United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

March 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on January 30, 2025, and published in the Federal Register on January 2, 2025. See 90 Fed. Reg. 8968 (February 4, 2025); see also 28 U.S.C. § 994(o).

Proposed Amendment No. 1—Supervised Release

Part A: Proposed Amendments to Part D of Chapter 5 addressing the Imposition of a term of Supervised Release.

The Commission seeks comment on amendments which are designed to provide the sentencing courts with greater ability to tailor supervised release decisions such that the final decision on supervision is based on a complete individualized assessment of the defendant. TIAG supports the initiative behind

the Commission's proposed amendments. We believe that for all defendants a "one size fits all approach" to supervision can result in injustice and that this injustice is magnified for Indians who are convicted of offenses arising in Indian Country. TIAG believes that the adverse impact in Indian Country occurs when the sentencing court fails to take into full consideration the defendant and the cultural, economic, and nature of Indian Country. We agree with the Commission that the purpose of imposing a period of supervised release in any individual case is not to punish the defendant but to aid in the successful reintegration of the offender into the community while doing what is possible to reduce the likelihood of the offender to relapse into criminality. In doing so, supervision and supervised release conditions should promote both the betterment of offenders who are being reintroduced to society and protect the public by reducing the risk of recidivism.

1.A Directing sentencing courts to base decisions on an "individualized assessment" of the 18 U.S.C. §3583(c)–(e) factors.

The Commission seeks comment on whether the inclusion of an individualized assessment is sufficient to provide both discretion and useful guidance. TIAG is of the view that the proposed language is sufficient, but it could be much improved by reminding sentencing courts that they are to consider both the facts related to the individual defendant and the resources available in the community into which the defendant is likely to be released following the service of a custodial sentence.

TIAG's experience with Indian Country defendants is that sentencing courts often unintentionally set conditions that make it more likely for native offenders to fail because the court is insufficiently aware of the resources and limitations that may exist in Indian Country. For example, we have experience with conditions of supervision that require a supervisee to complete a treatment program that is only available 3 hours away and which requires weekly attendance. Given that many Indian nations are rural, remote, and poverty-stricken, many programs that judges in urban areas assume are available are simply not available on the reservation or near enough to reasonably be accessible. Likewise, transportation opportunities in rural areas are often limited, and newly released supervisees are not often financially

equipped to undertake extensive travel to comply with conditions of supervision that require attendance at meetings that are hours away. TIAG also notes that many conditions that relate to work can be difficult to comply with on many reservations as they are places where the labor force participation rate can run well below 50%. The unemployment rates for Indian Country frequently are 3 or more times the rates for the states in which they are situated. Worse yet, the official unemployment statistics frequently understate the problem. Economists frequently call people who have simply quit looking for work because there are no jobs are available in their communities that they are qualified to perform as "discouraged workers." In TIAG's experience, such discouraged workers are more common among supervisees in Indian Country because the areas are remote, are economically challenged with few available jobs, and what few jobs are available will be taken by people without criminal pasts. Thus, a condition that requires that a supervisee be employed or perform community service is far preferable to one that simply requires gainful employment.

But even in imposing a condition of community service, the sentencing court needs to be cognizant of the resources that are available in the community. For example, on many reservations community service is much less formal and regularized than is found in community service programs run by states, local communities, and charitable organizations. In many Indian Country situations, a burden is placed on the probation officer to arrange community service programming as few formal programs our available. TIAG believes, and our experience confirms, that supervising officers in Indian Country are extremely committed in the face of significant headwinds in arranging a way to comply. That said, the imposition of conditions that fail to take into consideration the resources in the community creates problems for both supervising officers and supervisees.

A second consideration that TIAG believes should be emphasized in the new guidance on individualized assessment is a direct reminder that the supervising court should have a routine practice of reviewing conditions of supervision whenever a defendant is released to supervision after serving a significant term of incarceration. Currently, many individuals who are released

to supervision have spent years, sometimes decades, in custody. Their individual circumstances, and circumstances in their communities, have likely changed significantly, for example, the composition of the household may have changed as a result of births and deaths, treatment resources in the community may have changed—for better or for worse—and the individual's health and employment prospects may look very different from when they went into custody. Thus, we agree that in order to provide the greatest possibility of successful reentry a review of conditions should be performed.

