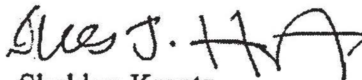
(4) What types of penalties should be considered for violations by corporations?

Section 1037 does not provide specific fine provisions for corporations. If § 2B1.1 will be utilized as the pertinent guideline, corporations will be sentenced under the provisions of §§ 8C2.3-8C2.9 in the absence of other directives. If these provisions are utilized for calculating organizational fines, it will be necessary to specify special offense characteristics for organizations in § 2B1.1 that will increase fine levels to appropriate levels. For large corporate violators, this will require that the total offense level would need to be set at levels of 20 or higher.

In ICC members' experience suing spammers, spammers who engage in conduct that violates § 1037 incorporate as part of a strategy of evading detection. There are usually few employees, all of whom are principals in the act of sending spam. More sophisticated outlaw spammers sometimes use corporate shells to transfer assets (e.g. e-mail lists) in the wake of civil lawsuits. Some spammers also cycle through lots of corporate identities to avoid the effects of recipient opt outs. Use of incorporation as a further form of falsification is very different than questions of whether a legitimate corporate entity has complied with this provision of law. Use of this falsification method should be treated as an enhancing factor, and should under no circumstances entitle a defendant to lesser punishment.

The provisions of § 8C1.1 should be used in situations where an entity has been created entirely or primarily for criminal purposes or to operate primarily by criminal means. Under § 8C1.1, when this occurs, the fine level is set at an amount that divests the entity of all of its net assets.

Respectfully submitted,



Sheldon Krantz
James J. Halpert
Piper Rudnick L.L.P.
1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

Counsel to the Internet Commerce Coalition

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 1, 2004

Members of the
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Commissioners:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on December 30, 2003, and January 14, 2004. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard with us to develop proposed amendments to implement these priorities. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

* * * * *

CHILD PORNOGRAPHY AND SEXUAL ABUSE OF MINORS

The proposed guideline amendments for child pornography and the sexual abuse of minors largely implement provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21. Child pornography and the sexual abuse of minors involve many complicated statutory and guideline issues, and the Commission and staff have methodically and diligently worked to both faithfully implement the new law and at the same time strive to make sentencing policy in this area as easy as possible to apply. We support most of the published proposed amendments and offer a host of comments below.

I. Child Pornography Offenses

A. Consolidation of Possession and Trafficking Offenses Under §2G2.2

We agree with the proposed consolidation of child pornography possession offenses and child pornography receipt/trafficking offenses under a single guideline.[1] The existing scheme, with a cross reference from the possession guideline, has created a great deal of confusion and, we believe, has been applied inconsistently. Also, as the Commission is well aware, whether a person can be shown to have received child pornography or simply to have possessed it is often based more on the quality of forensic evidence than on the person's actual culpability. Thus, we support the proposed consolidation, as we believe it is likely to promote greater consistency in sentencing.

1. Option 1 vs. Option 2 – Base Offense Levels

Although we favor consolidation, in light of the fact that Congress has chosen to impose a mandatory minimum sentence for receipt offenses, but not possession offenses, we believe some higher base offense level for receipt offenses is still appropriate. We favor a variation of Option 1; we believe one base offense level should apply to possession offenses without the intent to traffic in, or distribute the material. Other offenses sentenced pursuant to the guideline, all of which are subject to a five year mandatory minimum penalty, should be subject to a higher base offense level.

2. Choice of Base Offense Level and Enhancements, Generally

Currently, the base offense level for possession offenses under §2G2.4 is level 15. The base offense level for receipt and distribution offenses under §2G2.2 is level 17. The new statutory mandatory minimum penalty for receipt and distribution cases is 60 months, which is within the sentence range of offense level 24 or 26, Criminal History Category I. Under Option 1, the Commission has proposed a base offense level of either 15, 18 or 20 for possession, receipt, and solicitation offenses that do not involve the intent to distribute and a base offense level of either 22, 24, 25 or 26 otherwise (which encompasses distribution, transportation, possession with intent to distribute, etc.). As stated above, because possession offenses are not subject to a statutory minimum sentence, we do not believe the base offense level for such offenses should be exactly the same as that for receipt.[2]

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[1]Our comments, infra, are relevant whether or not the Commission chooses to consolidate the guidelines. For example, our recommended alternative base offense levels are suggested for either a consolidated guideline or in two separate guidelines.

[2]We recognize that even if receipt and possession have the same base offense level, the guideline sentence can be meaningfully different in that one convicted of possession can benefit from a downward adjustment for acceptance of responsibility, bringing him below the five year

We believe the base offense level for receipt and distribution offenses should be level 24 or 26.[3] This offense level will ensure that the less serious offenses within Criminal History Category I will be sentenced at the mandatory minimum while at the same time ensuring that sentences for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress. If the base offense level in §2G2.2 is lower than offense level 24, the sentencing enhancements will have not have full effect and dissimilar conduct will be sentenced similarly. In line with our comments above, we would recommend a base offense level of 20 for possession offenses not involving the intent to distribute.

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mandatory minimum that will apply to those convicted of receipt. However, the distinction that Congress sought between possession and receipt offenses in that circumstance will only be reflected in cases where the defendants benefit from the downward adjustment for acceptance of responsibility.

[3] The Commission has historically, and we believe correctly, set the base offense level for offenses subject to mandatory minimum penalties so that the low end of the sentencing range for a defendant in Criminal History Category I would be no lower than the statutory minimum sentence. Thus, for example, the base offense level for drug offenses subject to a five year mandatory minimum sentence is set at level 26, which carries a sentencing range of 63-78 months in Criminal History Category I. We believe this is the proper method of implementing mandatory minimum statutes within the guidelines; a method that keeps the guidelines consistent with all Acts of Congress.

We recognize, however, that in PROTECT Act cases, unlike drug or other cases subject to a mandatory minimum statute, several special offense characteristics will likely apply to the "typical" case. For example, Commission data shows that the enhancement for the use of a computer, included by the Commission in many of the child pornography guidelines as directed by Congress, will apply in about 90% of the cases. Thus, a base offense level of 26 would result in a sentence above the mandatory minimum in 90% of the cases, even assuming no other enhancements applied and a Criminal History Category I. Moreover, there are multiple and cumulative special offense characteristics which are likely to apply in the typical case. Accordingly, we have recommended base offense levels that incorporate the mandatory minimum sentence and, thereby, ensure that the least serious offenses within Criminal History Category I will be sentenced to the mandatory minimum while at the same time ensuring that the sentences for more serious offenses having multiple special offense characteristics and within higher criminal history categories are sentenced more severely and are proportionally distributed between the mandatory minimum and statutory maximum set by Congress. This distribution is analogous to drug cases where the sentences are proportionally distributed between the mandatory minimum and statutory maximum based upon the amount of the drug. A base offense level lower than 24, however, will not give full effect to the special offense characteristics and will result in cases with and without special offense characteristics to receive the same sentence.

More culpable conduct involving distribution offenses would be subject to several enhancements, under proposed subsection (b)(2). The new, broad, definition of "Distribution" contained in the proposed Application Notes would ensure that behavior such as distribution and possession with intent to traffic result in an increased sentence.

We believe one gap in the proposal is that there is no enhancement for advertisement, which also involves the prospect of distribution. Generally, advertising offenses under § 2251(d)(1)(A) (formerly § 2251(c)(1)(A)) now are sentenced pursuant to §2G1.1. To the extent that some advertising offenses (such as § 2252A(a)(3)(B)) will be sentenced pursuant to §2G2.2, we believe a two level enhancement should be provided for advertising. This could be accomplished either by adding a provision to subsection (b)(2) or by expanding the definition of "Distribution" to include advertising.

3. §2G2.2(b)(2) – "Defendant's Conduct" or "Offense Involved"

The Commission has recommended amending the language which triggers the different base offense levels in the consolidated §2G2.2; making the higher base offense level applicable only if "defendant's conduct" included the more culpable factors rather than if the "offense involved" the more culpable factors. The Department strongly disagrees with this approach. Such a change would insulate conspiracies from appropriate upward adjustments, contrary to the generally applicable federal sentencing scheme. We believe a defendant should receive an enhancement for distribution, for example, if he was involved in a conspiracy to distribute, even if he himself did not distribute the material. The Commission's proposal may be motivated by a concern that a defendant not receive an enhancement for distribution when he only received child pornography. This concern is valid. However, a better way to address the concern would be to add an application note making it clear that a defendant should be liable only for his own conduct, unless he is part of a conspiracy or criminal enterprise.

4. Enhancement for Bestiality or Excretory Material

We suggest that the Commission consider clarifying the enhancement in §2G2.2(b)(3) for material that "portrays sadistic or masochistic conduct or other depictions of violence" to ensure that it includes material containing bestiality or depicting excretory functions. Material that depicts bestiality or excretory functions is harmful in ways similar to that depicting sadistic or masochistic conduct or other depictions of violence, and we believe should be treated accordingly. The distribution of such material warrants an enhancement, because of the degradation inflicted on persons depicted in images. While we believe that there is an argument that bestiality and excretory material are already encompassed by the existing sadistic and masochistic enhancement, a clarification making it explicit should be considered.

5. Enhancement for Video Clips

We agree with the definition of "image" proposed by the Commission. However, we urge that an enhancement be provided for "moving images" such as video, streaming video, etc. The proposed definition correctly limits the definition of "image" to the visual depiction itself, rather than the humans depicted in it. Although "image" is not defined in 18 U.S.C. § 2256, the definition of "visual depiction" in § 2256(5) suggests that "image" properly refers to the visual depiction itself, rather than to each human depicted. Defining "image" to include each human depicted is somewhat inconsistent with § 2256 and probably would not make a significant difference in the vast majority of cases.

Determining how many "images" are in a video/movie clip is more complex. A definition that treated a video/movie and a still image as both being one image, we believe, would be arbitrary. A video/movie that contains even one second of sexually explicit conduct is a more serious item than a still image. The Motion Picture Association of American defines video as 24 frames per second. Each frame is equivalent to one still image. Thus, a one minute video is equivalent to 1440 still images. While counting each minute of video as 1440 images would be inappropriate, considering the increased harm caused by moving videos, a two or three level enhancement for offenses that involve video clips (defined as any type of moving images) would be appropriate.

6. §2G2.2(c)(1) Cross Reference to Production Guideline

The Department suggests clarifying the cross reference contained in §2G2.2(c)(1) (and similar cross references throughout the guidelines) so that it is clear that it applies when the defendant has, in any way, unsuccessfully sought or solicited a "minor" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The current wording of the cross reference invites the argument that it is only when the defendant seeks "by notice or advertisement," and not by direct means such as an e-mail sent to a "minor," that the cross reference is triggered.

