ABERRANT BEHAVIOR

I. We Continue To Believe That Aberrant Behavior Should Be Eliminated as a Ground for Departure Altogether

As we have stated on a number of previous occasions, we believe aberrant behavior (§5K2.20 (Policy Statement)) should be eliminated as a ground for downward departure. We continue to believe that sentences under Criminal History Category I are properly gauged to first time offenders and that aberrant behavior as a departure ground is prone to inconsistent application and abuse, since "aberrant" behavior presupposes little more that an otherwise law-abiding life. See, e.g., United States v. Brenda Working, 287 F.3d 801 (9th Cir. 2002) (reversing, for a second time, a departure from sentencing range of 87-108 months to a one day sentence for a defendant/wife who pleaded guilty to assault with intent to commit first degree murder after luring her husband to a remote location and shooting him in the back; the case was reassigned to a different judge for resentencing on the second remand). Although the aberrant behavior policy statement was amended effective November 1, 2000, to preclude such departures in cases involving, among other things, a firearm or serious bodily injury, the fact that the amendment was even needed illustrates the potential for inconsistency and mischief inherent in such departures.

Section 5K2.20 allows for a departure "in an exceptional case" if the defendant's criminal conduct constituted aberrant behavior. The court may depart only if "the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." §5K2.20(b).[17] Only first offenders will qualify for an aberrant behavior departure – defendants with no significant prior criminal behavior. We believe the guideline definition invites this argument for nearly every first offender. Every first offender has no criminal history points and no significant prior criminal activity. Each presumably has led an "otherwise law-abiding life" or at least the documented record would suggest an otherwise law-abiding life. Yet at the same time, the Commission has clearly signaled that first-time offenders are not automatically eligible for an aberrant behavior departure. For example, the Commission has explicitly taken the absence of a prior criminal history into account in setting the guideline ranges for Criminal History Category I offenders, and has prohibited departures below the lower limit of the applicable guideline range for Criminal History Category I. §4A1.3(b)(2)(A). Section 5K2.20 seems to be inconsistent with that prohibition.

---

[17]The PROTECT Act categorically prohibits aberrant behavior departures for certain offenses listed in §5K2.20(a).

In addition, in determining whether to depart based upon a claim of aberrant behavior, §5K2.20 encourages courts to consider a number of circumstances, many of which are not ordinarily relevant in determining whether to depart. Application Note 3 encourages sentencing courts to consider the defendant's "(A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." Elsewhere in the guidelines, a defendant's mental or emotional condition and his employment record are "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range. §5H1.3 and §5H1.5. Similarly, "prior good works" are not ordinarily relevant. §5H1.11. The defendant's motivation for committing the offense may already be considered in setting his offense level, and would therefore not be a proper basis for departure. See, e.g. §2L1.1(b)(1) and §2L2.1(b)(1) (each providing for a three level decrease if the offense was committed other than for profit); §2K2.1(b)(2) (providing for a reduced offense level if the defendant possessed firearms or ammunition solely for lawful sporting purposes or collection, and did not unlawfully discharge or use them). And efforts to mitigate the effects of the offense are taken into account under §3E1.1 (Acceptance of Responsibility). We believe §5K2.20 is simply ill conceived because it encourages courts to consider discouraged factors or factors already taken into account elsewhere in the guidelines.[18]

II. Aberrant Behavior Should Not Be Integrated Into the Defendant's Criminal History Score under §4A1.1

We strongly oppose integration of aberrant behavior into the criminal history calculation. As we note above, the guidelines already account for first offenders through Criminal History Category I, the lowest available criminal history category. Incorporating aberrant behavior into the criminal history calculus will simply exacerbate what we believe is the existing problem under §5K2.20. In our view, to give a first offender more lenient treatment than that already allowed by a Criminal History Category I, may run afoul of 18 U.S.C. 3553(a)'s requirement that a sentence "reflect the seriousness of the offense," "promote respect for the law," "afford adequate deterrence to criminal conduct," and "protect the public from further crimes of the defendant." Further, we think the impact of incorporating aberrant behavior into criminal history could have a substantial, and potentially devastating, impact on a variety of crime types and enforcement programs, including civil rights, tax, fraud and other white collar, and environmental crimes.

---

[18]Another example of the logical inconsistency of this provision is that many of those who may qualify for an aberrant behavior departure – educated people with good employment histories and solid backgrounds – may actually be the least appropriate for such a departure. It is for this reason that socio-economic status is a prohibited ground for departure under §5H1.10.

If the Commission chooses to maintain the aberrant departure provision, we think it should be limited even further than it is today. Rather than disqualifying only offenses involving serious bodily injury or death, or cases in which the defendant discharged a firearm or otherwise used a firearm or other dangerous weapon (which does not include, for example, unarmed bank robberies, unarmed rapes not resulting in serious injury, and many assaults), §5K2.20(c) should categorically preclude any offense constituting a crime of violence as defined in §4B1.2. Further, if the sentencing court finds that the defendant meets all of the requirements for a departure based on aberrant behavior and that such a departure is appropriate, the extent of the departure should be limited to no more than one or two offense levels, much the same as departure under §4A1.3(b)(3)(A) for career offenders is limited to one criminal history category.

HAZARDOUS MATERIALS

As you know, the transportation of hazardous materials poses significant and wide ranging risks to the public. We think the Commission's effort to ensure appropriate sentencing policy for those who violate the law surrounding the transportation of hazardous materials is a significant step toward the goal of reducing those risks, and we appreciate the Commission efforts to address this issue.

I. New Guideline for Hazardous Materials Offenses

As we stated in our August 1, 2003, letter to the Commission, the guideline currently covering hazmat transportation crimes, §2Q1.2, was written chiefly for hazardous waste crimes, not hazardous materials violations. Because the specific offense characteristics of §2Q1.2 are designed for hazardous waste crimes, their application in hazmat cases will often yield sentences that are inadequate in terms of both punishment and deterrence. Adoption of a new sentencing guideline for hazmat crimes therefore is a Department priority. We believe a new guideline would focus upon those characteristics that are critical to hazmat transportation crimes, and with such a focus, would be relatively easy for courts and probation offices to apply. We also believe a separate guideline would yield sentences that are appropriate for hazmat violations.

Dealing with hazmat crimes by amending existing §2Q1.2 likely would have two significant negative effects. First, the addition of specific offense characteristics for hazmat transportation violations to a guideline that is designed for pollution crimes could create confusion for sentencing courts. For example, existing §2Q1.2(b)(1)(A) provides an enhancement for repetitive crimes, but only if releases occur. This approach fits the context of pollution crimes that commonly involve repetitive releases of hazardous or toxic substances. However, it is a poor fit for hazmat transportation crimes. For those crimes, both releases and repetitiveness are appropriate specific offense characteristics, but by the nature of the offenses, both do not necessarily occur together. Therefore, application of the §2Q1.2(b)(1)(A) formula to hazmat crimes would ignore any repetitiveness that did not include releases. Amending §2Q1.2

by adding to it provisions to take account of hazmat transportation repetitiveness and releases would cause uncertainty as to when those provisions should be applied versus when existing subsection (b)(1)(A) should be used. Second, amending §2Q1.2 could invite the reopening of issues that courts already have resolved in litigation involving that guideline. The adoption of a new and entirely separate hazmat guideline would allow hazmat crimes to be specifically addressed in a manner that would not involve revisiting well-settled §2Q1.2 issues.

II. Key Elements of a Hazmat Guideline

The hazmat guideline should cover violations of 49 U.S.C. §§ 5124, 46312, and possibly all or part of § 60123. In order to avoid any confusion over what constitutes a "hazardous material," that term should be defined in a new guideline by specific reference to the appropriate regulatory provision, 49 CFR § 105.5. In application notes, both "release" and "environment" should be specifically defined for purposes of hazardous materials transportation crimes. Appropriate definitions for those terms are as follows:

> "Environment" includes all surface waters, ground waters, drinking water supplies, land surfaces, subsurface strata, or air. The term is not limited to those parts of the environment that are within or subject to the jurisdiction of the United States.

