PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group offers the following comments with respect to several of the non-emergency permanent amendments as listed in the *Federal Register*, January 26, 2001:

Amendment Five – Sexual Predators

POAG prefers a combination of Part A, Options One and Three, as an approach to satisfy the congressional directive in the Act that requires penalty increases in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The creation of §4B1.5 addresses the high-risk sex offender whose instant offense is a sexual abuse conviction and who has a prior felony conviction for sexual abuse. Option One is preferred as it mirrors the present §4B1.1 (Career Offender) and §4B1.4 (Armed Career Criminal) guidelines that enhance a defendant's sentencing range based on the elements of the instant offense of conviction and the defendant's prior convictions.

Although Option One is favored, POAG identified two areas of concern within this option. The first concern is §4B1.5(a)(2), "the defendant committed the instant offense of conviction subsequent to his sustaining at least

one sex offense conviction". POAG brings to the Commission's attention that neither the second prong of determining if a defendant is a repeat and dangerous sex offender nor the supporting commentary addresses whether the prior sex offense conviction is one that has to be counted under the provisions of §4A1.1(a), (b), or (c), or is restricted by the time periods under §4A1.2. POAG would strongly encourage the Commission to consider that the prior sex offense conviction receive criminal history points under the provisions of §4A1.1 in order for the defendant to qualify for the application of §4B1.5.

The second concern lies within the format presentation of §4B1.5(d), "a repeat and dangerous sex offender's criminal history category in every case shall be...". We suggest that this language precede the table at §4B1.5(b). This minor format change becomes consistent with the presentation of a career offender's criminal history category found at §4B1.1. POAG takes no position in recommending the criminal history category for this type of defendant.

With respect to the commentary options for §4B1.5, POAG prefers the commentary as set forth at Option 1B. However, we would strongly encourage that for Option 1B, comment.(n.3), language be included to designate whether the prior sex offense conviction under §(a)(2) is one that has to be counted under the provisions of §4A1.1.

POAG prefers Option Three wherein a specific offense characteristic is included at §2A3.1, that addresses "pattern of activity". This two-level enhancement allows for the consideration of additional sexual abuse or exploitation of a minor behavior that does not necessarily result in a conviction, hence sanctioning the often ongoing activities of many sex offenders.

Amendment Nine – Safety Valve

POAG strongly supports the proposed amendment which allows a two-level reduction for all defendants despite their offense level who meet the criteria of the sub-sections as set forth at §5C1.2. Such change allows for the first-time offender to benefit even if their offense level is below 26.

Amendment 12 – Economic Crime Package

Based on time constraints with respect to our meeting, POAG focused on the proposed loss tables for the consolidated guideline. Of the three options proposed, POAG prefers Option One. POAG's collective opinion is that the penalties in all the proposed tables are too low as we routinely receive comment from our courts that the sentencing ranges for offenses calculated under §§2B1.1 and 2F1.1 do not provide significant punishment at the lower levels where the majority of the defendants prosecuted under these two guidelines fall. However, of the options presented, POAG prefers Option One since the majority of offenses we encounter would receive greater sentences, thus keeping in line with the concerns of our courts. While we recognize the penalties are more substantial at higher loss levels in the recommended tables, it has been our experience that only a minority of cases prosecuted fall within this category.

Amendment 18 – Immigration

POAG appreciates the concerns that have been voiced in reference to the application of §2L1.2(b)(1)(A) wherein a 16-level enhancement is applied if the defendant was previously deported after a criminal conviction for an aggravated felony, thus often resulting in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. POAG concurs that the term "aggravated felony" is broadly defined and that some aggravated felonies are "less serious" than others. Although conceding that a problem exists, POAG nonetheless, has reservations with the proposed remedy. While disproportionality is the stated incentive for revising §2L1.2(b)(1)(A), POAG is acknowledges the plight of the border states and the overwhelming number of unlawful entry cases they perennially process. It is believed that distinguishing one aggravated felony from another may benefit certain defendants and expedite the plea/sentencing process in those cases. Like other defendants, aliens are more agreeable when they are facing the possibility of serving less time.

The proposed amendment is intended to achieve proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony conviction. The concerns POAG had with the "time served" approach are three-fold. First, ascertaining reliable information pertaining to the time a defendant actually served is believed to be impractical and in some instances, impossible. Court records are often difficult to acquire. Even if it were possible to obtain reliable jail/institutional/correctional records to determine the actual time served, the already protracted sentencing process may take even longer, thus providing another obstacle for the border states. The solution to the problem is beyond officers merely improving their investigation/research techniques and/or work ethics. POAG is of the opinion that officers already perform an admirable job ferreting available information within a reasonable time period.