B. Production of Child Pornography Offenses – §2G2.1

1. Choice of Base Offense Level

Similar to our analysis regarding §2G2.2, we believe the base offense level for offenses involving the production of child pornography should balance appropriate sentence length (arrived at in consideration of applicable mandatory minimum statutes) with the ability of specific offense characteristics to adjust sentences in appropriate cases. For production offenses, the mandatory minimum sentence was increased from ten to 15 years by the PROTECT Act, which lies within offense level 34 or 36. Similar to the analysis in determining the base offense level in §2G2.2, we believe a base offense level of 34 or 36 will ensure that the least serious offenses within Criminal History Category I will satisfy the mandatory minimum while sentences

for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress.[4]

2. Enhancement for Conduct Described in 18 U.S.C. §§ 2241 and 2242

We believe a four level enhancement is warranted if the production offense involved conduct described in 18 U.S.C. § 2241(a) or (b). The same conduct receives a four level enhancement under §2G1.3 and includes the most egregious aspects of sexual abuse, including force and threats of death. It is, however, a significant oversight that the almost equally reprehensible conduct described in 18 U.S.C. § 2242 has not previously led to an enhancement under these guidelines. Section 2241(a)(2), for example, includes causing someone to engage in a sexual act by threatening that person with death or serious bodily injury. Section 2242(1) includes engaging in a sexual act by otherwise threatening the victim. Similarly, § 2241(b)(2) includes engaging in a sexual act with a person after surreptitiously administering an intoxicant that impairs that person's ability to appraise or control his or her conduct. Section 2242(2) includes engaging in a sexual act with a person who is physically incapable of declining participation in that sexual act. The conduct described by both of these statutes involves an even higher level of culpability than the behavior typically covered by §2G2.1 and §2G1.3. Therefore, we believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242."

3. Choice of Enhancement for Sadistic or Masochistic Material

We believe the enhancement at §2G2.1(b)(2) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be four levels, consistent with that in §2G2.2(b)(3). Additionally, this enhancement should be broadened to include material containing bestiality or depicting excretory functions, as described earlier.

4. Choice of Enhancement for Distribution

We believe the table of enhancements for distribution in §2G2.2(b)(2) should similarly apply in the guideline for child pornography production. For example, there should be at least a five level enhancement for production of child pornography for pecuniary gain or the receipt of a thing of value. Similarly, an offense that involved the distribution to a minor should receive a five level enhancement. Other types of distribution should receive a two-level enhancement.

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[4]It is not clear to us that §1591 crimes should be referenced directly to §2G2.1. Rather, we believe such offenses would more logically be sentenced under §2G1.3 and §2G1.1. We do believe a cross reference to §2G2.1 would be appropriate in some cases.

II. Travel and Transportation Cases

A. Proposed Amendment to §2G1.3

1. Choice of Base Offense Level

A five year mandatory minimum prison sentence applies to crimes under 18 U.S.C. §§ 2422 and 2423(a), which is roughly equivalent to an offense level 24 or 26.[5] Hence, we believe the base offense level should be set at 24 or 26.

2. Clarification of Enhancement for Conduct Described in 18 U.S.C. § 2241

Variations of the enhancement contained in §2G1.3(b)(2) – for conduct described in § 2241 – are contained in other guidelines, such as §2G2.1(b)(4) in cases involving the production of child pornography. There are certain complexities in the cases covered by §2G1.3, however, which make this enhancement and its application note confusing. For example, a person convicted of sex trafficking of children under 18 U.S.C. § 1591 may be a pimp who used physical force against a minor to get the minor to engage in commercial sex acts with others. A defendant in such a situation might argue that because the conduct described in § 2241 involves engaging in a sexual act with a person by means such as force or the administration of intoxicants, the offense for which he was convicted is not subject to the enhancement unless he actually had sex with the minor. Similarly, a person may be convicted under § 1591 for harboring a minor knowing that the minor would be caused to engage in a commercial sex act. In addition, such a defendant might know that the pimps with whom he or she was working used physical force to obtain the compliance of minor victims. Such a person, who knowingly benefits from the use of force (by others) to cause minors to engage in commercial sex acts (with others), we believe, should also be subject to the enhancement contained in §2G1.3(b)(2). A clarification could be effected by adding a sentence such as "the enhancement in subsection (b)(2) is to be construed broadly to include all instances in which the offense involved the use of force or other conduct described in § 2241(a) or (b). It may apply even if the defendant did not personally use force against the minor or did not personally engage in a sexual act with the minor."

There is one additional complicating factor, which is that Congress has set a higher maximum sentence of life imprisonment for cases under § 1591 not only involving force, but also those involving fraud or coercion against victims less than fourteen years of age. See 18 U.S.C. § 1591(b)(1). Yet, an enhancement simply tied to conduct described in § 2241(a) or (b) would not cover an offense involving fraud, for example. Additionally, an initial review of other

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[5]Section 2G1.3 also applies to sex trafficking offenses, which includes the use of children for commercial sex acts.

statutes and guidelines involving sexual abuse of minors indicates that the age of fourteen is not chosen anywhere else as the cutoff point for liability or enhanced punishment. It may therefore be appropriate to have the enhancement in §2G1.3 tied more broadly to the use of force, fraud or coercion or to add an additional enhancement for offenses involving fraud or other conduct not covered by the enhancement for conduct described in § 2241.

3. Additional Enhancement for Conduct Described in 18 U.S.C. § 2242

As discussed above, we believe it is a significant oversight that the conduct described in 18 U.S.C. § 2242 has not previously triggered an enhancement under the guidelines. We believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242." Such an enhancement is especially advisable because cases involving conduct described in § 2242 were subject to a cross reference to §2A3.1 under previous guidelines and were thus treated as seriously as offenses described in 18 U.S.C. § 2241(a) or (b).[6]

4. Choice Between Option 1A or 1B

Both Option 1A and Option 1B provide for higher sentences for offenses that involve minors under the age of 12. Option 1A would do so through an enhancement while Option 1B would do so through a cross reference to §2A3.1. The language in Option 1B would also have the effect of cross referencing offenses involving minors of any age in cases involving conduct covered by §2A3.1. This includes conduct described in § 2241, which is already subject to an enhancement under §2G1.3(b)(2). We believe the enhancements in Option 1A provide a much clearer approach as long as the resulting offense level is as high as the offense level that would be imposed under §2A3.1; we believe an eight-level enhancement for offenses involving minors less than twelve years of age would be appropriate.

5. Enhancement for Minor Between the Ages of 12 and 16

Like the child pornography production guideline §2G2.1, §2G1.3 covers offenses involving sixteen or seventeen-year-old victims (for example, offenses under § 1591). Like §2G2.1, we think there should be a second enhancement for minors between the ages of 12 and 16. Under Option 1A, §2G1.2(b)(3) might read: "If the offense involved a minor who had (A) not attained the age of 12 years, increase by eight levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by four levels."

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[6]An application note should be added here as well to clarify that the enhancement applies to those such as recruiters or pimps who may not themselves apply force or coercion against a minor or have sex with a minor but who are nevertheless responsible for the use of such means in connection with the offense.

6. Choice Between Option 2A and 2B: Need for a Broader Enhancement

Because § 1591 cases involving minors are covered by this guideline, Options 2A and 2B are both overly narrow and would lead to inconsistent results. Options 2A and 2B provide an enhancement for the conduct described in 18 U.S.C. § 2423(d), which targets those who facilitate the travel of a participant knowing that the participant is engaging, or will engage, in illicit sexual conduct. Illicit sexual conduct includes both non-commercial and commercial sexual activity. Section 1591(a)(2) has a similar provision covering those who knowingly benefit from a venture involving the use of a minor in commercial sexual activity. This similarly culpable conduct should also result in an enhancement. In addition, §§ 1591 and 2423 both cover the activities of pimps, or those who directly entice, transport, or sell children for commercial sex acts. This extremely reprehensible conduct is not presently subject to any enhancement under §2G1.3. Perhaps the simplest solution is to replace 2A and 2B with an enhancement, such as: "If the offense involved a commercial sex act, increase by three levels." "Commercial sex act" could be further defined by reference to § 1591(c)(1).[7]

7. Multiple Victims

The language of subsection (d)(1) involving multiple victims, in combination with Application Note 7(A), makes it appear as if multiple victims listed in the same count of conviction should only be treated as if they were contained in a separate count of conviction for travel or transportation offenses. We believe this language should be clarified to indicate that victims listed in the same count in offenses under §§ 1591 and 2422 should similarly be treated as if they were contained in separate counts of conviction.

8. Comment on Subsection (d)(1)

The special instruction in subsection (d)(1) refers to "victim" instead of "minor." Due to the new definition of "minor," which includes undercover law enforcement officers, we believe "minor" should be substituted for "victim." While the definition of "victim" in Application Note 7 includes undercover law enforcement officers, using two different terms to cover the same situations could cause confusion. The similar instruction in §2G2.1(d)(1) uses the term "minor."[8]

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[7]As is the case with the cross reference contained in §2G2.2(c)(1) (and similar cross references throughout the guidelines), the cross reference in §2G2.4(c)(1) should make clear that it applies when the defendant has unsuccessfully sought or solicited a "minor" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

[8]Application Note 6 addresses the cross reference to the production guidelines contained (c)(1). While the cross reference uses the broadly-defined term "minor," the application note uses the term "person less than 18 years of age." We believe this language is confusing and should be changed to "minor."

B. Proposed Amendment to §2G1.1

While the proposed new §2G1.1 would cover only cases involving adult victims, it would nonetheless apply to a broad range of offense conduct. It would cover cases under 18 U.S.C. §§ 2421 and 2422(a), in which the participation of the person transported or enticed to travel for prostitution may have been entirely voluntary; it would also cover 18 U.S.C. § 1591 offenses, in which it must be proven that the defendant knew that force, fraud or coercion would be used to cause a person to engage in a commercial sex act. Given this background, we believe the combination of the enhancement in subsection (b)(1) for "physical force, fraud or coercion" and the cross reference at (c)(1) for criminal sexual abuse is very confusing. Criminal sexual abuse refers back to §§ 2241 and 2242, which include everything subject to the enhancement in subsection (b)(2), except fraud and perhaps some sort of coercion. As an initial matter, then, all § 1591 cases involving adults would seem eligible for the enhancement contained in (b)(2). If the cross reference is properly applied, however, the only § 1591 cases remaining under §2G1.1 would be those involving fraud or some sort of coercion not described in §§ 2241 or 2242. A subset of cases under 8 U.S.C. § 1328 and 18 U.S.C. §§ 2421 and 2422(a) would also be subject to the enhancement under (b)(2) or to the cross reference. The cross reference and enhancement are also marked by some of the complexities discussed in relation to similar enhancements under §2G1.3 involving culpability of those who recruit or harbor a victim knowing that force will be used to cause the person to engage in a commercial sex act but may not themselves use force against the victim or have sex with a victim. We therefore recommend that the enhancement be narrowed so that it does not overlap with the cross reference and that the cross reference itself be clarified.