> "Release" includes any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, burning, or disposing into the environment or within or from any building, structure, facility, package, container, motor vehicle, rolling stock or equipment, rail car, aircraft, pipeline, or vessel. It also includes the abandonment or discarding of containers or other closed receptacles containing hazardous materials. A "release" is not restricted to locations within or subject to the jurisdiction of the United States. For example, a violation occurring within United States jurisdiction may result in a release on or from a vessel in the mid-Pacific or a train that has crossed into Canada. As long as a release results from a violation occurring within the jurisdiction of the United States, it is a "release" for purposes of this section.

The "environment" definition is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(8)(B). The proposed definition of "release" is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(22), and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11049(8). Since both statutes deal with releases of dangerous materials into the environment, they are logical sources for definitions of "release" and "environment." The additional language in the latter portions of both definitions makes clear that they do not apply only within the jurisdiction of the United States. As long as the crime itself is committed within the jurisdiction of the United States, a sentencing court should be able to take into account a release into the environment wherever it may occur.

III. Base Offense Level and Aggravating and Mitigating Factors

Given the inherent danger posed by the transportation of hazardous materials, the appropriate base offense level is eight, as it is for dangerous pollutants under §2Q1.2. We believe many of the aggravating factors outlined by the Commission in the issue for comment merit some treatment within the guidelines and we address each of these in turn.

- Passenger-carrying modes of transportation. The unlawful transportation of hazardous material on any passenger-carrying mode of transportation potentially involves large numbers of victims with limited escape possibilities. An even higher offense level, we believe, should attach to hazmat crimes involving passenger-carrying aircraft, because successful escape from an aircraft is even less likely than it is from other modes of transportation.

- Concealment. Concealment, by whatever means, is a particularly insidious characteristic of some hazardous material transportation crimes and, therefore, merits an enhancement. First responders, innocent cargo handlers, and the public at-large are especially vulnerable to harm when they are not even aware of the presence of hidden hazmat.

- Release, damage to the environment, critical infrastructure, and emergency response. The release of a hazardous material, the disruption of, or damage to, critical infrastructure, the release of a hazardous material resulting in damage to the environment, or to public or private property, and required emergency response and/or evacuation of a community or part thereof are all factors that, if present with respect to a particular hazmat crime, reflect harm or a threat of harm to the public.

- Repetitiveness. A hazmat crime arising from a terrorist act likely would be a one time violation. However, conventional hazmat crimes are prone to repetitiveness. The person who reduces shipping costs by failing to identify materials as hazardous, for example, is likely to do so as often as he thinks he can get away with it. With each repetition of such a crime there is another chance that the risk of harm will materialize into reality; hence it also is a characteristic meriting an enhancement.

- Serious bodily injury or death. The risk of death or serious bodily injury or their actual occurrence are the most serious harms that the hazmat laws are intended to prevent. Therefore, they should be treated as specific offense characteristics with significant offense level additions. We recommend the following provision:

If the offense resulted in (A) a substantial likelihood of death or serious bodily injury, increase by eight levels; (B) actual serious bodily injury, increase by 12 levels; or (C) death, increase by 16 levels.

The (A) portion of this provision would be consistent with §2Q1.2(b)(2), which adds 9 levels for a substantial likelihood of death or serious bodily injury. However, subsection (b)(2) deals only with the likelihood, not with the actual harms (except through departures). In (B) and (C) above, the recommended language would add four levels for actual serious bodily injury and four more levels for death (to which an application note should add an upward departure option for multiple victims).

Increasing the offense levels for actual serious bodily injury or for death would provide greater certainty of sentencing and would be consistent with a number of other guidelines. Among those that include increases for injury are the following:

§2A2.2(b)(3)(B)	Aggravated Assault
§2B3.1(b)(3)(B)	Robbery
§2B3.2(b)(4)(B)	Extortion by Force, etc.
§2E2.1(b)(2)(B)	Extortionate Extension of Credit, etc.
§2L1.1(b)(6)(2)	Alien Smuggling

While death is not as commonly dealt with by specific offense characteristics, there are precedents for doing so. For death under the air piracy guideline, §2A5.2(b)(1), five levels are added. The same is true for §2D2.3 (operating a common carrier under the influence), although the five levels are added by an alternative base offense level rather than a specific offense characteristic, a distinction without a difference. (Note that §2D2.3 also adds eight levels for serious bodily injury, again through an alternative base offense level.) Under §2M6.1(b)(2), four levels are added for death.

Express additions of levels for death or serious bodily injury would avoid heavy reliance upon departures and they would step beyond §2Q1.2's focus only upon risk to address the actual harm to people that occurs when risk turns to reality.

- Particular types of hazardous materials. We believe the inclusion of a specific offense characteristic for particular types of hazardous materials should be avoided. The problems with such an approach lie with both the wide variety of materials and the fact that their potential effects can vary widely with circumstances. Explosive materials provide a good illustration. They vary so much in their power that the Department of

Transportation has placed them in six different labeling categories, all of which might not merit tougher treatment than, for example, inhalation poisons. See 49 C.F.R. § 172.400. Rather than trying to choose among the lethal qualitites of so wide an array of substances, those qualities may better be part of the assessment of the risk involved in a violation.

- A terrorist motive. A hazmat crime that involves a terrorist motive should be treated by a cross-reference with a provision such as the one below:

  If the offense was committed with intent (A) to injure the United States or (B) to aid a foreign nation or a terrorist organization, apply §2M6.1.

- Proper training. Training violations are among a number of offenses that can increase the risk of a hazardous material being released into the environment. Other examples include packaging or packing violations. Rather than having separate specific offense characteristics for each of these types of offenses, they could all be addressed in a single "risk-based" specific offense characteristic. This specific offense characteristic could be made part of a multi-part guideline provision, such as the example below, that addresses releases of hazardous materials in a descending scale from those that cause damage through releases for which damage is not established to risk of release.

  (A) If the offense resulted in the release of a hazardous material and damage to the environment or to property or harm to any (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendices I or II to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by four levels; or

  (B) If the offense otherwise resulted in the release of a hazardous material, increase by three levels; or

  (C) If the offense resulted in the risk of release of a hazardous material, increase by two levels.

A risk-based specific offense characteristic as in subsection (C) should be accompanied by an application note explaining some of the types of behavior to which it would apply. Below is language that could be incorporated into such an application note:

> If the offense resulted in a risk of a hazardous material being released, then two offense levels are added under Subsection (C). This subsection is intended to apply to violations including, but not limited to, inadequate packaging, packing, or training. Packaging or packing violations increase the likelihood of hazardous material releases even if all other requirements are met. Failure to properly train people working with hazardous material transportation increases the likelihood that those people will mishandle hazardous materials and that those materials will be released.

- The procurement of a license through fraudulent means. Fraudulently obtained commercial drivers' licenses with hazmat endorsements could allow persons to transport hazmat with the intent to use it to commit other crimes. For example, a person with a fraudulent license could drive a tanker filled with anhydrous ammonia to a point where he could release it into subway vents, causing widespread death. In order to reduce the traffic in fraudulent licenses, this behavior should be subject to an enhancement.

IV. Interaction With Chapter Eight of the Guidelines

If a new guideline is adopted for hazardous material transportation crimes, it should relate to Chapter Eight in the same manner as other Part 2Q crimes. We believe, therefore, there is no need for additional compliance requirement factors.

