PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 3, 2015

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, 2015, to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment dated January 16, 2015.

2. PROPOSED AMENDMENT, "SINGLE SENTENCE" RULE

The proposed amendment specifies that when multiple prior sentences are counted as a single sentence under USSG §4A1.1(a), (b), or (c), for purposes of determining predicate offenses, each of the multiple prior sentences included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. The Commission seeks comment regarding whether a different approach should be used to respond to a circuit split. POAG unanimously agreed the proposed amendment, which is consistent with *U.S. v. Williams*, is the preferable approach. POAG believes the Commission should emphasize in the amendment that the applicable time period may be a factor when determining which convictions in that "single sentence" may be assigned criminal history points. For example, one of the

convictions in the "single sentence" may be independently scored under USSG §4A1.1(a), which provides the sentence must be imposed within 15 years of the commencement of the instant offense, while another conviction that was part of the "single sentence" may only be scoreable under USSG §4A1.1(b), which provides a 10-year window with regard to the imposition of sentence. POAG believes that an example may provide clarification to this issue.

The Commission also seeks comment on whether the application issues presented by the conflict over the "single sentence" rule are also presented in other provisions involved in calculating the criminal history score. The four criminal history point limitation placed on convictions counted under USSG §4A.1.1(c) present similar application issues in the career offender application. POAG unanimously agreed that any sentence which independently scores under USSG §4A1.1(c), should always qualify as a predicate for career offender. The only restriction in the guidelines regarding the calculation of criminal history points under USSG §4A1.1(c) is with regard to the *total* criminal history points.

3. PROPOSED AMENDMENT, JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

This proposed amendment is a result of the Commission's effort to simplify the operation of the guidelines, including, among other matters, the use of relevant conduct in offenses involving multiple participants. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).

The Commission seeks comment on revisions that would provide further guidance on the operation of the "jointly undertaken criminal activity" provision as well as on possible revisions that would change the operation of the provision.

POAG supports the proposed amendments and revisions to USSG §1B1.3(a)(1)(B) and associated commentary. The revisions clearly set out the three-step analysis the court applies to hold the defendant accountable for the acts of others in a jointly undertaken criminal activity. Specifically, POAG feels the proposed amendment refocuses those involved in determining the proper guideline calculations on the scope of the criminal activity that the defendant agreed to jointly undertake. POAG observed that practitioners do not always maintain strict fidelity to the three step process in application, often arguing exclusively on one or two of the three steps (e.g. relying solely on the concept of reasonable foreseeability). Clearly defining the three-step analysis will help to ensure the proper analysis is applied. Additionally, POAG felt the amendments made to the commentary and examples help to further clarify the three-step analysis.

Addressing the possible policy changes proposed by the Commission, POAG has the following comments and concerns:

<u>Option A: Requiring a Higher State of Mind Than "Reasonable Foreseeability"</u>

POAG has some level of concern regarding potential changes to the state of mind requirement for jointly undertaken criminal conduct. A more restrictive analysis of USSG §1B1.3(a)(1)(B) may

provide an incentive for defendants to falsely deny or frivolously contest what is now considered relevant conduct.

Option B: Requiring a Conviction for Conspiracy or At Least a "Pinkerton Conviction"

The POAG expressed concerns that an implementation of this option limits the court's ability to factor in the real harms that occur during the commission of an offense. The drawbacks associated with this proposal include the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment and through plea agreements that limit charges to an offense which do not reflect the defendant's actual conduct. While courts can limit the impact of charge and plea manipulation through departures, this could also then raise concerns regarding sentencing disparity.

The POAG believes the current provisions, examples, and commentary, as proposed to be amended, for "jointly undertaken criminal activity" appropriately guides users to the three-step analysis, and defendants will be held accountable for appropriate sentencing factors associated with "real offense" sentencing. Lastly, POAG believes the current provision on "jointly undertaken criminal activity" appropriately furthers the purposes of sentencing.

4. PROPOSED AMENDMENT, INFLATIONARY ADJUSTMENTS

POAG supports Option 1. POAG believes the tables should be adjusted periodically to capture the appropriate harm and loss. POAG discussed that a loss of $10,000.00 10 years ago is punished the same as a $10,000.00 loss today; however, the true value of the $10,000.00 has drastically changed. In essence, a defendant sentenced today is being punished for the same period of time as someone 10 years ago, even though the true value of the $10,000.00 is less than it was 10 years ago. However, POAG would carve out an exception for the robbery and extortion tables as generally the loss in these offenses are low and a change would effectively eliminate an increase for the majority of these types of cases.