1. Narrowing the Enhancement for Force, Fraud or Coercion

The enhancement could be changed along the lines of the following: "[i]f the offense involved fraud or coercion other than that described in 18 U.S.C. §§ 2241(a) or (c) or 2242, increase by four levels." The application notes could then clarify that all § 1591 convictions involving adult victims should be subject either to the enhancement or to the cross reference and take out references to offenses involving force.

Application Note 2 for subsection (b)(1) is also somewhat problematic in its current form, because it indicates that the enhancement "generally will not apply if the drug or alcohol was voluntarily taken." In contrast, the cross reference at subsection (c)(1) would apply in some circumstances where drugs or alcohol were voluntarily taken, because such situations are sometimes covered by § 2242. It is anomalous to send offenses involving victims who were unconscious because of voluntary intoxication, for example, to a more serious guideline through the application of the cross reference at (c)(2) but not to apply an enhancement to such cases. Accordingly, we recommend that the last sentence of Application Note 2 be deleted.

2. Clarification of Cross Reference

We believe the cross reference should be clarified to indicate that all offenses involving force or coercion, such as threats of violence, are subject to the cross reference. Whether the language of the cross reference is changed to parallel the language of the enhancement in §2G1.3(b)(2) or not, it is essential to clarify the cross reference through the application note so that it is clear that a pimp who uses force to cause a person to engage in prostitution is subject to the cross reference.

Similar to the application note for §2G1.3(b)(2), Application Note 4 should be revised to clarify that the cross reference applies when the defendant knowingly participates in an offense involving force or threat. The application note could, for example, include the following:

> "Conduct described in 18 U.S.C. § 2241(a) or (b)" means using force against the victim; threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the person unconscious; or administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. "Conduct described in § 2242" means threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or engaging or causing another to engage in a sexual act with the victim if the victim is incapable of appraising the nature of the conduct; or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved the use of conduct described in 18 U.S.C. §§ 2241(a) or (b) or 2242. It may apply even if the defendant did not personally use force against the victim or did not personally engage in a sexual act with the victim.

III. Obscenity and Misleading Domain Names – §2G3.1

Similar to our earlier comments, the enhancement in §2G3.1(b)(4) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be broadened to include material containing bestiality or depicting excretory functions.

IV. Conditions of Probation and Supervised Release – §5B1.3 and §5D1.3

We recommend that the language at §5B1.3(d)(7)(B) and §5D1.3(d)(7)(B) read, "A condition limiting or prohibiting the use of a computer or an interactive service in cases in which the offense involved the use of such items." We believe that "or prohibiting" should be included to make explicit the court's ability to ban computer use by the defendant. Additionally, we believe "the offense involved" language is preferable to the "defendant used" in order to account for situations in which the defendant was part of a conspiracy or criminal enterprise.

V. Chapter 2, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

A. Proposed §2A3.1 – Option 1, Option 2, or Option 3

The Commission has provided three options in §2A3.1 to cover cases involving the production of child pornography. Option 1 does not appear separately to account for circumstances in which the offense involved the production of child pornography. Option 2 does account for such circumstances, but by way of an enhancement, which in our view is more likely to cause confusion than a clear cross reference. Accordingly, we support Option 3, as it provides an appropriate cross reference to the production guideline in §2G2.1 and thus ensures that all production cases will be sentenced under the same guideline.[9]

B. Proposed §2A3.2 – Base Offense Level

As currently drafted, the base offense level for §2A3.2 offenses will be 18, with no enhancements for violations of Chapter 117. Given that §2A3.2 would be the guideline applicable to an offender who had sex with a 12-year-old (the oldest victim typically sentenced under this guideline would be 15), we believe the base offense level should at least be commensurate with that for enticing a child (who may be an undercover officer) to engage in sexual activity. Moreover, an offender who had sex with an 11-year-old would be sentenced under §2A3.1, which under any proposal under consideration would have a base offense level of at least 27, and perhaps as high as offense level 36. Under these circumstances, we do not

[9]If Option 3 is used, we note that Application Note 6 (discussing the enhancement under Option 2 if the offense involved the production of child pornography) should be deleted. If the Commission selects Option 1, we recommend that the base offense level under §2A3.1(a)(1) be 36, and the base offense level under §2A3.1(a)(2) be 30. If Option 2 is chosen, we recommend that the base offense level under §2A3.1(a) be 30. Moreover, if Option 2 is chosen, we recommend that the enhancement under §2A3.1(b)(7) be three levels to avoid inconsistency with §2G2.1. Overall, these recommendations are based on our belief that §2A3 guidelines should be increased to maintain proportionality with increases in the base offense levels in the §2G guidelines.

believe that there should be such a great disparity between the base offense levels for §2A3.1 and §2A3.2. Accordingly, we recommend that the base offense level for §2A3.2 be increased.[10]

C. Proposed §2A3.3 – Base Offense Level

Because we believe that increases in the §2A3 guidelines should be increased to maintain proportionality with the increases in the §2G guidelines, we recommend that the base offense level for §2A3.3 offense be increased to 12. This increase will mean that even if neither enhancement applies and the offender receives all three levels for acceptance of responsibility, the guideline range would still call for at least four months' imprisonment.

D. Proposed §2A3.4

We support raising the base offense level under §2A3.4, as it appears that many offenses sentenced under this guideline involve attempted forcible sexual acts where it is difficult to prove that the defendant had the intent to commit a sexual act rather than sexual contact.

VI. Responses to Issues for Comment Not Addressed Above

A. Violent Child Pornography

The Department agrees with the Seventh Circuit's decision in United States v. Richardson, 238 F.3d 837 (7th Cir. 2001), finding strict liability for receiving violent child pornography. We do not believe that the Commission should provide a definition of sadistic or masochistic conduct or other depictions of violence that would unduly constrain courts in determining whether specific images portray sadistic or masochistic conduct. If a definition is proposed, it should be broad enough to include conduct that is per se painful, coercive, degrading or abusive, such as material portraying sexual penetration of prepubescent minors. As we discuss above, we recommend that the Commission clarify that the enhancements for material that "portrays sadistic or masochistic conduct or other depictions of violence" include material depicting bestiality or excretory functions.

B. Offenses Under 18 U.S.C. § 2425

We recommend that offenses under 18 U.S.C. § 2425 be sentenced pursuant to the proposed §2G1.3. We do not believe that § 2425 offenses should be analogized to harassment or threatening communications offenses, because § 2425 offenses include, for example, defendants

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[10]While we recognize that an argument can be made that the operation of §4B1.5 (applying to repeat and dangerous sex offenders against minors) in most cases will reduce the disparity, we believe that relying only on §4B1.5 to address the issue may be inadequate because §4B1.5 will not apply in all §2A3.2 cases.

trafficking in child prostitutes and using interstate facilities to transmit information about the minors. Thus, §2G1.1, which now applies only to offenses involving adults, would not be the appropriate guideline. Similarly, §2A6.1, which covers offenses involving threatening or harassing communications and has a base offense level of 12, would also be inappropriate, because its base offense level does not adequately account for the severity of the conduct involved. We note that other offenses similar to § 2425 offenses, such as §§ 1591, 1421, 2422(b), and 2423 offenses, are all sentenced pursuant to §2G1.3. With respect to the Commission's question concerning whether any specific offense characteristic should be added to a guideline to account for § 2425 conduct, we believe that the enhancement at §2G1.3(b)(7) is sufficient.

C. Incest

Incest is, of course, a particularly heinous crime and usually involves both an abuse of trust as well as care, custody, or control of the victim. We have seen that in cases where incest has occurred, courts have sometimes applied the abuse of trust guideline in §3B1.3. While this guideline seems particularly applicable to incest crimes, we believe the Commission should explicitly specify in §3B1.3 that offenses involving incest should receive the two-level enhancement. The enhancement at §3B1.3 should be in addition to any available enhancement for care, custody, or control of the victim, which may, but does not always, apply. While we recognize that the Commission is considering an enhancement for offenses involving incest in the §§2A3.1 through 2A3.4 and §§2G1.1 through 2G3.1 guidelines, we believe that including such an enhancement at §3B1.3 would maximize the likelihood that the enhancement were applied in all appropriate cases. The relationships that should be listed in §3B1.3 include:

1) Father and daughter or stepdaughter or son or stepson;

2) Mother and daughter or stepdaughter or son or stepson;

3) Siblings of the whole blood or of the half blood;

4) Grandparent and grandchild;

5) Aunt and nephew or niece; and

6) Uncle and nephew or niece.

D. Interactive Computer Service

We believe the definition of "interactive computer service" used in the guidelines is broad enough to cover Internet-capable phones or phones that can take digital photographs and transmit them directly to the recipient.

EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

I. Introduction

We commend the Commission for having had the foresight to convene the Advisory Group on Organizational Sentencing Guidelines and in so doing fulfilling the Commission's ongoing statutory responsibility to regularly review the sentencing guidelines, including the guidelines for organizational crime. We also want once again publicly to thank the members of the Advisory Group for their service and for the thoughtful and comprehensive report the Group prepared.

The proposed amendments to the sentencing guidelines for organizational defendants, recommended by the Advisory Group and published by the Commission, are intended primarily to give greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendments add to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies for the first time in the body of the sentencing guidelines the purposes of an effective compliance program, sets forth more clearly the seven minimum steps for such a program, and provides greater guidance for their implementation. We strongly support these amendments. We believe compliance programs are key to reducing crime within organizations and that the sentencing guidelines for organizations have been not only a real innovation but also a great success in providing incentives for organizations to develop and operationalize these programs. The proposed amendments will communicate to the corporate community, with greater emphasis and clarity, the federal policy of encouraging self-policing through effective compliance programs and self-reporting if violations of law are detected. Moreover, the continuing policy of ascribing a benefit to having such programs will, we believe, likely lead to better compliance programs and practices and increased information to corporations about monitoring their own conduct and self-reporting any misconduct.

Despite our general support for these amendments, we do have concerns about a few specific provisions of the proposed amendments.

II. Rebuttable Presumption When High-Level Personnel Are Involved In Crime

Currently, there is a provision in §8C2.5(f) that prohibits an organization from receiving a three level downward adjustment to its culpability score for having an effective compliance program if an individual within high-level personnel of the organization, or a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed, or an individual responsible for the administration or enforcement of a compliance program participated in, condoned, or was willfully ignorant of the offense; and there is a rebuttable presumption against receiving the adjustment if an individual within substantial-

authority personnel participated in the offense. The Commission proposes to delete this provision in its entirety and replace it with one that creates a rebuttable presumption against receiving the adjustment where high-level personnel of the organization participated in, condoned, or were willfully ignorant of the offense. The synopsis to the proposed amendment indicates that "this modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f)." In its issues for comment, the Commission "requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?"

