PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

March 3, 2025

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 (the Commission) regarding the proposed amendments issued on January 24, 2025.

Supervised Release

(A) Imposition of a Term of Supervised Release

POAG appreciates the Commission's review of the importance of supervised release. United States Probation Officers throughout the country are dedicated to our mission to create and support a system that "facilitates the fair administration of justice, enhances public safety, and positively impacts the lives of individuals who become involved with the federal courts."[1] The goal of supervision is the successful reentry into the community, coupled with compliance of court conditions for the purpose of community safety. Probation officers play a crucial role in that success and are, in many cases, one of the few, if not the only, prosocial relationships in the life of a person under supervision. On a daily basis, probation officers are tasked with balancing the sometimes competing functions and values of law enforcement with social work, to ensure public safety, while also providing supportive services to those under supervision. The United States Probation Office is continuously focus on research to help improve outcomes and core correctional practices. We have evolved over the past century to incorporate these best practices and the results

[1] United States Courts. (2025, February 25). Probation and Pretrial Services. https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services

of scientific research to execute our duties and responsibilities to the people we supervise, our stakeholders, as well as the community at large.

Imposition of a Term of Supervised Release (USSG §5D1.1)

POAG was split regarding the noted changes to both USSG §5D1.1(a), removing the requirement for supervised release in cases in which it is not required by statute, and §5D1.1(d), noting that the reasons for imposing or not imposing supervised release should be stated for the record. Those in favor of keeping the language in §5D1.1(a)(2) noted the benefit of having the opportunity to supervise individuals for a minimum amount of time, allowing the United States Probation Office to complete an initial determination if supervision is necessary past 12 to 18 months. Additionally, a minimum term of supervision provides the United States Probation Office, supervisee, and the community with a safety net; allows for receipt of First Step Act benefits while in the custody of the Bureau of Prisons; and assists those individuals transitioning into or from a Residential Reentry Center.

Those in favor of removal of the §5D1.1(a) language believe it allows for a more individualized approach for the court to determine if supervision would be beneficial for the defendant and allow for the allocation of limited resource of the United States Probation Office and their outside stakeholders towards those most in need of services.

Furthermore, those in favor of adding (d) to §5D1.1, noted that this is already occurring in court. In contrast, those who were against adding (d) indicated that this may appear to be an acceptable practice, but adding the language into the guidelines may result in unintended consequences and continually invite ligation on both sides of the aisle. Additionally, as the practice is already occurring in most cases, the inclusion of the language in the Guideline Manual could have the unintended consequence of suggesting what is being done is insufficient. POAG recommends that, should the Commission choose to amend this language, the bracketed statement of "or not imposing" be utilized.

Regarding §5D1.1(b), POAG unanimously opposed the updated language pertaining to the imposition of a term of supervised release when not required by statute. The language is problematic, specifically pointing out "when, and only when" will give rise to numerous appellate issues and definitional challenges. This change may ultimately cause issues with articulating what is already deemed procedurally good practice within each court. The phrasing also makes it seem as if the Commission is suggesting that supervision is unnecessary when the court should make that decision independently. POAG believes that supervision of defendants after their release from custody produces a substantial benefit to the defendant and the community. POAG also observes that it is difficult to determine which defendants fall within the slim minority of cases that would experience no benefit from the added stability supervision provides. Defendants who appear stable may have unforeseen obstacles in life that then disrupt that stability. A defendant may look

relatively stable at sentencing, but they may leave custody months or years later in a substantially less stable posture than they entered.

Finally, POAG was in favor of the Commission adding the sentencing statute citations to the Commentary, as it creates consistency within the manual and appropriate statutory authority references.

Overall, POAG did express some concern regarding the "individualized assessment" language utilized in the proposed changes throughout Chapters 5 and 7. In the parlance of probation officers, assessments are often written evaluations of a person's risk of recidivism (i.e. the Post Conviction Risk Assessment (PCRA)) or a person's mental health or substance abuse diagnoses and treatment needs. To our knowledge, there are presently no individualized assessment tools which are used to determine the need for supervised release or the appropriate conditions for supervised release.

At the presentence stage, there is no formal assessment tool utilized; however, the presentence investigation itself, including interviewing a defendant, interviewing an individual with close knowledge of the defendant, and reviewing relevant records (i.e. criminal history, education, medical) on the defendant, and, therefore, does lend itself to making an individualized determination of whether or not a person needs, or could benefit from, a term of supervised release. Defendants with greater needs or risk factors for recidivism that are discovered during the presentence investigation would typically be recommended for a longer term of supervision, to ensure ample time to address the identified risks and needs. And, if it is determined supervised release is necessary, that same investigation reveals what conditions of supervised release are appropriate for the defendant and his/her personal circumstances.

Furthermore, while under supervised release, probation officers are routinely engaging in case planning and making what would be considered individualized determinations, regarding the risks and needs of a person under supervion. Probation officers often begin working with, and assessing, persons soon to be under supervision while they are still under the custody of the Bureau of Prisons in the halfway house environment. As part of that initial case planning, probation officers are required to conduct a risk assessment using the PCRA tool, along with an initial case plan within 30 days of that individual's release (or 60 days in cases in which the person is directly released from prison and not the halfway house). The individual's case and risk level are continuously assessed throughout the term of supervision and are formally done so within six months and one year later at eighteen months, and every year thereafter. Said case planning may result in recommended modifications of the conditions of supervised release or even the consideration of early termination. In many districts, probation officers recalculate the PCRA prior to proceeding with a violation of probation or supervised release. Case planning could also reveal that the person should be transferred to a low risk, administrative, or inactive case load, requiring little to no interaction with the probation office. Therefore, while these determinations are regularly made by probation officers, they are often not a formalized assessment, based upon a written tool. With this

in mind, members of POAG believe changing the term "individualized assessment" to "individualized determination" may be more appropriate.

Term of Supervised Release (USSG §5D1.2)

In reviewing the requested changes to this section of the guideline manual, similar concerns were raised as those noted in USSG §5D1.1, with emphasis on conducting an individual assessment to determine the length of term of supervised release.

Regarding §5D1.2(a), as noted above, POAG has concerns with the term "individualized assessment" and again note that "individualized determination" may be more appropriate. In the parlance of probation officers, assessments are often written evaluations of a person's risk of recidivism (i.e. PCRA) or a person's mental health or substance abuse diagnoses and treatment needs. For supervision officers, "determinations" are processes while "assessments" are tools in that process. Additionally, the majority of POAG members were opposed to changing the language of §5D1.2(a), for the same noted reasons under §5D1.1.

