Effect of Involvement of High-Level Personnel. ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations.

Expansion of the Compliance Program's Scope to Civil Compliance. ACC requests the Commission to clarify that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties.

"Risk Assessment." ACC has no objection to this approach in concept, but urges the Commission to drop the phrase "risk assessment," due to extraneous connotations the phrase automatically incorporates from areas such as public health. If it does not drop the phrase, the Commission should clarify that it is not intended to import technical or scientific concepts of risk assessment.

Deleting "unreasonable delay" as a basis for a reduction for self-reporting. ACC supports this approach. There simply is no policy basis for the current prohibition.

Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense. ACC supports the Commission's across-the-board proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program.

Changing the reduction available for an effective compliance program from three points to four. The Commission's proposals would impose substantially greater obligations on organizations seeking a reduced fine. Increasing the possibly available reduction from three points to four is thus entirely appropriate.

Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation.

ACC fundamentally questions the premises of DOJ's arguments for tougher hazmat Guidelines. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on Senate-passed legislation that would increase those punishments. Hazmat incidents are not more consequential than fixed facility incidents.

DOJ's proposal would add little to the impressive punishments already available to terrorists, but would be overly severe for non-terrorist-related hazmat violators. Terrorists are already subject to extraordinary sanctions, and new hazmat rulemakings already address the problem of inadvertently helping terrorists. DOJ's proposal would punish nonterrorist hazmat personnel as severely as, and more commonly than, the terrorists who attack or exploit them.

A free-standing hazmat guideline would greatly complicate the job of organizations attempting to implement an effective compliance system.

Discussion

I. Effective Compliance Programs

ACC commends the Commission for the open and deliberative approach that it has taken over the past 3-plus years in its consideration of this issue. The Commission's Advisory Group gathered a great deal of public comment in very thorough, focused and dialogic fashion in which Group members were actively engaged. The Group then worked very diligently and came up with recommendations that, in ACC's view, generally adopt the right approach. The overall thrust of ACC's prior comments and testimony was that the current Guidelines have worked well: beyond their strict role as providing rules for criminal sentences, they have already driven the development of effective compliance programs in businesses and will continue to do so. ACC noted that it was not aware of objective evidence indicating that compliance systems based on the current Guidelines were deficient. ACC recommended that any significant changes to the Guidelines be based on concrete evidence of shortcomings in the Guidelines that could be cured by the proposed changes. We also cautioned against expanding the Guidelines further into areas of corporate governance or corporate ethics, and by large the Commission has heeded those cautions.[2]

The following comments highlight areas of the proposal that ACC believes are particularly praiseworthy and reiterate concerns about making more sweeping changes. We also urge the Commission consider expressing a stronger position on the problem of waiver in connection with cooperation, and to serve in the "fulcrum" role recommended by the Advisory Group to advance the debate on this issue and the related litigation dilemma.

A. Corporate Governance.

ACC is particularly pleased that the Commission has worked to ensure consistency between (i) the Guidelines and (ii) Sarbanes-Oxley and the many other laws, rules and self-regulatory provisions that affect corporate governance. ACC's earlier comments in

[2] ACC has filed four sets of comments and testimony since the Commission's 2001 notice requesting comment on whether to create the Advisory Group. Attachment B is the testimony we filed in connection with the November 14, 2002 public meeting.

this docket addressed this issue at length, and we were invited to make a presentation specifically on this issue at the Group's public meeting. The Group's report recognized the substantial effect of Sarbanes-Oxley and other current drivers of change in corporate governance,[3] and noted concerns that the Commission not do anything to interfere with these ongoing processes.[4] The Group emphasized that its recommendations "will not impose upon organizations anything more than the law requires, nor will it conflict with industry-specific regulatory requirements."[5]

ACC does recommend two clarifications in this regard. Proposed Section 8B2.1(b)(2) provides that "[s]pecific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the [compliance] program . . . and shall report directly to the governing authority or an appropriate subgroup . . . ."

