PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

March 10, 2009

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, D.C. on February 18 and 19, 2009 to discuss and formulate recommendations to the United States Sentencing Commission. We are submitting comments relating to issues published for comment in January 2009.

Identity Theft Restitution and Enforcement Act of 2008

(A) Level of Sophistication and Planning Involved in the Offense

The proposed amendment at §2B1.1 includes language under the sophisticated means definition regarding a scheme involving computers to conceal the identity or geographic location of the perpetrator. The Group recommends this language should include using computers to conceal not just the perpetrator, but the offense itself. It was suggested that the "layering" language from the Money Laundering guideline may be appropriate.
The Group agreed the 2-level enhancement for sophisticated means is sufficient to capture this factor and in most cases, the dollar amount of the loss drives the offense level. The floor of level 12, which was instituted in 1998, is no longer sufficient based upon the serious nature of many of these offenses. The Group agreed that the floor should most likely be raised, but a review of sentencing data related to the frequency of the application of this floor would be helpful in making that determination.

The Group unanimously agreed the language at §3B1.3 should be changed to unequivocally include a person who has self-trained computer skills as one who has a special skill.

(B) Whether the Offense was Committed for Purpose of Commercial Advantage or Private Financial Benefit

The current language at §§ 2B1.1, 2B1.5, 2B2.3, 2B5.3, and 2H3.1 adequately addresses the factor described in section 209(b)(2) of the Act. There was some concern raised, however, in some inconsistent application in the retail value of low-quality and high-quality fakes, specifically as to offenses covered by §2B5.3

© The Potential and Actual Loss Resulting from the Offense Including (a) the Value of Information Obtained from a Protected Computer, Regardless of Whether the Owner was deprived of Use of Information; and (b) Where the Information Obtained Constitutes a Trade Secret or Other Proprietary Information, the Cost the Victim Incurred Developing or Compiling the Information

Regarding the proposed amendment at § 2B1.1,comment.(n.3), the Group agreed that Option 2 was the better choice. The first option was determined to be problematic in terms of placing a value on proprietary information. Option 2, on the other hand, uses a dollar amount that is more likely to be available from the victim. Overall, a broader application is preferred as a better way of determining harm.

With respect to the first and second issues for comment, regarding information from a protected computer, we concluded that as currently written, the guideline is not sufficient to capture loss. If Option 2 as described above was adopted, however, it would be sufficient in conjunction with Application Note 19.

The Group agreed that a victim who suffers pecuniary harm but is immediately reimbursed by a third party, should be considered a victim for purposes of the SOC for the number of victims, and their reimbursed losses should be included in the dollar amounts under § 2B1.1(b)(1). In addition, the Group agreed that victims with unidentified and/or non-pecuniary harm are being overlooked in many cases. Frequently, these individuals may not know they were victimized; the investigation into the illegal activity ceases before potential victims are identified and/or notified; and other losses which may have been sustained are not captured. The Group would urge a more broad definition of victim in order to better capture the size or extent of the offense. A special rule similar to that found at § 2B1.1, Application Note 4© may be appropriate. Where there is a theft of a large number of credit card numbers, or a database is accessed, the potential victims may need to be more vigilant in monitoring their credit, even if they did not sustain any part of the "actual loss." In sum, victims of crimes who did not sustain a pecuniary harm oftentimes sustain non-pecuniary harms that are not being captured.

The Group unanimously concluded that §3B1.3 should be amended to unequivocally include a person who is an officer, employee, or insider of a business who participates in any offense involving proprietary information, and the employee had access to the proprietary information.

(D) Whether the Defendant Acted With Intent to Cause Either Physical or Property Harm in Committing the Offense

The Group concluded that this factor is adequately addressed by the guideline enhancements delineated in the issues for comment.

(E) The Extent to Which the Offense Violated the Privacy Rights of Individuals

The Group declined to make a recommendation with regard to the 2 options based upon our negligible experience with these kinds of cases and this guideline application. However, for any case outside the heartland of cases, a departure provision is preferred.

Regarding the issue for comment, to the extent that we have recommended a special rule to address the privacy rights of individuals, in conjunction with what is already present (enhancement for obtaining personal information and upward departure), the guidelines should be adequate to address this issue.

(F) The Effect of the Offense Upon the Operations of an Agency of the United States Government, or of a State or Local Government

We agreed that the upward departure provision will adequately address this factor and is the better option as the Group agreed we rarely or never see cases where this factor applies.