POAG unanimously agreed that striking the language in §5D1.2(b) was an appropriate determination; however, POAG was unanimously against the updated language noted in §5D1.2(c). This language, although appearing procedurally appropriate, would likely cause unintended consequences and give rise to more litigation at sentencing, increased length of sentencings to achieve largely the same result, and appeals from defendants.

Finally, POAG agrees that the commentary changes should be adopted, as it aligns with POAG's noted position on this guideline.

Conditions of Supervised Release (USSG §5D1.3)

Beginning in the mid-2010s, there were a flurry of cases in the Seventh Circuit Court of Appeals which began to call into question the imposition of various conditions of supervised release.[2] The conditions which were initially debated were more specialized conditions pertaining to the supervision of sexual offenders; however, case law continued to evolve in this previously little reviewed area and then turned to more "standard" conditions, including those required by law (i.e. mandatory conditions). This has resulted in a landscape in the Seventh Circuit in which the reasons for applying a term of supervised release and each of the conditions needs to be carefully described and detailed on the record. This has necessarily resulted in sentencing hearings lasting for longer than they previously did. For instance, an officer in the Seventh Circuit observed that sentencing hearings - without any issues or objections - lasted on average of two hours. It was not until 2019 that it was settled that the recitation of each of the imposed conditions, along with the rationale for each condition being imposed - for even undisputed conditions - could be waived by the

[2] See, *United States v. Goodwin*, 717 F.3d 511 (7th Cir. 2013); *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015); and *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015).

defendant.[3] While such debate regarding the conditions of supervised release is mostly confined to the Seventh Circuit, members of POAG expressed concerns that requiring an individualized assessment of the conditions of supervised release will result in such practice spreading to the other circuits. Additionally, concerns were expressed that, if the court were to inadvertently miss some of the necessary steps, not make a full record of why supervised release was imposed for that length of time and with those specific conditions, it could result in an appellate issue and remand, perhaps requiring a full re-sentencing hearing.[4] Those who work in already overburdened courts are concerned that the additional time requirements will further mire the court docket. While POAG agreed that the use of resources to achieve a better outcome is well worth it, POAG does not believe this approach produces a better result.

POAG has observed that the proposed Application Note 1 of USSG §5D1.3, pertaining to the individualized assessment appears to imply that an officer is to assess the need for all conditions, including mandatory and standard conditions, as well as special conditions. Many of the mandatory and standard conditions listed encompass administrative conditions, which are the statutory requirements of a probation officer.[5] If certain conditions, such as reporting requirements, are excluded, that prohibits the probation officer from being able to supervise the individual and meet their statutory obligations. In addition, standard conditions of supervised release are geared towards accountability, leading a law-abiding lifestyle, promoting stability and pro-social activity, reducing the risk to the community, and allowing for effective supervision. As these are all important hallmarks of supervision and post-offense rehabilitation, POAG believed these conditions should remain unchanged in most cases. As an aside, members of POAG have expressed concern that changing the basic expectations of a term of supervised release, in addition to reducing probation officer's ability to effectively supervise individuals, could result in difficulties in performing academic studies on supervised release, as it may become too variable to make for meaningful comparison and study. While that may seem like a relatively collateral concern, the probation system works to refine their effort based on social science research, and erosion of the comparisons that science focuses on may have a long-term impact on that effort.

Members of POAG and supervision officers we represent did express trepidation regarding what we believe could be an unintentional consequence of what were often considered standard conditions of supervised release being subject to individualized assessments, including by other parties in the courtroom. Specifically, officers are concerned that the probation office's discretion could be hampered by this procedure. For the past 100 years, the federal probation system has crafted their policies and procedures, based upon the social science, correctional best practices, and evidenced based practices research. While these practices and research may be well known to the probation office, it is not anticipated that the parties would be as well versed. Furthermore, in recent lean budget years, probation offices have become well skilled at doing more with less and

[3] See, *United States v. Flores*, 929 F.3d 443 (7th Cir. 2019).
[4] See, *United States v. Kemp*, 88 F.4th 539 (4th Cir. 2023).
[5] See, 18 U.S.C. § 3603.

focusing our offices' limited resources on those supervisees who need them the most, not only for the supervisee's own rehabilitation but to protect the public. It is important for the probation office to maintain its discretion in how to best supervise persons under supervision, while also not burdening the courts with additional hearings regarding how the probation office should execute their statutory authorities in individualized cases. Anecdotally, in the Seventh Circuit in which the supervised release conditions have been debated for the past decade, those which provide discretion to the probation officer (i.e. where a supervisee can be visited, participation in substance abuse and mental health treatment, third party risk notification) are some of the most often debated conditions. Sometimes in the resolution of the objection, it can result in conditions that are difficult to execute. For example, a probation officer being unable to visit a person at their home or place of employment but being permitted to execute searches of those same places with reasonable suspicion. Another example is when a supervisee being placed under home detention, but with no monitoring technology imposed (i.e. a location monitoring bracelet) to ensure the court's orders are being followed. Furthermore, when courts specifically tailor or modify the wording of the conditions of supervised release, it can result in vast differences among various judges within the same district, let alone across districts and circuits. This could result in disparities in how supervised release looks on a national level. It could also have unintended consequences in terms of other districts being unwilling to accept the supervision of a case, as the conditions with which that person under supervision has been placed may not comport with the preferred conditions and wording of those conditions in the other district.

POAG members expressed concerns that such individualized tailoring of conditions of supervised release and modifying the wording of the conditions, to the satisfaction of the parties, could lead to circumstances in which there is greater liability for the probation office and officers. Officers will need to carefully and routinely review the imposed conditions on each of their many cases, in order not to inadvertently infringe upon the supervisees' civil rights by overstepping what was imposed by the court. While caseloads can vary a great deal nationally and within individual probation offices (i.e. those who supervise higher risk offenders or specialty populations may have a lesser caseload than those who supervise low-risk cases), imagine a probation officer who supervises sixty-five individuals and would need to review sixty-five potentially very different sets of conditions of supervision on a routine basis. Under this structure, the differences between those cases could be very nuanced. For instance, what would happen if the probation office conducted a drug test which exceeded the maximum number of annual tests ordered by the court and that drug test was the basis of a violation? Or, what would happen if the probation officer were to visit a supervisee at his community service location, in order for him to not have to request time off of work to visit with the probation officer, but visits at the community service location were not permitted? Or, if the home visits could only be done when scheduled in advance, and the officer having scheduled a visit with the person under supervision arrives a little late or early to the scheduled appointment, due to unforeseen circumstances, resulting in litigation against the officer for acting to supervise the supervisee outside the scope authorized by the court? Regularly needing

to review each supervisee's imposed conditions could serve to overburden an already burdened system.