What does "report" mean? ACC suggests the Commission clarify that the phrase "shall report directly to the governing authority or an appropriate subgroup" means only to "provide . . . information" to these bodies (as stated in proposed Application Note 3). However, if "report" were construed to mean "be directly accountable to and be supervised by," that interpretation would wreak havoc with corporate governance in many, if not most businesses, where only the president or CEO reports (in the accountability sense) to the board, and all other employees and officers report to him or her (including the person(s) with overall and direct responsibility to ensure the effectiveness of the compliance program). While persons responsible for compliance programs should have the capability and authority to provide information directly to the governing authority, having separate lines of accountability for staff officers of a company or the CEO to the governing authority is a recipe for competition and dysfunction. ACC would appreciate clarification that it has interpreted proposed Application Note 3 correctly.

The split between accountability for compliance and for monitoring the compliance program. In many (if not most) leading business organizations, the responsibility for compliance with the law lies with line management, not with a corporate staff function. This alignment of responsibility makes compliance as much a part of these managers' responsibility as meeting production or sales targets, and prevents a dynamic in which compliance becomes the obligation of a corporate "overhead" or "police" function not directly responsible for the actual conduct that constitutes compliance or noncompliance. Under this arrangement, the people who actually have to direct business activity to comply with the law are the ones charged with implementing the program to ensure compliance.

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[3] Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003) at 39-48.
[4] *Id.* at 59 and n. 207.
[5] *Id.* at 54.

In many of these same companies, a corporate staff function is tasked with supporting and monitoring the line managers in their implementation of the compliance program. For example, a corporate environmental, health and safety department headed by a vice president of EH&S might play this role, supporting the vice presidents of manufacturing or the business unit vice presidents who actually have the EH&S compliance obligation within the company. In these companies, this corporate staff function – not the line managers -- typically has the job of surveilling the implementation by line management, of the compliance program and, in particular, reporting to the governing authority on the status of the program. However, the ultimate responsibility for the effectiveness of the compliance program -- i.e., compliance -- remains with line management.

Section 8B2.1(b)(2) should would allow for this flexibility in how companies establish responsibility for compliance and for the administration of the compliance system. It should not require dramatic and potentially dysfunctional shifts in corporate management (e.g, making the corporate staff "responsible" for compliance instead of line management, even though the staff do not control the behaviors that constitute compliance or noncompliance).

To address this issue, ACC recommends that the Commission adopt one of three options:

- clarify that the high-level personnel "with direct, overall responsibility to ensure the implementation and effective**[] administration** of the organization's [compliance] program" need not be the high-level line management with the actual compliance obligation, but may be a separate staff function (we assume this is the Commission's intent);
- clarify that, if line managers have "direct, overall responsibility to ensure the implementation of and effectiveness of the organization's [compliance] program," they can do so with the support of, and may report through, the corporate staff responsible for supporting and monitoring the compliance program; or simply
- provide that the organization must specify the roles of high level personnel in the compliance program, which would include responsibilities for (i) compliance, (ii) administration of the compliance program and (iii) reporting to the governing authority.

B. "Ethics" concerns

To its credit, the Advisory Group resisted the call to increase fines for organizations that do not establish "ethics programs" above and beyond their compliance programs. While the Group proposed requiring an organization with effective compliance program to "otherwise promote an organizational culture that encourages a commitment to compliance with the law," the Group wisely constructed its recommendations so that a company implementing the seven elements of an effective compliance program "can attain both the compliance with law and organizational culture called for under the proposed guideline. . . . The proposal avoids the need for determinations of whether a particular organization has adopted a good 'set of values' or appropriate 'ethical

standards,' subjects which may be very difficult, if not impossible, to evaluate in an objective, consistent manner."[6] The Commission has proposed to adopt this approach.

Within a month of publishing the instant Federal Register notice, the Commission was already being assailed by some consultants for "fail[ing]," "sidestep[ping]" and "neglect[ing]" opportunities to "go 'beyond compliance'" by requiring free-standing ethics programs.[7] ACC urges the Commission to resist these entreaties, for the reasons explained at length in our prior comments:

- Over the years, the Guidelines have clearly taken on a significant collateral role as an inspiration and template for the development of effective corporate compliance programs. These programs in turn have frequently grown into, or been merged with, more general programs designed to foster ethical behavior and that extend beyond notions of law-abidance.
- However, the Commission's purpose is to promulgate "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[8] Courts use the Guidelines to sentence those convicted of crimes. The purpose of the Guidelines, therefore, is to "further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."[9]
- Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission.
- The focus of the Guidelines should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given the lack of any detailed set of "ethical criteria" that is agreed upon by the nation as a whole against which organizations could be measured or that could be the basis for setting criminal penalties.