There is, however, a compliance-related change to Chapter Eight that would be useful for hazmat and other similar regulatory crimes: the expansion of §8D1.4(c)(4), concerning a recommended condition of probation, to allow regular or unannounced physical inspections of property in order to determine whether an organization is in compliance with terms of probation. Currently that provision allows for only inspection of books and records and interrogation of knowledgeable individuals. While that provision may be adequate for conventional financial crimes that are reflected in records, it does not deal effectively with crimes that involve physical objects or facilities. For example, an inspection of books and records will not reveal that a convicted violator has continued to conceal hazmat in shipments of otherwise benign cargo. In other regulated areas neither will such an inspection of books and records alone uncover the critical facts, such as a convicted hazardous waste generator's disposal of waste by dumping it on the ground.

V. Cross References

Because a hazmat violation could well involve an act designed to kill people, perhaps for purposes involving the security of the United States, a hazmat transportation guideline should be cross-referenced to the homicide and terrorist guidelines. We recommend that a provision such as the one below be included in the guideline:

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly or, otherwise, apply §2A1.2 (Second Degree Murder), if the resulting offense level would be greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level would be greater than that determined above.

(3) If the offense was committed with intent (A) to injure the United States or (B) to aid a foreign nation or a terrorist organization, apply §2M6.1.

For examples of other guidelines containing provisions similar to (1) and (2), see §2N1.1(c)(1) and (2) covering tampering with consumer products and §2Q1.4(c)(1) and (2) relating to Safe Drinking Water Act offenses.

VI. Civil Penalties

Prior similar misconduct that has been the subject of a civil or administrative action, we believe, could be treated as a basis for an upward departure, as it is in Application Note 9 to §2Q1.2.

VII. Multiple Counts

The grouping rules of Part 3D should apply to hazmat crimes just as they would to any other federal crimes. (Note, though, that §§2Q1.1-2Q1.6 are neither specifically included in nor specifically excluded from operation of the grouping rule at §3D1.2(d).) For example, if a transporter hauled a hazardous waste (which also would be a hazardous material; see 49 C.F.R. § 171.8) to an unpermitted disposal site in violation of 42 U.S.C. § 6928(d)(1) and also failed to appropriately placard the load in violation of 49 U.S.C. § 5124(b), those two violations might be grouped for sentencing purposes. See §3D1.2, Application Note 6, Example (7). On the other hand, for pollution and hazmat crimes that are not closely associated, grouping would not be appropriate. As with other multiple crimes by the same defendant, the circumstances of the

various crimes must be analyzed in order to determine whether they would belong in a common group or in separate groups.

While generally we believe that the grouping rules should apply to a hazmat crime as they would to any other Part 2Q guideline, for crimes that involve substantial threats to more than one victim, it may be appropriate to include a provision that tracks §2Q1.4(d):

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

IMMIGRATION

I. Alien Smuggling

We agree with the underlying premise of the proposal – i.e., that those who illegally smuggle people into the country should be punished differently depending upon the alien's purpose. However, we believe it should go further if it is to have effect.

A. Entering the United States to Engage in Certain Activity

The proposed new specific offense characteristic would require that the defendant have "knowledge" of the alien's intended unlawful activity within the United States at the time the defendant assisted the alien to illegally enter the country. However, a defendant who "smuggled, transported, or harbored" an alien knowing that the alien intended to engage in terrorist activity could also be charged as a co-conspirator in the underlying terrorist activity and thus already would be subject to a substantial sentence. Significantly, this proposal does not address the more typical situation of smugglers who assist "all comers" and who are often deliberately ignorant of the identity or motive of the person entering the country illegally.

We believe this proposal is far too restrictive. Aliens who are inadmissable pose a serious threat to the security of the United States. The guidelines and laws already address individuals, who with direct knowledge, facilitate those entering illegally to commit acts of terrorism and other specific crimes. What the guidelines do not adequately address are the smugglers who are used by terrorists and others to gain entry, but do so without fully revealing to the smugglers their real identity or intent. The smugglers who enable terrorists to illegally enter

this country undetected should not be able to escape increased liability simply because they did not "know" what specific illegal act the alien intended to commit.

As such, we recommend that the guidelines impose a strict liability standard rather than imposing a knowledge requirement. We believe that once a defendant has been convicted of the underlying smuggling offense, the offense level should be increased under a new specific offense characteristic that would take into account the reason the alien was coming into the country (to engage in terrorist activity, in a crime of violence or controlled substance offense) or why they were barred from entry pursuant to 8 U.S.C. § 1182(a)(2) or (3). This could be accomplished by changing proposed specific offense characteristic §2L1.1(b)(4) to read:

"(4) If the defendant smuggled, transported, or harbored an alien, who -

(A) entered the United States

A. to engage in a crime of violence or controlled substance offense, increase by:

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored.

B. to engage in terrorist activity, increase by [12] levels, but if the resulting offense is less than [32], increase to level [32].

(2) was inadmissable as defined in 8 U.S.C. §1182(a)(2) or (3) increase

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored."

This alternative is similar to the criteria used in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms). An individual found guilty of illegally possessing a firearm faces a base offense level of 12. However, if the weapon is one that is particularly dangerous – as described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30) – then the offense level is increased six levels to a level 18. It is not necessary that the defendant have knowledge of the restricted nature of the weapon. See, e.g., United States v. Fry, 51 F.3d 543 (5th Cir 1995).

This proposal would also increase the enhancement commensurate with the number of dangerous aliens smuggled, in a manner similar to that used in §2L1.1(b)(2). A person who smuggles six aliens barred from entry because they were designated terrorists should receive a substantially higher increase than just the three levels under current §2L1.1(b)(2)(A).

B. Offenses Involving Death

The published proposal suggests three changes that would impact the treatment of deaths resulting from alien smuggling. The first removes the specific offense characteristic subcategory from its present grouping with other injuries and creates a new specific category and suggests, in the alternative, increases of eight (current), 10, or 12 levels. The second proposed change expands a related cross-reference to include deaths involving manslaughter and not just murder,[19] while the third proposed amendment would also address incidents of multiple deaths.

We support the three amendments. The first change, separating the death enhancement from the other injuries and providing a minimum offense level of 25, will have an impact on those cases where the death results from negligence rather than just intentional or reckless conduct. Under the proposed §2L1.1(b)(8), alien smuggling resulting in a death due to negligence would result in an offense level of at least 25 (57-71 months under Criminal History Category I) while under exiting guidelines it would most likely result in a level 20 (33-41 months). We support increasing the minimum offense level for these cases to any of the

[19]A similar provision exists at §2K1.3(c)(1)(B); §2K2.1(c)(1)(B); §2K2.5(c)(1)(B); §2M5.3(c)(1); §2M6.1(c)(1); §2Q1.4(c)(1)

alternative minimum levels between 25 to 30, but would suggest that they should be commensurate to other guidelines where underlying criminal conduct results in death.[20]

We also support the amendment to treat multiple deaths occurring in a single incident as if the case involved multiple counts. It would bring §2L1.1 in conformity with other similar guideline provisions such as §§2D2.3(b)(1), 2G2.1(c)(1), 2M6.1(d)(1), 2N1.1(d)(1) and 2Q1.4(d)(1). In recent years, we have seen a number of alien smuggling cases involving multiple deaths. This provision would, we believe, result in an appropriate increase in the sentence imposed.

C. Number of Illegal Aliens

We support the Commission's proposal to expand the specific offense characteristic that increases the offense levels depending upon the number of unlawful aliens smuggled, transported, or harbored, adding groupings of "200 to 299", and of "300 or more" with a corresponding increase in levels of either 11 or 12, for the first set and either 13,15 or 18 for the second.

We believe increases in offense levels of 12 and 15 for the two new groups would be an appropriate extension of the enhancements already assigned to the lower levels. This would result in increases of three, six, nine, 12, and 15 levels for the entire specific offense characteristic. It would provide a six level enhancement for the first 99 aliens smuggled and then three level increases for each additional 100 illegal aliens. Sentencing courts would still be able to depart upward in those cases involving substantially more than 300 aliens, pursuant to Application Note 4.