As to the proposed wording changes, POAG unanimously prefers the Commission retain the longstanding language of "standard" conditions, rather than change the language to "examples of common" conditions. No concerns were presented regarding the deletion of "additional conditions" and those conditions being included under "special conditions," as the term "special conditions" has been used for many years.

POAG largely supports the inclusion of a high school or equivalent diploma as a potential special condition of supervised release. Some remarked that the obtainment of a high school diploma or equivalency may be most appropriate in cases in which the supervisee is otherwise not employed. There are often many requirements placed upon a person following his or her release from imprisonment, at the same time the person is trying to reintegrate into the community, from which he or she may have been removed for a significant period of time. Many people are released from prison with limited financial means and necessarily need to focus on employment. However, obtainment of the minimal education requirement may be an appropriate condition for some persons under supervision, or an appropriate modification to include should a supervisee struggle to obtain employment due to educational deficits. In addition to including participation in education as a special condition, the Commission may also wish to consider including participation in vocational training, as well as job skills training. Some persons under supervision have little to no work history and, in addition to obtaining an education, may need to acquire basic soft skills to help them obtain employment and gain a better understanding of how a formalized work environment operates. Furthermore, some persons under supervision, while they may struggle with formalized education, may be better adept at vocational skills and could complete that type of program in lieu of education.

Modification, Early Termination, and Extension of Supervised Release (USSG §5D1.4)

The inclusion of modifications, early termination, and extension of supervised release is an appropriate addition to the Guidelines Manual. POAG is appreciative of the Commission's efforts to include statutory authority into the Guideline Manual to provide further guidance on modifications, early termination, and extension of supervised release; however, there are concerns that the changes may contradict the Guide to Judiciary Policy. Modification of conditions are common and happen fluidly as a supervision tool. Probation officers utilize PCRA to assess the risks and needs of the person under supervision. According to the responsivity principle, intervention strategies should be administered in the modality that is most effective in the reduction of criminal behavior. Further, the delivery of treatment services must also align with the individuals' learning styles. Probation officers are trained annually on the utilization of PCRA and are in the best position to apply the results along with an individualized determination of the appropriate conditions necessary for a positive outcome. Additionally, on-going assessments are

made during the period of supervision with personal and collateral community contacts, written reports, and other observed behaviors. Officers routinely work directly with defense counsel, the U.S. Attorney's Office and the court to ensure that conditions are structured to equip the person on supervision with the tools needed for a successful reintegration into society and further ensuring a decreased likelihood of reoffending. In the current structure, a violation of supervision is not necessary to request a modification of conditions. POAG suggests utilizing the language of "may," rather than "should," and striking the last sentence which encourages the court to conduct an assessment after the defendant's release from imprisonment. The Probation Office would like to continue to take the lead on modification requests given our firsthand knowledge of the person under supervision's unique needs.

The Guide to Judiciary Policy provides a presumption in favor of recommending early termination at 18 months of supervision for individuals that meet a specific criterion and are not classified as violent or career offenders. This internal policy directs probation officers to closely review all cases at the eighteen-month mark, to assess if the case is eligible for early termination. This date coincides with the third mandatory case review of each case on probation or supervised release. Initial case plans are completed within 30 to 60 days of the onset of probation or supervised release. A second case review is required at six months. As a part of the case planning activities, probation officers are completing the PCRA. Factors such as antisocial attitudes, antisocial associates, impulsivity, substance abuse, deficits in education, and vocational and employment skills are directly associated with the probability of recidivism. These areas drive the criteria set forth in the Guide to Judiciary Policy. In discussion, POAG found that officers frequently review cases for early termination during annually required case staffings which occur between officers and their supervisors. During the case review period, officers are reviewing compliance of court-ordered conditions, employment and residence stability, along with running a record check to ensure that no new criminal behavior has occurred. This may also be a time when modifications of conditions of supervised release may be considered and the transfer of the individual to a low risk or administrative caseload occurs. While these practices are common, POAG does acknowledge that the probation office work-funding structure needs re-evaluation as it pertains to early termination, and it is our understanding that the Administrative Office is engaged in an effort to rebalance the work-funding formula on this issue. Notwithstanding, officers and districts are still working to early terminate cases that present a sustained pro-social development and a low risk to the community. The data on this reflects that of the 52,042 cases in which supervision was closed in 2024, 9,580 of those cases were early terminated (18.4%).

A recent study entitled Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety (2025) published by Thomas H. Cohn, Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts, substantiated that the current structure and usage of early termination in federal probation did not threaten community safety. The study examined approximately 296,023 cases that were closed via early or regular termination between 2014-2023. "Specifically, when matched on a range of criteria associated with the risk of

recidivism, supervisees with early termination manifested post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular termed counterparts."[6] Another study finding revealed that the greatest indicator as to whether a case would be early terminated was the district of supervision. Perhaps the Commission's inclusion of early termination within the Guideline Manual, coupled with the Administrative Office's recent study, will encourage more probation offices across the country to more regularly consider, recommend, and support early termination. The inclusion of this language could also encourage the USAO and the court as well. If the Commission incorporates instructive guidance for early termination, it should mirror the current counsel advised in the Guide to Judiciary Policy, particularly as it relates to the timing (18 months versus 12 months).

Many individuals on supervision are aware of the possibility of early termination and often inquire about it during the initial phases of supervision. Early termination can be a useful incentive to motivate and facilitate compliance with conditions and the development of sustainable prosocial activities. Additionally, the practice of early termination helps to reduce the heavy workload experienced by many officers. If individuals that are less likely to recidivate and have shown the ability to self-manage are released from supervision, officers can focus their attention on high-risk supervisees. The risk-needs-responsivity model dictates that recidivism can be reduced if the level and type of treatment services are proportional to the risk level of the person on supervision.

If early termination appears to be appropriate, officers are working in conjunction with defense counsel and the U.S. Attorney's office to file a request for early termination to the court. Officers value their ability to make independent decisions with careful consideration. They continuously serve the court by providing factual information based on their close proximity to persons under supervision. In some instances, probation officers serve as one of (or the sole) prosocial model in a person under supervision's life. There is a strong bond which forms between probation officers and persons under supervision, which may sometimes last beyond the term of supervision. Studies have shown that the relationship which is built between the probation officer and person under supervision can factor heavily into the success of the person under supervision.[7] It is through this unique relationship that change is encouraged, fostered, and supported.

