

**PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission**

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February 9, 2001

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 (POAG) met in Washington, DC on February 6 and 7, 2001, for the purpose of formulating our recommendation with respect to emergency amendments that will be effective May 1, 2001, as well as to provide comment on amendments to be considered effective November 1, 2001. This paper focuses on amendments that we were informed you will be discussing at your meeting on February 13, 2001.

Following is POAG's position with respect to three of the four proposed emergency amendments:

Proposed Emergency Amendment No. 1 - Ecstasy

Based on the facts presented to POAG concerning the harms inflicted by this drug, it is our position that a penalty increase is warranted. POAG is not in a position to comment on whether Ecstasy should be comparable to some other major drug of abuse. The proposed amendment does not present any application difficulties and appears to address the concern that the penalties for this substance is too low.

Proposed Emergency Amendment No. 2 - Amphetamine

POAG supports this amendment and views it appropriate based on the analysis that amphetamine and methamphetamine are chemically similar, produced in a similar fashion, trafficked in a similar manner, share similar methods of use, effect the same parts of the brain, and have similar intoxicating effects. Therefore, these substances should receive the equivalent punishment as there appears to be no objective criteria to differentiate the two. POAG supports Option 2 wherein amphetamine is included in the drug quantity table at USSG §2D1.1(c). This option provides ease of application as it eliminates the mathematical conversion of the amount of amphetamine to its marijuana equivalent.

POAG is of the opinion that USSG §2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine because of the similarities between these substances and methamphetamine. POAG is of the opinion that whenever possible, the guidelines should be consistent. Therefore, if methamphetamine and amphetamine are treated as a one-to-one ratio and there is a two-level increase for manufacture or importation of methamphetamine, the same should hold for the production or importation of amphetamine.

Proposed Emergency Amendment No. 3 - Trafficking in List I Chemicals

After listening to Committee reports provided by staff members of the United States Sentencing Commission, POAG supports the proposed amendment. POAG is of the opinion that application of the proposed amendment will not be difficult.

The following comments are related to POAG's position with respect to circuit conflicts which were published in the *Federal Register* November 7, 2000:

Amendment No. 4 - Circuit Conflict Concerning Stipulations

POAG supports the proposed amendments to §1B1.2(a). POAG is of the opinion that the revised proposed language addresses the circuit conflicts and will promote good practice and a uniform understanding that should a plea agreement, written or made orally on the record, contain a stipulation that establishes a more serious offense than the offense of conviction, the Chapter Two guideline applicable to the stipulated conduct is to be applied. There was concern regarding that there may be a misunderstanding between the parties as to the specific Chapter Two guideline that would be referenced as a result of the stipulation.

Amendment No. 5 - Circuit Conflict Concerning Aggravated Assault

POAG agrees that both options address the circuit conflict regarding whether the four-level enhancement in subsection (b)(2) of USSG §2A2.2 applies even though the basis for the application of the Aggravated Assault guideline is the presence of a dangerous weapon. However, POAG supports Option One as we found Commentary Note 2 provides a thorough explanation regarding the application of the specific offense characteristic. It is also our position that Option One resolves the circuit conflict without making

further substantive changes to this particular guideline. It is POAG's posture that Option Two may inadvertently present additional issues for litigation.

Amendment No. 6 - Circuit Conflict Concerning Certain Fraudulent Misrepresentations

Generally, POAG is in agreement with the proposed amendment. POAG recommends that the Commission review Example (C) as the example does not appear to capture the application of this enhancement in the case of a legitimate organization when all or part of the funds were diverted. An area of concern was identified as the timing of the intended diversion of all or part of the benefit. As in Example (C), it appears the fire chief at the onset of the fund raiser did not intend to divert all or part of the benefit but made the decision to do so during the fund raiser or sometime thereafter. The question of whether or not timing should be an issue needs to be addressed. POAG was of the opinion that Example (C) generated confusion and agreed that perhaps another example could be drafted to capture the applicability of the enhancement in a legitimate organization when all or part of the funds were diverted.

Proposed Amendment No. 7 - Circuit Conflict Regarding Drug Defendant's Mitigating Role

POAG supports the general framework of this amendment, however, identified several areas of concern. First, the proposed deletion of the sentence which states in part that, "the minimal role adjustment is intended to be used infrequently" may be interpreted that it is the Commission's intent to actively discourage the application of minimal participant as the deletion of this sentence would be a substantive change to the prior commentary as currently reflected in USSG §3D1.3, comment.(n.2). Second, the concern arose in defining "average participant" as noted at Commentary Note 3A, Substantially Less Culpable Than Average Participant. POAG presented two different interpretations of "average participant". One interpretation was that an average participant was distinguished among others within the conspiracy while the other interpretation of an average participant was compared to participants in like offenses. The context and framework of "average participant" is extremely essential in determining the application of this adjustment.

With respect to proposed application note 3(C), we are of the opinion that the mitigating role adjustment should not be restricted in applying to a defendant whose role in a drug offense is limited to transporting or storing of drugs. Furthermore, we agree that the example in proposed application note (C) should be expanded for the purpose of clarifying that the rule is intended to apply to a defendant who has a similarly limited role in any offense, i.e., telemarketing, and who is accountable under sub-section 1B1.3 only for that portion of the offense for which the defendant was personally involved.

In closing, the Probation Officers Advisory Group appreciates the opportunity to respond to issues involving the Sentencing Guidelines and desires that you find our responses beneficial when making your decisions.

Respectfully,

Ellen S. Moore
Chairman

ESM/amc