We oppose this proposed change for several reasons. First, we do not believe the proposed amendment logically is suggested by or flows from the Advisory Group study, report, or recommendations. The Advisory Group report notes that small organizations rarely qualify for the three level downward adjustment to their culpability score for having an effective compliance program. Two causes are mentioned: one, small organizations frequently fail to establish effective compliance programs, and two, the involvement of high-level officials in the commission of an offense is likely in the case of the small, closely-held organizations that are in fact prosecuted in federal court and that do make up the majority of organizations sentenced under Chapter 8. Report at 131-32. The only recommendation related to small organizations made by the Advisory Group is that "the Sentencing Commission devote resources to reaching and training this target audience (small organizations), perhaps through coordinating with the Small Business Administration and other appropriate policy makers." Report at 133. The Report provides little or no support for the proposed amendment beyond the language already quoted.

Second, we do not believe simply making it easier for small organizations to qualify for the adjustment for having an effective compliance program by creating a litigatable issue is good public policy. By definition, it is more likely that crime involving small organizations (as compared to larger organizations) will involve high-level personnel. But whether in a small organization or large, when high-level personnel are involved in crime, there can be no effective organizational self-policing and therefore no downward adjustment for an effective compliance program is warranted.

Yet, even if the Commission found the small business rationale compelling, the proposed amendment is considerably overbroad. It sweeps away the current automatic preclusions on receiving the adjustment for high-level personnel involvement in the offense, as well as the rebuttable presumption against receiving the adjustment for substantial-authority personnel involvement in the offense, for all organizations, large and small. There is no discussion in the Report concerning the need to make it easier for large organizations to qualify for the adjustment despite high-level or substantial-authority personnel involvement in the offense of conviction. In

fact, such a change would be directly contrary to the thrust of the Report, which is to increase the involvement of governing authorities and organizational leadership both in the oversight of compliance programs and, more significantly, in creating law-abiding organizational cultures.

> [T]he corporate scandals that exploded shortly following the tenth anniversary of the adoption of the organizational sentencing guidelines demonstrated that the involvement of officers and directors in corporate crime was not confined to small businesses. The corporate scandals of 2002 greatly contributed to the public's lack of confidence in the capital markets. In virtually all of the scandals, the alleged malfeasance occurred at the senior management and/or governing authority level. Where there was no actual malfeasance by members of the governing authority, there were often instances of negligence.

Report at 57.

As a result of this finding, the amendments now under consideration would require higher levels of awareness of, and involvement in, compliance programs by governing authorities and organizational leaders in order for those programs to be considered to be effective. They also propose that to be considered effective a compliance program must not only be designed to prevent and detect violations of law, but it must also "promote an organizational culture that encourages a commitment to compliance with the law." Proposal at 60. We believe to propose, at the same time, an amendment that would make it easier to qualify for the adjustment where there is actual involvement in (or willful negligence of) the instant offense by high-level and substantial-authority personnel is inconsistent at best. The involvement of these personnel in compliance programs is the clearest indication of a law-abiding organizational culture and their involvement in criminal activity the clearest indication that the organization's compliance program is ineffective. That was the reason that the limitations on receiving the adjustment were originally imposed, and the spectacular failure of the leadership of numerous large organizations in recent years to obey the law is the strongest possible argument in favor of retaining them.

For example, in many recent major international antitrust/cartel prosecutions, including the prosecutions of Archer Daniels Midland Company, UCAR International Inc., and F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft, high-level personnel participated in and, in fact, were among the leaders of the cartels. It is impossible, as many of the proposed amendments put forward by the Advisory Group and the Commission recognize, to create a law-abiding organizational culture from the bottom up; respect for the law must begin at the top and permeate downward by means of an effective compliance program. If an organization is rotten at the top it cannot be the good corporate citizen that the adjustment for having an effective compliance program was designed to reward.

This is true to an equal, if not greater, extent in small organizations as in large. Clearly, there should be distinctions between what large and small organizations must do to establish effective compliance programs. An effective compliance program in a small organization may be much less formal than in a large organization. The Commission proposes to add commentary to the guidelines making this plain, and we support this commentary. "For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business." This proposal recognizes that in a small organization the personal involvement of an owner/manager is the key element to creating an effective compliance program. Yet how can personal involvement create a law-abiding organizational culture when the manager or proprietor is engaged in unlawful activity?

To the extent that small organizations are not receiving credit for having effective compliance programs, the better solution is the one identified by the Advisory Group: making greater efforts to educate small companies on their obligations under the law and working with them to establish effective compliance programs, rather than giving them credit for compliance programs despite the participation of their owners and high-level managers in criminal activity. Adopting the proposed amendment, even revised to apply only to small organizations, would send exactly the opposite message to the one being sent by virtually every other change being proposed by the Commission regarding compliance programs.

III. Waiver of Attorney-Client Privilege and Work Product Protections

There has been considerable debate – within the Advisory Group and beyond – about the circumstances under which an organization ought to be asked to waive the attorney-client privilege or its work product protections in order to receive a reduction in its culpability score for cooperation with the government or to receive a downward departure for providing substantial assistance in the investigation or prosecution of another. The Department's position on this has been, and continues to be that what is required to receive these reductions is simply cooperation and substantial assistance; and that neither waiver of the attorney-client privilege nor waiver of the work product protections are prerequisites to receiving these reductions. We recognize and the Advisory Group recognized, however, that in many cases, cooperation and substantial assistance will not be fully achieved unless there is a waiver of some kind. It comes down to a case-by-case analysis, depending on the particular circumstances of the investigation.

It is for these reasons that we accept the proposed new language in §8C2.5, Application Note 12, that clearly indicates that in certain circumstances, but not all cases, a waiver will be necessary to receive the reduction in the culpability score for cooperation. Where we believe the Application Note falls a bit short is in recognizing that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver if the privilege or work product protection is necessary for full cooperation.

The current guideline Application Note 12 correctly points out that "[a] prime test of whether an organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." We believe that in determining whether sufficient cooperation has occurred, the sentencing court should consider all evidence but should give extra weight to the government's assessment of the defendant's cooperation and the government's assessment of the sufficiency of the cooperation in identifying the nature and extent of the crime and those responsible. We think the language of the proposed Application Note would be improved with the following:

> If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in other circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. Substantial weight should be given to the government's evaluation of the extent of the defendant's cooperation and whether waiver of either the privilege or work product protections is necessary to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

IV. Substantial Assistance

These same principles surrounding the waiver of the attorney-client privilege and the work product protections apply in the context of substantial assistance motions. However, one critical difference between substantial assistance departures and reductions in culpability score for cooperation is that under existing statutes and guidelines, the availability of a substantial assistance departure is triggered only by the government. Simply put, departures for substantial assistance pursuant to 18 U.S.C. § 3553(e), §5K1.1, or §8C4.1 may not be made absent a motion by the government. In Wade v. United States, 504 U.S. 181, 185-86 (1992), the Supreme Court clearly held that the making of a substantial motion is the sole prerogative of the government. The only authority a district court has to review a prosecutor's refusal to file such a motion and the only authority a court has to grant a remedy is if the court finds "that the refusal was based on an unconstitutional motive." Id. The Court gave as an example of an unconstitutional violation the refusal to file the morion "because of the defendant's race or religion." Id.

We believe that proposed Application Note 2 in §8C4.1, which mirrors Application Note 12 in §8C2.5, suggests that the government's determination of whether or not to file a substantial assistance motion is reviewable, at least to the extent that the government's determination may hinge on a waiver of the privilege or waiver of the work product protections. We think this

suggestion is at best confusing and at worst contrary law. We strongly urge that this proposed application note be eliminated.

BODY ARMOR

We support the Commission proposal to create a new guideline, at §2K2.6, to cover the new offense of possessing, purchasing, or owning body armor by a violent felon – 18 U.S.C. § 931. We believe that a base level of 12 is appropriate for the new guideline, which would provide a sentence of 8-14 months for a typical offender in Criminal History Category II, well below the three year statutory maximum penalty. In creating this new crime, Congress found that body armor enables armed criminals to both cause more harm and be more difficult to apprehend. The congressional findings specifically cite three separate incidents of law enforcement officers who were killed during shootouts with armed criminals shielded by body armor. We share Congress's belief that armed criminals protected by body armor are an extremely serious threat and believe that a base offense level of 12 properly reflects that threat.

We further believe that if a violent felon uses body armor in the commission of any offense, that a sentence at the statutory maximum would be appropriate, irrespective of the offender's criminal history score. We therefore recommend that a four level enhancement be provided for such conduct.

PUBLIC CORRUPTION

I. Introduction

We support the majority of the proposed changes to the public corruption guidelines, and, in particular, agree with the effort to reduce the emphasis on the dollar amounts involved in the crime in calculating the offense level under the primary corruption guideline, §2C1.1. We appreciate the opportunity over the course of the last several months to work with the Commission to develop a workable and effective sentencing policy for corruption cases. We recognize, however, many of the technical difficulties related to sentencing policy for these cases. For example, we have been working with the Commission closely on the proposed consolidation of the guideline for bribery offenses (§2C1.1) with that for honest services fraud (§2C1.7). In our view, the consolidation is not necessary and raises issues stemming from the special nature of honest services fraud cases. Several of our specific comments are designed to address these issues and insure that no substantive change in the coverage or scope of the guidelines results from the consolidation. For example, we do not think it is the intent of the Commission – and we oppose – any amendments that will have the effect of reducing the number of defendants who will receive an enhancement as a result of holding a high-level decision-making or sensitive position. We have included, at the end of this section of the letter, a draft of the applicable guidelines which include revisions along the lines of our comments below.

II. The Proposed Consolidated Guideline at §2C1.1

A. Title

The title of the proposed new §2C1.1, which is a product of the consolidation with §2C1.7, we believe should include the phrase "Conspiracy to Defraud by Interference with Governmental Functions," which is currently included in the title of §2C1.7. Similarly, the Statutory Provisions section of the commentary should include a reference to18 U.S.C. § 371. As mentioned above, we do not believe it is the intent of the Commission, and we do not believe the consolidation of §2C1.1 and §2C1.7 should result in any change to the sentencing for this conspiracy offense, which is closely related to the honest services mail and wire fraud offense, but which is grounded in a different statute. Absent this revision, an inference will be drawn that this conspiracy offense is no longer covered by this guideline.

B. More Than One Bribe

The proposed specific offense characteristic §2C1.1(b)(1) would require a determination of whether the offense involved more than one "incident" of bribery or honest services fraud. In the context of corruption cases, and honest services fraud in particular, the use of the term "incident" would be ambiguous and difficult to apply. We suggest two alternative ways of dealing with this problem. First, the two level increase could be folded into the base offense level, raising it to a level 14, and eliminating any litigation regarding the issue. Given that this enhancement applies in a large majority of cases, we think this would be an appropriate step. Second, if the enhancement remains, we propose that it remain as it is worded in the current guideline, to avoid any confusion.