Some districts offer re-entry court programs, such as the one noted by the Commission in the Eastern District of Pennsylvania. There is also a similar program in the Northern District of Illinois. Individuals who complete the program requirements are referred for early termination. Persons under supervision who complete such programs not only have abided by the terms and conditions of supervised release initially imposed by the court at the time of sentencing but have shown further

[6] Cohen, 2025

[7] DeLude, B., Mitchell, D., Barber, C. (2012). The probationer's perspective on the probation officer-probationer relationship and satisfaction with probation. Federal Probation, 76(1), 35-39.

determination and compliance by completing the re-entry court program's requirements. Such individuals are appropriately recommended for and receive early termination.

POAG had mixed opinions regarding whether a formal court proceeding for early termination is necessary, but the majority favored an informal process. On the one hand, a formal proceeding would allow for any victims to participate and continue to have his or her voice heard. The role of victim notification relies with the U.S. Attorney's Office as referenced in the Crime Victims' Rights Act. Those offices are equipped with Victim Witness Coordinators who have established protocols for maintaining contact with victims, to include pertinent notifications. Probation officers do have a duty to notify third parties if there is a risk to their safety and to monitor restitution payments if so ordered; however, ongoing contact with victims is often unnecessary. In some instances, victim notification may even become impractical because of the length of time that has transpired since the offense or deleterious to the victim due to the continued reminders of the offense. In addition, if a formal proceeding occurs, counsel may need to be re-appointed or re-retained to represent the supervisee, which might hinder the process.

Repeat and Dangerous Sex Offender Against Minors (USSG §4B1.5)

It appears the Commission has suggested that when making an individualized assessment of the conditions of supervised release, that would also result in a conforming change to USSG §4B1.5. USSG §4B1.5 pertains to enhanced criminal punishments for those convicted of certain sex offenses who have a prior conviction for a sex offense or have otherwise engaged in a pattern of activity involving prohibited sexual conduct. The background commentary indicates these are "persons who present a continuing danger to the public." Therefore, POAG unanimously believes that treatment and monitoring should remain compulsory, and not a discretionary consideration, for these recidivist sexual offenders. POAG would discourage the Commission from striking Application Note 5 in entirety, as well as discourage changing the wording from "should" to "may." POAG believes Application Note 5 should remain unchanged due to the dangers posed by repeat and dangerous sex offenders who are not being monitored or treated.

(B) Revocation of Supervised Release

POAG recognizes that Chapter 7 has predominately been untouched for decades and may be in need of changes. POAG observes that there is a case pending before the Supreme Court of the United States, *Esteras v. United States*, 145 S. Ct. 413 (*Cert.* granted), which centers around the factors that can be used to revoke supervised release and whether judges are able to consider factors such as the seriousness of the original offense and promoting respect for the law within the context of the supervised release violation. As this case may change the landscape of violation considerations, POAG believes it may be prudent to revisit this issue in a later amendment cycle. Further, because this area of the guidelines has been largely untouched for decades, POAG recommends that the Commission consider bringing in working groups and roundtables on these

issues to discern any possible unintended consequences. However, POAG has also provided our views of the proposed amendments as they currently stand.

POAG opposes the introduction of a Grade D violation structure, and, as a result, POAG remains neutral on the creation of a new Part C in Chapter 7 to address violations of supervised release. POAG recognizes that supervised release and probation serve different purposes; probation is intended to provide just punishment and promote rehabilitation, whereas supervised release is intended to promote rehabilitation and ease a defendant's transition back into the community. However, POAG also recognizes that the supervision strategies that are employed during supervision are similar, whether the individual is under a term of probation or a term of supervised release. This is particularly true when responding to noncompliance and violation issues. Supervision officers rely upon risk assessments, evidence-based practices, and professional discretion in determining the risks and needs of a person under supervision, the required level of supervision, and the appropriate responses to violations and noncompliance. Risk assessments, in particular, are performed as early as the pre-release planning stage and routinely thereafter, as noted in our response to Part A. As the risks and needs of a person under supervision change, adjustments are made by the supervising officer, in consultation with others within their district, including the frequency of personal and collateral contacts, the intensity of treatment and the request for condition modifications. Further, supervision officers regularly conduct case plans, collaborate with treatment providers, and assess compliance. When certain violations occur, specialty caseloads, including mental health, sex offender, or substance abuse, are utilized as needed. For example, a defendant whose violation is a result of a mental health condition that was previously unknown or well-controlled, may be transferred to a supervision officer with specialized training in supervising persons under supervision with mental health issues. Part C, which appears to be an attempt to codify these routine efforts, may unintentionally undermine the professional discretion of supervision officers and the guidance provided by evidence-based risk assessments.

As previously noted in POAG's response to the amendments proposed in §5D, for persons under supervision, the term "assessment" typically equates to a formal tool or evaluation used during the supervision process to determine risk and/or need, and therefore, referring to a "process" as an "assessment" may cause some confusion. Therefore, the Commission may also wish to use a different term in §7C, such as "individualized determination." Additionally, as reflected above, POAG would note that often during the prerelease stage and continuing throughout the term of supervised release, such individualized determinations are regularly being completed by the supervision officer, particularly in response to noncompliance, resulting in changes to supervision strategies, condition modifications, and adjustments to treatment. POAG has concerns regarding the language of the proposed amendment, which seems to reduce the discretion of the probation officer to make such determinations and adjustments, and instead, requires the court to make a formal determination in each case.

The majority of POAG was not in favor of separating technical violations of supervised release into Grade D violations. Many POAG members noted that at times, technical violations can be as serious, if not more serious, than a misdemeanor offense. For instance, a convicted sex offender who has unapproved contact with a minor, or a person under supervision with a history of bank fraud who opens multiple lines of credit without approval, would likely be viewed as more serious than a person under supervision who committed a minor traffic misdemeanor offense. Further, it was noted that there are inconsistencies across districts as to what constitutes a technical violation. For example, in most districts, a positive urinalysis is considered a technical (Grade C) violation. However, in some districts, those violations are considered a Grade B violation because the conduct required possession of a controlled substance, which is typically a felony offense. Additionally, it was observed that oftentimes, a petition for a technical violation is filed due to the exhaustion of other options. By the time a petition for a technical violation is presented to the court, there have likely been numerous attempts to address noncompliance, such as discussions and counseling related to the court-ordered conditions, increased contacts to help mitigate risk or ascertain areas where problems are occurring, condition modifications, changes to treatment, and a multitude of other supervision strategies.