Regarding the fine tables, POAG believes a change would create application issues. The proposed changes in fine ranges would also produce amounts well over the statutory maximum. Additionally, ex post facto issues may arise, which would lead to further application issues.

5. PROPOSED AMENDMENT, MITIGATING ROLE

POAG discussed the application issues related to this adjustment. The purpose of the amendment appeared vague. Is the intent of the amendment to expand the analysis of the defendant's conduct? It is unclear when determining if the reduction applies if the analysis should include a comparison of similar/typical offenses or the defendant's role within the charged offense. POAG believes limiting the assessment to the defendant's role in the "criminal activity" rather than his/her activity in the typical crime, does not rectify the disparity across the country in how the mitigating role adjustment is applied, and it may even have the reverse effect by creating more ambiguity. POAG believes the application of the mitigating role adjustment will continue to be applied inconsistently based on the interpretation in each district or circuit. POAG recommends the Commission look at

case law from the circuits that apply the adjustment infrequently to ascertain the barriers that may inhibit application. This may offer insight and guide the Commission in developing expanded language or formulating examples in the application notes. Much more than a two level reduction hinges on minor role. When considering the mitigating role cap in USSG §2D1.1, there is a potential swing of seven offense levels for defendants that are categorically denied mitigating role in one district and given the adjustment in another. POAG agrees §3B1.2 needs to be revised because it is one of the most inconsistently applied sections across the country.

6. PROPOSED AMENDMENT, FLAVORED DRUGS

POAG did not receive comments from circuit/district representatives regarding controlled substances which are colored, packaged, or flavored in ways that appear to be designed to attract use by children. POAG is not aware of any federal prosecutions or pattern of offenses that may be occurring nationally or regionally.

7. PROPOSED AMENDMENT, HYDROCODONE

POAG discussed various issues being addressed by the Sentencing Commission regarding the administrative re-scheduling of Hydrocodone.

On the issue of proportionality, POAG agreed that the actual weight of the controlled substance should be the determinative factor in calculating drug quantity – similar to the current approach in oxycodone application. Analyzing the active ingredient of hydrocodone (actual) will bring more consistency to application – especially considering the variety of hydrocodone products with varying pill sizes, formulations, and dosages. Using the proposed (actual) approach would also bring uniformity in the treatment of combination and single-entity hydrocodone products.

With regard to the issue of severity, POAG advocates that 1 gram of hydrocodone (actual) equate to 4,467 grams of marijuana. This approach supports a hydrocodone-oxycodone ratio of 2:3. The alternative and less-preferred approach calls for a marijuana equivalency of 6,700 grams – which represents a hydrocodone-oxycodone ratio of 1:1. POAG believes the lower equivalence is justified based on hydrocodone's relative pharmacological composition to oxycodone and its secondary presence as an abused opiate.

In evaluating equianalgesic dosing of opiates for pain management, pharmacological literature compares the relative strength of narcotic pain medications to assist physicians and pharmacists making prescription determinations.[1] Within this literature, a 30-45 milligram (mg) dose of hydrocodone has an equianalgesic quality to a 20-30 mg dose of oxycodone – representing a 2:3 ratio.

1 PL Detail-Document, Equianalgesic Dosing of Opioids for Pain Management. Pharmacist's Letter/Prescriber's Letter. April 2, 2014.

Anecdotal evidence from probation officers and contract treatment providers also support the lower conversion rate. The majority of physically dependent opioid abusers typically seek to acquire more powerful opiates such as heroin, morphine, oxycodone, hydromorphone and fentanyl. In fact, the recent reformulation of immediate release oxycodone products has caused a significant increase in heroin abuse – particularly in the New England states. Although hydrocodone products certainly have a presence as an abused narcotic, they are rarely the "drug of choice" for opioid addicts. Market factors including cost, availability and relative potency cause hydrocodone products to be considered more of an "introductory opiate" (typically as an abused prescription) or a "maintenance opiate" (used by addicts to stave off withdrawal symptoms).