C. "Unlawful Payment"

The proposed language for §2C.1.1(b)(2) reflects the addition of a new phrase: "unlawful payment." We believe that the use of this new term, with a new definition in the proposed commentary, is unnecessary, and will inappropriately miss instances that occur frequently in honest services cases and cases involving conspiracies to defraud the United States. In those cases, the corruption may occur despite the absence of any payment. For example, an honest services case might involve a city council member who has an undisclosed financial interest in a company that is a bidder on a contract on which the city council votes. The city council member's hidden financial interest is not in the form of a payment, but it is a financial interest that causes corruption, and it should be taken into account in calculating the appropriate offense level.

Instead, we suggest that, if there is a consolidated guideline, the language that is currently used in §2C1.7(b)(1)(A), regarding honest services cases, be used in the new, consolidated guideline. Specifically, we believe that the specific offense characteristic should begin with the following language: "If the value of anything obtained or to be obtained by a public official, the

benefit received or to be received in return for the payment, or the loss to the government from the offense . . ." This broad language covers all things of value obtained by public officials as a result of the offense, whether it is in the form of a payment or, as in some honest services cases, an undisclosed financial interest that may take a form other than an actual payment.

D. Enhancement for Payment to a Public Official – §2C1.1(b)(3)

We agree with the proposal to make this enhancement cumulative with the enhancement for the monetary amount, rather than as an alternative. We believe that the enhancement should be four levels – currently it is eight – and also agree with the proposed a minimum offense level of 18.

We are concerned about the use of the term "payment" in this specific offense characteristic as well. As discussed above, this term will not capture aggravating conduct in many honest services cases, which do not involve direct payments to public officials. The proposed enhancement begins with the following language from the bribe guideline: "If the offense involved an unlawful payment for the purpose of influencing an official act of a public official [holding a high-level position] . . ." Consistent with the language currently used in §2C1.7, we suggest that the enhancement should simply read: "If the offense involved [a high-level official] . . ."

We have several concerns regarding the proposed language describing the officials who will qualify for this enhancement: "a public official in a high position of public trust." We believe that the proposed change will narrow the scope of the types of officials who will qualify, thus lowering the total offense levels in corruption cases. In addition, we believe that this revision to guideline language and commentary that has been used for many years will unsettle matters unnecessarily.

First, for many years now, this enhancement has applied to all elected officials, and, under the proposed amendment, elected officials would no longer automatically receive this enhancement. We believe that this bright line rule is effective and that it is important that this enhancement apply to any public official who is elected by the voters. Regardless of the particular title that a person holds, when a populace or government determines that a position is of sufficient importance that the officeholder should run for office and be elected by the voters, that person holds a position of elevated public trust that warrants a sentencing enhancement if corrupted. We are not aware of any federal case in which this enhancement has been applied to an elected official whose authority and position of trust did not warrant such an enhancement. To the extent that courts may have been hesitant to apply the enhancement in a particular case, that hesitancy will be reduced by the fact that, in most cases, the enhancement will now be only four levels, rather than eight.

Second, the proposed language does not include individuals who hold "sensitive" positions, as the current guideline does. Thus, for example, there is no enhancement for someone who is not an "agency head" but who holds a position in which he is entrusted with particularly sensitive information or decisions. Similarly, we believe that a juror holds a sensitive position, but not a "high position," and, as the proposed commentary indicates, an offense involving a juror should qualify for this enhancement. If the language regarding sensitive positions is removed, we are concerned that the enhancement will apply only to "agency heads."

Third, the proposed commentary indicates that the "high position of public trust" involves a greater level of trust than that required under §3B1.3 (Abuse of Trust). The language in the commentary to §3B1.1 indicates that §3B1.1 applies only where the public official has "substantial discretionary judgment that is ordinarily given considerable deference." By placing the bar even higher than this already elevated level, the proposed §2C1.1(b)(3) enhancement will apply to a narrower range of cases than the enhancement in the current guideline. We do not believe that the amendments should reduce the range of cases in which this enhancement will apply.

Finally, the language that is currently employed in §2C1.1 and §2C1.7 ("high-level decision-making or sensitive position") and accompanying commentary has been used and interpreted by prosecutors, probation officers, and the courts for years now. We believe that adopting new language will unsettle matters considerably as the courts attempt to discern precisely how much higher the new bar should be placed relative to where it has been. We do not see a corresponding benefit to be derived from the change.

E. Enhancement for Public Officials

The proposed amendment includes an enhancement for defendants who are themselves public officials, as opposed to the defendants who bribe and corrupt them. Although we agree with a two level enhancement for public officials as part of the overall revisions proposed by the Commission, we note that this automatic enhancement may be inconsistent with proposed Application Note 8, which indicates that the non-public official may be more culpable in some cases. We do not see any need for this proposed application note, given that it should be clear to prosecutors, probation officers, and judges that the relative culpability of participants in any crime depends upon their individual roles in the crime.

F. Enhancement for Border Related Crimes

We agree with the proposal to add an enhancement for an offense that involves allowing people, vehicles, and cargo into the county. We do not, however, believe that the enhancement should single out the United States Customs Border Protection Inspectors for the enhancement. Instead, we think it should apply in any case involving anyone, including a Border Protection Inspector, who commits an offense that permits things to enter the country illegally. The

potential defendants could include data entry personnel, administrative assistants, supervisors, law enforcement personnel, and the people who corrupt them.

We believe that the enhancement should not use the term "unlawful payment." As discussed above regarding §2C1.1(b)(2), we believe that this will fail to cover certain forms of honest services mail and wire fraud, or conspiracies to defraud the United States.

G. Proposed Application Note 1 – Definitions

We do not believe that there is any need to define the term "bribe." There is no such definition in the current guideline or in title 18, and we are not aware of any difficulty caused by this absence. We also do not believe that the term "official act" should be included in §2C1.1(b)(3), and thus see no reason to include it in the definitions. We note that bribery includes instances in which the public official refrains from taking some official action, 18 U.S.C. § 201(b)(1)(B), and instances that involve defrauding the government without taking official action, 18 U.S.C. § 201(b)(1)(B). As a result, using this term in the guideline may result in excluding certain bribery offenses from the reach of the enhancements. We do not believe that this was the intent of using and defining this term.

We do not believe that there is any need for a definition of the term "public official." If such a definition is included, we believe that it should simply parallel the definition in 18 U.S.C. § 201(a)(1), which is designed to include individuals, such as government contractors, who act "for or on behalf of" the government under some official authority. See, Dixson v. United States, 465 U.S. 482 (1984). We also believe that the language in the proposed definition regarding a government contractor and the contractor's position of trust "with respect to a government agency" is not sufficiently clear.

As discussed above, we do not believe that the term "unlawful payment" should be used or defined in the guideline.

H. Cross References

We believe the cross references for cases where the offense was committed to facilitate another criminal offense or to conceal or obstruct the investigation of another offense are important and should be maintained. For example, in a case in which a law enforcement officer solicits a bribe or extorts a payment from a drug dealer, this cross reference provides a vehicle for insuring that the offense level for the bribe or extortion will reflect the relative seriousness of the drug dealer's underlying crime. Department prosecutors have used this cross reference in such cases, and obtained substantially higher (and appropriate) sentences than would have applied without the cross-reference.

I. Issue for Comment – Election and Balloting Integrity

In response to one of the issues for comment, we think the Commission should seriously consider the addition of a two level enhancement for a bribe, extortion, or honest services offense that may affect the integrity of the balloting, voting, and election process. For example, such an enhancement might apply to an offense involving a local election official or clerk who does not hold a "high level" position, but whose position is important to the integrity of the election process.

II. Gratuity Offenses

We agree with the Commission that the gratuity guideline should be amended proportionally with the bribery guideline and that the language used should parallel the language used in the bribery guideline. However, all of the language adjustments that we propose for the bribery guideline, to ensure coverage of honest services fraud and conspiracy to defraud the United States, need not be made to the gratuity guideline.

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§2C1.1. **Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud the United States by Interference with Governmental Functions**

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by **2** levels.

(2) If the loss to the government or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greatest (A) exceeded $2000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(4) If, at the time of the offense, the defendant was a public official and the offense involved an abuse of the defendant's official position in any manner, increase by **2** levels.

(5) If the offense involved obtaining (A) entry into the United States for a person, a vehicle, or cargo; (B) a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) a government identification document, increase by **2** levels.

* * *

<u>*Application Notes:*</u>

1. "Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, law enforcement officers, and other governmental officials with similar levels of responsibility. It also includes jurors and election officials because of the sensitivity of the processes over which they have influence.

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§2C1.2 **<u>Offering, Giving, Soliciting, or Receiving a Gratuity</u>**

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by **2** levels.

(2) If the value of the gratuity (A) exceeded $2000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by

the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **15**, increase to level **15**.

(4) If, at the time of the offense, the defendant was a public official and the offense involved an abuse of the defendant's official position in any manner, increase by **2** levels.

* * *

Application Notes:

1. "Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, law enforcement officers, and other governmental officials with similar levels of responsibility. It also includes jurors and election officials because of the sensitivity of the processes over which they have influence.

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DRUGS (INCLUDING GHB)

I. GHB / GBL

Two options are provided for raising sentencing levels for GHB (gamma hydroxybutyric acid) and GBL (gamma-butyrolactone).[11] For GHB, Option One would effectively set penalties so that 1 gallon (3.785 liters) of GHB would result in offense level 26 and 10 gallons in offense level 32. Option Two would make five gallons (18.925 liters) trigger offense level 26 and 50 gallons trigger offense level 32. Either option would be a substantial improvement over the current guidelines, which require over 13 gallons (100,000 "units" as defined at §2D1.1(c) (Drug Quantity Table), Note (F)) to reach offense level 26.

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[11]Both options are expressed in the proposed guidelines as liter equivalents to marijuana. GHB and GBL are illicitly distributed both as liters and gallons.

We support Option One, because we believe it is an appropriate approach to sentencing this serious drug of abuse and tool of sexual predators. To begin with, mid-level dealers work in quantities ranging from several ounces to a few gallons, and high-level dealers often sell multi-gallon quantities (even up to 55-gallon drums). We believe it is critical that the ten year guideline sentence apply to most distributors at that level. Second, while GHB is, pharmacologically speaking, a depressant, several factors with respect to its abuse and trafficking counsel against a strict dose-for-dose comparison to heroin or other Schedule I depressants in setting the guideline penalty.

- Perceived effect. Regardless of pharmacology, GHB is not only abused for its depressant /euphoric effects on the central nervous system; it is also abused for its perceived hallucinogenic effects (i.e., altered sensory sensations). GHB is more likely to be trafficked along with other club drugs that have widely accepted hallucinogenic effects, such as MDMA, ketamine and LSD. At least some segments of the abusing population ingest it for these effects, rather than its depressant properties. A very recent study stated: "[o]f the known motives for using GHB, 80% reported psychic effects."[12] GHB's popular street names "liquid ecstasy" or "liquid x" illustrate its close tie to MDMA in the abusers' minds and shows the correlation it has with club drug culture. New GHB guidelines should recognize these trafficking patterns and perceived effects.