II. Document Fraud

People entering into this country using false documents are a serious national security threat. The recent hearings of the National Commission on Terrorists Attacks Upon the United States ("the 9-11 Commission") revealed that many of the terrorists involved in the airline highjackings of September 11th entered the country using fraudulent passports and/or made false statements to gain entry.[21] Although we recognize that most who enter the country illegally are not terrorists, ensuring the security of our borders is critical to protecting the safety of all Americans, and maintaining the integrity of U.S. passports and other immigration documents is absolutely necessary to securing the borders. We strongly support the proposed amendments

---

[20]See for example, §2D2.3(a)(1) (base offense level 26, if death resulted from operating or directing the operation of a common carrier under the influence of alcohol or drugs).

[21]*Entry of the 9/11 Highjackers in the United States*, Staff Statement No. 1, January 26, 2004, http://www.9-11commission.gov/hearings/hearing7/staff_statement_1.pdf.

here (with some suggested revisions, see infra), which would increase penalties for fraudulently acquiring or misusing a passport or other immigration documents and strike the right balance of just punishment for all offenses.

We especially support the proposed increases for fraud related to the acquisition and use of U.S. passports. The U.S. passport is the most respected travel document in the world and is the most widely accepted and versatile identity document. Whereas visas allow a person to enter the United States, holders of U.S. passports are granted all of the privileges of U.S. citizens both in the United States and throughout the world. A U.S. passport is the "gold standard" of all passports and identity documents and is used not only as a travel document but also to open bank and credit card accounts, obtain a driver's license, obtain government benefits, cash checks, and obtain a host of other privileges of U.S. citizenship. The proposed amendment properly recognizes the unique nature of U.S. passports with significant penalties when a defendant fraudulently obtains or uses such a document. As a whole, we think the proposed amendments are critical to the nation's homeland security efforts, and we thank the Commission for considering them now.

A. Base Offense Level

We support the proposed revision of the base offense level under §2L2.2. Stricter penalties for document fraud offenses are needed to help stem the growing number of instances in which such fraud is used as a means to enter the country or obtain purported United States citizenship. We also believe an increase is necessary simply to bring the guideline into parity with §2B1.1, which provides enhanced penalties for "the unauthorized transfer or use of any means of identification to produce or obtain any other means of identification." See §2B1.1(b)((9)(C)(i). In any monetary crime, e.g., a credit card fraud involving a small dollar loss, a two level increase applies if the case involved the unauthorized use of a social security number or other means of identification to obtain the credit card with a minimum offense level of 12. Although the same circumstance arises in nearly all passport or document fraud cases, where an applicant unlawfully submits a false or stolen name, birth certificate and/or social security number in support of a passport application, these crimes yield a base offense level of eight under

§2L2.2.[22] We strongly urge the Commission to provide a base offense level of 12 for these offenses.

B. Specific Offense Characteristics

The proposed amendment also includes two new specific offense characteristics: when the defendant is a fugitive and when the case involves a U.S. Passport. We support these proposed enhancements. As for fugitive status, we recommend that the enhancement be accompanied by an explanatory note about the type of evidence necessary to prove the fugitive status. Obtaining complete foreign court records to prove that a defendant is a fugitive in a foreign country can be very difficult. It might involve the Mutual Legal Assistance Treaty process, which usually takes many months, and may depend upon the cooperativeness of the foreign responding authority. We believe an explanatory note in the guideline stating that prima facie proof is sufficient if a foreign government has notified the United States of the defendant's foreign fugitive status or if the defendant's foreign fugitive status has been entered in an international organization's data base (such as Interpol) would be helpful. In addition, we believe the enhancement should not apply to defendants who are being prosecuted for offenses that would not be recognized as criminal in the United States, either because of First Amendment or other civil rights concerns, to avoid the appearance of the United States' complicity in another country's political persecution.

The second enhancement would apply in any case where "the defendant fraudulently obtained or used a United States passport". We think the proposed enhancement properly distinguishes cases involving U.S. passports from cases involving visa fraud or foreign passports and visas. As we mention above, the U.S. passport is the most respected travel document in the world, and its integrity must be maintained. Whereas visas only allow a person to enter the United States, holders of U.S. passports are granted the privileges of U.S. citizens both in the United States and around the world. The enhancement also recognizes that non-citizens who

---

[22]The guideline in its current form also frustrates efforts to seek detention at bail hearings in passport fraud cases. Despite the fact that these cases often present compelling flight risk indicators, many U.S. Magistrate Judges will not order detention if the defendant is charged with passport fraud, because the sentence that follows a finding of guilt almost never involves a period of incarceration. The worst scenario occurs when a passport fraud defendant would remain in administrative custody pending deportation by ICE in the absence of criminal proceedings, but is ordered released by a Magistrate Judge upon transfer to the court's jurisdiction. In this situation prosecution actually works to the defendant's benefit. The low sentence range results in pretrial release, and provides the defendant an opportunity to flee and thereby avoid both prosecution and deportation.

obtain passports by fraud engage in a host of collateral criminal activity each time the passport is used for any domestic or travel purposes.

We support the enhancement's limited scope – it would apply only if a United States passport was "fraudulently obtained or used." The majority of passport fraud cases arise when the crimes are detected by the State Department at the application stage, before the passport is actually issued, and thus would not be subject to the enhancement. For those defendants whose crime results in actually obtaining the fraudulent passport, a much more severe penalty is warranted. First of all, a criminal's success in moving an application past the approval stage is usually attributable to the sophistication of the fraudulent application. The defendant may have obtained a high quality counterfeit birth certificate or stolen the true birth certificate and social security number of a real victim/citizen. Furthermore, many who have obtained fraudulent passports have enjoyed the benefits of citizenship and passport ownership for many years. Some of these offenders are now being detected for the first time as they send in the unlawfully obtained passports for renewal. This is a class of offenders to which the enhanced penalties are surely appropriate.[23]

Overall, we believe in order to maintain the integrity of U.S. passports, the repercussions of someone fraudulently obtaining a U.S. passport must be significantly increased from current policy. We support the adoption of the proposed specific offense characteristic but recommend a slightly revised tiered enhancement: four levels if the defendant fraudulently obtained or used a United States passport, and eight levels if the defendant fraudulently obtained or used a United States passport, intending to enter the United States to engage in terrorist activity.

Unlike the proposed amendment for alien smuggling, where a defendant who smuggles an alien into the United States to engage in terrorist activity would receive a notably greater increase in sentence than one who smuggles an alien into the United States to engage in other crime, the proposed amendment as published by the Commission, makes no distinction between terrorism related activities and others. As such, a terrorist who fraudulently applied for and obtained a United States passport would receive exactly the same level increase as any nonviolent offender who also fraudulently applied for and obtained a United States passport. We think some distinction should be made in the guideline.[24] This bifurcated approach is also

---

[23]We believe this specific offense characteristic should be accompanied by an application note which makes clear that the "use" of a passport includes the attempted renewal of the previously-issued passport. This would allow the application of §2L2.2(b)(4) to all cases involving fraudulent applications for renewal of U.S. passports (Form DSP-82).

[24]We also recommend the inclusion of the following proposed Application Note for this version of proposed §2L2.2(b)(4):

Application of Subsection (b)(4). The first sentence of Subsection (b)(4)

consistent with the approach followed in the general identity theft statute, 18 U.S.C. § 1028(a)(7). Under § 1028(a)(7), the maximum term of imprisonment for identity theft is (1) 15 years imprisonment, if as a result of the offense anyone committing the offense obtained anything of value aggregating $1,000 or more during a one year period; (2) 20 years imprisonment, if the offense is committed to facilitate a drug trafficking offense or in connection with a crime of violence; or (3) 25 years imprisonment, if the offense is committed to facilitate an act of international terrorism. See 18 U.S.C. § 1028(b)(1)(D), (b)(3)-(4).