It is good that the Guidelines are being integrated with aspirational ethics programs. It would be wrong, however, for organizations now to be punished more severely for not having taken these "leading," "best practice" steps, especially given the difficulty in identifying and measuring them. The Commission should retain its proposed approach.

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[6] *Id.* at 56.

[7] Letter dated Jan. 28, 2004 from Robert Olson, Principal Consultant, MetaEthics to the "Honorable Jude [sic] Diana M. Murphy."

[8] U.S. Sentencing Commission, *2003 Federal Sentencing Guidelines Manual*, Ch.1, Pt. A, General Application Principle 1 (Nov. 1, 2003).

[9] *Id.* General Application Principle 2.

C. Cooperation, Waiver & the Litigation Dilemma

1. Cooperation and waiver

The Advisory Group devoted a remarkable and admirable amount of effort to assessing the concern that prosecutors are requiring waivers of attorney-client privilege and work product protection in order to obtain credit for "cooperation" under the Guidelines. The Group's report also devotes much space to this crucial issue. Finally, the Group and the Commission deserve credit for addressing the issue in the proposed amendments in the face of the Justice Department's statement that it "sees no need" for the Guidelines to do so.[10]

Unfortunately, the proposed amendment to Application Note 12, while perhaps disfavored by the Justice Department, effectively codifies DOJ's official position: waiver is not required to satisfy the requirement for cooperation, except in the circumstances where it is. Given the "significant and increasingly entrenched divergence of opinion between [DOJ] and the defense bar" as to this issue,[11] and the even more worrisome divergence between DOJ's official position and the government's practice, as reported by the defense bar, ACC questions whether codifying DOJ's position in the Guidelines will help matters. On balance, we are concerned that it will only make matters worse, by signaling to judges and others that the Commission has considered and rejected the view that privileges and protections deserve such high respect that they should not be trumped by the government's interest in expediency.

Representatives of regulated entities – not just criminal defense lawyers – have argued often and at length that concerns about the near inevitability of waiver in the case of a government investigation have gravely hampered the effectiveness of internal investigations and the ability of corporate staff to gain the cooperation of employees. This has certainly been first-hand experience of ACC member companies. Our member companies' experience in conducting internal investigations over the past several years is that the status quo is having a serious chilling effect on communications between attorneys (especially outside counsel) and management. While unintended, this is a very negative consequence.

Previously, outside counsel conducting an internal investigation would provide extensive written advice to senior management of the company, clearly outlining the facts, legal assessment and recommendations for remedial action (including potential disciplinary action against personnel). Now, because of the very real concern that the company will be coerced to waive privileges and protections and turn the documents over to the government to receive credit for cooperation, those issues -- to the extent they are documented at all -- are likely to remain in the law firm's file in the form of internal memos. Otherwise, the documents potentially will not only provide a roadmap for prosecution but, because the action of giving them to the government could be construed

[10] Advisory Group Report at 102.
[11] *Id.* at 105.

as a broad waiver of the underlying information, could be discoverable for use in third party litigation (discussed immediately below). The net effect is that high-level personnel and the governing authority do not get the information and advice they need to fully appreciate the magnitude of the problem and allow them to take the sometimes painful steps involved in changing the culture of the company. Thus, the cooperation/waiver issue impedes not only compliance with law but the promotion of an organizational culture that encourages it.

ACC therefore urges the Commission to take the bold step of deleting the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite for evaluating cooperation for sentencing purposes. Doing so would not impede the Justice Department from taking whatever positions it wishes for purpose of initiating or declining an investigation or for settling versus filing cases. It simply means that an organization would not have to compromise its compliance program to receive credit for it at sentencing.

If the Commission is unwilling to delete the last sentence of its proposed amendment to Application Note 12, ACC reluctantly believes that the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with DOJ.