- Young user profile. GHB is a "club drug" abused primarily by young people (though not quite as young as MDMA). DAWN statistics for 2001 indicate that 58% of drug-related emergency room episodes involved individuals aged 25 and younger.

- Use in combination. GHB is frequently used with other drugs – most often alcohol – which compounds its effect. According to the study cited above, 84% of GHB users reported using it with other drugs, including alcohol (64%), cocaine (15%), or marijuana (14%).

- "Date rape" drug. GHB is now the most prevalent drug used by sexual offenders to commit drug-facilitated sexual assaults.[13] Neither the availability of the alternative charge in 21 U.S.C. § 841(b)(7) in certain cases, nor an enhancement for drug-facilitated sexual assault along the lines being considered by the Commission, would sufficiently account for this uniquely pernicious use of the drug at the trafficking level of mid- and high-level distributors that are generally the targets of federal prosecution.

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[12]Maxwell, J.C.; *Patterns of Club Drug Use in the U.S., 2004*, Gulf Coast Addiction Technology Transfer Center, Univ. of Texas at Austin, February 2004.

[13]One street name for GHB is "easy lay."

- Ease of trafficking and concealment. GHB is easy to manufacture from widely available precursor chemicals, which are sold under the thin disguise of being "cleaning agents," "organic solvents," and the like. A drug this easy to make, and whose precursors are this easy to traffic and conceal, should be given special consideration.

- High profit margin. Like many other synthetic drugs of abuse, the profit margin for GHB is very high. Gallons of the precursors GBL or 1,4-butanediol might sell at wholesale over the Internet for about $200. They may then be broken down and sold in 4-ounce bottles. Later, after simple conversion to GHB and passing down the distribution chain, capfuls or "drops" of 1-5 grams may eventually be sold at retail for between $5 and $30, with $10 being the prevailing rate at rave events. At each stage, the solution may be diluted several times, multiplying the profit margin. Given that the initial gallon costs only $200 (undiluted) and produces about 1,000 doses, the profit margin is astounding.

In addition, more than for any other Schedule I controlled substance, distributors use the Internet to sell GHB and its analogue (and precursors). This permits high-level traffickers to work in much larger quantities than smaller traffickers, making the 10:1 quantity ratio (between the mid-level and high-level sentences) built into the guidelines somewhat inapposite to the context of Internet GHB/GBL trafficking. The guideline enhancements for use of the Internet, which we address below under "Issues for Comment," would have particular relevance for mid- to high-level GHB traffickers.

With respect to GBL as a precursor chemical addressed in §2D1.11, we understand that this guideline tracks the quantities under the drug guideline, with certain fixed quantity "discounts" used by the Commission. Thus, all things being equal, we expect that whichever decision is made with respect to the treatment of GHB in the drug quantity table would also be reflected in the guideline for GBL as a List I chemical. However, we think the Commission should seriously reconsider one element of the "discount" that assumes a 50% conversion ratio of the precursor chemical to the target controlled substance. While this discount may be appropriate (though very conservative) for ephedrine, pseudoephedrine and phenylpropanolamine – with respect to methamphetamine and amphetamine – it is not appropriate for GBL, which converts to GHB (with addition of sodium hydroxide) at a ratio of approximately 1:1. Accordingly, we do not believe this part of the "discount" calculation should apply to GBL.

II. Controlled Substance Analogues and Controlled Substances Not Currently Referenced in the Guidelines.

This proposed amendment explicitly adresses, for the first time, controlled substance analogues in Application Note 5 of §2D1.1. It also provides a mechanism to address controlled substances for which there is no current reference in the guidelines in either the Drug Quantity

Table or the Drug Equivalency Tables at Application Note 10. We support the intent behind this amendment, but it has technical flaws that may serve to confuse the issue. However, these shortcomings can be easily addressed.

One problem with the proposed amendment is that it conflates the two distinct issues of sentencing (1) controlled substance analogues as defined at 21 U.S.C. § 802(32) and (2) actual, scheduled controlled substances for which no guideline exists. We suggest instead the following language (strikeouts indicate deletions, boldface indicates additions to the Commission's proposed text):

Proposed Amendment: Analogues and Drugs Not Listed in §2D1.1

Synopsis of Proposed Amendment: *This proposed amendment provides an application note regarding* ***analogues and*** *controlled substances not currently referenced in §2D1.1. The note directs the court to use,* ***in the case of a controlled substance analogue,*** *the marihuana equivalency of the* ***substance to which it is an analogue, and in the case of other controlled substances not referenced in the guideline, the controlled substance to which it is most closely related,*** ~~*the closest analogue of the controlled substance*~~ *in order to determine the base offense level. The note also refers the court to 21 U.S.C. § 802(32) for a definition of "analogue."*

Proposed Amendment:

§2D1.1. <u>**Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**</u>

<u>*Commentary*</u>

<u>*Application Notes*</u>*:*

* * *

5. <u>***Controlled Substance*** *Analogues and Controlled Substances Not Referenced in this Guideline*</u>*.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers,* ~~*and*~~ *all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline, "analogue" has the meaning given "controlled substance analogue" in 21 U.S.C. § 802(32).*

> *In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marihuana equivalency of the* ***most closely related*** ~~*analogue of that*~~ *controlled substance.* ***See USSG § 2X5.1 and note; see also, United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990). However, the court may, where appropriate, account for the greater or lesser potency of such substance compared to the substance for which there is a specified guideline.***
>
> ***In determining "the most closely related controlled substance" to a controlled substance not identified in the Drug Quantity Table or Drug Equivalency Tables, the court should consider the marijuana equivalency of the substance that is most similar to the unlisted controlled substance in question. Relevant factors could include, for example, the class of the substance (opiates, stimulant, depressant, hallucinogen); relative potency; the structure, pharmacology and effect of the substance; the appearance and representations with respect to the substance; and other harms associated with the drug. Expert testimony may be the best means to ascertain an appropriate equivalency.***

Our revised draft provides clearer guidance for the following reasons. First, it treats separately the two problems of sentences for analogues versus sentences for controlled substances that have no guidelines. Analogues would be sentenced like the drugs they mimic (with any adjustments the court may deem appropriate for potency). Controlled substances for which no guideline or equivalency currently exists – including, but not limited to, temporarily scheduled "emerging" drugs of abuse, most of which are synthetic stimulants and/or hallucinogens – would be sentenced like the "most closely related" substance. By using the term "most closely related," we consciously avoid use of the defined term "analogue" in any form, in order to avoid language likely to confuse litigants and sentencing courts. The use of the phrase "analogue" in the context proposed by the Commission creates confusion (and, in fact, legal impossibility), because the Commission's proposal directs the court to use the "closest analogue" of the scheduled controlled substance for which no guideline or equivalency currently exists. The guidelines and equivalency tables in almost all cases set forth equivalencies for scheduled controlled substances, and scheduled controlled substances, by definition, cannot be analogues. See 21 U.S.C. § 802(32)(C)(I) ("Such term [analogue] does not include a controlled substance").

Thus, the Commission's proposal directs the court to compare two scheduled controlled substances and identifies the relationship between the two to be an "analogue" relationship. This is a legal impossibility since a scheduled drug cannot be an analogue. To remedy the problem, we suggest that the Commission substitute the phrase "most closely resembles" for "closest analogue."

Equally important, in some cases of controlled substances for which there is no guideline, there may not be a scheduled drug to which it is an "analogue" as defined in the Controlled Substances Act. In such cases, the court should simply look to the most closely related substance for which a guideline exists. As set forth in our suggested application note, when making such a determination, a court should look, inter alia, to the class of drug, its relative potency, pharmacology and effect, and other pertinent factors. This result is dictated by logic, as well as §2X5.1. However, we think it should be explicitly set out in the drug guidelines.

Second, our draft provides a measure of needed flexibility for courts to account for variance in potency in determining quantity equivalencies for analogues and controlled substances for which no guideline exists. Even controlled substance analogues can be more or less potent than the scheduled substance to which they are similar. For example, in United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990), the district court accounted for the 100 times greater potency of the drug in question (OPP/MPPP is 100 times more potent than MPPP). The Ninth Circuit Court of Appeals reversed that part of the district court decision, holding that the law requires a 1:1 ratio. The language we propose affords an opportunity for courts to "account" for potency upwards or downwards as they deem appropriate, based on evidence including expert testimony.

III. Correction of Technical Error in Drug Quantity Table

This amendment corrects a technical error where no maximum base offense level was explicitly set forth in the current guidelines for Schedule III controlled substances. We fully support this fix, which clarifies any possible confusion with respect to the limit for Level 20 at 40,000 units or more.

IV. Update of Statutory References in §2D1.11

This amendment updates the statutory references to incorporate the changed designation in Sec. 9 of Pub. L. 106-172, the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000. It also expands the application of the three-level reduction for cases where "reasonable cause to believe," rather than actual knowledge, is proven. The corrected references are a helpful clarification. The inclusion of references to paragraphs in 21 U.S.C. § 960(d) for three-level reductions for "reasonable cause to believe" is appropriate, given that the mens rea is the same and the statutes at issue are generally analogous.

V. Addition of White Phosphorous and Hypophosphorous Acid.

This amendment adds white phosphorous and hypophosphorous acid to the chemical guideline in the same quantities as red phosphorous. This amendment is entirely appropriate, and addresses an oversight in the last amendment cycle. White phosphorous is directly substituted at a 1:1 ratio for red phosphorous by clandestine methamphetamine "cooks" (one part phosphorous to 1.5 parts iodine). Hypophosphorous acid (in a 50% solution) is used at a ratio of

approximately two-thirds of either red or white phosphorous (one part hypophosphorous acid to one part iodine). Actual quantities vary widely in the field, as most clandestine chemists lack training or theoretical understanding of the chemical reactions. The wide variability of quantities used is such that we think it is fair, and is certainly simpler, to lump all three of these related List I chemicals together at the same quantities for guidelines purposes.

VI. Deletion of Reference to § 957 from Statutory Index

This deletion is appropriate, as 21 U.S.C. § 957 is not a substantive criminal offense but a regulatory (registration) provision; violations are prosecuted under appropriate subsections of § 960.

VII. Issues for Comment

A. Offenses Involving Anhydrous Ammonia

The Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310) established a federal crime for the theft or unlawful transportation of anhydrous ammonia ("AA") knowing, intending or having reasonable cause to believe it will be used to manufacture a controlled substance. The applicable sentencing guideline, §2D1.12, provides for a base offense level of 12 if the defendant intends, knows, or believes the chemicals will be used to manufacture methamphetamine, and offense level nine if he only has reasonable cause to believe such is the case. In either event, a two-level enhancement is applied if the drug involved is methamphetamine.