Responses to Violations of Supervised Release (§7C1.3)

POAG has no position regarding the proposed amendment under §7C1.3(a), which addresses the responses to supervised release violations. POAG does observer that, while providing a list of available options may be helpful, those options are well-established. Therefore, it does not appear this addition would result in significant changes in procedures or outcomes.

Regarding mandatory violations, a slight majority of POAG was in support of Option 2 under §§7C1.3(b) and (c). Those in favor noted that Grade A and B violations involve serious, criminal, felony-level conduct that should result in a mandatory violation. And, similar to technical violation petitions, often by the time a petition for a Grade A or B violation is filed, other noncompliance issues have surfaced and interventions have failed. Those in favor of Option 1 believe it provides more flexibility and allows for professional discretion when responding to violations of supervised release, including Grade A and B violations. Under Option 1, other interventions, including increased treatment and supervision contact can be utilized, rather than mandatory revocation.

Revocations of Supervised Release (§7C1.4)

Regarding supervised release revocations, a slight majority of POAG was in favor of Option 1 under §7C1.4, which allows the term of imprisonment imposed to be served either concurrently, partially concurrently, or consecutively to any other term of imprisonment. Those in favor noted that Option 1 allows for more discretion and flexibility, depending on the individual case. However, those in favor of Option 2, which indicates the term of imprisonment imposed for a revocation should be imposed consecutively to any other term of imprisonment, believe it provides more accountability and incremental punishment for any violations. Further, as previously noted,

often by the time a revocation occurs, there have been several instances of noncompliance and violation conduct that has not been curtailed through supervision strategies, interventions, or modifications.

Grade D Violations and Recalculation of Criminal History Category (§7C1.5)

Regarding the term of imprisonment under §7C1.5, as noted above, POAG is not in favor of separating technical violations of supervised release into Grade D violations. Therefore, POAG does not endorse the proposed changes to the revocation table. In addition, POAG does not believe the defendant's criminal history should be recalculated at the time of revocation for a violation of supervised release. Criminal history scoring is a technical, complex application of the guidelines, and the court and attorneys rely on probation officers who specialize in presentence investigations to determine criminal history scoring. Most supervision officers who prepare violations are not familiar with the scoring rules, let alone retroactive amendments or changes to the scoring rules between when the presentence report was authored and when the violation petition was prepared, which could result in complications, inaccurate calculations, and inconsistencies. Another complication would be if a defendant sustained a new conviction prior to the supervised release violation, which may increase the criminal history score. Such a result could de-incentivize defendants from resolving pending charges. And, as a practical issue, when applicable, all violation reports would need to reflect the changes to the criminal history scoring, including any new arrests, which may result in objections from the parties, the need to file addendums defending the scoring, and hearings related to these issues. Finally, there does not appear to be a mechanism in place that would allow for the recalculation of criminal history for a violation. Currently, with few exceptions, §1B1.11 allows for only the use of the Guideline Manual in effect at the time of the sentencing; §1B1.10 only applies to a term of incarceration imposed on the original sentence; and as Application Note 1 of §7B1.4 states, "the criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision." It seems like that kind of undertaking would better be executed as its own separate amendment, focusing on that singular purpose and adjusting the various guidelines that would be impacted.

POAG appreciates the opportunity to provide feedback regarding the proposed amendments to Chapter 7. However, as noted above, POAG encourages the Commission to delay implementing any of the proposed changes until working groups or roundtables can be conducted with supervision officers to determine any further unforeseen outcomes.

Drug Offenses

(A) Recalibrating the Use of Drug Weight in §2D1.1

POAG acknowledges the Commission's efforts to address concerns that the Drug Quantity Table overly relies on drug type and quantity as a measure of offense culpability, which may result in

sentences that are greater than necessary to meet the goals and objectives of sentencing. Below are our comments on issues relating to the Drug Quantity Table and §2D1.1(b)(17).

Drug Quantity Table (§2D1.1(c))

POAG supports the amendment to §2D1.1 to lower the highest base offense level in the Drug Quantity Table. POAG largely believes that Options 1 or 2, base offense levels 34 or 32, would be appropriate. A base offense level of 34 or 32 is also a meaningful decrease from 38. POAG observed career offender levels currently result in lower offense levels than the higher base offense levels under §2D1.1(c), and they generally include a drug conviction as the instant offense. For instance, the highest offense level for a career offender, where the statutory maximum sentence is life, is 37, while the highest base offense level under §2D1.1(c) is currently 38. The reduction in the highest base offense level under §2D1.1(c) will allow for an appropriate realignment in the Guidelines, and likely result in the individual who is characterized as a career offender to face greater punishment given the seriousness of their criminal history, over an individual who is not a career offender but is being held responsible for the highest quantities of drugs.

POAG was unanimously opposed to Option 3, which establishes a base offense level of 30 as the highest offense level, because it seems low as a starting place for serious drug offenses. POAG recognizes that adjustments that may also apply, such as safety-valve eligibility, acceptance of responsibility, mitigating role, and zero-point offender, will further significantly reduce the offense level.

POAG was also largely not in favor of applying further reductions to all the drug types and offense levels. There were members of POAG who have concerns that the removal of the higher tiers of the drug table will reduce the delineation between defendants, specifically those who are responsible for substantially more drugs than others. In such an instance, a defendant who is operating a drug trafficking organization could distribute 5,000 kilograms of cocaine, and he or she would receive the same base offense level as a defendant who alternatively distributes 50 kilograms of cocaine. There was also a further concern that significant adjustments of the drug quantity table may cause more instances when the statutory minimum mandatory overshadows the guideline range, providing the courts with less meaningful guidance from the calculation.

Mitigating Role Cap to the Base Offense Level (§2D1.1(a)(5))

With regard to the mitigating role cap at USSG §2D1.1(a)(5), POAG was largely in favor of eliminating the §2D1.1(a)(5) reductions. If applied, the decrease in the highest base offense level would represent a marked reduction and benefit to defendants, and the mitigating role cap may largely be rendered moot. For example, if the highest base offense level is reduced to 32, only one current provision of §2D1.1(a)(5) would apply. POAG believes a defendant's function and role will otherwise be captured through deeper analyses, specifically under §3B1.2 or the proposed amendment at §2D1.1(b)(17). POAG does not believe that a further reduction to the base offense level is necessary. POAG observes that the §2D1.1(a)(5) adjustment adds a level of complexity, which adds a risk of being overlooked, and we believe that with the other proposed amendments

identified in Part A, there are other opportunities for reductions through a more simplified mechanism.

