PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 7, 2016

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 17 and 18, 2016, to discuss and formulate recommendations to the United States Sentencing Commission (USSC). We are submitting comments relating to issues published for comment dated January 15, 2016.

1. PROPOSED AMENDMENT, CONDITIONS OF PROBATION AND SUPERVISED RELEASE

POAG was asked which option, if any, of the below-noted proposed "special" condition is appropriate and to provide any comment on the policy and Fifth Amendment implications of the options.

(4) The defendant must [answer truthfully] [be truthful when responding to] the questions asked by the probation officer.

At the outset, POAG believes that the proposed condition is mistakenly identified (at page 36) as a "special" condition and should be correctly labeled as a "standard" condition. POAG unanimously agreed that the "answer truthfully" option was the appropriate option and disfavored any reference to the invocation of the Fifth Amendment within the structure of the condition. It was noted that this option is consistent with the condition of probation and supervised release under 18 U.S.C. §

3563(b)(17), that states, in pertinent part, that the defendant "answer inquiries by a probation officer…" This particular condition generated a significant amount of feedback from districts around the country – cautioning against a condition structure that empowers resistance to probation officers' legitimate responsibility to engage in questioning to detect non-compliance and protect the community.

POAG was also asked to provide comment on the "standard" proposed condition of supervised release in USSG §5D1.3(c)(15), which would be renumbered condition (14) and which states that *the defendant shall notify the probation officer of any change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessment*. POAG unanimously favored the condition; however, some members suggested that a timeframe requirement, such as seventy-two hours, be added to the condition. Lastly, POAG agrees with the proposed amendment that this condition remain a "standard" condition.

POAG, despite any specific directive from the USSC, thought it was prudent to provide feedback on all of the proposed conditions of probation and supervised release. POAG unanimously agrees with the following proposed mandatory, standard, and special conditions of probation:

Mandatory Condition

(6) The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. *If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.*

Standard Conditions

(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

(8) *The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.*

(11) *The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.*

(12) *If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.*

(13) *The defendant must follow the instructions of the probation officer related to the conditions of supervision.*

Special Conditions

(4) If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol – *(A)* a condition requiring the defendant participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; *and (B) a condition specifying that the defendant must not use or possess alcohol.*

POAG unanimously agrees with the same above-noted proposed mandatory, standard, and special conditions with respect to supervised release as well as the following special condition:

(1) Support of Dependents

If the defendant –

(A) has one or more dependents – a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child – a condition specifying that the defendant must make the payments and comply with the other terms of the order.

With respect to this condition, POAG preferred that subsections (A) and (B) be connected with an "or" rather than "and."

Regarding the remaining proposed mandatory, standard, and special conditions, POAG respectfully suggests the following modifications:

Standard Conditions

(3) *The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.*

POAG could not come to a consensus regarding the word "knowingly." Some members noted there are occasions where a defendant may "unknowingly" go outside the district and they should not be penalized for that action.

(5) *The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to anticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change*.

POAG prefers the succinct and direct wording as it appears currently. If the USSC intends to adopt the proposed language, POAG suggests the removal of the term "calendar days."

(6) *The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view*.

POAG suggests that "items prohibited by the conditions of the defendant's supervision" be replaced with the current term "contraband."

(7) *The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change*.

In part, for the following reasons, POAG prefers the language regarding employment as it appears in the current condition, (5) and (6). The federal probation and pretrial services system has adopted evidence-based practices—specifically, the advanced actuarial risk instruments, which include Post Conviction Risk Assessment (PCRA). The mandate that the defendant must work full-time "at least 30 hours per week" is in opposition of the PCRA. Additionally, POAG expressed the concern that the additional language, instead of providing clarity, is a bit more cumbersome. However, if the USSC intends to adopt the proposed language, POAG suggests the removal of the term "calendar days."

(9) *If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours*.

POAG could not come to a consensus regarding the word "official." It was suggested that the word be replaced with "direct" or "personal."