Taken as a whole, this guideline is woefully inadequate, and we are pleased that the Commission is seeking comment on a possible revision. By cross-reference to 21 U.S.C. § 843(d), the statutory penalty for offenses involving anhydrous ammonia in § 864 is: (1) generally up to 4 years imprisonment, but (2) up to ten years if it involved the intentional manufacture or intentional facilitation of the manufacture of methamphetamine. The maximum guideline sentence of level 14 (12 + 2) under §2D1.12 yields sentences of under two years – short even of the four year basic sentence, and well under the ten year maximum.

We propose the addition of two alternative specific offense characteristics if the offense involves AA. We would provide (1) a 12-level enhancement for a defendant who violates § 864 with the intent of manufacturing or facilitating the manufacture of methamphetamine – the state of mind required for the ten year maximum sentence to be available under § 843(d)(2) – or (2) a four level enhancement for defendants whose offense conduct otherwise involved AA – including through violations of 21 U.S.C. §§ 864 or 843(a)(6) or (7) – but who can not be shown to have done so with the state of mind set forth in § 843(d)(2). To avoid double-counting under this proposed rubric, the defendant would not receive the two level increase under current

§2D1.12(b)(1) (incorporated into revised and redesignated (b)(3) under the scheme set forth below) if he or she were sentenced under one of the specific AA provisions. The combined effect of our proposal would be to increase guideline sentences from the current level 14 (12 +2) to level 24 (12 + 12) for offenders who steal or transport AA in violation of § 864 with intent to manufacture or facilitate the manufacture of methamphetamine, and otherwise to level 16 (12 + 4) for other offenses covered by the guideline that involve anhydrous ammonia. In addition, in current §2D1.12(b)(2) (as renumbered to (b)(4)), the two level enhancement for specified actions that threaten public health and the environment, could apply to AA cases.

To effect these revisions, we propose for the Commission's consideration that §2D1.12 be revised and renumbered as follows:

§2D1.12(a)(1) & (2): No change. Level 12 if the defendant intended (or knew or believed substance would be used) to manufacture a controlled substance, and level nine if the defendant had reasonable cause to believe it would be used to manufacture a controlled substance.

§2D1.12(b)(1): If the defendant stole or transported anhydrous ammonia in violation of 21 U.S.C. § 864 and had the intent to manufacture or to facilitate the manufacture of methamphetamine, increase by 12 levels.

§2D1.12(b)(2): If the offense involved anhydrous ammonia but §2D1.12(b)(1) does not apply, increase by four levels.

§2D1.12(b)(3): In circumstances other than those described in §2D1.12(b)(1) or (b)(2), where the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed or had reasonable cause to believe that the prohibited flask, equipment, chemical, product, or material was to be used to manufacture methamphetamine, increase by two levels.

§2D1.12(b)(4) [Redesignate existing §2D1.12(b)(2) (two level SOC for unlawful discharge or transportation) as (b)(4)]

In addition, although the matter was not placed at issue by the Commission's notice seeking these comments, we believe that a sizeable enhancement under this guideline should not be limited to violations of § 864 involving anhydrous ammonia. It should be available for any

violations subject to the penalty enhancements of § 843(d)(2) – including violations of § 843(a)(6) and (7), if related to methamphetamine manufacture. The referenced provisions make it a crime to possess or distribute substances, materials, or equipment knowing or having reasonable cause to believe they will be used to manufacture a controlled substance. An amended guideline could provide a more appropriate sentence for cases charged under these provisions, which may involve, for example, triple-neck flasks, heating mantels, non-listed chemicals, or listed chemicals. Some prosecutors with expertise in this area have expressed puzzlement and frustration with this guideline. Whereas Congress appears, by its gradation of penalties, to have intended sentences under § 843(d) to occupy a "middle tier" for cases that are more serious than regulatory violations but which lack all the elements to prove a violation of, e.g., 21 U.S.C. § 841(c)(1) or (2), in practice there is no corresponding "middle tier" sentencing guideline corresponding to these violations.

B. Internet Enhancement

The Internet provides a tool of unprecedented power and efficiency for certain drug trafficking activities. It permits virtually instantaneous, widespread, and anonymous communications, and has been used especially to sell GHB analogues such as GBL and 1,4-butanediol, as well as substances promoted as "legal Ecstasy" (MDMA). Moreover, the Internet has been used to promote drug-oriented "raves" and similar events, which frequently target teenagers under the legal drinking age but who ingest "club drugs" at the events. Noting the two level enhancement for use of a computer or the Internet in the course of promoting a commercial sex act or prohibited sexual conduct in §2G1.1(b)(5), we think that a similar adjustment is appropriate for the use of the computer or the Internet to facilitate drug transactions. We would recommend that any enhancement refer to the "mass marketing of illegal drugs, such as through the Internet," rather than mere use of the Internet itself. Relying only upon mere use will make the proposed enhancement apply in some cases involving a small finite conspiracy where a facilitating e-mail substituted for a telephone call. Application of the enhancement in that situation would not, we believe, fulfill the purpose of the adjustment.

C. Drug-facilitated Sexual Assault

The Commission raises an important issue with respect to the appropriate sentence for an offense involving drug facilitated sexual assault in a case where the victim knowingly and voluntarily ingested the drug. The knowing/voluntary drug ingestion renders 21 U.S.C. § 841(b)(7) inapplicable. We believe it would be appropriate to apply the Chapter Three vulnerable victim adjustment, set forth in §3A1.1, in this circumstance, providing a two level increase.

D. Resolving Circuit Split on Application Note 12 of §2D1.1

The Commission, citing a circuit split, asks if Application Note 12 to §2D1.1 should be amended to clarify whether, in a reverse sting situation (government "selling" drugs to the

defendant), the last sentence of the Note should operate to allow a defendant to establish that he did not intend to purchase or was not reasonably capable of purchasing all of the controlled substance(s) that he negotiated to purchase, and to thereby reduce the amount of controlled substances attributed to him for relevant conduct purposes (typically the amount of controlled substances under negotiation).

We believe the Note as currently written is fairly interpreted as excluding from relevant conduct (negotiated amount) the amount of drugs that the defendant did not intend to provide or was not reasonably capable of providing in situations where the defendant was distributing or selling (rather than purchasing) drugs. We support resolving the circuit split by clarifying that the last sentence of Note 12 does not apply to situations involving a defendant's negotiation to purchase drugs. We oppose amending the Note to allow defendants in reverse sting situations to argue that they did not intend to purchase or were not reasonably capable of purchasing the controlled substances for which they negotiated.

Typically in a regular undercover "sting" investigation, where a defendant is providing controlled substances to the government, the government is able to engage in multiple transactions with a defendant in order to obtain all of the controlled substance that the defendant has agreed to provide or to otherwise obtain evidence that the defendant is capable of providing the agreed-upon amount. In a "reverse sting" investigation, as observed in Gomez, 103 F.3d 249, 253 (2d Cir. 1997), the defendant may have negotiated to hold money in reserve pending his testing of a sample of the product or to take the drugs on consignment or on partial credit with a down payment, or he may simply seek to do so at the time of the transaction. This may occur because the defendant suspects law enforcement involvement or harbors some other suspicion about the seller. In any event, the government does not release any controlled substances to the defendant in such situations and typically does not have the opportunity for further fruitful investigation to definitively establish a defendant's intent and capability with respect to the negotiated purchase.

Although some defendants have raised the argument that they only intended to purchase the amount of drugs for which they produced payment at the time of the transaction, explicit allowance of such an argument likely would result in its routine use. Although the argument would be without merit, the burden on the government to rebut it would be undue given the investigation circumstances described above.

MITIGATING ROLE

We continue to believe that the Commission erred in 2002, by creating a maximum base offense level for drug defendants who receive a mitigating role adjustment ("mitigating role

cap"). The Department has supported, and continues to support efforts in Congress to repeal the mitigating role cap.

In 1987, the Sentencing Commission tied the sentencing guidelines for drug trafficking offenses to the quantity of drug associated with the offense. The guidelines call for base offense levels ranging from level six to level 38, based on two level increments determined by the quantity of drugs trafficked by the defendant. The guidelines are tied – correctly we believe – to the applicable mandatory minimum drug trafficking statutes. The amount of controlled substance that triggers a mandatory minimum in a given case corresponds to a particular base offense level. For example, 100 grams of heroin triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26, with a corresponding sentence of 63-78 months for a first offender. Congress, in 21 U.S.C. § 841, specified the quantity thresholds that trigger mandatory minimum sentences. Some observers, have criticized this premise of the sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree with this criticism.

We continue to believe there is no need for a mitigating role cap. Absent such a cap, federal statutes and the otherwise applicable sentencing guidelines appropriately allow for the consideration of aggravating factors such as the use of a gun or a defendant's criminal history or bodily injury in appropriate cases. Also, these statutes and guidelines – through, for example, the so-called safety valve exception to mandatory minimums, the guidelines' mitigating role adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person – appropriately allow for the consideration of mitigating factors.

The purpose of the mitigating role cap was supposedly to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of a drug-trafficking crime. We continue to believe that, in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance. Further, in establishing mandatory minimum penalties for controlled substance offenses, Congress relied on the type of substance involved. Thus, the most serious drugs of abuse carry the highest statutory penalties, regardless of whether violence or other criminal activity is present in a particular case.

In addition, we strongly believe the "mitigating role cap" provides an excessive windfall to minor role defendants who are involved in large narcotics trafficking transactions. For example, a minor role defendant in a 150-kilogram cocaine transaction will have his offense level reduced from 38 to 28 under the "mitigating role cap," thereby reducing the defendant's guideline range (assuming no criminal history) from 235-293 to 78-97 months incarceration.

Such an extensive sentencing reduction is not appropriate, especially since a minor role defendant in a 3-kilogram cocaine transaction would also end up with an offense level of 28. The minor role defendant in a 150-kilogram transaction should not be placed in the same sentencing position as a minor role defendant in a 3-kilogram transaction.

In sum, we continue believe the mitigating role cap should be repealed.

HOMICIDE AND ASSAULT

I. Homicide Offenses

We commend the Commission both for the amendments passed last year relating to involuntary manslaughter offenses and for agreeing to consider the issue of homicide and assault further this amendment year. As we have stated on several occasions, we believe the guideline penalties for all homicide, other than for first degree murder, are inadequate. While the number of homicides prosecuted in federal court is relatively small because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes.

The guidelines for second degree murder and attempted murder are particularly problematic. We believe that a defendant who accepts responsibility for a second degree murder, regardless of criminal history category, should receive a sentence of approximately 15 years imprisonment. We thus think the Commission should increase the base offense level for second degree murder to offense level 38.

