

# PROBATION OFFICERS ADVISORY GROUP to the United States Sentencing Commission

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September 28, 2010

The Honorable William K. Sessions III, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, D.C. 20008-8002

Re: Proposed Emergency Amendment to the  
Sentencing Guidelines, September 2, 2010

Dear Judge Sessions:

A majority of the Probation Officers Advisory Group (“POAG”) met telephonically on September 21, 2010, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission’s Proposed Emergency Amendment to the Sentencing Guidelines, September 2, 2010. POAG comments on the following selected portions of the Proposed Emergency Amendment.

## **(A) Changes to Statutory Terms of Imprisonment for Crack Cocaine**

POAG prefers the Base Offense Level 26 Option for several reasons. First, it will simplify implementation by eliminating the 2-level reduction currently required for offenses involving cocaine base and other drugs (Application Note 10(D)). Second, unlike the Base Offense Level 24 Option, it will maintain the 18 to 1 ratio throughout the drug table instead of resulting in a different ratio at each level in the drug table. Third, like other drugs in the drug quantity table, it will provide consistency between the guideline application and interplay with the mandatory minimums.

**(C) Enhancements and Adjustments**

*Violence Enhancement*

POAG has some concerns about consistent application because of the lack of definition of the term “violence.” It should be clarified if violence toward a person or persons is the only consideration, or if violence toward property would be included (arson for example). Perhaps the Commission would consider tying the definition to the definition of crime of violence in 18 U.S.C. § 16 which defines a “crime of violence” to include “the attempted use, use or threatened use of physical force against the person or property of another” and any other felony offense that, “by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

*Drug Establishment Enhancement*

POAG has a serious concern about the proper application of this enhancement because, from our experience, it appears this enhancement could apply in nearly any drug case. It could also result in inconsistency by providing an enhancement for this conduct at §2D1.1 but a role reduction at §3B1.2 might also be applicable for similar conduct. For comparison purposes POAG notes that, §2D1.8 contains a special instruction barring application of §3B1.2.

*Enhancement Based on “Super-Aggravating” Factors*

POAG is concerned that this proposed Specific Offense Characteristic does not include a definition for the term “little or no compensation” which will be needed for consistent application.

In addition, POAG has some concern that the term “knowingly involved a person under the age of 18 years” may be confused with §3B1.4, Using a Minor to Commit a Crime. If the Specific Offense Characteristic and the Chapter 3 Adjustment could both apply, it would be helpful to have an application note explaining that applying both would not be impermissible double counting. The same concern would apply to the “unusually vulnerable” person in the Specific Offense Characteristic and the Vulnerable Victim in §3A1.1; and “witness intimidation” in the Specific Offense Characteristic and Obstruction at §3C1.1.

For ease of application, the Specific Offense Characteristic for committing the offense “as part of a pattern of criminal conduct engaged in as a livelihood” could be referenced to §4B1.3, Criminal Livelihood, for definitions.

*Downward Adjustment Based on Certain Mitigating Factors*

Similar to the concern noted above, POAG is concerned that there is no definition for “no monetary compensation” or “unlikely to commit such an offense.” Regarding the first phrase, we are specifically referring to the defendant who commits the crime in exchange for drugs to support their own addiction. Regarding the second phrase, it would be helpful to know if the guideline is

referring to criminal history, substance abuse, or some other factor. Clarification, by way of an application note, would be most helpful.

**Closing**

POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to address issues we believe are important. Should you have any questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Sincerely,

Probation Officers Advisory Group  
September 2010