2. The litigation dilemma

Relatedly, the Advisory Group's report devotes even greater length to a very thorough and reasoned exposition of the litigation dilemma; that is, the concern that the very steps an organization takes to make its compliance program effective puts it at risk by arming prosecutors or civil plaintiffs who can use this information against it. The Group concluded that "the potential importance of this issue for purposes of encouraging truly effective compliance programs suggests . . . that the Sentencing Commission should, through its unique status and powers as an independent agency within the judiciary, serve as a fulcrum to advance the debate among policy makers."[12] Unfortunately, the Commission's latest Federal Register notice does not address this recommendation. ACC urges the Commission to do so, and to sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

D. Deletion of "propensity" language

ACC supports the Commission's proposed change to subsection (b)(3). The Advisory Group frankly recognized the "inscrutable" nature of the current language and the "difficulties" people have had interpreting it.[13] The alternative proposal -- "a history of engaging in violations of law or other conduct inconsistent with an effective [compliance] program" -- is much more objective and implementable.

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[12] Advisory Group Report at 131.
[13] *Id.* at 65-66 (quoting ACC).

ACC offers two comments in this regard:

- The Commission should clarify that the "other conduct" referenced above should be readily determinable, overt acts of attempted illegality or deception, or failures to act in clear and extreme circumstances -- rather than simple possession of supervisory power during a period that subordinate persons committed actual or potential violations of law. As the size of an organization grows, so does the unfairness of imputing to management every act or omission of those under it.
- How implementable any system of due diligence is, unfortunately, limited by the tendency of former employers -- motivated by privacy concerns, among other things -- not to comment about a person's employment history beyond noting dates of service. The Commission should acknowledge this difficulty in some fashion.

E. Promotion and Enforcement

ACC generally supports proposed subsection (b)(6). In particular, we agree with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. This approach is more consistent with organizational psychology and best practices regarding what things best motivate employees and encourage desired behavior.

It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are "appropriate." The law of unintended consequences operates in this area as in all others, and well-meaning incentives can promote undesired behavior. (For example, offering bonuses to managers without reported incidents can serve as a disincentive to reporting incidents, not a good outcome.) ACC also requests clarification that "appropriate" modifies "disciplinary measures" as well as "incentives," for the same reason (and to avoid mandating steps that could be seen as punishing whistleblowers or others that report potential problems).

F. Effect of Involvement of High-Level Personnel in Offense

ACC supports the Commission's proposal that involvement of high-level personnel raises a rebuttable, rather than conclusive, presumption that the organization did not have an effective compliance program. ACC also believes that this change should apply across the board, and not be limited to small organizations (the second "issue for comment" under Amendment 2). In fact, as organizations grow in size, the greater number of high-level personnel exist who have the potential to deprive the organization of the benefit under the Guidelines of an effective program. Any such case should be dealt with on its own merits, so that the organization has the opportunity to show that its program was nonetheless effective.

G. Expansion of the Compliance Program's Scope to Civil Compliance

ACC agrees with the Advisory Group that organizations typically do not establish separate criminal and civil compliance programs, and that in most cases conduct that can give rise to civil violations may, if intentional, be punishable criminally. On the other hand, the purpose of the Sentencing Guidelines remains criminal sentencing. The Guidelines have no effect in civil cases. ACC requests the Commission to clarify two points which we believe it intends -- that the expansion of scope to include civil compliance:

- is not intended to require organizations to establish any new compliance programs or mechanisms beyond those changes enumerated in the current proposal; and
- should not serve as the basis for prosecutors to inquire into, and request demonstrations regarding, compliance programs for legal regimes that do not have criminal penalties (e.g., the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050).

