

**United States Sentencing Commission Public Meeting Minutes
November 20, 2008**

Chair Ricardo H. Hinojosa called the meeting to order at 9:30 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Chair
- Judge Ruben Castillo, Vice Chair
- Judge William K. Sessions, III, Vice Chair
- Dabney L. Friedrich, Commissioner
- Michael E. Horowitz, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director

The following individuals participated in the meeting:

- Michael DuBose, Chief, Computer Crime and Intellectual Property Section (CCIPS), Criminal Division, Department of Justice
- Betsy Broder, the Federal Trade Commission
- J. Martin Richey, Assistant Federal Public Defender, District of Massachusetts
- Russell P. Butler, Executive Director of the Maryland Crime Victims' Resource Center, and Victims Advisory Group Member
- Bruce J. Heiman, Counsel to Business Software Alliance (BSA)
- Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, U.S. Drug Enforcement Administration
- Amy Baron-Evans, Sentencing Resource Counsel
- Brad J. Kieserman, Chief of the Operations Law Group in the Office of Maritime & International Law, and Counsel to the Deputy Commandant for Operations, and the Director of Operations Policy, United States Coast Guard

The Chair called for a motion to adopt the minutes of the September 18, 2008, public meeting. Vice Chair Castillo made the motion to adopt the minutes, with Vice Chair Sessions seconding the motion. Hearing no further discussion, the Chair called for a vote and the motion was adopted by voice vote.

Chair Hinojosa welcomed the individuals invited to participate in the public briefing. He stated that the Commissioners appreciated hearing from participants in the criminal justice community and added that the views expressed by them will help the Commissioners and staff.

Ms. Sheon reported that all 94 judicial districts are submitting the statutorily required sentencing documentation to the Commission electronically. Ms. Sheon stated that the electronic submission system has greatly assisted in the timely collection of sentencing data by the Commission.

Chair Hinojosa announced that two panels were participating in the public briefing to discuss several matters regarding recent congressional action. The Chair stated that the Commission welcomes comments from interested parties. The Chair noted the Commission's policy to reach out to many different groups because the Commission's work benefits from the varied views it receives.

Chair Hinojosa introduced the first topic, which concerned the Identity Theft Enforcement and Restitution Act of 2008 (the "Identity Theft Act"), Pub. L. No. 110-326. The Chair stated that the Identity Theft Act includes a directive to the Commission that lists 13 factors the Commission is to consider as it reviews the guidelines and policy statements applicable to offenses involving computer crimes and the theft or misuse of personal identifiable data.

Chair Hinojosa welcomed the first panel and called on Mr. Michael DuBose to begin the discussion.

Mr. DuBose focused on what he believes to be one of Congress's primary concerns when it passed the Identity Theft Act: the theft of personal information and the consequent breach of privacy. Mr. DuBose provided the Commission with several examples involving specific forms of criminal conduct including large-scale data breaches and smaller, individualized data breaches. Mr. DuBose noted the "level of sophistication of the offense" factor in the Identity Theft Act's directive and gave examples of how hackers evade law enforcement detection by use of anonymous proxy servers.

Mr. DuBose also spoke about the "non-pecuniary harm" directive, and how non-pecuniary harms caused by personal data breaches can be significant. Non-pecuniary harms, according to Mr. DuBose, seem very relevant to fairly assessing offense severity and punishment. Mr. DuBose further discussed the difficulties in measuring the significance of a large-scale data breach, especially when actual pecuniary harm may be absent. Mr. DuBose spoke about the value of private information that cannot be easily quantified into a dollar value. He suggested an enhancement for the disclosure or intent to disclose personal information. According to Mr. DuBose, the public disclosure of such information almost always exacerbates the harm from the original breach of privacy.

The Chair called on Ms. Betsy Broder. Ms. Broder noted that her remarks were hers alone and did not necessarily represent the position of the Federal Trade Commission. Ms. Broder spoke about the extent and impact of identity theft on victims and the steps that must be taken by victims of identity theft to clear their names. She outlined two different types of identity theft: the misuse of an existing account and new accounts opened in a victim's name. Both types result in wasted time, inconvenience, and stress for the victims. Ms. Broder also discussed the

role of the Federal Trade Commission in this matter and the resources it has developed to assist victims of identity theft.

Chair Hinojosa called on Mr. J. Martin Richey. Mr. Richey provided the Commission with an overview of how the Federal Public Defender's Office in the District of Massachusetts handles the defense in identity theft cases. He noted that the Commission has previously studied identity theft crimes and discussed the comprehensive report the Commission issued in 1999. Mr. Richey stated that Congress has already given prosecutors a "blunt tool" in prosecuting identity theft cases—18 U.S.C. § 1028A (Aggravated Identity Theft)—and that sentences for this offense are sufficiently high. He stated that in an appropriate case, the judge is invited to depart upwardly. Mr. Richey further noted that the Identity Theft Act allows judges to award restitution to victims for the victims' time spent resolving the harm. This amount, Mr. Richey stated, should be used by the judge in calculating loss. Mr. Richey concluded by stating that the Commission should make no changes to the definition of "victim" in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) because the issues surrounding non-pecuniary loss are best left to the judge, who can balance the aggravating and mitigating factors of the offense.