First and second degree murder have much in common under federal law. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The difference in the two degrees of murder is that the more serious form is accomplished with premeditation or in the perpetration of certain enumerated felonies. However, the presence or absence of premeditation is a jury matter that sometimes turns on fine distinctions; in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, the relatively low guideline sentence for second degree murder fails adequately to recognize the similarity between the two crimes or the maximum life sentence available for second-degree murder. The inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

For voluntary and involuntary manslaughter offenses, we believe the Commission should increase the base offense levels to create an appropriately tiered system of punishment. Our basic principle is that first degree murder should result in a life a sentence; second degree murder

should result in at least a 15 year sentence; voluntary manslaughter should result in at least a five year sentence; and involuntary manslaughter should result in some imprisonment. Based on this and in light of the statutory maximum penalties set by Congress for these various offenses, we believe the Commission should provide a base offense level of 28 for voluntary manslaughter and a base offense level of 26 for involuntary manslaughter offenses involving the reckless operation of a means of transportation. We also believe, in response to the issues for comment, that enhancements for the use of a weapon and the use of a firearm are appropriate.

II. Attempted Murder

We have previously expressed our concern about how attempted murder is treated under the current guidelines, especially where the attempt, had it been successful, would have caused the death of many people (e.g., a bomb on a plane, ship, subway, in a federal building, etc.). In cases where the attempt may not have been successful because of bad design or interruption by law enforcement or a good Samaritan, the defendant should be sentenced close to the level which would have been applicable had he been successful. Elsewhere in the guidelines, an attempt is typically treated three levels lower than the underlying offense under §2X1.1(b)(1). However, "attempted murder" can be 15 levels lower than the underlying crime, pursuant to §2A2.1. We think this is something that the Commission appropriately is reexamining.

We support a base offense level of 36 for attempted murder, if the object of the offense would have constituted first degree murder. This is seven offense levels below that for first degree murder, and if a defendant accepts responsibility for such a crime, would lead to a sentence of roughly 11 years imprisonment in Criminal History Category I and up to the statutory maximum penalty of 20 years under Criminal History Category VI. For attempts to commit second degree murder, we believe the base offense level should 30, which is eight levels below our recommended base offense level for second degree murder and which would result in sentences of roughly six years to 11 years (depending on criminal history category) for offenders who accept responsibility.

III. Obstructing or Impeding Officers – §2A2.4 – and the Official Victim Enhancement – §3C1.1

Section 1108(e) of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107-273, directed the Commission to review and amend the guidelines to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18. In response, the Commission has proposed increasing the base offense levels for offenses involving obstructing or impeding officers (§2A2.4), providing a specific offense characteristic if injury occurs, and also increasing the enhancement for the "Official Victim" adjustment (§3C1.1) from three levels to six levels.

We fully support these increases. While the increases will only be applicable in a handful of cases every year, we believe they are of particular importance because the crimes involved often attack or retaliate against the authority of the law and those who enforce it. In response to one of the issues for comment, we believe that obstructing or impeding an officer should be treated much more closely to aggravated assault. We do not, though, believe it is justified to differentiate cases based upon distinctions made in §3A1.2(a) and (b). In fact, such an approach would appear to minimize the significance of an assault upon a law enforcement officer or prison guard when done in a manner creating a substantial risk of serious bodily injury as compared to an offense of conviction motivated by the victim's status as a government officer or employee. We do believe there should be an invited upward departure if the assault or threatened assault involved family members of the official victim or if many official victims are placed in peril.[14]

MISCELLANEOUS AMENDMENT PACKAGE

We sincerely appreciate the Commission's ongoing efforts to address minor and technical issues through the annual miscellaneous amendments package. We support the package but have comments on several of the pending miscellaneous amendment proposals.

I. Multiple Victim Rule in Fraud/Theft Cases – Supart B

Subpart B would expand the special multiple victim rule in §2B1.1, Application Note 4(B)(ii), to include privately owned mail boxes. The proposal is sound and we support it, although we think it should go further. The proposal does not clearly apply to theft of material for delivery by private or commercial interstate carriers (i.e., courier services), even though such private carriers often are used in lieu of the United States mail to send or receive correspondence and other material in interstate or international shipments. Other substantive sections of the United States Code cover fraud involving either the United States mail or courier services (see 18 U.S.C. § 1341), as well as theft from the United States mail (18 U.S.C. § 1708) and theft from interstate shipment (18 U.S.C. § 659).

To ensure that the multiple-victim rule extends to both types of delivery, we recommend that the proposal be revised, in pertinent part, to read as follows: ". . . or any other thing used or designed for use in the conveyance of United States mail **or any matter or thing to be sent or delivered by a private or commercial interstate carrier** to multiple addresses, whether such

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[14]The Commission proposes amending Application Note 5 of §3A1.2 to provide that an upward departure may be appropriate if "the official victim is an exceptionally high-level official, such as the President" etc. We believe that rather than limiting this upward departure to those rare situations involving "an exceptionally high-level official," an upward departure may be appropriate in any instance where the assault or threatened assault results in the disruption of a governmental function.

thing is privately owned or owned by the United States Postal Service . . ." (Changes in bold). This revision, which incorporates Option 2 of the Commission proposal, would track the language of 18 U.S.C. § 1341 to ensure coverage of both privately owned mail boxes and privately owned collection boxes, delivery vehicles, and related collection mechanisms for courier service packages.

II. Use of a Minor in Crimes of Violence – Subpart D

Subpart D addresses the new offense, created by the PROTECT Act, of using a minor in a crime of violence, 18 U.S.C. § 25. The new crime provides a maximum penalty of double that of the underlying crime for a first offense and triple for subsequent convictions. Currently, the guidelines provide a two level adjustment for this conduct, §3B1.4. The Commission proposes a new guidelines section, §2X6.1, which would provide an increase of either two, four, or six levels above the offense level for the underlying offense. We believe §2X6.1 should provide at least a three level increase above the offense level for the underlying offense. We believe Congress, in enacting § 25 and the PROTECT Act as a whole, intended greater protections for children. Section 25 provides a dramatic increase in the maximum statutory penalty, and if the Commission provides no additional increase in penalty beyond current law, we think the will of Congress will not have been followed. In response to the issue for comment, we believe §3B1.4 should be amended to provide a similar three level increase.

III. Double Counting in Certain Firearms Cases – Subpart J

The Commission requests comment regarding application of the guidelines in cases in which the defendant (1) is convicted under 18 U.S.C. 922(g) (felon in possession), (2) is an armed career criminal under §4B1.4, and (3) is also convicted under 18 U.S.C. § 924(c) (use of a firearm during a drug trafficking offense or crime of violence). Three options are proposed for addressing this circumstance: (1) leave §4B1.4 in its present form; (2) include an exception in §4B1.4, like that in §2K2.4, that provides that the guideline sentence is the term of imprisonment required by statute; or (3) include the exception, but also add a note that suggests an upward departure when the application of the exception may result in a guideline range that produces a total maximum penalty that is less than the range that would have resulted from applying the enhanced offense level and criminal history category.

We believe an exception is generally not warranted here, because the circumstances are unlike those, described in the issue for comment, where the defendant is simply convicted of a violation of only 18 U.S.C. § 924(c). In that latter situation, with the exception, the defendant still receives an enhanced penalty – pursuant to § 924(c) – for the aggravated circumstance of using the gun in a crime of violence or controlled substance offense. In the case being contemplated here, the defendant has acted illegally and been convicted both of possessing the gun as a felon with a serious criminal background and in addition of using the gun in the commission of a crime of violence or controlled substance offense. We think a penalty over and above that provided by § 924(c) is warranted in light of the defendant's felon status.

MANPADS AND OTHER DESTRUCTIVE DEVICES

I. MANPADS, Destructive Devices, and Chapter Two, Part K

Portable rockets and missiles are a category of destructive device that pose a particular risk to the public due to their range, accuracy, portability, and destructive power. Included within this category of devices are MANPADS (man-portable air defense systems) and similar weapons that have been used by terrorists; for example, in the 2002 attack in Kenya on an Israeli aircraft (using a shoulder-fired missile). They have the ability to inflict death or injury on large numbers of persons if fired at a building, aircraft, train, or similar target. Even if death or injury does not result from such an attack, there may be significant economic consequences and adverse effects on public confidence in the transportation or other industries. For example, if a MANPAD were fired at a commercial aircraft, but no casualties resulted, the news alone that an attempted attack had occurred would likely severely harm the airline industry and create a potential domino effect on industries involved in other forms of transportation.

MANPADS and similar weapons are currently highly regulated under the National Firearms Act ("NFA"), 26 U.S.C. Chapter 53, and the Gun Control Act of 1968 ("GCA"), 18 U.S.C. Chapter 44. Under the NFA, such weapons are classified as "destructive devices." See 26 U.S.C. § 5845(f). Currently, the sentencing guidelines provide for a two level increase to the base offense level applicable to unlawful possession and certain other offenses involving NFA weapons, if the offense involves a destructive device. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. See §2K2.1. As a result, an offender who unlawfully possesses a MANPAD could face a guideline offense level of 20, which requires only 33-41 months of imprisonment if the defendant is in Criminal History Category I.

We believe individuals who are convicted of possessing MANPADS and similar weapons should be treated much more severely than the current sentencing guidelines allow. Therefore, we support an increase to a 15-level enhancement for the unlawful possession of portable rockets or missiles or devices for use in launching a portable rocket or missile in the proposed new §2K2.2(b)(3)(A).[15]

The unlawful possession of other destructive devices also poses a danger to public safety that warrants more severe punishment than that under the current sentencing guidelines. In the case of all destructive devices other than portable rockets or missiles, we support the highest

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[15] We note that our original proposal limited the MANPADS increase to portable rockets or portable missiles. We continue to recommend that the proposed amendment be changed to apply the portability criterion to rockets and missiles.

appropriate increase in the proposed new §2K2.2(b)(3)(B) and believe that it should be a six to nine level enhancement. We also believe that there should be no limitation on the cumulative offense level in §2K2.1 to prevent an inappropriately low offense level from becoming the ceiling in a particular case.

II. Issues for Comment

The Commission requests comment regarding whether 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a), should be referenced in Appendix A (Statutory Index) to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than, or in addition to, §2A6.1 (Threatening or Harassing Communications). Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. § 32 should be referenced only to §2A5.2. We agree that there should be cross references, which would allow for the most applicable sentencing guideline to be chosen for a particular case. For the same reason, we do not believe that § 32 offenses should only be referenced to §2A5.2. There are numerous subsections in section 32 and the most appropriate guideline should be available to the court.

The Commission also requests comment regarding whether there should be a cross reference to §2A5.2 or §2M6.1 in any guideline to which offenses under 18 U.S.C. §§ 32, 1993, and 2332a are referenced, if the offense involved interference or attempted interference with a flight crew, interference or attempted interference with the dispatch, operation, or maintenance of a mass transportation system (including a ferry), or the use or attempted use of weapons of mass destruction. We think there should be such cross references for the reasons stated above.[16]

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[16]The Commission also seeks comment on whether the "destructive device" definition at Application Note 4 of §2K2.1(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. According to the issue for comment, practitioners have commented that it is unclear whether certain types of firearms qualify as "destructive devices". We do not believe the definition is unclear and therefore do not think an amendment is necessary.