H. "Risk Assessment" Under Proposed Subsection (c)

ACC recognizes that the proposed Application Note explaining this proposed new subsection is largely a restatement of current note 3(k)(7), wrapped up in more formal language about assessment, prioritization and modification. ACC has no objection to this approach in concept. However, ACC is concerned about the use of the phrase "risk assessment" to capture the approach. While compliance programs in the banking and health care fields may have pioneered use of that phrase for this purpose, the phrase automatically incorporates an enormous amount of complexity in more technical areas such as food, drugs, safety, environment and public health, due to the highly refined, extensive and controversial literature and practices associated with it.[14]

ACC strongly urges the Commission not to use the term "risk assessment" and instead simply to describe what organizations should do. That is, organizations should know their legal obligations, understand how those obligations apply to their businesses, and focus their compliance programs on the applicable laws most relevant to their activities and operations, taking into account the likelihood that violations of those laws might occur. Organizations should periodically review their legal obligations, operations and compliance programs to verify that the programs are designed to address the appropriate requirements and operations and the likelihood of noncompliance. If the Commission decides to retain the term "risk assessment," it should clarify that the phrase is not intended to import technical or scientific concepts of risk assessment, such as quantitative analysis or complicated statistical tools (such as probabilistic or "Monte Carlo" simulations).

[14] *See, e.g.*, National Research Council, *Science & Judgment in Risk Assessment* (1994).

I. Issues for Comment under Amendment 2

1. *Deleting "unreasonable delay" as a basis for a reduction for self-reporting.* ACC supports this approach. There simply is no policy basis for the current prohibition. Any time an organization self-reports, the law enforcement system benefits by learning of wrongdoing that it otherwise may never have discovered. The Advisory Group's long discussion of the litigation dilemma dramatizes the substantial downsides associated with self-reporting. This both explains the reason for delay in some cases and shows the inequity of continuing to penalize companies that do come forward by denying them credit where that delay was "unreasonable." EPA's experience with its self-audit policy provides some illumination in this regard. The policy originally had a fairly strict 10-day deadline for self-reporting, but over time EPA extended the deadline to 21 days and, more important, has created periodic "incentive programs" where industry sectors have had upward of six months to disclose. No evidence has been cited or reported in studies of EPA's program that these longer periods in any way compromised the overall effectiveness of the disclosures or the public benefit they have produced.

2. *Retaining the automatic preclusion of credit where high-level personnel of large organizations were involved in an offense.* See "Effect of Involvement of High-Level Personnel in Offense," above.

3. *Changing the reduction available for an effective compliance program from three points to four.* In the overview to its executive summary, the Advisory Group concluded:

> [L]egal standards in a remarkably diverse range of fields . . . have increasingly articulated more detailed and sophisticated criteria for organizational law compliance programs that warrant favorable organizational treatment. Efforts and experience by industry and private organizations have also contributed to an evolution of 'best practices' during the last decade. In short, the Advisory Group believes that the organizational Guidelines should be updated to reflect the learning and progress in the compliance field since 1991.[15]

There can be no doubt that, if an organization hopes for favorable treatment under the law, its obligations have increased steadily and substantially over the past decade. The bar has clearly been raised, and the Commission's proposals will codify that change. Given the increasingly heavy lifting this imposes on organizations, and the increasingly greater legal risk that such voluntary efforts poses through the litigation dilemma, increasing the possibly available reduction from three points to four is entirely appropriate. It should also spur continued private implementation of effective compliance programs and supporting organizational cultures. Conversely, not raising the available reduction effectively debases the value of the Guidelines, as organizations will be getting less credit for unit of effort.

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[15] Advisory Group Report at 3.

II. Request for Comments re Hazardous Materials

ACC strongly opposes making any changes to the existing organizational Guidelines, or creating any new Guidelines, regarding hazardous materials (hazmat) transportation. In particular, pending legislation could render DOJ's concerns moot.

A. ACC Fundamentally Questions the Premises of DOJ's Arguments for Tougher Hazmat Guidelines

1. Hazmat incidents can be amply punished under the existing Guidelines, and the Commission should await action on pending legislation that would increase those punishments

DOJ asserts that application of Section 2Q1.2 of the Guidelines to criminal hazmat violations produces inadequate sentences. ACC disagrees. Under the Hazardous Materials Transportation Act (HMTA), knowing violations of proscriptions on tampering with required marking, labeling, placarding or documents, and any other willful violation of the statute or regulations or orders under it, are punishable by fines under Title 18 or five years imprisonment.[16]

The Senate has already passed comprehensive HMTA reauthorization legislation that would increase the available jail time to 20 years in any case where a hazardous material was released in connection with the offense -- the very circumstance that motivates DOJ's concerns.[17] Given the prospects of this legislation being enacted this year, the Commission should defer any further action on this subject.