8. PROPOSED AMENDMENT, ECONOMIC CRIME

Intended Loss at USSG §2B1.1: POAG reviewed Options 1 and 2, and initially supported Option 2. However, after considering the potential application issues that may arise, we could not arrive at a consensus. POAG fully recognizes that determining loss has become difficult and in many cases impossible; however, neither of these options seems to rectify that issue. POAG believes the solution to this issue would require a much more substantive change rather than a minor modification. One issue POAG agreed on was both options appear to change the relevant conduct rules for this guideline. The group felt different relevant conduct rules for specific guidelines would lead to confusion in applying the guidelines and result in misapplications.

Victims Table at USSG §2B1.1(b)(2) as well as other provisions relating to victims in USSG §2B1.1: Options 1 and 2 provide a new enhancement at USSG §2B1.1(b)(3) that applies if the offense resulted in substantial hardship to one or more victims, and provides factors for the court to consider in determining the applicability of the enhancement under USSG §2B1.1, Application Note 5. Under Option 1, the enhancement applies if there are one or more such victims, whereas Option 2 provides a tiered enhancement based on the number of victims. POAG feels Option 1 is the better of the two options because it is believed Option 2 would be overly burdensome on the sentencing process particularly if the probation officer was required to verify a hardship for twenty-five or more victims. It is noted POAG did not take a position with respect to the cumulative effect of this enhancement with subsection (b)(2). In those instances where there are a significant number of victims who sustained a substantial hardship in the offense, POAG suggested, in light of the proposed deletion of prong (iii) of §2B1.1(b)(16)(B), that this factor be a consideration for an upward departure under USSG §2B1.1, Application Note 20(A).

With respect to the term "substantial hardship," POAG believes this term should be inclusive of both financial and non-monetary hardships because, in some cases, the severe emotional trauma sustained by a victim may be more profound than the monetary loss. In so doing, POAG recommends the "substantial non-monetary harms" referenced in the second sentence of USSG §2B1.1, Application Note 20(A)(ii) be incorporated into the hardship factors listed under proposed USSG §2B1.1, Application Note 5. For consistency purposes, POAG further recommends the introductory sentence of proposed USSG §2B1.1, Application Note 5, be re-worded such that it suggests a "non-exhaustive list" or a list without limitation similar to the language used in USSG §3C1.1, Application Note 4 (Obstructing or Impeding the Administration of Justice) and USSG §3E1.1, Application Note 1 (Acceptance of Responsibility).

There was some discussion among members of POAG concerning the application of this enhancement with respect to wealthy victims who, despite suffering a substantial investment loss, continue to be wealthy. It was believed by some that this enhancement could be unfairly construed as such that a victim who continues to be wealthy despite said loss has not suffered a hardship.

POAG also believes some clarification of this enhancement may be required as it relates to defendants who, in conjunction with an underlying offense conviction, are convicted of an Aggravated Identity Theft offense under 18 U.S.C. § 1028A. Because a sentence under USSG § 2B1.6 (Aggravated Identity Theft) accounts for conduct that involves the "possession, or use of a means of identification," a "substantial hardship" enhancement under USSG §2B1.1(b)(3)(A) would require factors that are separate and in addition to "having his or her identity assumed by someone else."

Sophisticated Means at USSG §2B1.1(b)(10)(C): POAG supports the Commission's revision to the sophisticated means enhancement under USSG §2B1.1(b)(10)(C) and its corresponding commentary. The update to this guideline section requires not only that the offense involve conduct constituting sophisticated means, but also that the defendant engaged in or caused such conduct as determined by USSG §1B1.3(a)(1)(A).

POAG requests clarification to the requirement in Application Note 9 that sophisticated means is determined relative to other offenses of the same kind. For ease of guideline application, POAG members believe offenses of the same kind should encompass a broad category of offenses. Offenses covered by USSG § 2B1.1 include many types of fraud offenses, several of which occur through the mail, internet, or by wire. Common types include: bankruptcy fraud; tax fraud; mail fraud; credit card fraud; securities fraud; telemarketing fraud; and wire fraud. Conduct for the sophisticated means enhancement should be compared to a broad spectrum of fraud offenses that fall within the scope of USSG § 2B1.1. Taking this approach ensures a defendant will be held accountable for "intricate offense conduct" which may pertain to all fraud offenses covered by USSG § 2B1.1, rather than a select or narrow category of offenses. An additional suggestion would be to include a case scenario or two in the commentary, or update the case examples being deleted from the commentary, to assist those applying the guidelines to better understand the Commission's proposed amendment of applying the sophisticated means enhancement relative to "offenses of the same kind."

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
February 2015