(G) - (J) Not addressed by the Group.

(K) Whether the Defendant's Intent to Cause Damage or Intent to Obtain Personal Information Should be Disaggregated and Considered Separately from the Other Factors Set Forth in §2B1.1(b)(15)

The Group agreed that the intent to cause damage or intent to obtain personal information should be disaggregated, but not solely within the context of 18 U.S.C. § 1030 cases. Our experience has shown that the Government infrequently charges under 18 USC §1030.

(L) Whether the Term "Victim" as Used in §2B1.1 Should Include Individuals Whose Privacy Was Violated as a Result of the Offense in Addition to Individuals Who Suffered Monetary Harm as a Result of the Offense

The group agreed that the term " victim" should include individuals who suffered non-pecuniary harm and a special rule, as previously recommended, would adequately address the harm, especially when combined with the current departure provisions. The increase proposed by the special rule would capture the additional harm to multiple individuals.

The Group agreed that the definition of reasonably foreseeable pecuniary harm should not be amended to include the costs to the victim of correcting or repairing the harm incurred because it would be too difficult to determine; would result in inconsistent application; and would create evidentiary issues which would complicate the sentencing process.

(M) Whether the Defendant Disclosed Personal Information Obtained During the Commission of the Offense

The Group agreed that there should be an increase for charged offenses other than 18 U.S.C. §§ 1030 and 119, where personal information (including means of identification) is made publicly available. Crimes involving victims of identity theft should be punished more harshly if the information was not just obtained, but was otherwise disclosed. Disclosure could be defined as made publicly available, as described at §2H3.1(b)(2)(B).

(N) Other Issues Relating to the Directive Not Otherwise Addressed Above

The group agreed that there should not be a new guideline for identity theft cases. Section 2B1.1 adequately addresses the harm caused from these crimes, particularly in light of the proposed changes.

Ryan Haight Online Pharmacy Consumer Protection Act of 2008

The group agreed that offenses involving Schedule III substances are not adequately addressed by the guidelines. It was the consensus that the maximum base offense level of 20 for offenses involving Schedule III substances (except Ketamine) should be eliminated entirely and the offense level increases should mirror those for Schedule II substances. A base offense level of 20 applies to 40,000 or more units of the substance concerned. With the advent of online pharmacies, the amount of Schedule III substances involved in an offense has oftentimes exceeded 1 million dosage units. Before online pharmacies, probation officers located in areas known for the diversion of Schedule III substances frequently handled cases involving local pharmacies where the unit threshold of 40,000 was exceeded. A typical Schedule III prescription is for 60 dosage units with one to two refills. This would require only 225 to 660 prescriptions to reach the 40,000 unit threshold. As many investigations span multi-year periods of time, this is an easy threshold to reach.

With respect to Schedule IV and V substances, the group does not have enough experience with cases involving these substances to render an opinion. Because of the low maximum threshold for Schedule III substances, many reached the maximum level for Schedule III substances without consideration of any Schedule IV or V substances in the calculations. It was also noted that many Schedule V cases involving cough medicines were handled as civil licensing violations rather than criminal prosecutions.

The group agreed that offenses involving Schedule III hydrocodone should not be treated differently than other Schedule III substances. The group was reluctant to recommend changes to the guidelines based on the current popularity of a substance. It seems that lifting the base offense level threshold of 20 for Schedule III substances would be the better approach and would obviate revisiting the issue when the next Schedule III substance achieves an alarming level of abuse. Further, the Group agreed that a change to hydrocodone "actual" would not create application difficulties as the dosage weight per unit is available in lab reports accessible by the probation officers.

The Drug Trafficking Vessel Interdiction Act of 2009

The group reviewed the proposed amendment at § 2D1.1(b)(1)(B) and agreed this will adequately address the use of submersible vessels in drug trafficking offenses. After consulting with the probation officers in the Middle District of Florida, which is the only district known to have prosecuted these types of offenses, the following recommendations are made.

In any other case, the group agreed a new guideline under §2X7.2 is preferable to using §2X5.1 (*Other Felony Offenses)* as a directive. The use of a specific guideline is less problematic than choosing an analogous guideline which invariably leads to strong disagreement.

It was also agreed that the base offense level should account for THE use of the submersible vessel as part of an ongoing criminal organization or enterprise as this will most likely be the typical case, with downward departure language for the atypical case. The suggested upward departure language found in the proposed §2X7.2, comment. [n.1 (A),(B)] would be more appropriate as SOCs as these factors will likely apply in most cases as noted by probation officers who have experience with cases involving submersible vessels.