We find that probation officers frequently sit down with newly released individuals and seek revisions to the conditions by stipulation and that the resulting agreements are simply submitted to the court and that this process could be improved in ways that would improve outcomes both for the person and for the public. TIAG believes that a more direct and hands-on approach by the supervising court would be much more beneficial—and that re-tailoring of the conditions at the time of release should be the norm, rather than an exception. When reviewing how the person being released has performed in custody, we often have a more complete and comprehensive picture of the supervisees areas of strength and concern. Courts will accommodate a more successful integration and protect the public more fully by imposing revised conditions that meet the current needs of the public and the supervisee. Of nearly equal importance, an initial meeting with the judge sends a message to the supervisee that supervision is of importance to the court and that compliance is in the supervisee's best interest.

Finally, TIAG believes that if a review of terms of conditions is going to be undertaken at the time of release, the greater the buy-in by all parties the higher the success rate will be. To accommodate this, TIAG is of the opinion that when a re-entry review is undertaken the team reviewing the conditions should include the Court, prosecution, defense counsel, defendant and the probation officer. Each person brings a unique view to the review and all opinions are of value in crafting a plan that has the greatest possibility of success.

1B. Retention of language related to criminal history and substance abuse and inclusion of the non-exhaustive list of factors in the Commentary to §5D1.1 (imposition of a Term of Supervised Release).

TIAG believes that as a part of the development of an individualized assessment it is appropriate to take into consideration the defendant's criminal history and substance abuse history. In order to succeed on any supervision plan, it is necessary to address the areas of particularized need presented by the supervisee and clearly recurring criminality and addiction or abuse of substances are areas that are necessarily addressed in a plan that seeks to both successfully reintegrate a defendant and protect the public.

TIAG has somewhat divided views about creating a non-exhaustive list of factors to be considered when a court is making decisions related to imposition of a term of supervised release and appropriate conditions. As a general principle, TIAG believes that providing more guidance to sentencing judges related to the types of factors that can and perhaps should be considered in making an individualized assessment is important and can provide helpful assistance in putting together a supervision plan that is best poised for success. That said, TIAG is concerned that the non-exhaustive list is not culturally normed for non-dominant cultures and nothing in the list directs sentencing judges to consider how the non-exhaustive factors might be framed and applied in light of cultural norms. For example, most in Indian Country would have a broader view of prosocial activities than might be apparent to sentencing judges and would include things like traditional spiritual practices, sweats, drumming, dance, traditional arts, and powwows as important prosocial activities—practices that are often beyond the scope of a sentencing judge's experience but which might have significant predictive value on the supervisee's ability to remain law abiding without additional supervision.

2. Supervised release as regards deportable defendants

TIAG has no position on this matter as it only rarely arises in Indian Country cases.

3. Inclusion of non-exhaustive list of factors to be considered in early termination or extension of term of supervised release.

The Commission seeks comment on whether the Part A proposed amendment to §5D1.4 which sets forth a non-exhaustive list of factors for courts to consider when determining early termination of supervision. The Commission identifies the list as a bill entitled the Safer Supervision Act which was introduced in the 118th Congress. TIAG has the same views as regards the non-exhaustive list for this as it does in Section 1B above.

4. Application of time credits for successful completion of evidence-based recidivism reduction programming or productive activities under The First Step Act of 2018.

TIAG is aware that the Bureau of Prisons' (BOP) policies in application of the governing statutes allow for sentence credits for successful completion of evidence-based recidivism programming while in custody. As applied by the BOP, such credits may only be "cashed in" if the defendant is going to be released to supervision. With the adoption of a more individualized assessment and the concomitant policy that persons who are not in need of supervision should not be placed on supervised release, there is a possible unintended consequence that by not placing a defendant on supervision the person is subject to serving more actual in-custody time.

Because the BOP bases its current determination on the statutory language and is not bound by the Sentencing Guidelines or its commentary, TIAG is of the view that the Commission has limited ability to control this outcome. The Commission could suggest amendment of the statutory language, but such amendments are difficult to shepherd through the bill process and the likelihood of success is unknown.