Chair Hinojosa called on Mr. Russell P. Butler. Mr. Butler suggested that the Commission amend two specific guideline provisions: §§2B1.1 and 5E1.1 (Restitution). He stated that the current definition of "victim" in §2B1.1 falls short because it focuses only on monetary loss. Mr. Butler addressed the problems victims face when an individual uses a victim's name to open a line of credit. According to Mr. Butler, these problems include: credit problems, including problems buying a house or taking out a loan; loss of social security benefits; tax problems; motor vehicle or criminal problems; medical problems; and employment problems. Mr. Butler called for the Commission to change the definition of "victim" to include these non-pecuniary harms. Regarding §5E1.1, Mr. Butler suggested the Commission amend the guideline to reflect the changes Congress made regarding restitution in the Identity Theft Act.

Chair Hinojosa called on Mr. Bruce J. Heiman. Mr. Heiman stated the Business Software Alliance's view that the Commission should adopt tougher guidelines for computer crimes for two reasons: (1) these are serious crimes inflicting significant economic and personal damage; and (2) they are committed by rational, economic actors, who are more likely than others to be deterred by the threat of increased penalties. Mr. Heiman remarked on the nature and severity of cyber-crime and offered suggestions on how the Commission could amend the guidelines to provide increased sentences for these offenses.

A question and answer period followed the panel's presentations and concluded with Chair Hinojosa thanking the attendees for their participation.

Chair Hinojosa welcomed the second panel to discuss the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (the "Ryan Haight Act"), Pub. L. No. 111-425, and the Drug

Trafficking Vessel Interdiction Act of 2008 (the “Drug Trafficking Act”), Pub. L. No. 110–407. The Ryan Haight Act created two new offenses concerning Internet sales of Schedule III, IV, and V controlled substances and includes a directive to the Commission. The Drug Trafficking Act created a new offense concerning the use of unflagged submersible and semi-submersible vessels and also includes a directive to the Commission.

The Chair called on Mr. Joseph T. Rannazzisi to discuss the Ryan Haight Act.

Mr. Rannazzisi stated that the majority of illegal trafficking of Schedule III, IV, and V controlled substances takes place over the Internet, with the number of hydrocodone cases in particular increasing significantly since 1996. Mr. Rannazzisi also noted that hydrocodone has doubled in strength and stressed that the penalties for distribution of hydrocodone are not adequate to deter doctors, pharmacists, and businessmen involved in these types of crimes. Mr. Rannazzisi proposed a number of guideline amendments that would increase penalties for hydrocodone offenses specifically, other offenses involving Schedule III substances, and offenses involving Schedule IV and V controlled substances. Mr. Rannazzisi stated that the Department of Justice’s proposals would target the ultimate source of these substances: the doctors, pharmacists, and businessmen involved in these types of crimes.

Chair Hinojosa called on Ms. Amy Baron-Evans to discuss the Ryan Haight Act. Ms. Baron-Evans asked the Commission to wait to see whether the Ryan Haight Act deters potential criminals before it acts to significantly amend the guidelines. Ms. Baron-Evans further stated that the guidelines as written give the government enough tools to sufficiently punish the most culpable actors, noting the guidelines currently include invited upward departures for the distribution of large quantities of controlled substances and offenses that involve death or serious bodily injury as a result of the use of controlled substances.

Chair Hinojosa called on Mr. Brad J. Kieserman to discuss the Drug Trafficking Act. Mr. Kieserman stated that drug traffickers from transnational criminal organizations are smuggling huge amounts of cocaine into the United States using submarines and semi-submersible vessels. He added that this activity is dangerous to our national security. He noted that this type of violation of the law is a very new, dangerous, and emerging threat. Mr. Kieserman stressed that the Commission should take the steps necessary to deter this conduct and asked the Commission to consider establishing a high base offense level for the new offense.

Ms. Baron-Evans noted that the Federal Public Defenders did not yet have a position concerning the Drug Trafficking Act but did not agree with the suggestion of a high base offense level for the new offense. Ms. Baron-Evans expressed concern regarding the new offense, believing that it punishes conduct when there is no evidence that wrongdoing took place.

A question and answer period followed the panel’s presentations and concluded with the Chair thanking the attendees for their participation.

The Chair asked if there was any further business before the Commission and hearing none,

asked if there was a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Commissioner Howell seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 12:05 p.m.