The offense characteristics in Section 2Q1.2, moreover, would substantially elevate sentences under the HMTA. Assume, for example, that a terrorist hijacked a gasoline tank truck and drove it into a shopping center, causing an immense conflagration, many deaths and a major evacuation. While the hijacking terrorist would presumably no longer be available for prosecution, assume further that several accomplices are arrested and convicted of aiding and abetting, and thus punishable under the same offense. Under Section 2Q1.2, these terrorists' sentences would:

- Begin at offense level 8;
- Be increased by 4 levels because the attack involved a release of a hazardous substance;
- Be increased by 9 levels for posing a substantial risk of death or serious bodily injury; and
- Be increased by 4 levels for resulting in evacuation of a community.

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[16] *See* 49 U.S.C. 5124.
[17] *See* S. 1072, § 4442(b).

Since the terrorist driving the truck likely did not have a commercial drivers license with the required hazardous materials endorsement, the sentences would likely also be increased 4 levels for involving transportation without a permit.[18]

Based on the foregoing, ACC submits that the terrorists' sentences would be significant, and that the Guidelines do not be revised to increase them further.

2. Hazmat incidents are not more consequential than fixed facility incidents

Contrary to DOJ's assertions, hazmat incidents are not peculiarly high-casualty, high-consequence events, and conversely "offenses involving the environment" at fixed facilities are not necessarily ongoing, continuing and repetitive (and hence implicitly minor). Fixed facility incidents have the potential to be equally as, if not more, devastating than hazmat transport incidents. Bhopal is the most obvious example. Indeed, an entire EPA program -- the Risk Management Program established under Section 112(r) of the Clean Air Act -- is devoted exclusively to preventing and minimizing the consequences of catastrophic air releases of toxic or flammable chemicals.[19] While EPA notes that "catastrophic chemical accidents . . . are fortunately relatively rare,"[20] some 15,000 facilities across the United States are regulated under this program, and hence incidents involving them are exactly the kind of "one-time, catastrophic occurrence . . . present[ing] a 'target rich' environment . . . and that . . . could affect a large population" contemplated by DOJ. Thus DOJ's first basis for distinguishing between fixed and transportation activities does not hold up to analysis.

B. DOJ's Proposal Would Add Little to the Impressive Punishments Already Available to Terrorists But Be Overly Severe for Non-Terrorist-Related Hazmat Violators

1. Terrorists are already subject to extraordinary sanctions

An entire chapter of Title 18 of the U.S. Code is dedicated to the criminal punishment of terrorists.[21] Post 9/11, it specifically addresses "domestic terrorism."[22] It contains

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[18] Not only must hazmat drivers have a special endorsement, but most hazmat shippers and carriers must register with the DOT, something else that a terrorist is not likely to do. ACC believes DOJ reads the word "permit" in Section 2Q1.2 too narrowly; in our view, a court is likely to interpret "permit" to encompass the licenses and registrations that are ubiquitous in the hazmat world, such that this basis for upward adjustment should apply routinely in terrorism cases.

[19] *See* 42 U.S.C. § 7412(r)(7); 40 C.F.R. Part 68.

[20] EPA, *Assessment of the Incentives Created by Public Disclosure of Off-Site Consequence Information for Reduction in the Risk of Accidental Releases* 47 (April 18, 2000).

[21] 18 U.S.C. Ch. 113B.

[22] *Id.* § 2331(5).

provisions directly addressed to use of "weapons of mass destruction," "explosives" and "other lethal devices," one or more of which definitions is likely to apply to any use of hazmat shipment for terrorist purposes.[23] The punishments under these provisions generally are any term of years or life, or death if death results from the offense.[24]

Similarly (but unnoted by DOJ), a separate section of the Guidelines already addresses these terrorist offenses, as well as attempts and conspiracies to commit them. Section 2M6.1 applies to offenses involving unlawful use, transfer or possession of weapons of mass destruction or toxins, among other things, and if the offense involved intent to injure the United States, *begins at offense level 42.*[25]

These provisions together assure that, in any case where terrorists use a hazmat to accomplish their goals, they will be punished as severely as U.S. law permits.