TIAG believes that the best solution to this problem is by providing a short statement in the Commentary that indicates that the current policy adopted by the BOP is that First Step Act credits are likely unavailable unless some term of supervision is imposed and with this understanding the court should consider imposing at least 1 day of supervision to comply with the BOP policy for time of service credit. That should be followed up with instruction

when the Sentencing Commission participates in educational programming, especially the training for New Judges (affectionately, "Baby Judges School") and the district court educational conferences.

5. Conditions of Supervised Release Categories: Standard & Special

The Commission seeks comment on whether the sentencing guidelines should continue to include two general conditions of supervised release, the "Standard" and "Special" Conditions in §5D1.3 of the guidelines. TIAG believes that continuing to call a class of conditions the "standard" conditions operates in a manner at odds with the general principle of individualized assessment and may lead some sentencing judges to default to the imposition of some conditions as standard that would actually be at cross purposes with the individualized assessment approach. For example, boundaries of tribal communities do not always align perfectly with state—or even national—boundaries. The Navajo Nation alone occupies portions of three separate states. A requirement that the supervisee obtain permission of a probation officer to cross the river to shop at the nearest grocery store, go to the nearest medical facility, or go to work may be impracticable in such an environment. Likewise, a work requirement is different in a place with high unemployment than in places with full employment.

TIAG believes these concerns can be ameliorated by calling the standard conditions "commonly imposed conditions" and continuing to emphasize individualized assessment and tailoring of the conditions imposed.

6. New Policy Statement at §5D1.4 related to the completion of reentry programs.

TIAG has no position other than to note that at present reentry programs are very rare in Indian Country.

7. Potential new policy statement at §5D1.4.

The Commission seeks comment on whether the policy statement should provide guidance on appropriate procedures to employ when deciding whether to terminate supervised release early. TIAG is of the opinion that such guidance

is unnecessary, and that there is a risk that such guidance would overly complicate the proceedings. The most common practice for early termination at this time in TIAG's experience is that the probation officer notifies the judge and counsel of record that it would seek to early terminate supervision. Hearings are only held if the Judge believes such a hearing is necessary. Such hearings are rarely held. Merely noting that a hearing can be held at the discretion of the court would be sufficient to let the judge and parties know that they could request a hearing. TIAG fears that establishing a practice where hearings are routinely held would be expensive, burdensome for the court, and would not likely result in better decisions than decisions made on the paper reports and requests.

Part B: Revocation of Supervised Release

Chapter Seven (Violations of Probation and Supervised Release) of the *Guidelines Manual* addresses violations of probation and supervised release. The Commission has proposed various structural reforms of the process which are designed to afford both courts and supervising probation officers greater discretion in their ability to manage non-compliant behavior and seeks comment on specific issues.

1A. Use of individualized assessment in the revocation process

TIAG supports the Commission's proposed amendment throughout Chapter Seven, Part C to reflect a recommendation that the court facing a revocation petition undertake an individualized assessment based on the statutory factors listed in 18 U.S.C. § 3583(e). TIAG believes that this direction, consistent with what it has said previously above, is appropriate and sufficient to provide both guidance and encourage the exercise of discretion in responding to non-compliant behavior by supervisees. The use of an individualized approach is consistent with the understanding that the purpose at this stage of proceedings is to address the supervisee's breach of trust and confidence placed in the supervisee but not to punish any new criminal activity. By focusing on the non-compliance and the rehabilitative and reintegration aspect of supervision the individualized assessment will allow the supervising court a broad spectrum of tools to modify behavior, improve outcomes, and to

protect the public. This discretion allows the court to focus on what works and encourages positive outcomes rather than on punishment.

1B. New Policy statement §7C1.3 (Responses to Supervised Release Violations) Policy Statement regarding graduated response short of the more formal options listed in 18 U.S.C. § 3583(e) and community confinement in §7C1.4.

TIAG supports the inclusion of the bracketed language in §7C1.3 which, after directing the court to perform the individualized assessment, lists a number of options short of revocation and incarceration. TIAG believes that by more closely monitoring non-compliant behavior and imposing more modest interventions than long-term incarceration, the odds are greater that supervisees will have a more successful outcome—meaning more positive rehabilitative outcomes and greater protection of the public. All too often, by not taking affirmative steps to address early non-compliance courts send the wrong message to supervisees. When courts tolerate low level violations without any court intervention the person on supervision often assumes that the court is untroubled by low-level non-compliance. But multiple lesser violations can and frequently does result in revocation and an imposition of a substantial incarcerative sentence.

