PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 7, 2011

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

Dear Judge Saris,

The Probation Officers Advisory Group (POAG or the Group) met in Washington, D.C., on February 23 and 24, 2011, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2011.

Proposed Amendment No. 1 - Drugs

POAG concurs with re-promulgating the emergency amendment implemented in October 2010, as a result of the Fair Sentencing Act. Specifically, to promote ease of application, POAG prefers a Base Offense Level of 26 for offenses involving cocaine base. First, a Base Offense Level of 26 eliminates the 2-level reduction required for offenses involving cocaine base and other drugs previously addressed in Application Note 10(D) of the 2009 Guidelines Manual. This adjustment was sometimes missed. Second, unlike a Base Offense Level of 24, a Base Offense Level of 26 maintains an 18 to 1 ratio between powder cocaine and cocaine base throughout the Drug Quantity Table, for example:

	Level 26	Level 24
Ratio:	level 32 - 18 to 1	level 32 - 6 to 1
Ratio:	level 26 - 18 to 1	level 26 - 4.5 to 1
Ratio:	level 22 - 18 to 1	level 22 - 13 to 1

Third, like other drugs in the Drug Quantity Table, a Base Offense Level of 26 provides consistency between the guideline application and interplay with the mandatory minimums, for example:

> Compare Base Offense Level 26 considering offenses pursuant to 21 U.S.C. § 841(b)(1)(B) which carry mandatory minimum prison terms of 60 months:
>
> > Cocaine Base: At least 28 grams but less than 112 grams of cocaine base results in a Base Offense Level of 26. A Base Offense Level of 26 and a criminal history category I results in a guideline range of 63 to 78 months.
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> > Heroin: At least 100 grams but less than 400 grams of heroin results in a Base Offense Level of 26. A Base Offense Level of 26 and a criminal history category I results in a guideline range of 63 to 78 months.
> >
> > Methamphetamine: At least 50 grams but less than 200 grams of methamphetamine results in a Base Offense Level of 26. A Base Offense Level of 26 and a criminal history category I results in a range of 63 to 78 months.
>
> Contrast Base Offense Level 24 considering offenses pursuant to 21 U.S.C. § 841(b)(1)(B) which carry mandatory minimum prison terms of 60 months:
>
> > Cocaine Base: At least 28 grams but less than 112 grams of cocaine base results in a Base Offense Level of 24. A Base Offense Level of 24 and a criminal history category I results in a range of **51 to 63** months.
> >
> > Heroin: At least 100 grams but less than 400 grams of heroin results in a Base Offense Level of 26. A Base Offense Level of 26 and a criminal history category I results in a guideline range of 63 to 78 months.
> >
> > Methamphetamine: At least 50 grams but less than 200 grams of methamphetamine results in a Base Offense Level of 26. A Base Offense Level of 26 and a criminal history category I results in a range of 63 to 78 months.

Enhancements Based on "Super-Aggravating Factors"

POAG is concerned that the Specific Offense Characteristic at U.S.S.G. § 2D1.1(b)(12) is very broad, perhaps too broad. Application Note 28 cites factors the Court should consider in determining

the applicability of the enhancement including (A) whether the defendant held possessory interest in the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. POAG is concerned that this language may lead to inconsistency: Would a defendant guarding a cache of controlled substances inside the premises be protected from the enhancement unless he/she has a possessory interest in the premises even if the defendant is controlling access to the premises? Different districts might answer that question differently. If the intent is that a sufficient showing of *either* a possessory interest or controlled access would be sufficient to support the enhancement, then perhaps the word "and" in between should be changed to "or."

Downward Adjustment Based on Certain Mitigating Factors

POAG suggests that "an intimate or familial relationship," referenced at U.S.S.G. § 2D1.1(b)(15)(A), be defined in an Application Note to clarify whether the "intimate or familial relationship" to consider is limited to within the conspiracy versus outside the conspiracy. For example, if a defendant delivers drugs for her co-defendant boyfriend, a known drug trafficker, she may be "motivated by an intimate relationship" within the conspiracy. However, if a defendant sells drugs to secure money to feed her family, the defendant may be "motivated by an intimate or familial relationship" outside the conspiracy. POAG has received feedback from other probation officers that the latter example is being argued by defendants and may not be what the Commission intended.

POAG also suggests that and Application Note be created to address the timing of "no monetary compensation" referenced at U.S.S.G. § 2D1.1(b)(15)(B). To qualify for the reduction under this prong, there is no direction provided as to whether a defendant was never to receive monetary compensation, or whether a defendant simply did not receive monetary compensation before he/she was arrested. Assume, for example, the situation of a drug courier. POAG received feedback from other probation officers that it is common for couriers to be paid upon completion of the delivery. If the courier completes the delivery and is paid prior to his arrest, then there was monetary compensation. However, if the courier is expecting to receive compensation but arrested prior to receiving it, some defendants are arguing that there was "no monetary compensation" and this may not be what the Commission intended.