Finally, as to the case in which §3B1.2 *(Mitigating Role)* applies, the group agreed that a lower alternative base offense level or downward adjustment would not be necessary to reflect the lesser culpability of a defendant, as the offense level achieved by the application of §2X7.2 would most likely be much lower than the offense level achieved if the criminal enterprise is identified, charged and the applicable guideline is applied. For example, the most likely use for this type of vessel is drug trafficking, and if §2D1.1 were to be applied, it would likely result in a higher offense level than the offense level achieved through application of §2X7.2.

Court Security Improvement Act of 2007

The Group recommends that convictions for 18 U.S.C. §1513 should be referenced to the following guidelines: 2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, in addition to 2J1.2. Because the offense behavior for convictions of 18 U.S.C. § 1513 and § 1512(a) are similar, the Statutory Index should allow for the application of the same guideline options for both offenses of conviction.

The Group agrees that the Official Victim enhancement should remain in Chapter Three and that adding an SOC is unnecessary.

The Group spent a significant amount of time discussing the use of the Internet as an aggravating circumstance in threatening official victims, and whether the initial sender of threats was an individual or a member of a larger group. The Group was concerned about public disclosure of personal information as well as the potential for greater harm if this information was disclosed to a larger audience. The Group agrees that this disclosure is likely an aggravating factor not adequately considered under the Sentencing Guidelines. However, there is concern that it may result in disparity between a defendant who personally threatens a victim and a defendant who creates the potential to incite members of a larger group (i.e., through the use of a blog) to commit harm. There is unresolved disagreement within the group as to which circumstance a victim might find more threatening.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

Regarding conformity between the guidelines applicable to persons convicted of alien smuggling and the guidelines applicable to persons convicted of promoting a commercial sex act, the Group agreed a cross-reference in § 2L1.1 to § 2G1.1 and § 2G1.3 would sufficiently address the concerns regarding harboring aliens in furtherance of prostitution and provides conformity as well as ease of application.

With regard to how the aggravating role factor for these types of offenses should be incorporated into the Guidelines, the Group considered the option of creating an SOC, but found that problematic since aggravating role is not normally addressed as an SOC. Alternatively, the Group suggests expanding the language in § 2G1.1,comment.(n.3), to include an instruction for these types of offenses, that the organization may be considered otherwise extensive for purposes of applying § 3B1.1, when 5 or more criminal participants cannot be identified. The Group suggests adding a similar application note to § 2G1.3.

As to whether Appendix A should be amended to refer the new offenses under 18 USC §§ 1593A and 1351 to one or more guidelines, the Group agreed that any offense which can be referenced in Appendix A to a specific guideline or guidelines provides more consistency and ease in application.

The Group agreed the new offense under 18 U.S.C. § 1593A would be adequately addressed at § 2H4.1. Regarding the new offense under 18 U.S.C. § 1351, the Group recognizes benefits in the application of either § 2B1.1 or § 2H4.2. However, as this is a new offense, little is known about the sentencing factors that may apply in these cases. Although § 2H4.2 appears to incorporate foreign labor violations; the available SOCs are narrowly focused and may not address the variety of factors within this offense. Therefore, the Group concluded that until more is known about this offense, the better option may be to reference to § 2B1.1 as it provides for a wider range of SOCs which may be applicable. The Group notes that if § 2H4.2 is referenced to address violations of 18 U.S.C. § 1351, then a reference to § 2H4.2 should be added to the organizational guidelines under § 8C2.1(a), as it is envisioned that organizations could also be charged with this new offense.

Commission of Offense While on Release

During our discussion of § 3C1.3, the Group agreed that the new language and additional examples provided help to clarify the application note without changing the substance of the rule. It was agreed that the new language provides guidance on how to correctly apportion the sentence.

Counterfeiting and "Bleached Notes"

The Group reviewed the proposed changes at § 2B5.1(b)(2)(ii), and the application notes. The Group agreed the changes are clear, easily understood and should resolve the issue.

Closing

POAG appreciates the opportunity to express its concerns and the willingness of the Commission work with POAG to address issues we believe are important. Should you have any further questions or require any clarification regarding the issues detailed above, please do no hesitate to contact us.

Sincerely,

Probation Officer's Advisory Group
March 2009