TIAG believes that the current manner of dealing with initial low-level non-compliance is resulting in unnecessary incarceration that could be avoided by early, swift, and meaningful court intervention. We believe that a person under supervision is far more likely to respond positively and comply to a lesser but more immediate sanction. Many, if not most, people on supervision suffer from cognitive behavioral deficits. Science teaches us that many of these people fail to recognize the consequences of their acts and the way that they are likely to be perceived by the outside world when they fail to comply. Early and swift intervention greatly increases the possibility that such people will come to recognize the inappropriate nature of their conduct and be more successful in moderating their behavior. TIAG perceives that our system of supervision is all too frequently designed to deal with normal people who would understand that a warning from a probation officer is a serious "wake up call." People with cognitive behavior deficits are less likely to pick up on such cues. TIAG believes

that these sort of warnings are more likely to be accepted and accounted for by the supervisee if they are coming directly from a judge, who is an identifiable authority figure. Sometimes merely reminding the defendant that the person deciding on whether or not he should be returned to prison thinks the conditions are important is enough to gain compliance.

TIAG also believes that early intervention at low levels of non-compliance will create an environment where the interactions between the judge and the offender are more likely to be viewed by both as collaborators in an effort to have the supervisee succeed. This sort of collaboration fosters an understanding by the supervisee that he is a person with input in the decision-making process, is in some control over their own destiny, and that the court is concerned about making their lives better. All too often, a system that overlooks some minor violation and then imposes a very punitive penalty based in part on repeated non-compliance that appeared to be unimportant acts to impair rehabilitation. Given the nature of most people under supervision, it is important to provide sufficient structure and guidance that leaves little room for misunderstanding. Non-incarerative and short-term intervention options are important in getting the message through to supervisees that their conduct is unacceptable and that increasing graduated penalties are likely to result if they do not modify their behaviors.

TIAG favors Application Note 1 to §7C1.4. As to Application Note 3 to §7C1.4 which provides that if revocation is based, at least in part, on a violation of condition specifically pertaining to community confinement, intermittent confinement, or home detention the imposition of the "same or a less restrictive sanction is not recommended," a majority of TIAG takes no position. A minority of TIAG believes that while the language is sufficiently discretionary for the court to impose an individually assessed penalty, they believe that the language could be clarified to note that by adding an additional condition (such as additional counselling or treatment) that returning the person the same non-custodial environment is not the same sanction.

2. Options to address when revocation is required or appropriate under new §7C1.3

TIAG is strongly of the opinion that adoption of the individualized assessment will both increase the likelihood of a positive rehabilitative outcome and do more to protect the public long term than providing for mandatory revocation. We believe that whenever the statute allows for an individualized assessment prior to revocation, it should be encouraged by the guidelines. Indian Country defendants frequently complain to their counsel and the courts that they feel like they are simply chaff being ground in the gears of justice without any regard to their individual circumstances and in a way that would not happen in state courts to non-Indians. While Grade A and Grade B violations are usually serious and would merit a consideration of revocation and incarceration, there are circumstances that arise with some regularity in supervision cases that are unusual and might point towards leniency in even these cases. There also may be significant lesser sanctions that are well-supported in the community that might accomplish the end goals without revocation. In addition, the underlying criminal behavior is capable of, and frequently is, a parallel path of litigation. TIAG generally favors the greatest discretion possible to achieve the best outcomes possible for both the supervisee and the public.

3. Retention of the Revocation Table set forth in §7C1.4

While TIAG understands why the elimination of the Revocation Table might encourage greater individualized assessment, we take the position that its absolute elimination would likely introduce too much disparity in revocation sentences. If, after an individualized assessment is completed, the Revocation Table is retained it has the ability to help inform the sentencing court of the types of penalties that might ordinarily be appropriate. This suggestion will likely have the impact of ameliorating sentences that are outside of the bell curve. The implied boundaries of the Revocation Table serve a useful purpose, especially for new judges, and it should be retained. TIAG does believe that if the Revocation Table is retained the manual should make plain that it should be consulted only after the individualized assessment is completed.

