PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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The Honorable Diana E. Murphy, 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 Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on March 6 and 7, 2003 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments for the amendment cycle ending May 1, 2003. We are submitting comments relating to the following proposed amendments.

Proposed Amendment -- Corporate Fraud

POAG considered the issues that remain outstanding and were published for comment on January 17, 2003. To date, we have insufficient experience with the impact on the total offense level of the various specific offense characteristics which were added between November 1, 2001, and January 25, 2003. There is also a concern that charge bargaining will increasingly occur as a result of some of these changes. POAG discussed the sweeping changes to §2B1.1, effective November 1, 2001 and January 25, 2003. Given the recent amendments to §2B1.1, which have raised issues of ***ex post facto*** for offenses committed prior to enactment, POAG believes the field has not had sufficient opportunity to consistently apply this guideline. The group remains concerned about the impact to low level theft type cases which are now captured in this consolidated guideline. That being said, however, the group does not support this guideline being deconsolidated. The amendments effective November 1, 2001 and January 25, 2003 may provide adequate sanctions to the type of offender targeted under *Sarbanes-Oxley*. Notwithstanding these concerns, POAG's positions with respect to

the proposed amendments are outlined below.

With the increased statutory penalties from ten to twenty years for fraud offenders, POAG recognizes the need to provide alternative base offense levels to reflect these penalties. If alternative base offense levels are implemented, POAG prefers applying the higher base offense level of 7 in cases involving offenses for which the maximum term of imprisonment prescribed by law is at least twenty years. This option would assign the higher base offense level to many cases involving fraud; the lower base offense level of 6 would almost always apply in theft cases. This might, to some extent address the concern that theft and fraud cases warrant different punishment.

There are three options under consideration for amending the loss table in §2B1.1. POAG notes that none of the options raise sanctions for offenders whose frauds involve $70,000 or less. If the table is altered, POAG noted ease of application exists for all three loss tables.

With respect to §2B1.1(b)(13), POAG supports expansion of this guideline as proposed. POAG members noted limited experience with cases where this enhancement would apply but surmise that this specific offense characteristic will specifically provide for the inclusion of non registered brokers and dealers and thus will close a potential loophole.

Likewise, POAG supports the creation of an application note under §2J1.1 (Contempt) regarding application of §2B1.1 as the most analogous guideline in cases involving a violation of a judicial order enjoining fraudulent behavior. Again, POAG members voiced limited experience concerning these types of cases.

POAG supports an increase to the base offense in §2J1.3 (Perjury) to conform to the increased base offense level in §2J1.2 (Obstruction of Justice), which became effective January 25, 2003. These types of offenses are similar and should have the same base offense level. POAG recommends that, under application note 4 at §2J1.2, which lists potential considerations for upward departure, examples of "extreme violence" would be helpful. This would assist officers in identifying the types of aggravated obstruction cases falling outside the heartland.

Proposed Amendment - Campaign Finance

POAG has had no experience with the new emergency Campaign Finance Fraud guideline and offers no suggestions for change. The group previously agreed with the establishment of a separate guideline, a base offense level of 8 and use of the loss table in §2B1.1 to address the value of the illegal transactions. POAG notes that the new guideline will eliminate possible disparity as previously, the instruction was to apply the most analogous guideline.

Proposed Amendment - Use of Body Armor in a Crime of Violence or Drug Trafficking Crime

POAG understands and appreciates the need to provide an enhancement/enhanced punishment for crimes of violence and/or drug trafficking offenses in which the defendant used body armor. Offenses involving both a weapon and body armor have an increased potential for violence and should not be treated in the same manner as the person who is simply wearing body armor, yet, has no means to commit an act of violence. Both situations indicate an awareness of a heightened potential for violence and therefore, it is our position that

enhancements are appropriate for both scenarios. Under a new guideline, §3B1.5, consideration should be given for an increased enhancement for the more egregious case of an offender possessing a dangerous weapon and wearing body armor.