Parity between §2D1.1(c) and §§2D1.11(d) and (e)

With regard to §2D1.11 and the two chemical quantity tables, given that the tables are tied to, but are less severe than, the base offense levels in §2D1.1 for offenses involving the same substance, POAG believes that if the base offense levels in §2D1.1 are reduced, the chemical quantity tables at §2D1.11 should also be amended for consistency.

Proposed Trafficking Functions Adjustment (§2D1.1(b)(17))

With regard to Subpart 2, POAG acknowledges that the proposed low-level trafficking functions adjustment may capture additional individuals who would not otherwise receive a reduction under §3B1.2 mitigating role. POAG discussed that the application of mitigating role is not consistently applied across districts or even within districts. This may be because the defendant is arrested by themselves and charged individually or are arrested along with similarly situated individuals who are all performing a similar function.

Some members of POAG also expressed that the functions represent much of the same conduct that is currently considered for a mitigating role adjustment and that many of these functions are already captured under Chapter Three. Despite the similarity, POAG largely believes that capturing function distinctions would be more suitable as an alternative Chapter Three consideration, perhaps in the same section as Mitigation Role considerations at §3B1.2. If this reduction was placed in Chapter Three, it may also resolve the issue when a defendant is sentenced under another guideline other than §2D1.1 but the offense level is determined under §2D1.1. POAG observed that if functions become a reduction mechanism that the Commission is later wishing to expand, Chapter Three would provide that further flexibility.

Nonetheless, as a format to adopt into Chapter Three, POAG would recommend a version of Option 2 of the proposed amendments, which lists the low-level trafficking functions as examples, rather than Option 1, which provides a list of factors to consider when determining if a defendant was performing low-level trafficking functions. In the alternative to putting a version of this language into Chapter Three, if the Commission is inclined to place functions exclusively in §2D1.1, POAG would support Option 2.

With regard to the bracketed language, POAG was unanimously in favor of using "the defendant's primary function in the offense was performing a low-level trafficking function because…" as compared to "most serious conduct…" This is because this determination is fact-dependent and will allow courts to consider the totality of the circumstances surrounding the defendant's action and the extent of their involvement.

POAG believes this approach will allow for more ease and frequency of application in order to capture those individuals who fit the description of a low-level trafficker. It also will give the courts more flexibility in making those function determinations, empowering them to exclude

cases that may have other factors that outweigh that function consideration. Even if the individuals are engaged in some preparation and repetition, their primary purpose does not change – they are recruited to facilitate the distribution of controlled substances from a source of supply to a mid-level trafficker, they are recruited to perform a specific task, or they engage in the hand-to-hand street-level drug sales to end users at the behest of high-ranking members.

POAG was largely in favor of maintaining the examples listed under sections (A) and (B), except for a few functions. In Example A, the concept of a "significant share" is somewhat subjective and likely to result in a wide variety of interpretations. POAG discussed that even if drug traffickers are compensated incrementally higher for riskier endeavors, their function within the drug scheme does not change. Furthermore, while some defendants are compensated through monetary means, other defendants are compensated through non-monetary payments such as payment in drugs or payment of illegal entry into the United States. As such, POAG is also concerned that the "share of profits" and "holding an ownership interest" language is vague, and it is sometimes difficult to ascertain the relationship a payment has within the transaction as to the ownerships interest or the total profits.

A concern with Example B is that the phrase "other than the selling of controlled substances" may preclude individuals for whom the function adjustment is intended to apply. "Selling" can have the connotation that the individual is involved in the negotiation of the amount of drugs and price for the drugs. However, there is concern that an individual who is tasked with trading a package of drugs for a package of drug proceeds, without having an ownership in either or involvement in the negotiations, may be viewed as having been involved in a sale, when in fact they are simply continuing their function by exchanging one illicit item for another.

Regarding Example (C), in districts that do not generally have cases where defendants are engaged in the street-level hand-to-hand drug transactions directly to users, the phrase "retail or user-level quantities of controlled substances" is vague and is likely to result in a wide variety of interpretations. POAG suggests that the Commission provide further clarification as to this phrase to better capture those whom this example was intended to capture. Along the same lines, if this example is applied broadly, POAG was concerned that several mitigating circumstances listed in Example (C) are common for many drug traffickers, not just low-level drug traffickers, and could be universally applied. POAG observes that the "two or more" bracketed language could work to narrow the broad application of this example. Finally, we believe that "being motivated by an intimate or familial relationship," along with the other mitigating circumstances, is sufficiently captured in the proposed §2D1.1(b)(18) guideline and is not necessary to include.

POAG also observed circumstances in which a defendant might qualify for a function reduction and an aggravating role enhancement under §3B1.1. For instance, in Example A, the defendant's primary function could serve as transporting drugs from one location to another, but he or she could have also recruited other couriers. Similarly, Example B, cites "sending or receiving phone calls or messages" as a low-level trafficking function, but the content of these messages could reflect a manager or organizer level action. Using the messages to receive directions may be a low-level trafficking function but sending messages to broker drug transactions or directing the conduct

of others would not appear to be a low-level trafficking function. That person could instead be viewed as a supervisor or manager of the couriers, worthy of an aggravating role enhancement in addition to a function reduction. However, the example introductory paragraph involving the consideration of the scope and structure of the criminal activity allows the court to balance these factors. POAG also considered the prospect that the bracketed language of "most serious conduct" may also resolve this issue but recognizes that the most serious conduct has a subjectivity that could create a new challenge. For instance, transporting hundreds of kilograms across the ocean may be considered more serious than recruitment of a co-participants, who is making an introduction to a higher-level trafficker. Alternatively, this may be resolved by including a Special Instruction that §3B1.1 does not apply.

Firearm Possession within Function Considerations (§2D1.1(b)(17)(B))

POAG was in favor of eliminating §2D1.1(b)(17)(B), which excludes a defendant who possesses a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense from receiving the reduction. Those in favor of eliminating this exclusion noted those defendants would not only receive the two-level dangerous weapon enhancement under §2D1.1(b)(1), but the defendant would be disqualified from safety-valve and zero-point offender consideration. Additionally, the majority of POAG does not believe that the possession of a firearm is a good proxy for determining an individual's function or role in the drug trade and including this exclusion would be another reduction that an individual who otherwise served as a low-level trafficker would not receive. Those in favor of keeping the firearm possession exclusion believed that the seriousness of possessing a firearm while engaging in drug trafficking activities is not akin to low-level trafficking conduct.