4. How a Retained Supervised Release Revocation Table should recommend dealing with criminal history.

TIAG believes that the most appropriate approach would be to use the criminal history determined at the time of the original sentence after modifying the criminal history score to exclude prior sentences that are no longer countable under the rules in §4A1.2.

5. Grade D violations

TIAG is concerned that the creation of a new category of violations, the Grade D violation may have the impact of actually increasing the likelihood that a supervisee will have his supervision revoked for a Grade C violation—an outcome it believes is likely an unintended consequence by the Commission. That said, it generally supports a Grade D violation if the Commission makes plain that its intention is not to increase the perceived seriousness of the other violation categories on the Revocation Table. Since Grade D violations are limited to "a violation of any other condition of supervised release" the type of violations are often non-compliance with technical conditions such as failing to meet with their probation officer, keep treatment appointments, or the like. We believe that these non-criminal violations are more important in a system based on individualized assessment. TIAG believes that the new approach to supervision anticipates that courts will have more hands-on contact with people on supervision and that early intervention should be more common. As such we think that for many Grade D violations non-revocation approaches are going to be more appropriate and when revocation is appropriate the more appropriate response is less likely to include a need for incarceration.

It is TIAG's position that creation of a Grade D violation is appropriate so long as the manual provides additional guidance directing that its presence should not be viewed as a basis for treating Grade C violations more severely.

6. Recommended ranges of imprisonment

Consistent with its previous statements, TIAG believes that a defendant's criminal history score should be recalculated to reflect the changes in §1B1.10(d) if the amendments would have had the effect of lowering the

defendant's criminal history category. TIAG also would support having a single table for both probation and revocation.

However, TIAG is opposed to the lengths of sentences contemplated under Grade D on the Revocation table. TIAG believes that a non-incarcerative sentence should always be both available and considered when applying the individualized assessment to the Revocation Table for Grade D offenses, which are by their nature non-criminal violations. We suggest that the following table is more appropriate and urge the Commission to consider adopting it.

Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category					
	I	**II**	**III**	**IV**	**V**	**VI**
Grade D	0–2	0–3	0–4	0–5	0–6	0–7
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A	(1) Except as provided in subdivision (2) below:					
	12–18	15–21	18–24	24–30	30–37	33–41
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
	24–30	27–33	30–37	37–46	46–57	51–63

Proposed Amendment No. 2—Drug Offenses

a. Recalibrating the Use of Drug Weight in §2D1.1

TIAG supports the Commission's efforts to amend the Guidelines to reduce the overreliance on drug quantity as a proxy for culpability. Our collective experience mirrors that reflected in the data briefing,[1] which is that many, perhaps even most, courts appear to consider the drug tables to be unduly harsh as concerns "heartland" defendants and that the distance between the most appropriate sentence and the Guidelines-recommended sentence tends to increase as an individual moves to higher and higher quantity-based base offense levels.

TIAG also recognizes that quantity often substantially overstates culpability, in part because individuals who are found in personal possession of largest quantities of drugs are often among the lowest-level participants in the overall drug trafficking scheme. TIAG has seen that the existing available mitigating role reduction, while undoubtedly helpful, has often been inadequate to sufficiently mitigate the harshness of the Guidelines, particularly at these higher base offense levels.

For these reasons, TIAG welcomes the Commission's proposal to amend the drug guidelines, in particular to recalibrate their use of drug weight as a proxy for culpability.

A number of the Commission's Issues for Comment ask for feedback on the number of levels by which various parts of the drug guidelines should be recalibrated. TIAG struggled, at times, to identify precise numbers in response to these queries, in part because many of the proposed amendments are interdependent. For example, while TIAG supports both substantial downward revisions to base offense levels and also supports robust mitigating role reductions, TIAG recognizes that, for example, a substantial reduction in base offense levels across all quantities might justify a more modest specific offense characteristic ("SOC") reduction for low-level participants. By contrast, a more

[1] United States Sentencing Commission, Proposed Amendments on Drug Offenses, Public Data Briefing (hereinafter "Data Briefing"), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.

limited reduction in base offense levels militates in favor of a more robust reduction for low-level participants.