In application note 1, it would be helpful to highlight that the definition under 18 U.S.C. § 16 for a crime of violence is different and broader than the definition found in Chapter 4.

Application note 2 currently indicates this enhancement is defendant based. We understand that the Congressional directive was worded in a defendant specific manner. It is our position that this enhancement should include relevant conduct of others. For example, four individuals planned and committed a bank robbery. Two wear body armor, two do not. Under current relevant conduct standards, all four would receive a weapon enhancement. It is our recommendation that this same principal should apply to offenses involving body armor if the defendants plan a crime together and decide that some participants will wear body armor and others will not.

Finally, in regard to application note 4, POAG found the language "actively used the body armor in a manner to protect the defendant's person" confusing. Perhaps some examples to illustrate this principal would assist officers in making this determination.

Proposed Amendments - Oxycodone and Red Phosphorous

POAG believes the proposed amendment to §2D1.1 would remedy proportionality issues resulting from inequitable counting of oxycodone. Based on the increasing levels of abuse and the addictive nature of oxycodone, POAG supports the amendment to resolve oxycodone calculation difficulties and increase its marijuana equivalency from 500 to 6,700 grams.

POAG supports the amendment which adds red phosphorous to the Chemical Quantity Table in §2D1.11. The conversion method suggested by staff appears to be sound and, like the precursor ephedrine, is based on the amount of methamphetamine which could be manufactured from the precursor.

Proposed Amendment - Cybercrime

POAG discussed the proposed promulgation of amendments pursuant to the Cyber Security Enhancement Act of 2002. The Group believes that an increase of four levels, rather than two, more accurately accounts for the increased risk of serious bodily injury or death which may occur as a result of conduct described in 18 U.S.C. § 1030(a)(5)(A)(i). The expanded language proposal in the loss definition for protected computer cases in application note 2 mirrors the loss language in the statute. This definition addresses consequential damages without using said terminology and POAG is concerned about the difficulty in ascertaining these loss amounts and the sentencing delays that may result. Although the U.S. Attorney's Offices are to produce this information, it is often not provided.

POAG discussed the proposed specific offense characteristic at §2B1.1(b)(14)(A), which provides for alternative offense level increases of two levels, or four levels. POAG believes these offense level increases accurately reflect the Congressional directive that the Guidelines account for (1) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, and (2) whether

the violation was intended or had the effect of significantly interfering with or disrupting a critical infrastructure.

POAG requests that the Commission examine the terminology used in the proposed upward departure at §2B1.1, comment. (n.16(B)), to the extent that an upward departure under this provision seems to require a higher degree of "disruption" than that required under §5K2.7. The proposed application note provides that "[a]n upward departure would be warranted in a case in which subsection (b)(14)(A)(ii) applies and the disruption of public or governmental functions or services *is so substantial as to have a debilitating impact* on national security, national economic security, national public health or safety, or any combination of those matters. See, e.g., §5K2.7 (Disruption of Governmental Function)." In contrast, §5K2.7 requires only that the " . . . conduct resulted in a *significant* disruption of a governmental function." (Emphasis added). POAG foresees a possible application problem given the apparent differences between the two provisions in the degree of governmental disruption required for an upward departure. To the extent that the Commission is concerned with maintaining consistency between guideline sections, POAG suggests the Commission consider amending the language in one or both provisions, eliminating the reference to §5K2.7, and adding examples to clarify use.

POAG foresees no application problems with the amendments proposed at §§2B1.1, comment. (n.2(A)(v)(III)), 2B2.3, or 2B3.2.

