

# PROBATION OFFICERS ADVISORY GROUP

*An Advisory Group of the United States Sentencing Commission*

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The Honorable Carlton W. Reeves  
United States Sentencing Commission  
Thurgood Marshall Building  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed amendments issued on December 26, 2023.

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### **Proposed Amendment No. 7: Simplification of the Three-Step Process**

POAG overwhelmingly supports the proposed amendment for simplifying the three-step sentencing process. POAG does not believe this change will have an impact on the ultimate sentence imposed, rather this change will merely simplify the record and the factors that form the basis for a sentence outside the advisory guideline range. Many officers throughout the country have remarked the proposed amendment essentially captures the current sentencing practice, as very few departures are used, with the exception for certain ones, primarily USSG §§5K1.1 and 5K3.1, and to a lesser extent USSG §§4A1.3, 5K2.20, and 5K2.23. Though these would no longer be departures, the basis for these reductions would remain intact under the proposed methodology. It is further noted that, subsequent to the *Booker* decision, the Seventh Circuit has issued opinions which have both stated and reiterated that, in a post-*Booker* world, departures are “obsolete” and “beside the point” (see *U.S. v. Arnaout*, 431 F.3d 994 (7th Cir. 2005) and *U.S. v. Walker*, 447 F.3d 399 (7th Cir. 2006)). Across the country, the trend is to see the sentence imposed based on the sentencing principles outlined in 18 U.S.C. § 3553(a), oftentimes even for circumstances which are also potential grounds for departure. However, POAG observes a collateral procedural impact of this amendment is that, with departures, the Court provides notice if it intends to depart, but no such notice is required for a variance. According to *Irizarry v. U.S.*, 128 S. Ct. 2198, 2202 (2008),

the Court also reasoned that Fed. R. Crim. P. 32(h) “does not apply to 18 U.S.C. § 3553 variances by its terms” because the word “departure” is a “term of art under the guidelines and refers only to non-guidelines sentences imposed under the framework set out in the guidelines.” This confirms that the United States Supreme Court held that no advance notice of a variance is required. While there would still remain references to departures in the Federal Rule of Criminal Procedure, those rules would remain in existence, dormant, as sentencing practices continue to move in a different direction.

POAG observes that the proposed simplification appears consistent with the authority and instructions outlined in 28 U.S.C. §§ 994 and 995. The lower sentence based on substantial assistance required by 28 U.S.C. §994(n) would still be reflected in the amended USSG §5K1.1.

POAG observes that the parties (and occasionally Judges) at sentencing hearings often use language suggesting departures and variances are interchangeable, which could then impact the accuracy of the information captured on the Statement of Reasons. The simplification will help alleviate this potential issue, particularly as the Statement of Reasons would subsequently require amending. Members of POAG have remarked that, while we are largely in favor of the change, we recognize it will likely result in the need for a mindset change and the implementation of a revised Statement of Reasons.

The Statement of Reasons has historically been utilized, in part, for data collection and assessment of the factors the Court considered in imposing a sentence under 18 U.S.C. § 3553(a). POAG does not envision this will change with the removal of departures and anticipates the Court will continue to provide a sufficient amount of detail regarding the factors considered in determining the sentence that should be imposed. The Commission is a data driven agency and will be able to continue to assess the factors considered at sentencing as it continues to refine the process of sentencing. However, POAG presumes there are varied practices and amount of detail across districts. Further, there may be various approaches to the details included on the Statement of Reasons, especially regarding whether aggravating factors are noted in cases of an upward variance, whether mitigating factors are noted in cases of a downward variance, or if both aggravating and mitigating factors should be noted regardless if the sentence was an upward or downward variance as they inform how the Court arrived at the ultimate sentence. The Commission may wish to consider guidance on how these various factors should be reported. Specifically, if it is the Commission’s intention that all factors considered, whether mitigating or aggravating, be included on the Statement of Reasons, they should find a way to articulate that intention into the guidelines.

One issue that POAG has identified with the proposed amendment is the creation of the new Chapter 6, which would affect the chapter number of the subsequent chapters. POAG believes that by changing to Chapter 6, the ripple effects of the altering the citation of guidelines would create an added and unnecessary difficulty in caselaw research. The shifting of previous citations may become confusing and tedious, and ultimately is an unnecessary change. POAG believes including the proposed Chapter 6 at the end of Chapter 5 (i.e. USSG §5J) would be more user-friendly. It was noted this process will not change the entire system of the guidelines, only the process by which a custodial or probationary sentence is formed. Additionally, POAG advises that the

Commission include their intended method for citing Additional Offense Specific Considerations and Additional Considerations with the other citations included at the beginning of the manual.

POAG supports reclassifying departures as “Additional Offense Specific Considerations” in the appropriate guideline sections. It is notable that some “Additional Offense Specific Considerations” sections appear more thorough and user-friendly than others (notably the one following USSG §2D1.1 that features several sub-headers is very used friendly). There are also some instances in which the presentation of the information appears inconsistent. POAG has included the below list of the guideline sections in which these sub-headers are not present, and we encourage the Commission to generate appropriate sub-headers that que the reader about what type of Additional Offense Specific Consideration is being described.

Additional Offense Specific Consideration and Additional Consideration sections that lack the sub-headers:

USSG §2B1.1;

USSG §2B1.6;

USSG §2B5.3;

USSG §2D1.11;

USSG §2D1.12;

USSG §2E3.1;

USSG §2G2.2;

USSG §2H3.1;

USSG §2J1.2;

USSG §2K1.3;

USSG §2K2.2;

USSG §2L1.1;

USSG §2L1.2;

USSG §2L2.1;

USSG §2N3.1;

USSG §2Q1.2;

USSG §2Q1.3;

USSG §2Q1.4;

USSG §2X7.2;

USSG §3C1.2;

USSG §3D1.4; and

USSG §7B1.4 (proposed to be amended to USSG §8B1.4)

It was also suggested that the new proposed USSG §6A1.3(a)(1) may need some adjustments. At the end of the proposed USSG §6A1.3(a)(1) it states, “Such factors may be identified in specific Chapter Two guidelines as ‘Additional Considerations.’” POAG suggests that “Additional Considerations” be corrected to “Additional Offense Specific Considerations” and that this clause be further expanded to include “Additional Considerations” that occur in Chapter Three, Four, and Seven (now Eight). With that in mind, it may be that the sub-header for §6A1.3(a)(1), “OTHER OFFENSE SPECIFIC CONDUCT OVER-OR UNDER-REPRESENTING SERIOUS OF OFFENSE,” would need to be broadened to include “Additional Considerations” and edited to be “SERIOUSNESS” rather than “SERIOUS.” POAG also noticed a linguistic error in the Additional Offense Specific Considerations of USSG §2B1.6, where the term “may be relevant” appears both in the introductory language in part 1 and then again in the sub language at 1(A). While POAG observed that there was some repetitiveness between Chapter 2 “Additional Offense Specific Considerations” and items listed in Chapter 6, POAG understands that reiteration can sometimes accentuate the intent of the Commission.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group  
February 2024