A second concern is that the use of the time served methodology is contrary to the philosophical underpinnings of Chapter Four. There has been an ongoing debate as to the propriety and purpose of using criminal history to determine the defendant's sentence. There has also been objection to the *Federal Sentencing Guidelines* because of their relatively unique approach to determining criminal history by measuring the severity of the prior offense by the length of time imposed for the prior conviction. Employing a tiered system at §2L1.2 could possibly fuel the fires of discontent regarding the current approach in determining severity in Chapter Four. We do not suggest, however, that the rationale in Chapter Four is beyond reproach.

As a third issue, even if it were practical or possible to determine time served, the same may not be a fair measure of severity. One would have to wrestle with the issue of the disparity that results in varying charging and plea practices, time served in parole- and non-parole systems, alternative sentences whose custodial component is not the traditional form of incarceration, early releases prompted by prison overcrowding, time served for revocation of supervision, and premature releases to detainers, particularly those in the cases of deportable aliens.

Looking to an alternative to basing the enhancement on time actually served, one option would be predicated on the type of aggravated felony involved. It is noted that this focus is eluded to in Option One. Such alternative may be a feasible approach if the enhancement hinged on real versus charged offense behavior. Given prosecutorial discretion and charge/plea bargaining, reliance on the latter would invite disparity in the

application of §2L1.2. The traditional measure of severity, i.e., length of sentence imposed, may still be the preferred approach.

The option of relying on departures was also discussed as an approach to the situation but summarily dismissed by POAG as we are of the opinion that sufficient language presently exists in the guidelines inviting such a departure. It was perceived that given a range of 16 levels, departures without structure would invite an unacceptable degree of disparity.

Lastly, the Commission invited comment as to whether the enhancement for previous convictions for aggravated felony should follow the same counting rules as provided at §4A1.2. POAG generally favors consistency and would recommend that there be a "shelf life" even for aggravated felonies in Chapter Two.

Although not precisely on point, POAG engaged in a brief discussion with regard to "uniformity" in the punishment of aliens. When incarcerated and upon completion of their imprisonment sentence, alien offenders are typically released to a detainer and deported. Although a term of supervised release is applicable, it is seldom imposed. Aliens seldom have to comply with the rigors of supervision. Given this reality, the severity of their sentence is obviously depreciated. An order to remain outside the United States may be consequence enough but it would seem this depreciated sentence undermines the goals of uniformity that Congress sought to achieve by enacting the Sentencing Reform Act. In expediting the disposition of immigration cases, POAG is of the opinion that we must remain cautious so as not to compromise the ability of the criminal justice system to "...combat crime through an effective, fair sentencing system".

Amendment 20 – Money Laundering

The Commission invited comment on four issues with respect to the money laundering proposed amendment.

(1) Whether application of subsection (a)(1) of proposed §2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under §1B1.3(a)(1)(A).

The consensus of POAG is that relevant conduct should be limited to the defendant's accountability under §1B1.3(a)(1)(A). Incorporating under §1B1.3(a)(1)(B) would more than likely include the "third-party cases", thus, the distinction between the two groups would be lost. It was brought to our attention that the Commission did not want to lose the distinction between the two groups.

(2) Should §2S1.1 include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, whether, and if so, to what extent, proposed §2S1.1 should include an enhancement if:

(A) The offense involved concealment even if the conduct did not constitute sophisticated concealment.

POAG is of the opinion that concealment is inherent in the offense. Therefore, an enhancement should only be applicable if the offense involved "sophisticated" concealment.

(B) If the defendant is convicted under various codes indicated referencing Internal Revenue violations:

The presumption is that tax issues are not necessarily part of every money laundering offense; therefore, POAG is of the opinion that an enhancement treated as a specific offense characteristic would be appropriate. Furthermore, addressing this conduct as a specific offense characteristic would satisfy the grouping issue that exists when there is also a tax count charged.

(C) If subsection (a)(1) applies and: (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.

POAG is of the opinion that the underlying offense appropriately addresses the seriousness of the amount of laundered funds. Should an aggravating or mitigating factor be identified that has not been captured within the computation, the Court would have the option of departing.

(3) Whether application of §(b)(2)(A) should be expanded to include defendants: (1) whose base offense level is determined under subsection (a)(1), and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A).

POAG is of the opinion that application of this subsection should be expanded so a defendant is held accountable for being a direct and a third-party money launderer.

(4) Whether violations of 18 U.S.C. §1960 should be referenced to §2S1.3.

POAG has no position with respect to this issue.

In Conclusion

Due to the time constraints of our meeting and the volume of information presented to us, the staff of the Office of Education and Sentencing Practices assisted POAG in prioritizing issues for response. Our lack of response to additional proposed amendments in no way should be interpreted that we do not consider the proposed amendment noteworthy, i.e., *Sentencing Table Amendment* and *Alternative to Sentencing Table Amendment*. We trust that our comments have been beneficial and should you have any questions or need clarification, please do not hesitate to contact me or a circuit representative.

Very truly yours,

Ellen S. Moore
Chairman

ESM/amc