Other components not captured (§2D1.1(b)(17))

POAG discussed other aspects that the Commission may wish to consider as rendering a function reduction as inapplicable. For example, should a defendant whose conduct resulted in serious bodily injury or death be eligible for this reduction? As we have discussed in previous guideline amendment cycles, sometimes a defendant who distributes fentanyl that resulted in death does not plead guilty to the element of having caused the death, insulating them from the higher base offense level consideration.

(B) Methamphetamine

POAG appreciates that the Commission is addressing §2D1.1's methamphetamine purity distinction.

POAG has seen an increase in the types of methamphetamine trafficked, including liquid, powder, crystals, and pills. POAG observed that the unique nature of methamphetamine has led to difficulties when applying the guidelines and recommending sentences.

Laboratory reports are relied upon to determine the base offense level at the Drug Quantity Table at §2D1.1(c) because the purity of the substance and the type of methamphetamine involved in the offense impacts the base offense level. POAG observed that the availability of laboratory reports, as well as testing practices, vary between districts and even within districts based on which agency is conducting the analysis. When laboratory reports are available, the reports do not always identify the purity of the methamphetamine. Further, the laboratory reports do not consistently reflect the molecular structure of methamphetamine to determine between "Ice" and other forms of methamphetamine.

POAG recognizes that varied testing practices has led to unwarranted sentencing disparity, and that the growing policy disagreements regarding purity as an indication of culpability (discussed in further detail below) has resulted in inconsistent guideline application.

Subpart 1 ("Ice" Methamphetamine)

Regarding Subpart 1, POAG was unanimously in favor of amending the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to delete all references to "Ice," largely because of inconsistency in testing practices.

With respect to "Ice," USSG §2D1.1(c), Note (C) provides that "Ice… means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity." POAG noted confusion and disparate treatment over methamphetamine when laboratory analysis identifies the substance as methamphetamine of at least 80% purity. Some districts reported considering all methamphetamine of at least 80% purity as "Ice," whereas other districts reported only considering methamphetamine of at least 80% purity as "Ice" if the laboratory analysis reflects "d-methamphetamine hydrochloride" as opposed to Methamphetamine Hydrochloride, Methamphetamine HCl, or another molecular structure of methamphetamine.

POAG also observed that the overwhelming majority of "Ice" is highly and uniformly pure, such that there is typically not a significant difference between the calculation of methamphetamine (actual) and "Ice." It is rare that the net weight of the "Ice" and the pure weight of the methamphetamine (actual) fall on the cusp of different offense levels. Therefore, the base offense level is almost always the same whether the "Ice" or methamphetamine (actual) amount is used.

Non-Smokable, Non-Crystalline Form Reduction (§2D1.1(b)(19))

POAG also unanimously opposed including a new specific offense characteristic at subsection (b)(19) that would provide a two-level reduction if the offense involved methamphetamine in a "non-smokable, non-crystalline form," without further clarification. POAG observed that the referenced phrase is vague and broad. There is concern that without further definition, it is unclear what evidence is needed to support its application, and there will be unnecessary litigation to

determine if the reduction applies. Therefore, the reduction may not adequately capture the conduct the specific offense characteristic was intended to capture.

Subpart 2 (Methamphetamine Purity Distinction)

Regarding Subpart 2, POAG unanimously supported reducing the disparity between the treatment of methamphetamine mixture and methamphetamine (actual).

As discussed above, there are inconsistent testing practices that have caused disparity when calculating the base offense level, as the base offense level is reliant in part on the methamphetamine purity. When laboratory reports are unavailable, or the purity level is not identified, the base offense level is routinely determined based on a methamphetamine mixture.

For instance, in a case where a defendant is responsible for three kilograms of methamphetamine (actual), the base offense level would be 36 because the offense involved at least 1.5 kilograms but less than 4.5 kilograms of methamphetamine (actual). If the court were to employ the base offense level for the mixture quantity of methamphetamine rather than the actual amount, the base offense level would be 32 for an offense involving at least 1.5 kilograms of methamphetamine but less than 5 kilograms of methamphetamine. Absent any other adjustments, with a criminal history category of I, the corresponding guidelines range that would have been 188 to 235 months is instead 121 to 151 months.

Moreover, the premise underlying the Guidelines' higher base offense levels for pure methamphetamine is that purity "is probative of the defendant's role or position in the chain of distribution." USSG §2D1.1, comment. (n.27(C)). This was because, historically, methamphetamine was cut as it worked its way down to the street-level dealer or user. While purity may have been reflective of one's culpability in a drug trafficking organization, there has been a shift in methamphetamine offenses as the substance is almost all of a high purity.[8]

POAG notes that because of the factors identified herein, individual judges in several circuits have adopted policy disagreements with the treatment of methamphetamine (actual) and "Ice," such that they are already treating these substances as methamphetamine mixture. Some courts recalculate the guidelines based on the mixture amount and are adjusting the sentence based on aggravating or mitigating factors, while other courts are adjusting the sentence with that same objective but vary downward on policy grounds.

[8] The Methamphetamine Trafficking Offenses in the Federal Criminal Justice System report published by the Commission on June 13, 2024; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

Based on the foregoing, to promote uniformity with how methamphetamine is considered under the guidelines, POAG believes methamphetamine (actual) and methamphetamine mixture should be treated the same.

However, POAG was uncertain as to what measure would be appropriate. Only a few districts expressed support for either of the threshold options set forth by the Commission, and even that feedback was fairly split between the two options. In general, POAG did not support either option and believes, for the most part, the appropriate ratio may lie somewhere in between the current level of methamphetamine mixture and the current level of methamphetamine (actual).

POAG notes that methamphetamine (actual) and "Ice" have a converted drug weight that is one of the highest in the drug table, at 1 gram to 20 kilograms, eight times higher than fentanyl, a similarly problematic substance, in terms of prevalence and lethality, and twice as high as fentanyl's more potent analogues.

On the opposite side of the spectrum, methamphetamine mixture has a converted drug weight of 1 gram to 2 kilograms. As noted above, most of the methamphetamine we are seeing across the country is highly pure. Adopting the methamphetamine mixture conversion rate, which is below that of fentanyl, does not seem appropriate. However, POAG also believed the threshold methamphetamine (actual) is too high.