With this limitation in mind, with respect to Part A, subpart 1 of the drug amendment, TIAG supports a reduction in the drug table that would set the highest base offense level at 30 and effect a similar reduction to other existing offense levels, *e.g.*, by recasting current offense level 36 as new offense level 28, and so on down the table. TIAG bases this opinion on our collective experience, which accords with the data briefing, that tends to show that quantity, while not wholly irrelevant to the analysis of culpability, increases with a more gentle slope than the current drug tables do.[2]

TIAG is also in favor of retaining the mitigating role cap under §2D1.1(a)(5) and applying the existing reductions to the new (reduced) base offense levels. TIAG supports this option because the current mitigating role adjustment under Chapter 3 is generally only capable of partially accounting for the often wide disparity in culpability as between "average" and "minor" participants in a drug trafficking scheme. This is particularly true at higher offense levels.

With respect to Part A, subpart 2 of the drug amendment, TIAG supports creation of a new SOC for low-level participants to replace the minor role reduction under §3B1.2. TIAG's members represent diverse geographic areas, and we have seen inconsistent application of the current mitigating role adjustments between and even within districts, and this inconsistent application contributes to a lack of uniform application and creates unwarranted disparities between similarly situated defendants.

Between the options listed, TIAG prefers Option 2 because it believes that the examples provided will assist judges in implementing the new SOC in a more uniform manner. TIAG also believes the new SOC should be available to defendants whose "primary function" in the offense was low-level because we believe that primary function more closely accords with overall culpability. TIAG is additionally concerned that an invitation to identify and punish the "most serious conduct" will lead to unnecessary litigation regarding the scope of peripheral conduct and may unfairly disqualify individuals whose primary function is low-level but who on one occasion have engaged in an isolated act that might be viewed more seriously.

[2] Data Briefing at 7, 8.

As noted above, the appropriate number of levels for this new SOC should be determined within the context of other, related reductions that the Commission may adopt. TIAG supports a new SOC that contains a reduction at least significant enough to mirror the one currently available under §3B1.2 but would also support a more substantial reduction in the event, for example, that the mitigating role cap under §2D1.1(a)(5) is reduced or eliminated, or in the event overall adjustments to the quantity-based offense levels are modest.

In sum, TIAG welcomes the Commission's proposals to modify the §2D1.1 to incorporate feedback from data that has shown that the existing Guideline is, on the whole, unnecessarily punitive and increasingly divorced from the reality of how the majority of judges view these cases.

b. Methamphetamine

The Commission seeks comment on two, not mutually exclusive subparts relating to the treatment of methamphetamine under §2D1.1. TIAG recognizes the concerns raised regarding the continued relevance of purity distinctions in methamphetamine sentencing and generally agrees with the assertion that all methamphetamine is effectively "pure" in contemporary cases, as noted by judicial and practitioner perspectives. This position aligns with the reality that purity distinctions may no longer serve a meaningful sentencing function.

For tribal defendants, the purity-based framework may disproportionately impact individuals involved in lower-level offenses who do not have significant control over the drug's composition. The presence of liquid methamphetamine further complicates the existing guidelines. Liquid methamphetamine is being more frequently encountered and poses risks comparable to smokable forms yet it does not have analogous consequences. For these reasons TIAG believes the directives are outdated, fail to address the evolving method of drug distribution and consumption and they should be revised.

TIAG supports consolidating the current three-tiered approach to methamphetamine sentencing—distinguishing between methamphetamine (actual), Ice, and methamphetamine mixture—into a single, unified category. In each instance, the combined guideline quantity should be situated at the methamphetamine mixture guideline. Additionally, this new consolidated category should align with the broader amendments aimed at lowering all drug-quantity offense levels, as previously discussed.

TIAG supports incorporating a Specific Offense Characteristic to capture the two-level directive for differentiation of non-smokable methamphetamine. A Specific Offense Characteristic approach wherein a two-level downward decrease would be applied if the methamphetamine was in a non-smokable form provides a streamlined approach to addressing this issue, ensuring alignment with congressional intent and directive while modernizing the guidelines to reflect practical application. While this adjustment may afford a break to defendants involved with liquid meth, judges would retain the ability to upwardly vary sentences in cases where necessary. This modification better aligns sentencing with contemporary drug trends and avoids anachronistic distinctions that do not reflect the conditions in tribal communities or anywhere else across the country.

