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Acceptance of Responsibility

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Throughout the past year, POAG obtained a significant level of feedback on the Commission's proposed amendment for Acceptance of Responsibility. This amendment seeks to clarify a defendant's ability to reasonably contest "non-frivolous" relevant conduct issues that "have no basis in either law or fact." The amendment also seeks feedback as to whether acceptance of responsibility should remain tied to relevant conduct or become an elements-based determination. POAG unanimously supports acceptance of responsibility remaining tied to relevant conduct; and also supports the clarifying amendment explicitly permitting defendants to contest relevant conduct – where those objections are made in good faith.

During the open comment period, various advisory and interest groups criticized the current structure of Acceptance of Responsibility as creating a "chilling effect" – discouraging defendants from making objections to relevant conduct and forcing them to take calculated risks with potential sentencing consequences. In certain localities, POAG is aware of AUSAs who assertively object to acceptance of responsibility in response to factual and/or legal relevant conduct objections. We have also observed District Judges follow suit in routinely denying the adjustment following contested evidentiary hearings, a practice generally upheld by appellate courts. While this pattern of practice does exist in certain localities and within individual courts, we do not believe it is an institutionalized issue denying defendants due process. However, these outlying courts do create disparity. Make no mistake, they appropriately exercise their discretion under current guideline authority, but we believe the clarifying amendment is necessary to bring consistency to the system.

As the Sentencing Guidelines have evolved in the past 30 years, applications have grown increasingly complex and there are often shades of grey where reasonable practitioners can disagree. Estimation of drug quantity and loss, mitigating and aggravating role, evaluating jointly undertaken criminal activity and assessing witness credibility – these are just a few sentencing issues that cannot always be answered in the black and white of an investigative report or grand jury transcript. Sometimes it takes a defendant's objection to flesh out the truth, which is why it is important objections made in good faith be permitted within acceptance of responsibility.

As POAG observed in previous submissions, the current commentary allows the government to make guideline objections with no worry of consequence – whether the legal or factual merits are strong or marginal. The Court simply accepts or denies the objection and the process moves along. We believe proposed commentary promotes a better sense of balance within the system.

POAG has received some feedback that the proposed amendment could produce a more contentious sentencing environment in which hearings could evolve into “mini-trials.” We believe this concern to be somewhat overstated – so long as acceptance of responsibility remains tied to relevant conduct rather than an elements-based determination. The pattern of practice in many District Courts is already consistent with the spirit of the proposed amendment. While extending this level of due process can take more time, we do not believe it to be overly burdensome. There are still limits; and when a defendant’s objection to relevant conduct is completely unfounded or fits within an overall pattern of frivolous minimization, courts retain the discretion to respond appropriately.

POAG ultimately views this amendment as an opportunity to reduce disparity in federal sentencing and to ensure that defendants have a voice in the process. We believe the proposed amendment provides increased clarity that recognizes the complexities of sentencing – that defendants can make reasonable relevant conduct objections and still demonstrate contrition. Ultimately, a relevant conduct objection should not necessarily be a threshold determination in every case, it should be one of several factors considered in the totality of the circumstances.