c) and held that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance, are ineligible for sentence reductions under 18 U.S.C. § 3582(c)(2). *Koons* found that, in these cases, the sentences were not "based on" their guideline ranges but were instead "based on" the statutory minimum penalties and the substantial assistance reduction pursuant to 18 U.S.C. § 3553(e). As such, POAG recommends the Commission address the *Koons* impact on USSG §1B1.10(c) and provide further application instructions prior to implementing any retroactive amendments.

The 2019 proposed amendments reflected that Part A would revise USSG §1B1.10(a) and its corresponding commentary to clarify that a defendant is eligible for a reduction under the policy statement only if the defendant was "sentenced based on a guideline range." The proposed amendment to subsection (a)(1) intended to closely track section 3582(c)'s requirement that the defendant must be "sentenced based on a guideline range." The proposed amendment also sought to revise subsection (a)(2) to state the requirements for eligibility rather than exclusions from eligibility. It also added a requirement for eligibility that the defendant was "sentenced based on a guideline range."

POAG submitted public comment during 2019, indicating it was in favor of Option 2, which provided that the amended guideline range is determined after operation of USSG §§5G1.1 and 5G1.2. As noted in *Koons v. United States*, applying USSG §§5G1.1 and 5G1.2 in this manner treats defendants whose sentences are being amended due to a retroactive amendment in the same manner as similarly situated defendants who are being sentenced for the first time. Option 2 would provide for a consistent process and avoid unwarranted disparity that would otherwise result solely based upon the date judgment was entered.

In contrast, the proposed Options 1 and 3 provided that straddle and/or above defendants be sentenced without regard to operation of USSG §§5G1.1 and 5G1.2. POAG commented that the provisions of Options 1 and 3 were inconsistent with USSG §1B1.10(b), which direct that, in determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. The guidelines that would have been in effect at the time the defendant was sentenced would have included operation of USSG §§5G1.1 and 5G1.2. Further, USSG §1B1.10(c) directs that, in making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected. POAG believes an amendment directing that USSG §§5G1.1 and 5G1.2 do not apply conflicts with the provision that all other guideline applications are unaffected when determining the term of imprisonment due to a retroactive amendment.

Part B of the 2019 proposed amendment sought to resolve a circuit conflict concerning the application of USSG §1B1.10, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991). For the same reasons as noted

above, POAG believes further direction on this issue is needed prior to implementing a retroactive amendment out of concern that failure to provide such direction will result in additional disparity the amendment is seeking to resolve.

POAG recommended Option 2, which provided that if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of the initial sentencing, the reduction under subsection USSG §1B1.10(b)(2)(B) may take into account any departures, including substantial assistance, or a variance that was imposed at the time of the initial sentencing. This is consistent with USSG §1B1.1(a), which provides that the first step in determining the appropriate sentence is to determine the defendant's offense level computations under Chapters Two, Three, and Four; consider any applicable departures under Chapter Five; and then consider "the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Departures and variances are part of the process of sentencing, and POAG disfavors any amendments that would place arbitrary limits on judicial discretion to reimpose any departure or variance deemed appropriate at the initial sentencing. However, with that recommendation, POAG recommended limitations comparable to the guidance currently set forth in USSG §1B1.10(b)(2)(B) should be included in order to preclude additional litigation. Specifically, POAG recommended that USSG §1B1.10 be amended to include that any departure or variance from the amended guideline imprisonment range be based solely upon factors originally considered and shall not exceed the reduction imposed at the time of the initial sentencing. POAG took the position that consideration of new grounds for departure or variance in resentencing would produce sentencing disparity for defendants who are ineligible for resentencing and result in a proceeding that is more comparable to a full resentencing. Such a provision would give deference to original judicial intent, which is particularly relevant when the original sentencing judge does not preside over the resentencing. Further, the aforementioned establishes a procedurally consistent process that aligns sentencing with the determination of an amended sentence after application of a retroactive guideline amendment.

Notwithstanding POAG's previously submitted commentary supporting Part B of the 2019 proposed amendments regarding USSG §1B1.10(b)(2)(B), said amendment would have also reduced the impact of USSG §1B1.10(b)(2)(A), which as it is currently written, precludes a significant number of defendants from being eligible for retroactive relief. Specifically, USSG §1B1.10(b)(2)(A) provides that, with the exception for substantial assistance, the court shall not reduce the defendant's term of imprisonment under this policy statement to a term that is less than the minimum the amended guideline range. Well over 90% of those potentially eligible for the potential retroactive amendment were sentenced in the last decade. During that period of time, variances have become a staple part of the sentencing process, with only the extent of the variance being the primary variable. Knowing the minimal impact of one Criminal History Category or two offense levels upon the determination of the advisory guideline imprisonment range and knowing the regularity and extent that a variance has been imposed over the last decade, application of USSG §1B1.10(b)(2)(A) would result in resources being expended to assess a case, only to find that the original sentence imposed was lower than the amended guideline range, making them ineligible for retroactive relief. However, if the 2019 proposed amendment had been adopted, USSG §1B1.10(b)(2)(A) would not have the same limiting effect, thus making an additional approximately 4,300 defendants eligible for relief.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on behalf of the dedicated professionals who serve the court as United States Probation Officers.

Respectfully,

Probation Officers Advisory Group