(10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e.,. anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

POAG suggests the extraction of the term "dangerous weapon" and proposes that it be relocated as a "special condition." POAG members discussed districts where the possession/use of a "dangerous weapon" such as a bow and arrow or black powder rifles, are allowable for sporting purposes (hunting), which can promote prosocial activity. POAG also discussed different patterns of practice among districts regarding firearm prohibitions for defendants convicted of misdemeanor offenses who are not otherwise prohibited persons under federal statute.

There are some POAG members who expressed a concern about the relocation of current conditions (7) and (8) from a standard condition to a special condition.

2. PROPOSED AMENDMENT, ANIMAL FIGHTING

The proposed amendment provides for a higher Base Offense Level (BOL) for those offenses involving an animal fighting venture and responds to two new offenses established by the Agricultural Act of 2014. These two new offenses make attending animal fighting ventures and causing an individual under the age of 16 to attend an animal fighting venture unlawful. The USSC sought comment regarding the prevalence of these type of cases and if the guidelines adequately addresses these offenses. It was determined that these type of cases are infrequent and limited experience exists in applying USSG §2E3.1. Because of the infrequency and limited experience with animal fighting and this guideline, POAG was undecided on how the grouping rules should treat multiple counts of animal fighting offenses.

POAG believes the seriousness of these type of ventures support the USSC proposed BOL of 16. Similarly, POAG supports the higher BOL if the defendant was convicted under 7 U.S.C. §2156(a)(2)(B), the unlawful act of causing an individual under 16 to attend an animal fighting venture provision in the Agricultural Act. It was suggested that a Specific Offense Characteristic (SOC) be provided if the defendant possessed a dangerous weapon while participating or attending the venture because of the enhanced risk of violence the weapon's mere presence brings to the gambling environment. This suggested SOC would be similar to that already in existence in the fraud guideline at USSG §2B1.1(b)(15).

With regard to the upward departure cited at Application 2, POAG recommends "the offense involved animal fighting on an exceptional scale" also include duration (in time) of the conspiracy or venture, frequency of individual events, extreme cruelty toward the fighting animal and exceptionally large numbers of animals being euthanized as the result of injury.

3. PROPOSED AMENDMENT, CHILD PORNOGRAPHY CIRCUIT CONFLICTS

Offenses Involving Unusually Young and Vulnerable Minors

The proposed amendment addresses cases that involve unusually young and vulnerable minors. Specifically, the amendment provides the addition of Application Notes at USSG §§2G2.1, 2G2.2, and 2G2.6 instructing that the Vulnerable Victim enhancement at USSG §3A1.1(b) should be applied if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12, and the defendant knew or should have known this. The USSC seeks comment regarding whether a different approach should be used to resolve the circuit conflict. POAG believes that the Application Note with the reference to USSG §3A1.1(b) is the appropriate method to use since this conduct can be captured in an existing guideline application. Furthermore, POAG discussed infants and toddlers as an especially vulnerable class of child exploitation victims due to their inability to communicate and protect themselves as a result of their cognitive development and small size. POAG is concerned over the proposed language "extreme youth and small physical size," and advocates the consideration of whether the more specific term of "infant or toddler," while not perfect, would provide more direction as to how the guideline should be applied.

POAG discussed the appropriateness of the Vulnerable Victim adjustment relative to the Production and Possession guidelines. Members unanimously agreed that the Vulnerable Victim adjustment is appropriate at USSG §2G2.1 due to the severity of the offense and the fact that defendants generally have direct contact with their victims and, therefore, have specific knowledge about the age of the victim.

With regard to the possession guideline at USSG §2G2.2, POAG discussed potential complications associated with the application. First, possession defendants do not typically have direct contact with the individual victims. Secondly, possession defendants often obtain large volumes of images in "data dumps" containing a variety of material for which they are accountable, whether or not they viewed or were interested in the contents. Thirdly, there are other cases in which evidence reflects that possession defendants having actively sought media involving infants and toddlers. POAG discussed the merit of providing a higher burden of proof in USSG §2G2.2 that targets defendants actually soliciting this material or who have focused collections of this nature. Nevertheless, the group could not come to consensus.