IMPLEMENTATION OF THE CAN-SPAM ACT OF 2003

The Commission has published a number of issues for comment in response to section four of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act of 2003"), Pub. L. 108–187, which directs the Commission to review and, as appropriate, amend the sentencing guidelines and policy statements to establish appropriate penalties for the criminal offenses created the act – i.e. 18 U.S.C. § 1037 – and other offenses that may be facilitated by the sending of a large volume of unsolicited e-mail. Section four further directs the Commission to consider providing sentencing enhancements for several listed factors.

I. Statutory Reference for § 1037 Offenses

We recommend that the Commission reference in the Statutory Index all five sections of 18 U.S.C. §1037 to §2B1.1. The "hacking spam" provision in §1037(a)(1) prohibits one from

---

would establish a four-level increase in any case (other than the special circumstance set forth in the second sentence of that subsection) in which the defendant fraudulently obtained or used a United States passport. As the Department of State has noted, "The U.S. passport is the most valuable identity document in the world as it establishes American citizenship and allows its bearer unlimited access to virtually every country in the world." [Source: http://www.state.gov/m/ds/investigat/] In addition, United States passports – especially if they are legitimate passports obtained by fraud – are likely to be given greater credence, as proof of identity by financial institutions and other businesses, than many other types of identifying documents than can be more easily forged or counterfeited. The second sentence of Subsection (b)(4) would establish an eight-level increase in any case where the defendant fraudulently obtained or used a United States passport intending to enter the United States to engage in terrorist activity. The defendant need not have actually entered the United States or actually engaged in terrorist activity within the United States for this latter increase to apply.

knowingly accessing a protected computer without authorization and intentionally initiating the transmission of multiple commercial electronic mail messages from or through that computer. This provision is intended for the prosecution of those who break into computer systems of others, set up an e-mail server, and start sending out electronic mail messages. It is intended to fill a perceived gap in § 1030 when the resulting damage from the hacking offense does not meet the $5,000.00 threshold or is otherwise the type of damage established under § 1030(a)(5)(B). Given that §2B1.1 already encompasses similar conduct, we believe the same guideline section should apply to violations of §1037(a)(1).

The "open relay" provision of §1037(a)(2) prohibits one from knowingly using a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of those messages. This subsection is intended for the prosecution of people who send spam through mail servers that are configured to accept mail from any source and forward it to mail servers on other networks. Such mail servers, or "open relays," are often otherwise available to the public, but not necessarily intended for the use of spam. Consequently, the use is not necessarily "without authorization," but is nonetheless an abuse of the servers, especially when the origin of the spam is disguised. This fills a perceived gap in § 1030(a)(5) when a computer is intentionally accessed, but not necessarily without authorization, and where the type of damage under § 1030(a)(5)(B) cannot be proven. Again, §2B1.1 already encompasses similar conduct, and as such is the logical reference to violations of §1037(a)(2).

The "false header" provision in § 1037(a)(3) prohibits one from knowingly and materially falsifying header information in multiple commercial electronic mail messages and intentionally initiating the transmission of those messages. This subsection is intended for the prosecution of persons who create false e-mail headers to frustrate efforts by recipients, Internet Service Providers ("ISP"), or investigating agencies in determining the true sender of the electronic mail. Since this is a type of fraud, to the extent it is criminalized, we believe it can also be adequately addressed by §2B1.1.

The "false registration" provision in §1037(a)(4) prohibits one from registering for five or more e-mail addresses or online user accounts, or two or more domain names, knowingly using information that materially falsifies the identity of the registrant, and then initiating the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names. This is a companion provision to § 1037(a)(3), and prohibits persons from sending out commercial electronic mail that reflects a true electronic mail address, but which address points to an account that has been registered with bogus information. Again, as a type of fraud, it can be adequately addressed by § 2B1.1.

Finally, the "false IP address" provision of the statute, covered by § 1037(a)(5) prohibits one from falsely representing oneself to be the registrant or legitimate successor in interest to the

registrant of five or more Internet Protocol addresses, and intentionally initiating the transmission of multiple commercial electronic mail messages from those addresses. This subsection is intended for the prosecution of those involved in the developing problem of "zombie spam," where spammers attempt to get around IP-level blocking software by falsely assuming the identity of a legitimate domain name and convincing the appropriate IP-block administrator to re-establish routing to the spammer's ISP, effectively hijacking legitimate IP blocks for spam-sending purposes. Once again, it is a type of fraud which can be addressed by §2B1.1.

II. Base Offense Level and Enhancements

We believe that the present base offense level under §2B1.1 is appropriate for all provisions of §1037. At the current base offense level of six, a misdemeanor violator would receive a penalty of 0-6 months in Criminal History Category I through to a penalty of 12 months in Criminal History Category VI (since the applicable 12-18 month range would be capped by the statutory maximum). Additional levels could be added for the more serious conduct described in § 1037(b)(2).

In keeping with the statutory directive, however, we believe additional enhancements should be triggered by the amount of loss to victims, the amount of gain to the defendant,[25] quantity of electronic mail sent, number of false domain and address registrations, unauthorized access to a computer system in the course of the offense, and role as an organizer or leader.[26] We believe that an enhancement of at least four levels is necessary to appropriately capture the increased statutory penalty enacted by Congress where these aggravating factors are present.

We recommend against applying the multiple victim enhancement and mass-marketing enhancement to simple misdemeanor violations of the statute. Since the offense described in 18 U.S.C. § 1037 inherently involves mass-marketing, adding an enhancement on top of the base offense level would effectively establish a higher base offense level because the enhancement would apply to every case. Because we believe that the present base offense level of six is an appropriate starting point for the guideline calculation, we would not seek an automatic enhancement to level eight.

However, we believe the "multiple victim" enhancement should apply if, for example, a defendant accessed more than ten protected computers to send out commercial electronic mail

---

[25]Specifically, we believe that the sentencing guidelines should, at least in the spam context, treat gain more affirmatively than they do at present – in which gain can only be considered as a measure when loss to the victim cannot be reasonably calculated. See §2B1.1 Commentary (n. 3(B)).

[26]We believe that the leadership role can be appropriately applied through the existing §3B1.1 enhancements.

messages in violation of § 1037(a)(1). Furthermore, in cases where the conduct is widespread or significant, such as cases where the amount of electronic mail initiated significantly exceeds the minimum thresholds of § 1037(b)(2)(C), a mass-marketing enhancement would be appropriate. Major financial institutions and other online businesses, for example, are being increasingly targeted for "phishing" – i.e., the use of unsolicited e-mail, designed to appear that it is being sent by those institutions or businesses, that seeks to deceive multiple Internet users into disclosing their personal financial or identifying data, which the phishing scheme can then use to gain access to Internet or financial accounts and commit identity theft and fraud. During 2003 and early 2004, several dozen phishing schemes have used the names and corporate logos of leading U.S. financial institutions and financial services-related businesses such as Bank One, Bank of America, Citibank, eBay, PayPal, and U.S. Bank.

Therefore, we recommend revising Application Note 4 in §2B1.1 relating to the mass-marketing enhancement to address the use of spam in furtherance of schemes to conduct online identity theft and fraud to read as follows (changes in bold):

> For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; **(iii)** invest for financial profit; **or (iv) disclose personal financial or identifying data.** "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase life insurance policies**, or a campaign of unsolicited e-mail that solicits a large number of people to assist in transfers of funds or to disclose personal financial or identifying data.**

Inclusion of the proposed language would also serve as a suitable alternative to creating a new and separate enhancement for the sending of a large volume of unsolicited e-mail in cases that would be governed by §2B1.1 (e.g., fraud and identity theft cases).