Due to the infrequency of cases that would be impacted by the Issue For Comment numbered (3) in tribal jurisdictions, TIAG takes no position on this issue.

Crack and powder cocaine are chemically the same drug, yet they continue to be treated drastically differently under federal sentencing guidelines, perpetuating an outdated and unjust disparity. Similarly, while methamphetamine and cocaine are distinct substances, they often function as effective substitutes for one another, with meth being significantly cheaper—and in that way mirrors the crack versus powder cocaine divide. These sentencing differences do not reflect pharmacological science but instead serve to disproportionately punish those who live in economically disadvantaged communities which tend to have methamphetamine as a drug of choice. The proposed amendment would minimize inequities and address substance use in a fairer and more effective manner.

c. Misrepresentation of fentanyl and fentanyl analogue

Part C of the proposed amendment two involves misrepresentation of fentanyl and fentanyl analogues. The Commission seeks comment on two issues: (1) whether any of the three options set forth in the proposed amendment to §2D1.1(b)(13) is appropriate and if not, if there is an appropriate alternative approach; and (2) whether any of the proposed amendment to §2D1.1(b)(13) are appropriate to address the concern for individuals who purchase fentanyl believing they are purchasing a different substance.

As to Issue 1, TIAG endorses Option 2 which would impose a *mens rea* requirement for application of §2D1.1.(b)(13). As to the choices set forth in

Option 2, TIAG believes that the "with knowledge or reason to believe" version is superior. TIAG is concerned that the "reckless disregard" option might exclude instances in which an individual turned a blind eye to the content of the substance being trafficked. TIAG believes that "with knowledge or reason to believe" properly imposes heightened culpability on those who know or should know that they are distributing products known to contain fentanyl. Within Option 2, TIAG also supports the four-level enhancement option given the well-documented dangers of fentanyl and the frequency of cases in which unwitting overdose occurs because of the misrepresented nature of the substance.

Issue 2 seeks general comment as to whether the terms used in §2D1.1(b)(13) such as "representing" and "marketing" are sufficient. TIAG believes that when used in the context of Option 2 of Issue for Comment 1, these terms are sufficient. Both terms are commonly used and understood. TIAG believes that it is clear that someone is "representing" a substance when they provide a description of it or its composition. In the context of drug distribution, a person would be "representing" if they told a potential buyer, "this is meth," or responded to an inquiry of whether there was another substance included. If such representation falsely disclaimed the presence of fentanyl or fails to note that fentanyl is included in the substance, the enhancement would be triggered. TIAG likewise believes that it is clear someone is "marketing" if they are making such representations in the context of a sale or other transaction surrounding a controlled substance. No choice of words will be perfect, but TIAG believes that these choices are appropriate and adequate for the purpose of this amendment.

d. Machineguns

The Commission seeks comment on a proposed amendment to §2D1.1(b)(1) to add an additional 4 levels to the base offense level if a machinegun is possessed and should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Per Commission Data, during the FY2023 application of §2D1.1(b)(1) (weapons enhancements) was applied in 3,906 cases. Of those cases 3.8 % involved a machinegun. TIAG recognizes the seriousness of possessing a machinegun during a drug offense. That said, given the small number of cases in Indian Country that involve machineguns, TIAG takes no position on the proposed amendment to §2D1.1(b)(1).

e. Safety Valve

TIAG supports the proposed amendment to §5C1.2, which clarifies that a defendant's provision of truthful information and evidence to the Government is not limited to in-person meetings. This amendment is particularly important for tribal defendants, as safety concerns and logistical barriers may deter them from engaging in direct meetings with prosecutors.

TIAG recognizes that written disclosures, such as letter proffers, are already widely used by the Department of Justice (DOJ) to conserve resources and focus investigative efforts on individuals with substantive knowledge of criminal activities. Allowing written disclosures to satisfy the safety valve requirement ensures that eligible defendants are not unjustly denied relief due to unnecessary procedural constraints. This approach aligns with current DOJ practices in certain jurisdictions and provides a fairer and more efficient process for determining eligibility under §5C1.2.

Therefore, TIAG supports the inclusion of the application note explicitly stating that the manner of disclosure—whether written or in-person—should not preclude a determination of compliance, as long as the information provided is complete and truthful.

Sincerely yours,

Ralph R. Erickson