With regard to USSG §2G2.2, POAG also discussed the applicability of a four level Vulnerable Victim adjustment for cases involving a large number of victims under USSG §3A1.1(b)(2). As previously noted, this media can be downloaded in a high volume and could result in the 4 level enhancement being inconsistently applied.

POAG views this application note as creating a Vulnerable Victim enhancement that will almost always apply. While POAG supports the new Application Note to USSG §§2G2.1, 2G2.2, and 2G2.6, the circuits that frequently impose non-guideline sentences will likely continue doing so and circuits with lower variance rates will likely impose sentences consistent with the higher guideline ranges. This will create a two to four level difference in application, which is unevenly

impactful because of inconsistent variances, increasing disparity between circuits, districts and individual judicial decisions.

The 2-Level Distribution Enhancement at Subsection (b)(3)(F)

POAG supports the addition of a knowledge requirement in the application of USSG §2G2.2(b)(3)(F). Members discussed the variety of Peer-to-Peer (P2P) users and the effectiveness of investigators conducting interviews to assess user sophistication and knowledge of the applications. Forensic evaluations of computers/cell phones also provide evidence of distribution at times. Members observed that the knowledge requirement will not substantively change the operation of the guideline as it currently exists and will assist in stratifying the guideline to provide more punishment to users with a higher level of knowledge.

The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

POAG agreed with the proposed changes to USSG §2G2.2(b)(3)(B), which creates a higher standard to apply the SOC involving distribution "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." For many of the reasons stated above, POAG believes that investigators are generally discovering evidence from interviews and/or forensic computer analysis, when defendants are engaging in quid pro quo exchanges involving child pornography. This change will help provide consistency across the country by reducing the application of USSG §2G2.2(b)(3)(B) enhancements for use of a P2P or file sharing software without creating the need for a bright line rule regarding file sharing programs.

The USSC seeks comment on whether the guideline for obscenity offenses at USSG §2G3.1 should contain similar revisions to the tiered distribution at USSG §2G2.2. POAG supports the amendment to USSG §2G2.1(b)(3), and supports the same revisions to be included at USSG §2G3.1 for consistency.

4. PROPOSED AMENDMENT, IMMIGRATION USSG §2L1.1

The USSC seeks comment on proposed amendments to USSG §2L1.1, Smuggling, Transporting, or Harboring an Unlawful Alien. Of the two options presented as a change to the offense level, POAG unanimously agreed that Option 1 is more favorable than Option 2. Option 1 provides a simpler approach, which would result in an ease of application. POAG believes Option 2 could likely become cumbersome with evidentiary evaluations of what constitutes an "ongoing commercial organization."

POAG discussed the difference in smugglers seen under this guideline, which generally fall into the following two categories: a) low level individuals who drive or guide smugglees with little knowledge of the organization; and b) repeat smugglers who operate more professionally. Representatives discussed nuances of smuggling operations in Florida (involving Cubans and fast-boat operations), Mexican smuggling groups and Canadian smuggling operations. POAG members discussed that in well-run alien smuggling conspiracies, low-level individuals may have one or two contacts within a criminal organization, but are purposefully compartmentalized to

protect the organization. POAG discussed how these two classes of smugglers would be treated in Option 2. It was believed that if the USSC adopted the "reason to believe" standard in its "ongoing commercial organization" definition, the enhanced Base Offense Level (BOL) could become over-inclusive and lead to inconsistent application in combination with the mitigating role adjustment.

Should the USSC adopt Option 2, POAG agreed that the commentary defining "ongoing commercial organization" should contain the "knowledge only" requirement. Notwithstanding, Option 1 is the preferred choice. POAG discussed whether there was a need for the "ongoing commercial organization" enhancement when this factor is already structured within the aggravating role adjustment – when a criminal activity is "otherwise extensive." POAG representatives discussed how the interaction of these two enhancements could provide for inconsistent application. If the USSC were to adopt Option 2, POAG believes clarifying commentary would be helpful regarding the interaction between the "otherwise extensive" BOL and the aggravating role adjustment.