Although to some extent, a level of sophistication is inherent in all spam, we believe there are circumstances under which an offense under § 1037 could be considered to involve sophisticated means which should trigger the application of an additional enhancement. For example, if an offender created or distributed a virus or trojan horse program to assist in accessing the computers of a number of innocent users to facilitate the sending of unsolicited commercial email, or if an offender routed his communications overseas to frustrate investigation or prosecution of a spam offense, the sophisticated means enhancement should apply. Accordingly, we do not believe that commentary discouraging application of the enhancement should be included.

We also recommend an enhancement for defendants who obtain e-mail addresses through improper means such as harvesting of e-mail addresses or who knowingly send or advertise an internet domain registered with false information, in keeping with the directive in section 4(b)(2)(A) of the Act. Such e-mails are more pernicious because the threat of being spammed creates a disincentive for legitimate users to use the Internet – these users will be less likely to purchase merchandise online or engage in other beneficial activities if they believe that their e-mail address might be misused or misappropriated by an Internet vendor. In addition, when the receipt of spam e-mail that relates to a false domain name, it is harder to report those violations to the Federal Trade Commission or the Department of Justice. Therefore, such an enhancement should be at least two and possibly four levels, to adequately reflect the additional culpability reflected by this behavior.

Finally, we recommend an additional enhancement for sending large quantities of electronic mail in the course of commission of crimes involving fraud, obscenity, child pornography, and sexual exploitation of children, among others. We believe, however, that rather than amending a number of individual guidelines sections to add this enhancement, a more generally applicable role/means enhancement in Chapter Three of the guidelines should be considered. If, however, the Commission believes that amending a number of individual guidelines provisions is more appropriate, then the fraud, obscenity, child pornography and sexual exploitation of children guidelines should be covered comprehensively, in order to best effectuate the express intent of Congress.

III. Other Issues

In response to one of a the Commission's question, we believe the term "large quantities of electronic mail" as used in the CAN-SPAM Act should at least include such quantities that would trigger the felony provisions of § 1037(b)(3) – i.e., 2,500 messages within a 24-hour period, 25,000 within 30 days, or 250,000 within one year. The Commission could also appropriately choose to set the guidelines lower than that, to the point that would trigger misdemeanor violations of § 1037. This would be particularly appropriate in cases involving child pornography and sexual exploitation of children, in which a few hundred messages might permit a defendant to find potential child victims.

In regards to violations of 15 U.S.C. § 7704, we recommend they be referenced to §2G3.1. Where the offense does not involve the transmission of child pornography, § 7704 violations are roughly analogous to offenses under 18 U.S.C. § 2252B and should be sentenced accordingly. In cases where the offense involves the transmission of child pornography, offenders would almost certainly be charged under one of the statutes sentenced at §2G2.2 and the existing cross-reference in §2G3.1 would nonetheless direct the court to §2G2.2. For offenses not involving the transmission of child pornography, the enhancements at §2G3.1 are generally sufficient, with one exception. Currently, proposed §2G3.1(b)(2) is written to cover "use of a misleading domain name on the Internet with the intent to deceive a [minor][person]

into viewing material that is harmful to minors." This enhancement should be expanded to cover "a violation of 15 U.S.C. Section 7704(d)."

* * * * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Deborah J. Rhodes

Counselor to the Assistant Attorney General

American Chemistry Council Good Chemistry Makes It Possible

March 1, 2004

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002
Attn: Public Affairs

Re: Comments on Two Aspects of the Commission's December 30, 2003 Notice (68 Fed. Reg, 75340):
- Amendment 2: "Effective Compliance Programs in Chapter 8"; and
- Issue for Comment 11: "Hazardous Materials"

Dear Sir or Madam:

The American Chemistry Council (ACC or the Council) is pleased to submit these comments on two aspects of the Commission's December 30, 2003 Notice: Amendment 2: "Effective Compliance Programs in Chapter 8," and Issue for Comment 11: "Hazardous Materials." ACC represents the leading companies engaged in the business of chemistry, and our members are responsible for about 90% of basic chemical production in the United States. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Our members employ approximately 556,000 employees, with sales of $238 billion and 1,447 facilities. Chemistry companies invest more in research and development than any other business sector. Safety and security have always been primary concerns of ACC members, and they have only intensified their efforts, working closely with government at all levels, to improve security and to defend against any threat to the nation's critical infrastructure.

Due to the nature of their business, ACC member companies are heavily regulated under virtually all of the laws covered by the Sentencing Guidelines, and particularly in the areas of health, safety, environment, and maritime security. As a result, these companies have developed extensive and sophisticated compliance management systems. These systems influenced, and have been influenced by, the definition of an effective compliance program in the Organizational Guidelines. Any changes to those Guidelines will have direct effect on those companies' programs. ACC member companies also ship

1300 Wilson Boulevard, Arlington, VA 22209 ◆ Tel 703-741-5800 ◆ Fax 703-741-6800 ◆
http://www.americanchemistry.com

substantial quantities of hazardous materials, and the major bulk hazardous materials carrier companies are Partners in ACC's Responsible Care® program .[1] Accordingly, ACC has a vital interest in both of these aspects of the Commission's current notice.

Executive Summary

Effective Compliance Programs

Corporate Governance. The Commission has done a good job to ensure consistency between the Guidelines and the many other sources of authority that affect corporate governance. ACC suggests the Commission clarify that:

- the phrase "shall report directly to the governing authority or an appropriate subgroup" means to provide information to, not be supervised by, these bodies; and
- the high-level personnel with direct, overall responsibility to ensure the implementation and effective administration of the organization's compliance program need not be the high-level line management with the actual compliance obligation, but may be a separate staff function.

"Ethics" Issues. The Commission has wisely constructed its proposal so that an organization implementing the seven elements of an effective compliance program can attain both the compliance with law and organizational culture called for under the proposed Guidelines. The Commission should resist entreaties to go "beyond compliance" by requiring free-standing ethics programs.

Cooperation & Waiver. ACC urges the Commission to delete the last sentence of its proposed amendment to Application Note 12, so that there would be no exception to its general rule that waiver is not a prerequisite when evaluating cooperation for sentencing purposes. Otherwise, the Commission should drop the entire amendment, and leave defendants free to argue that the merits of the issue without the Commission being perceived as having agreed with the Department of Justice.

Litigation Dilemma. The Commission should sponsor additional public workshops, or joint studies with the judiciary committees of Congress, to promote a resolution of this increasingly problematic issue.

Deletion of "propensity" language. ACC supports the Commission's proposed change to subsection (b)(3).

Promotion and Enforcement. ACC agrees with expanding compliance standards enforcement to encompass appropriate incentives, rather than solely disciplinary measures. It is crucial, however, that organizations be free to determine what punishments or incentives, if any, are appropriate.

---

[1] Attachment A is a Responsible Care® Fact Sheet.

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

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

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

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

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

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

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

Request for Comments re Hazardous Materials

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

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

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

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

Discussion

I. Effective Compliance Programs

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

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

A. Corporate Governance.

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

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

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

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

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

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

---

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

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

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

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

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

B. "Ethics" concerns

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

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

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

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

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

---

[6] *Id.* at 56.

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

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

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

C. Cooperation, Waiver & the Litigation Dilem ma

1. Cooperation and waiver

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

Unfortunately, the proposed am endment to Application Note 12, while perhaps disfavored by the Justice Departm ent, effectivel y codifies DOJ's offici al position: waiver is not required to satisfy the requirem ent for cooperation, except in the circum stances where it is. Given the "significant and in creasingly entrenched divergence of opinion between [DOJ] and the defense bar" as to this issue, [11] and the even more worrisome divergence between DOJ's official position a nd the government's practice, as reported by the defense bar, ACC questions whether codif ying D OJ's position in the G uidelines will help matters. O n balance, we are concerned that it w ill only make matters worse, by signaling to judges and others that the Com mission has considered and rejected the view that privileges and protections deserve such high respect that they should not be trum ped by the government's interest in expediency.