Proposed Amendment - Terrorism

In discussing the proposed change in the Money Laundering Guideline, POAG agreed the term "terrorism" should be deleted from §2S1.1(b)(1). This will prevent double-counting with the terrorism adjustment found in §3A1.4. POAG thought the proposed amendment to §2X3.1, Enhancement in Accessory After the Fact Guideline for Harboring Terrorists, was difficult to understand. We anticipate there may be some confusion in applying this guideline and recommend this guideline be revised for easier application. POAG discussed the proposed amendment to §2M6.1, Biological Agents and Toxins, and suggests a definition be added under the application notes to define or explain the phrase "intent to injure the United States" which is found in §2M6.1(a)(1). We recognize that this wording is statutory construction and an element of the offense, however, we believe the language will pose application difficulty for the field. POAG also discussed the proposed amendment pertaining to the Safe Drinking Water Provision which provides for the consolidation of guidelines found in §2N1 and §2Q1. While POAG could not foresee any application problems by consolidating the guidelines, we simply do not have enough application experience with these particular guidelines to make a recommendation.

Proposed Amendment - Immigration

The proposed amendment to §2L1.2 contains two options for a slight change to the specific offense characteristics regarding prior drug trafficking offenses, and also adds or amends several definitions. With regard to the options at §2L1.2(b)(1)(B), POAG recommends Option Two. We believe that this option will result in sufficient punishment, and with the definition added for "sentence of imprisonment," application of the guideline should be facilitated. The group also prefers the second option in the revised proposal of sixty days at §2L1.2(b)(1)(B). However, we believe a conflict may exist. The definition provided for "sentence of imprisonment" in the case of a totally suspended sentence would seem to be at odds with the definition in the statute at 8 U.S.C. § 1101(A)(48)(b). Additionally, we would recommend if Option Two is adopted, that it not be retroactive as retroactivity would have an adverse effect on the caseloads in courts in the border districts.

POAG supports the definitions provided for "child pornography offense," "crime of violence," "drug trafficking offense," "firearms offense," "human trafficking offense," and "terrorism offense." We also support the revised definition of "alien smuggling offense," which eliminated the term "for profit." However, another conflict may exist between these definitions and the list of "aggravated felonies" provided at 8 U.S.C. § 1101(a)(43).

Regarding §2L1.2, (comment. n.3), POAG recommends Option 2 with the terminology "under such section" being replaced with 21 U.S.C. § 844. The group recognized sentencing disparity issues exist regarding the treatment of drug possession cases. A conviction for simple possession in one jurisdiction may be charged as distribution elsewhere, thus resulting in disparity. In addition, officers may encounter difficulties in obtaining documents outlining the criminal conduct.

Proposed Amendment - §5G1.3

POAG favors Option 1A of the proposed amendment since it is clearly stated in the case of a prior revocation, the sentence is to run consecutive to any prior undischarged term of imprisonment. It was the opinion of POAG that this option consistently uses the term "shall" in addressing cases falling under §5G1.3(a). POAG remains supportive of the Commission's past approach to revocation sentencing as a sanction for the breach of trust of supervision, and not punishment of new offense behavior.

POAG believes the use of the case examples in this guideline would be extremely helpful to the field. This guideline has traditionally caused great confusion to probation officers and examples demonstrating how this guideline is to be applied will assist the field in ease of application.

POAG feels the requirement in §5G1.3(b)(A) addressing credit received by the Bureau of Prisons may create problems for courts, since it is our experience that information obtained from the Bureau of Prisons is problematic to determine. Many times officers are unable to retrieve this information from the Bureau of Prisons in a timely fashion, or the Bureau is unable to assist the officer without receipt of the presentence report.

Regarding application note 3(D), POAG believes the language should clearly state that the sentence imposed is by way of a downward departure, and that the use of the word "adjustment" should be avoided. The term "adjustment" is inconsistent with its use in other areas of the guidelines.

As an aside, it might be helpful if the U.S. District Judges' Bench Book contained language for imposing sentences under §5G1.3(b) and (c) as these areas have proven problematic throughout the circuits. It is recommended that the amended language contain notice to the Bureau of Prisons as to when and how the "sentence alteration" has been rendered by courts.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Cathy A. Battistelli
Chair