POAG next discussed the proposed SOC for unaccompanied minors and the ramifications of the proposed SOC potentially containing two relevant conduct standards, with references to both the offense and the defendant. Considering the strong concerns set forth by Department of Justice, POAG believes a strict liability standard is appropriate and proposed the SOC to read as follows: *If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.*

With regard to the amendment addressing the sexual abuse of minors, POAG strongly supported adopting the federal definition of a minor (under 18) and the serious bodily injury clarification that included criminal sexual abuse. However, the group questioned whether four offense levels appropriately captured the physical and emotional damage caused by sexual abuse. POAG questioned how the proposed language would apply to the relative culpability of those who personally committed the sexual assault; aided and abetted the conduct; were deliberately indifferent to the conduct; or were simply part of the organization in which the conduct occurred. POAG proposes the USSC expand Application Note 4 to include a new subsection (E); permitting upward departure if the defendant was personally responsible for carrying out a sexual assault and/or there were multiple victims, with reference to USSG §§5K2.8 (Extreme Conduct) and 5K2.3 (Extreme Psychological Injury).

5. PROPOSED AMENDMENT, IMMIGRATION USSG §2L1.2

POAG commends the USSC for the proposed revisions to USSG §2L1.2 (Unlawfully Entering or Remaining in the United States). POAG received near unanimous support from probation officers across the country for this proposed amendment, due in large part to the reduced need to employ the categorical or modified categorical approaches when applying this guideline. POAG noted a few aspects of the proposed amendment that could potentially create disparity issues or difficulties in guideline application. However, these concerns did not negate the overall positive support this proposed amendment received from POAG stakeholders.

POAG supports the proposed tiered system to determine the Base Offense Level (BOL), as it distinguishes defendants who have no prior convictions for illegal reentry from defendants who have one or more prior convictions for illegal reentry, thereby taking into account the aggravating factor of recidivism. For that same reason, POAG also concurs that the BOL should be determined without regard to the applicable time period for criminal history scoring in Chapter 4. Furthermore, the proposed departure set forth under Application Note 4, which directs that a departure may be appropriate in cases where defendants have been deported on multiple occasions not reflected in a prior conviction, reduces the concern with disparity between jurisdictions that assertively prosecute illegal reentry cases and jurisdictions that do not.

POAG supports the proposed SOC structure with the following clarifying recommendations.

POAG is in favor of the proposed SOC structure and its ability to capture criminal activity before the defendant's first deportation/removal and after the defendant's first deportation/removal. Relying on the date of the defendant's first deportation/removal provides a clean line of demarcation and relies on information that is generally available at the time the presentence report is prepared. However, POAG would dissuade the USSC from adopting "voluntary returns" within the proposed demarcation structure as these dates are frequently reported with less accuracy in some districts.

With one limited exception, the revision to the SOC structure eliminates the need to rely on the categorical approach and modified categorical approach. For years, POAG has expressed concern that enhancements based upon the type of prior conviction often requires application of these legal analyses, which are time consuming and a cumbersome processes that requires analysis of court documents that are often either not available or difficult to obtain. Further, the modified categorical approach is unreliable in measuring the seriousness of a prior conviction because it is limited by the amount of detail each jurisdiction decides to include in the court records. POAG is in favor of the proposed revisions to the SOC because they rely solely on the Judgment/Sentencing Order, reduce the number of court documents needed, and simplify the analysis needed to apply the guideline. However, POAG is concerned that application of this guideline will continue to be impacted by the categorical and modified categorical approaches because subsections (b)(1)(D) and (b)(2)(D) include an enhancement if a defendant has "three or more convictions for misdemeanors involving drugs, crimes against the person, or both." Further, neither of these terms are defined in the commentary. As such, it is recommended the USSC provide a clear definition of "involving drugs and crimes against the person" such that it can easily be determined if these definitions were intended to include offenses like Possession of Drug Paraphernalia or Forging a Prescription. Moreover, POAG suggests that Application Note 2 be expanded to clarify that the enhancements at (b)(1)(D) and (b)(2)(D) are based on these type of offenses, rather than based on the sentence imposed, because these offenses are mandated by the 1996 Immigration Reform Act.