Representatives of regulated entities – not just crim inal def ense lawyers – have argued often and at length that concerns about the n ear inevitability of waiver in the case of a government investigation have gravely ham pered the effectiveness of internal investigations and the ability of corporate staff to gain the cooperation of em ployees. This has certainly been first-hand experience of ACC m ember companies. Our member companies' experience in conducting internal investigations over the past several years is that the status quo is having a serious chilling effect on com munications between attorneys (especially outside counsel) and m anagement. While unintended, this is a very negative consequence.

Previously, outside counsel conducting an inte rnal investigation would provide extensive written advice to senior m anagement of the company, clearly outlining the f acts, legal assessment and recommendations for remedial action (including potential disciplinary action against personnel). Now, because of the very real concern that the com pany will be coerced to waive privileges and protections and turn the docum ents over to the government to receive credit for cooperation, those issues -- to the extent they are documented at all -- are likely to rem ain in the law firm's file in the f orm of internal memos. Otherwise, the documents potentially w ill not only provide a roadm ap for prosecution but, because the action of giving them to the government could be construed

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

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

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

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

2. The litigation dilemma

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

D. Deletion of "propensity" language

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

---

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

ACC offers two comments in this regard:

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

E. Promotion and Enforcement

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

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

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

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

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

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

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

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

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

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

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

I. Issues for Comment under Amendment 2

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

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

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

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

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

[15] Advisory Group Report at 3.

II. Request for Comments re Haz ardous Materials

ACC strongly opposes making any changes to th e existing organizational Guidelines, or creating any new Guidelines, regarding hazardous m aterials (hazmat) transportation. In particular, pending legislation could render DOJ's concerns m oot.

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

1. Hazmat incidents can be am ply punished under the existing Guidelines, and the Com mission should await action on pending legislation that would increase those punishm ents

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

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

The offense characteristics in Section 2Q1.2, m oreover, would substantially elevate sentences under the HMTA. Assum e, for example, that a terrorist hijacked a gasoline tank truck and drove it into a shopping center, causing an im mense conflagration, many deaths and a major evacuation. While the hijacking terrorist would presum ably no longer be available for prosecution, assum e further that several accom plices are arrested and convicted of aiding and abetting, and thus punishable under the sam e offense. Under Section 2Q1.2, these terrorists' sentences would:

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

---

[16] *See* 49 U.S.C. 5124.

[17] *See* S. 1072, § 4442(b).

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

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

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

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

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

1. Terrorists are already subject to extraordinary sanctions

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

---

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

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

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

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

[22] *Id.* § 2331(5).

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

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

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

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

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

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

---

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

[24] *E.g., id.* § 2332a(a).

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

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

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

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

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

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

---

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

C. A Separate Hazmat Guideline Is Particularly Objectionable

ACC is especially opposed to the creation of a new guideline applicable only to hazardous materials. Entirely apart from the appropriateness or equities of the sentences that might be handed down under it, establishment of such a free-standing guideline would greatly complicate the job of organizations attempting to implement an effective compliance system. Presumably the separate guideline would have its own concept of such a system, and any business involved in hazardous materials transportation would then need to implement, and integrate, its generic organizational and hazmat Guidelines compliance programs. Even a business that does nothing but hazmat transport would need two compliance programs, one for its hazmat-regulated activities and one for the balance of its federally-regulated activities (e.g., tax, corporate, antitrust).

* * *

ACC appreciates this opportunity to comment on these two aspects of the instant notice. If you have any questions, please do not hesitate to contact the undersigned at 703-741-5166.

Sincerely,

James W. Conrad, Jr.
Counsel

Attachment A: Responsible Care Fact Sheet
Attachment B: Testimony of ACC in connection with the Commission's November 14, 2002 public meeting.

Attachment A

Fact Sheet

Responsible Care®
Contact: Lisa S. Grepps at 703-741-5842 May 1, 2003

SUMMARY

The chemical industry applies its tremendous knowledge and technologies to make life better, healthier and safer – not only in the products it manufactures, but in the processes by which it operates. For the past 15 years, the industry's Responsible Care initiative has guided the industry's performance by addressing issues that go beyond the bottom line and resonate on a personal level: the safety and well-being of employees and communities; enhanced security; environmental quality; and consumer protection. By focusing on these values, Responsible Care has elevated the chemical industry – greatly improving its environmental performance and making it the safest workplace in the United States. To follow through on its commitment to continuous performance, the chemical industry must regularly set new, more stringent goals for its performance. This year, ACC members considerably raised the bar for the industry by adopting a number of enhancements to Responsible Care.

DETAILS

Responsible Care continues to strengthen its commitments and enhance the public credibility of the industry. New program enhancements adopted by the American Chemistry Council as a condition of membership include:

- **A Responsible Care Management System (RCMS).** Responsible Care is moving beyond codes of management practices to achieve better EHS performance and obtain more business value for our members and partners. The RCMS replaces the current practice of applying six codes with a combined 106 management practices (e.g., community awareness and emergency response, distribution, employee health and safety, pollution prevention, process safety and product stewardship). Instead, relevant aspects of the existing codes are subsumed into a RCMS that is based on effective management practices of leading private sector companies, initiatives developed through the Global Environmental Management Initiative, International Standards Organization and other bodies, and requirements of national regulatory authorities. The framework for the RCMS includes such areas as Policy & Leadership; Planning; Implementation, Operation & Accountability; Performance Measurement & Corrective Action; and Management Systems Review.

- **Independent Third-Party Certification.** A credible, independent third party will certify that each Responsible Care company has a RCMS in place. The mandatory certification will be conducted at company/business group headquarters and chemical facilities on a regular cycle. The RCMS provides the framework and content for the identification and implementation of management systems elements that enable continuous improvement in all aspects of Responsible Care implementation.

- **Performance Measures.** Responsible Care has a set of uniform industry wide metrics to measure individual company and industry performance through the program. The measures will enable member and partner companies to identify areas for continuous improvement and provide a means for the public to track individual company and industry performance in an accessible and transparent way. The measures address performance across a broad range of issues including economics, environment, health, safety, security and products.

- **Security Code.** Safety is an inherent part of how the chemical industry does business. In fact, the industry's practices and procedures have made it the safest industry in the country. The Security Code is designed to help companies enhance this long-standing safety culture, safeguard their facilities and surrounding communities, and continuously improve their security performance. It provides a framework for companies to check potential vulnerabilities, act on them and have an independent third party verify that security enhancements have been made. Since the security of our companies, communities and nation is so critical, implementation of this code is mandatory for ACC members.

- **Responsible Care 14001.** The Responsible Care 14001 certification process combines ISO 14001 and Responsible Care and allows participating organizations to gain accredited certificates for both ISO 14001 Environmental Management Systems and Responsible Care Management Systems in a single audit. Responsible Care 14001 certification is an option for companies that may be required by customers or other parties to gain ISO 14001 certification, but want to also gain credit for their existing Responsible Care activities that go beyond the scope of an environmental management system such as occupational health and safety, product stewardship, community outreach and transportation safety activities.

Attachment B

STATEMENT OF JAMES W . CONRAD, JR., ESQ. FOR THE AMERICAN CHEMISTRY COUNCI L TO THE ADVI SORY GROUP ON ORGANI ZATIONAL SENTENCI NG GUI DELINES TO THE UNITED STATES SENTENCING COMMISSION RELATED TO THE REVIEW OF CHAPTER EIGHT OF THE U.S. SENTENCI NG GUI DELINES NOVEMBER 14, 2002

Good morning, my name is James Conrad, counsel with the American Chemistry Council. On behalf of the Council, I thank you for the opportunity to testify today before the Advisory Group on Organizational Guidelines to the United States Sentencing Com mission.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make our lives better, healthier and safer. The business of chemistry is a $460 billion-a-year enterprise and a vital part of our nation's economy. It is the nation's #1 exporting sector, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other industry.