Safety Valve Issues

Regarding expanding applicability of U.S.S.G. § 2D1.1(b)(16), also called the Safety Valve, to defendants in Criminal History Category II, POAG believes that the expansion of the 2-level reduction to defendants in Criminal History Category II should not be adopted by the Commission at this time. POAG members noted that while some defendants in this category have been convicted of petty offenses, defendants who were convicted of more serious offenses (but received lesser sentences) would also be captured under this new provision. For example, if expansion is adopted, the reduction would apply to an individual with a single conviction who received a custodial sentence ranging from 60 days (a 2-point conviction) to more than thirteen months (a 3-point conviction). As such, expanding the safety valve reduction could conceivably include a violent offender who has just one conviction, for which he is assigned 2 or 3 criminal history points, and

falls into a Criminal History Category II. This may be contrary to Congressional intent, as summarized in the Proposed Amendment, that the safety valve be made available to first-time, nonviolent drug defendants.

Should the Commission decide to expand the application of the U.S.S.G. § 2D1.1(b)(16) Safety Valve provisions to Criminal History Category II, a corresponding change will need to be made at U.S.S.G. § 5C1.2(a)(1), which defines its application when, "the defendant *does not have more than 1 criminal history point*, as determined under the sentencing guidelines before application of subsection (b) of U.S.S.G. § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)."

Regardless of whether the safety valve reduction is expanded, and to ease application confusion, POAG further recommends that U.S.S.G. § 2D1.1(b)(16) be amended to copy over and include the criteria listed at U.S.S.G. § 5C1.2. With this change, U.S.S.G. § 2D1.1(b)(16) would operate with complete independence. POAG believes this will help drive home the idea that the reduction is truly independent of whether a particular offense carries a mandatory minimum prison term. POAG is aware that some districts might only be applying the reduction when the offense of conviction carries a mandatory minimum prison term.

Proposed Amendment No. 2 - Firearms

POAG was provided with a document entitled, Staff Preliminary Discussion Draft, which contained specific proposed changes to U.S.S.G. § 2K2.1. The following discussion relates solely to this document.

First, POAG endorses the increase in base offense levels for straw purchasers convicted of 18 U.S.C. §§ 922(d), 922(a)(6), and 924(a)(1)(A). It is suggested, for ease of application, that this proposed change include language to clarify that a conspiracy[1] to violate one of these sections is also intended to be subject to the increased Base Offense Level. This could be accomplished within the guideline itself, at U.S.S.G. § 2K2.1(b)(4), (b)(6), and (b)(7), or as an application note.

Second, after much discussion, POAG has concluded that Option 2 (adding language to an existing Specific Offense Characteristic) is preferable to Option 1 (adding a new Specific Offense Characteristic) to address the concerns not adequately covered in the current guideline regarding offenses involving firearms crossing the United States border. POAG believes Option 2 would be easier to apply and, based upon information provided to us by Commission staff, might avoid potential circuit conflicts. POAG recognizes that one drawback to implementing Option 2 is that

[1]For an example, POAG looked to Application Note 1 to U.S.S.G. § 4B1.2 which states, "Crime of violence and controlled substance offenses include the offenses of aiding and abetting, conspiring, and attempting to commit such crimes." POAG is aware of the commentary at Application Note 6 to U.S.S.G. § 1B1.3 but believes further clarification would nevertheless be helpful.

it would result in two distinct kinds of conduct subject to a single enhancement. In cases involving multiple kinds of conduct limited to a single enhancement, POAG believes an application note recommending an upward departure would be appropriate.

Third, POAG supports the amendment to reference 50 U.S.C. § 1705 to §§ 2M5.1, 2M5.2, and 2M5.3. This now allows the probation officer to select the proper base offense level in those cases involving the evasion of export controls. Several POAG members previously had cases involving seemingly innocuous materials such as cameras, night vision goggles, and fingerprint kits, for which the alternative base offense level of 14 was previously not available.

Proposed Amendment No. 3 - Dodd-Frank Act

With respect to this proposed amendment, POAG only offers one comment: The current method for determining loss in mortgage fraud cases is cumbersome at best, impossible (due to loss of information) at worst, and certainly inconsistent across the nation. POAG is troubled with the notion that the volatile real estate market renders two similarly situated defendants subject to widely different prison terms. POAG also notes the struggle probation officers face in attempting to obtain current property values.

POAG recommends, as part of the multi-year study of this issue, that the Commission consider changing how mortgage fraud loss is calculated. POAG recommends simplifying the process to consider only the amount of the loan as intended loss. This value is universally available and always certain. Once the total offense level is determined this way, other factors (such as whether the conduct resulted in actual loss, whether the conduct involved residential versus commercial property, whether the defendant intended the property as his own residence or for income property, or whether the defendant was motivated to avoid foreclosure on his own residence) could be considered for departure purposes.

Proposed Amendment No. 4 - Patient Protection Act

POAG has no objection to the first provision of the amendment which inserts subsection (b)(8) to U.S.S.G. § 2B1.1. Also, there is no objection to the second provision involving a new special rule in Application Note 3(F).