In sum, POAG believes the offense levels and conversion rates associated with methamphetamine (actual) and methamphetamine mixture should be equalized but believed the resulting conversion rate should be somewhere in between the two options proposed by the Commission; POAG believes substantial deference should be given to the opinions of experts on the effects and impact of methamphetamine in determining an appropriate conversion ratio.

With respect to the latter two issues for comment, POAG believes the Commission should make conforming changes to the quantity thresholds at §2D1.11(d) for consistency. POAG also believes the Commission should re-assess the disparity between the treatment of powder cocaine and crack cocaine in future amendment cycles.

(C) Misrepresentation of Fentanyl and Fentanyl Analogues

As to the proposed changes to §2D1.1(b)(13), POAG appreciates that the Commission is revisiting this enhancement, as it has been applied inconsistently since it was implemented. There have been different interpretations of the *mens rea* requirement, as there is little guidance from the text of the Guidelines or from caselaw defining the terms "willful blindness" and "conscious avoidance."

Consistent with our position from 2023, the majority of POAG prefers Option 1 which sets forth an offense-based enhancement with no *mens rea* requirement. POAG discussed that in practice, it is difficult to prove that the defendant knew that the specific pills that they trafficked contained

fentanyl, as required for the enhancement. Defendants often claim that they do not know the substance they were distributing contained fentanyl. There are frequently sparse records of communication, if available at all. When communication is available, drug traffickers use vague, coded language that makes it difficult to establish that the defendant was discussing fentanyl. Given the elevated level of danger these counterfeit drugs represent, the mere possession for distribution or distribution of the counterfeit drugs containing fentanyl or a fentanyl analogue should be sufficient to trigger the enhancement. This is consistent with the Commission's finding that most of the fake pills seized containing fentanyl held a potentially lethal dose of the substance.[9]

If the Commission does intend to adopt a *mens rea* standard, POAG would prefer Option 3, which provides graduated punishment based on a defendant-based enhancement with a *mens rea* requirement and an offense-based enhancement with no *mens rea*. This tiered approach holds a defendant more accountable if it can be shown they had knowledge of the fentanyl content of the drugs in question, while also recognizing the seriousness of the offense.

Within the bracketed options for Option 3, the group preferred the language of "knowledge or reason to believe" as to the content of the substance. While there would still be evidentiary obstacles, this standard is a familiar one and likely to be easier to apply then some of the other *mens rea* standards. POAG further suggests that the guideline could provide information to consider when making this evaluation, including the source of the pills, the quantity involved, and other factors that would suggest that the pills were not actually a legitimately manufactured drug.

"Representing" and "Marketing" Terminology

Regarding the use of the terms "representing" and "marketing," POAG believes that the enhancement might apply more regularly to a street-level dealer who sells the fake pills directly to consumers, rather than to the individuals who manufacture and distribute fake pills without making any representations about their content. This is because some jurisdictions have interpreted that marketing has not occurred until the pills enter the stream of commerce. As such, a defendant convicted of possessing a large quantity of fake pills, with intent to distribute, may not be subject to any enhancement if there is insufficient information to establish that the fake pills have been marketed or misrepresented to consumers. POAG believes that the individuals operating the pill press are equally, if not more culpable, than the street-level dealer and should be subject to the same enhancement.

To address those concerns, POAG supports any effort to clarify the terms "represented" and "marketed" because these terms have a variety of meanings and, in practice, are difficult to apply.

[9] USSG, App. C. amd. 818 (effective Nov. 1, 2023). https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2024/APPENDIX_C_Supplement.pdf

It is also noted that Option 1 or 3, which provides for an offense-based enhancement may make it easier to apply, as the "represented" or "marketed" could be based on a co-participant's conduct.

POAG further supports that the proposed amendments remove the language "as a legitimately manufactured drug," and instead replace it with "as any other substance." It is common for the fake pills to have markings that are similar to the markings of a legitimate prescription drug. For example, legitimate 30 milligram oxycodone pills are generally blue, with the marking "M 30." Counterfeit pills might have a similar "M 30" marking but be different in color or have a non-specific marking. This may not be considered sufficient to apply the enhancement due to differences from legitimate prescription manufactured drugs, but consumers purchasing the fake pill may nonetheless reasonably believe that they are purchasing a legitimately manufactured drug.

(D) Machineguns

POAG overwhelmingly supports the proposed amendment to revise USSG §2D1.1 to include the four-level upward adjustment for the possession of a machinegun (as defined in 26 U.S.C. § 5845(b)). As noted in POAG's February 2025 submission to the Commission, Machinegun Conversion Devices (MCDs) present an extraordinary threat to public safety, and POAG has received feedback that districts have seen a sharp increase in the production, possession, and distribution of MCDs. Amongst the members of POAG, there was some concern that a four-level enhancement could be assessed based on a standalone MCD, unattached to a firearm and possessed by a co-participant, and such an assessment may over represent the weight of such an aggravating factor. There was also discussion that because MCDs are small and easily concealable, a defendant may not be aware that a co-participant possessed a MCD. However, in the heartland of cases, this greater upward adjustment would capture the clear and present danger to the community when an individual possesses a firearm capable of automatic fire through the use of a MCD or a traditional machinegun. POAG also discussed an adjustment to the proposal towards defendant-specific language rather than offense specific. The defendant would still receive a two-level increase under the proposed §2D1.1(b)(1)(B), which is offense specific.

POAG observes that 26 U.S.C. § 5845(a) provides a list of other dangerous firearms besides machineguns (i.e., sawed-off shotgun or a short-barreled rifle). POAG collectively agrees that the upward adjustment should capture all firearms listed under subsection (a) of 26 U.S.C. § 5845, not just machineguns under subsection (b). For context, the base offense level in §2K2.1(a)(1), (3), (4)(B), and (5) of the Guidelines is already determined using these criteria. Therefore, POAG believes any specific offense characteristic in §2D1.1(b)(1) should use subsection (a) from 26 U.S.C. § 5845 instead of just subsection (b).

(E) Safety Valve

Regarding the proposed amendment to the safety-valve at §5C1.2, POAG received feedback that a written disclosure may not provide sufficient information to make a determination if the

defendant complied with the requirements of §5C1.2(a)(5). POAG believes that courts should handle this on a case-by-case basis, rather than treating written submissions and in-person meetings as equivalent.

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
March 2025