The Council submitted written com ments to the Advi sory Group on May 16 and October 11 of this year. We have explained our views in som e detail in these comments, including our responses to some of the specific questions posed by the Advisory Gr oup. I would like to highlight som e important principles for you today.

The Advisory Group has initiated the action called for by Congress in Sarbanes-Oxley.

In Section 805(a)(5) of the Sarbanes-Oxley Act of 2002, Congress directed the Commission to ensure that the *Guidelines* "are sufficient to deter and punish crim inal misconduct." At least with respect to those elements of the G uidelines establishing th e criteria for an effective com pliance assurance program, the Advisory Group is alr eady considering this question. Sarbanes-Oxley does not call for a separate or new review: you are sim ply ahead of schedule.

The *Guidelines* should continue to focus on crimi nal conduct in the context of criminal sentencing.

The Commission is charged with promulgating "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crim es." The courts use the *Guidelines* to sentence those convicted of crimes. The purpose of the *Guidelines,* therefore, is to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." The Commission should not stray from this mission. The *Guidelines* should not be expanded to address general issues of corporate social responsibility or et hics that are not governed by criminal laws or that are not directly relevant to crim inal sentencing.

The Council's members strongly believe in ethical behavior and responsible social conduct. However, the Commission is tasked to address crim inal conduct, not promulgate a code of ethics. Any suggested

changes to the *Guidelines* must be evaluated in the very serious criminal sentencing context in which the *Guidelines* are used.

The *Guidelines* should not be used to encourage organization to foster "ethical cultures" to ensure compliance with the "intent" of the law as opposed to "technical compliance." Our members certainly support ethical conduct by organizations, and recognize that encouraging organizations to create an "ethics infrastructure" that goes "beyond compliance" with criminal law is a laudable goal. However, that is not the function of the Sentencing Commission. Establishing criminal sentences based on ethical judgments would effectively be creating new federal crimes, a course of action that lies within the jurisdiction of Congress, not the Commission. The focus of the *Guidelines* should remain on systems that assure compliance with legal requirements, not ethics programs that may focus on important questions in a wider domain. This is particularly true given that there is no agreed-upon set of ethical criteria against which organizations can be measured and that can be the basis for setting criminal penalties.

Any changes to the *Guidelines* should be based on objective evidence and a demonstrable need for change.

Any suggested changes to the *Guidelines* should be based on facts, not theory. Thousands of organizations have invested significant resources implementing compliance systems based on the *Guidelines*. Yet, we are unaware of any actual data or other evidence in the public record showing deficiencies in the *Guidelines* that need correcting. On the contrary, as the Commission has noted, the "organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years." The Advisory Group should follow the adage: "If it ain't broke, don't fix it." Material changes should only be considered after finding the *Guidelines* are flawed and that the user community is demanding changes.

Some may say that something must be done because of the alleged criminal activities and corporate governance scandals that currently are high-visibility issues. However, the mere existence of alleged illegal or unethical conduct in some organizations does not mean that the *Guidelines* were at fault or that changing the *Guidelines* would have produced a different result. Changes to the *Guidelines* should be based on objective evidence that the *Guidelines* have not established adequate criteria for effective compliance systems, not on general concerns about unethical conduct.

The *Guidelines* must remain flexible, practical and generally applicable to all organizations in all sectors.

The *Guidelines* currently offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. Any proposed changes to the *Guidelines* should take into account the small and medium-sized organizations that are the vast majority of U.S. businesses. This is not a theoretical concern. The Commission's statistics reveal that in FY 2000, some 87% of organizations sentenced under Chapter 8 had fewer than 200 employees, while approximately 65% of all sentenced organizations had fewer than 50. Whatever obstacles small and medium-sized businesses face will not be lessened by increasing the level of detail or complexity in the *Guidelines*. Further, attempting to create unique provisions in the *Guidelines* for small and medium-sized businesses would require the Sentencing Commission to be able to discern which obstacles are unique to such businesses

and to draw arbitrary lines betw een which businesses would "qualify" for any unique provisions and which would not.

The "best practices" developed by sophisticated co mpanies, consulting firms or academia should not become the model for what all organizations m ust undertake. While smaller organizations should follow the *Guidelines*, they should not be potentially subject to greater crim inal penalties if they cannot implement the "best practices" of large enterprises. Indeed, "raising the bar" m ight only serve to discourage organizations from implementing effective com pliance assurance system s.

The *Guidelines* already provide sufficient guidance on designing, implementing or auditing compliance systems.

Some commenters have suggested that the *Guidelines* should include more detailed guidance on designing, implementing or auditing com pliance systems. These suggestions, however well-intentioned, are m isplaced. The *Guidelines* should remain generic and applicable to all organizations.

There is no evidence of a "m arket need" for th e Commission to provide detailed im plementation guidance. There has been a proliferation of secto r-specific, public, private, national and international guidance documents and standards on compliance assu rance, many of which we surveyed in our May 16 comments. This vast literature is already availa ble to the user com munity. Indeed, it is not the function of the Commission to provide such general educational assistance through the *Guidelines*, since the failure of an orga nization to conform to the *Guidelines* can have direct im plications in the criminal sentencing context.

Moreover, if the Commission were inclined to provide more detail on compliance programs, the practical impact of that effort must be carefully weighed. The ava ilable specific guidance on compliance programs continues to be refined and tailore d to the needs of specific areas of regulation. For example, several Federal agencies have already developed sector-specific guidance or even regulations on compliance management systems. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, leading to practical im plementation problem s.

The Guidelines do not need to provide more detail on "corporate governance."

It is no secret that corporate governance is a signi ficant topic of public interest, and that there are several major legislative and regulatory initiatives that are making significant changes to corporate governance. Not the least of these are the new requi rements just created by Congress in the Sarbanes-Oxley Act of 2002 and are being im plemented by vari ous regulatory and self-regulatory bodies such as the Securities & Exchange C ommission, the New York Stock Exchange and the N ational Association of Securities D ealers.

Adding specific corporate governance responsibilities in the *Guidelines* at this time could create conflicts with the flood of new requirem ents already being generated. For exam ple, the *Guidelines* should not provide detail on the responsibilities of boa rds of directors or equivalent governance bodies in overseeing compliance programs. Not all organi zations, particularly sm aller ones, have such governance bodies, and the *Guidelines* already em body the principle th at compliance programs should be supervised by "high level" personnel. Further, specifying the responsibilities of particular functions

associated with corporate governance (e.g., CEO or CFO), expanding the definitions of "high level personnel," or providing additional comments on what is intended by "specific individual(s) within high-level personnel of the organization" would decrease the flexibility that is currently an outstanding feature of the *Guidelines*. These are all issues that are already topics of considerable federal legislative, regulatory and self-regulatory attention.

To provide one last example, more specificity on whistleblower protection is not necessary. We agree that whistleblowers must be completely protected from acts of retribution. However, the *Guidelines* already clearly state that internal reporting should be without fear of retribution. Further, many statutes already provide specific whistleblower protections. Adding more specific whistleblower provisions in the *Guidelines* might either create conflicts with existing substantive laws or be duplicative, or even create loopholes that might result in less protection.

It is not the function of the Sentencing Commission to create new corporate governance rules. That is properly the province of Congress and the numerous regulatory bodies that have been delegated the authority to promulgate and enforce regulations on this topic. The flurry of legislative and regulatory activity demonstrates that there is not a "gap" that the Commission must fill. As the legal requirements on corporate governance are revised and expanded, organizations that implement compliance assurance systems that conform to the criteria in the *Guidelines* will necessarily have to include those new requirements in their systems. Therefore, without any modification to the Guidelines themselves, any new corporate governance requirements will become elements of an effective compliance assurance system.

Thank you again for the opportunity to speak today. I would be happy to answer any questions you may have, and look forward to participating in this afternoon's sessions.