POAG believes that the proposed Application Note in Option 2 better defines Government health care program as there is a concern that the list of programs contained in Option 1 will change from time to time, unnecessarily requiring amendments to the Guidelines. The definition in Option 2 is broad and includes state programs that receive federal funds which make it more attractive for application purposes.

However, POAG recommend a third option for consideration which is a hybrid or combination of the two options presented:

"Government health care program" means (A) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (B) any State health care program, as defined in 42 U.S.C. § 1320a-7(h). Such programs include, but are not limited to, the Medicare program under part A of title XVIII of the Social Security Act; the Medicaid program under title XIX of the Social Security Act; the CHIP program under title XXI of the Social Security Act; the TRICARE for Life program; the veteran's health care program under chapter 17 of title 38, United States Code; and a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).

Proposed Amendment No. 5 - Supervised Release

POAG's discussions about this proposed amendment have meandered in a way we have never experienced. The group began its discussion about what we saw as application issues, but every approach led us to discussions involving policy issues. Further, the positions of various POAG members were generally aligned based on the geographic location of our respective offices. The representatives from the border districts are very passionate and in favor of this amendment. Other members are more cautious, worrying about the unintended consequences of such a sweeping change. Though we all began to understand the issue from the other's perspective, we could not reach consensus. Nevertheless, without taking up a policy discussion, we see certain application problems and we wish to bring some of these to the Commission's attention.

First, the proposed application note (either Application Note 5 under Option 1A or Application Note 3(D) under Option 1B) discusses deportable aliens and includes the following sentences: "*Unless such defendant returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution*." POAG is concerned that if the Guidelines take this position (that , at least in the instance of deportable aliens, deterrence and public protection are served solely by new prosecution), such reasoning will be taken out of context and argued on a global level. It could become a small step onto a slippery slope than ends with parties using it to justify no term supervised release in situations unintended by this amendment. The statements shift the focus to the kind of offense rather than the needs of the offender when discussing whether supervised release should be imposed. For that reason, POAG does not see that these statements help clarify any application issue and respectfully recommends removing the two noted sentences.

Second, a portion of the amendment refers to deportable aliens, however, there is no accompanying application note that defines who is a deportable alien. For example, is the amendment intended to apply to a resident alien who was in the United States legally or just illegal aliens? POAG has grave concern that this amendment does not consider the impact to the community if the "deportable alien" is not deported. For example, as the Commission is aware, the United States does not deport individuals to certain countries. In situations like that, supervised release may be necessary to provide treatment while the individual remains in the United States. Aside from issues relating to

the country of origin, there may be any number of legal claims an individual might raise that could delay or stop deportation. This creates an application issue for the Probation Officer; to try to guess if an immigration judge will issue a deportation order against the resident alien at a future immigration hearing. During that space of time, whether days or months or years, an individual defendant would go without treatment and the community unprotected.

Third, POAG was also unable to come to a consensus in regards to Option 1A and Option 1B which address whether supervised release should be discretionary even when an individual is sentenced to a significant prison term. Most of the debate dealt with how the presentence officer would determine if supervised release is needed. POAG would request further language as guidance to help determine if supervised release is warranted.

Proposed Amendment No. 6 - Illegal Reentry

In our Position Paper dated August 9, 2010, POAG asked that the Commission consider requiring prior convictions to receive criminal history points before they be considered as the basis for enhancements. Therefore, we are excited to see this proposed amendment.

The issue we have been discussing is the language at Proposed Application Note 1(C) which reads, "*A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points under Chapter Four*." We realize this was in the application notes before and would just be moving to the new application note. Nevertheless, we find the language to be imprecise and inviting argument which we view as an application issue. Perhaps it might be easier to apply, and form the basis of fewer objections, if it read, " It is intended that prior convictions which receive criminal history points pursuant to Chapter Four may also increase the offense level."

In order to use language as consistent as possible with other parts of the Guidelines, POAG looked to Application Note 10 following U.S.S.G. § 2K2.1 which reads, "Prior felony conviction(s) resulting in an increased base offense level under [§ 2K2.1(a)] are also counted for purposes of determining criminal history points pursuant to Chapter Four." POAG believes that the proposed language is as consistent as possible with language already contained in the Guidelines.

Proposed Amendment No. 7 - Child Support

POAG believes that an offender's failure to obey a court order is a separate harm that should be captured by a Specific Offense Characteristic (SOC) and POAG favors applying the SOC at U.S.S.G. § 2B1.1(b)(8). The only application issue POAG has identified is that the application note at U.S.S.G. § 2J1.1 is not easily detected and easily missed.

Our preference is that Appendix A be updated to refer violations of 18 U.S.C. § 228 directly to U.S.S.G. § 2B1.1 and that the direction to apply U.S.S.G. § 2B1.1(b)(8) be included at Application Note No. 7 of that section.

In the alternative, to avoid missing the application note, POAG suggests that it be added (either instead of or in addition to the note at U.S.S.G. § 2J1.1) at Application Note 7 of U.S.S.G. § 2B1.1.

In closing, POAG appreciates the opportunity to express its concerns and the willingness of the Commission to work with POAG to provide input into the issues the Commission has raised. Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Probation Officers Advisory Group
March 2011