POAG supports the proposed tiered enhancements under (b)(1) and (b)(2), including the recommended number of months for the sentence imposed and the corresponding increase to the offense level for each subsection. POAG believes the sentence imposed will serve as a measure of the seriousness of the defendant's prior criminal record in most cases. POAG did discuss the

concern the sentence imposed may not reflect the seriousness of the offense in some cases because some jurisdictions impose lenient sentences in cases where it is likely the defendant will be deported. However, it was decided the proposed structure of (b)(1) and (b)(2) is sufficient for most cases and a departure is an available option, if needed.

POAG recommends that the USSC clarify the definition of "sentence imposed." As it is currently written, (b)(1)(A), (b)(1)(B), (b)(2)(A), and (b)(2)(B) seem to use the term "sentence imposed" in reference to a term of imprisonment. As such, the term "sentence imposed" under (b)(1)(C) and (b)(2)(C) could be interpreted to only apply to sentences where a term of imprisonment less than 12 months is imposed. Therefore, POAG recommends that Application Note 2 be amended to clarify that "sentence imposed" includes sentences of probation, fines, and other non-custodial sentences for purposes of applying (b)(1)(C) and (b)(2)(C).

POAG notes that, in approximately eight states, certain misdemeanor offenses, including violations for driving offenses, are punishable by up to two years imprisonment. As such, the adoption of the "felony" definition from Chapter 4 (federal, state, or local offense punishable by imprisonment for a term exceeding one year) allows for offense level enhancement based upon certain convictions that are classified as misdemeanors in the jurisdiction where it was charged. POAG believes this concern can be resolved by adopting a similar departure provision approved by the USSC in the Johnson amendment at USSG §4B1.1, comment. (n.4) (Departure Provision for State Misdemeanors).

POAG identified a probable guideline application issue for prior federal convictions where an illegal reentry conviction is paired with another felony conviction, such as alien smuggling or drug trafficking. Specifically, these multiple count convictions can qualify as "single sentences" under USSG §4A1.2(a)(2). POAG recommends the USSC clarify the proper operation of the guideline when two or more offenses qualify as a single sentence under USSG §4A1.2(a)(2) and how those offenses should be used in determining the BOL and/or the SOC. There appear to be two Chapter 1 instructions which could apply to this situation. For instance, the application instructions under USSG §1B1.1(a)(2) instruct to "Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed," while the commentary under USSG §1B1.1, comment. (n.5), reflects "Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level." POAG recommends in these cases, for ease of application, that the illegal reentry be used to enhance the BOL instead of the alien smuggling or drug trafficking convictions being used to determine the SOC.

POAG believes the USSC commentary in Application Note 2 "sentence imposed" addresses how custody time for probation revocations would affect the enhancements under (b)(1). However, POAG recommends the USSC include commentary to address how custody time for probation revocations would affect the enhancements under (b)(2) and make a reference to USSG §4A1.2(k) regarding application of revocations of probation, parole, mandatory release, or supervised release.

As a technical note, USSG §2L1.2, comment. (n.1(A)(iv)), erroneously omitted a reference to subsection (b)(2). Also, USSG §2L1.2, comment. (n.1(A)(iii)), pertaining to the definition of "unlawfully remained in the United States" no longer seems relevant given USSG §2L1.2 no longer relies on this definition.

POAG concurs with the deletion of the departure grounds set forth in USSG §2L1.2, comment. (n.8) (Departure Based Upon Time Served in State Custody).

POAG agrees if the USSC does not approve the changes to the illegal re-entry guideline as proposed, the current guideline should be modified to adopt the new crime of violence definition set forth in the Johnson amendment, including the option of departing when certain misdemeanor convictions qualify as a felony because they are punishable by up to two years imprisonment.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments, and testimony during the public hearing on March 16, 2016.

Respectfully,

Probation Officers Advisory Group
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