2. DOJ's proposal would result most commonly in harsh sentences being imposed in cases not involving terrorism

ACC would be unconcerned about DOJ's proposal if the new or enhanced guideline provisions applied only where the offender was liable under one of the antiterrorism statutes discussed immediately above. Unfortunately, DOJ seems equally intent on preventing terrorist attacks by severely punishing criminally culpable but otherwise patriotic Americans whose hazmat violations could potentially facilitate a terrorist attack.[26]

At the outset, ACC notes that DOJ has offered no evidence of an epidemic of such violations. Before the Commission significantly changes the criminal sentences in this area, it is incumbent on DOJ to offer some empirical substantiation for these changes. Instead, DOJ has proffered a rather academic comparison of hazmat versus fixed-facility offenses and their treatment under the Guidelines -- which as shown above is unpersuasive.

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[23] "Weapon of mass destruction" includes "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination or impact of toxic or poisonous chemicals, or their precursors." *Id.* § 2332a(c)(2)(B). An "'other lethal device' means any . . . device that . . . has the capability to cause death, serious bodily injury, or substantial damage to property through the release, dissemination or impact of toxic chemicals, biological agents or toxins . . . ." *Id.* § 2332f(e)(9).

[24] *E.g., id.* § 2332a(a).

[25] *See* Section 2M6.1(a)(1). Sentences are to be increased by four levels if the offense results in death and by an additional four levels if it causes public disruption. *Id.*

[26] Actually, in some cases hazmat compliance could well facilitate a terrorist attack. For example, the very placards that ensure that emergency responders know what is contained in a tank truck advertise that truck's attractiveness to a terrorist. Failure to placard a truck would actually impede terrorists (though it would jeopardize first responders). This conundrum is now being hotly debated within the hazmat community.

DOJ's goal of punishing hazmat violations that might aid terrorists is unnecessary and inappropriate for at least two other reasons:

New hazmat rulemakings already address the problem of inadvertently helping terrorists. DOT recently issued a new regulation requiring hazmat shippers and carriers required to register with it to implement security plans and to train their employees on these plans. These requirements will help ensure that hazmat businesses recognize their vulnerabilities to terrorism and that they take steps both to minimize them and to sensitize their employees to them.[27] Separately, the Transportation Security Administration has issued new regulations regarding governmental background checks and security threat assessments for persons seeking hazmat endorsements to their commercial drivers licenses.[28] These steps are a far more narrowly tailored, and likely far more effective, approach to this problem than blunderbuss increases in criminal penalties.

DOJ's approach is unfair. ACC believes DOJ goes to far in proposing to punish nonterrorist hazmat personnel as severely as the terrorists who attack or exploit them. As DOJ itself recognizes, "so many different parties (e.g., shippers, carriers, freight forwarders, brokers, agents and others) are routinely involved in moving hazardous materials, as a practical matter no single party can be exclusively responsible for its safety."[29] In our view, this complexity and diffusion of responsibility is exactly why the Commission should not dramatically increase the criminal penalties potentially associated with hazmat transport. With so many people filling differing and interdependent roles, it would be too easy, in the event a terrorist exploited the system, for innocent or at least non-intentional conduct to be elevated to the level of crime; too easy for a less culpable person to become the fall guy for the conduct of the terrorist. The Commission should not exacerbate that problem.

Even worse, DOJ appears to be using the foregoing purposes as a convenient opportunity to hike the sentences applicable to anyone convicted of a hazmat crime, without regard to whether the offense could even theoretically have served to assist a terrorist. ACC is gravely troubled by this prospect. While it is impossible to predict the future probability of terrorist attacks involving hazmats, it seems undeniable that they will be highly infrequent relative to the number of times hazmat crimes will occur for reasons unassociated with terrorism. Thus, the predominant effect of DOJ's proposal would be to harshly punish hazmat offenders whose offenses had no connection with terrorism. For the reasons discussed above, ACC believes such offenses are already subject to sufficient sanction and likely will be even further sanctionable under pending legislation.

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[27] 68 Fed. Reg. 14510 (March 25, 2003).
[28] 68 Fed. Reg. 23852 (May 5, 2003).
[29] Annual Submission of the Department of Justice to the Commission (August 1, 2003), at 16.