PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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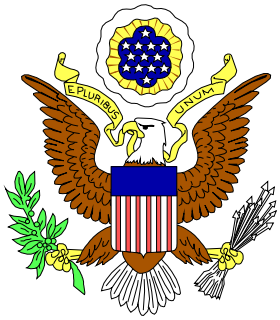

March 10, 2008

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008-8002

Dear Judge Hinojosa:

The Probation Officers Advisory Group (POAG) met in Washington, DC on February 20 and 21, 2008 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2008.

Immigration

The group considered the three options and agreed that Option 2 provides ease of application as it moves away from the categorical approach to crimes, which has historically complicated the sentencing process. This approach, which has been supported by the POAG in past position papers, relies on sentence imposed as a measure of seriousness of the offense which is easier to determine than the offense of conviction, due to jurisdictional differences in how crimes are charged and elements contained in the offense of conviction. The group liked the increase in offense level for those defendants who sustained a conviction for another felony offense that was committed subsequent to illegally reentering the United States. Further, the group liked the approach of increasing the base offense level and allowing for a downward adjustment in cases where there are no prior convictions. This is more representative of these types of cases as most have a prior record, those without are the exception.

As to the alternate base offense levels and other adjustments, the group agreed that the highest

levels more closely mirror the existing levels under this guideline. All were in agreement that any option employed should not reduce the existing offense levels for these offenses.

With regard to the reference to offenses described in 8 U.S.C. §1101(a)(43)(A), the group asked that the application notes include a recitation of this section as most districts do not provide a complete Title 8 book and looking for the reference is time consuming.

Finally, consideration of the departure provisions resulted in agreement by all that the upward departure for multiple removals prior to the instant offense should be included under any of the options.

Emergency Disaster Fraud

The group reviewed the recommended SOC and considered the option of including a minimum offense level. The minimum offense level is not recommended unless it differentiates between defendants who were actual victims of the disaster, but received more benefits than that to which they were entitled, and non-victim defendants who exploited the disaster by using the opportunity to seek disaster benefits to which they were not entitled. The group concluded that the 2 level increase is adequate for defendants who were victims of the disaster.

As to other aggravating and mitigating circumstances that might justify additional adjustments, the group expressed concern that the adjustment for number of victims found at §2B1.1(b)(2), as currently defined, may not be employed in disaster relief fraud as the victim is usually *one* agency or relief organization that services many people. Under the current definition of victim, only the agency or organization would be considered a victim. This would not account for cases in which an organization is defrauded of large sums of money or where the defendant collected large sums of money under the pretense of acting on behalf of a charitable organization, thereby diverting funds from the intended victim recipients, who do not meet the definition of "victim" under the guidelines. The group suggested consideration of a special rule similar to the one found in §2B1.1, comment. [n.4(C)(ii)] to account for the multiple victims of the offense. The rule should exclude any defendants who were victims of the disaster and received more relief than that to which they were entitled.

Food and Drug Offenses

Because hGH is used and distributed in a manner consistent with anabolic steroids, and appears to present a harm very similar to steroids, the group agreed that hGH offenses should be addressed under §2D1.1 and treated in the same manner as offenses involving steroids, including the base offense level cap of 20. Further, the group agreed that the SOCs which address steroids specifically, that is, §2D1.1 (b)(7) and (8), should include hGH, and that application note 8 should be modified to include hGH. The group took no position with respect to the unit/milligram equivalency issue and would defer to the judgement of the FDA and other experts with regard to this issue.

It is useful to note that everyone in the group indicated that they rarely, if at all, see cases in their respective districts relating to steroid abuse.

As to the issue for comment regarding the offenses referenced to §2N2.1, the group declined to comment as these offenses tend to be rare and the group has little experience with these types of offenses and this application.

Animal Fighting

The group agreed that a base offense level of 10 and an upward departure for extreme cruelty under §2E3.1 provide the courts with the most latitude in sentencing and adequately addresses the seriousness of the offense.

Court Security Improvement Act of 2007

The POAG reviewed the two new offenses titled under 18 U.S.C. § 1521 and § 119 and would respectfully make the following recommendations regarding implementation under the existing guidelines.

As to 18 U.S.C. § 1521, the group concluded that this offense may be addressed under §2J1.2 (Obstruction of Justice) as this guideline adequately captures the intent and harm caused by this offense. Further, the group suggested that an application note be added to instruct the use of §3A1.2 (Official Victim) for this particular offense.

As to 18 U.S.C. § 119, the POAG considered two existing guidelines for incorporation with this offense, specifically §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) and §2A6.1 (Threatening or Harassing Communications; Hoaxes). The group concluded that §2A6.1 may be the better choice as it captures the intent to threaten or facilitate a crime of violence element of this new offense. Combined with the three level increase for official victim under §3A1.2, this would adequately take into account the aggravating factors of this offense.

The group then considered alternate approaches to application of this guideline relative to this new offense. The first approach includes adding a SOC for a three level increase if the offense of conviction is a violation of 18 U.S.C. § 119, and an application note instructing that an adjustment under §3A1.2 (Official Victim) should not be applied in addition to this SOC. The second option would provide for a base offense level of 15 for defendants convicted of a 119 violation, and no new SOCs. Either alternative provides a 3 level increase for a conviction under this section which might not otherwise apply through §3A1.2, when the victim is a witness, informant, juror, or some other person covered by this statute who may not be considered an official victim.

In addition, the group suggests that a cross reference similar to §2H3.1 would be appropriate insofar as there may be cases in which it can be established that the purpose of the offense was to facilitate another offense, then the guideline for that other offense may be applied if it achieves a higher offense level.

Closing

We trust you will find our comments and suggestions beneficial during your discussions and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have questions or need clarification, please do not hesitate to contact us.

Respectfully,

2008 Probation Officers Advisory Group