PROPOSED AMENDMENT 9: MANPADS AND OTHER DESTRUCTIVE DEVICES

Synopsis of Proposed Amendment: *This amendment proposes to increase by [5]-[13] additional levels the existing two-level enhancement in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for cases in which the offense involved destructive devices that are portable rockets, missiles, or devices used for launching portable rockets or missiles, and by increasing the enhancement by up to [7] additional levels if the offense involved any other kind of destructive device. It also proposes to add certain attempts and conspiracies to the list of offenses for which the three-level reduction in §2X1.1 (Attempt, Solicitation, or Conspiracy) is prohibited.*

As defined in 26 U.S.C. § 5845(f), a "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellent, the barrels of which have a bore of more than one-half inch in diameter; or (3) any combination of parts designed or intended for use in converting any device into a destructive device as described above.

In its annual submission to the Commission dated August 1, 2003, the Department of Justice recommended that guideline penalties be increased if the offense involved the use or attempted use of, or conspiracy to use, a kind of destructive device known as the man-portable air defense system (MANPADS) or any similar destructive device. MANPADS are portable rockets and missiles that pose particular risks due to their portability, potential range, accuracy, and destructive power. This amendment addresses that concern by increasing the enhancement in §2K2.1(b)(3) for involvement of these types of destructive devices from 2 levels to [7]-[15] levels, correspondingly increasing the maximum cumulative offense level in that guideline from level 29 to level [30]-[42], and increasing the enhancement for all other destructive devices from two levels to up to [9] levels. An issue for comment follows regarding whether the increase should pertain to all destructive devices within the meaning of 26 U.S.C. § 5845(f) or only to MANPADS and similar weapons, or to some other subcategory of destructive devices, or whether there should be a graduated increase for different kinds of destructive devices.

Similarly, the Department of Justice also urged the Commission to increase guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive device. Those offenses include 18 U.S.C. § 32 (destruction of an aircraft or aircraft facilities), 18 U.S.C. § 1993 (terrorist attacks and other acts of violence against mass transportation systems), and 18 U.S.C. § 2332a (use of certain weapons of mass destruction). In response to this concern, the amendment proposes to amend the special instruction in §2X1.1(d) to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally, and not just in the context of the use of a MANPADS or similar destructive device. These offenses are comparable in nature to the offenses already listed in §2X1.1(d). Issues for comment follow regarding the appropriate Statutory Index references for these offenses the definition of "destructive device."

Proposed Amendment:

§2K2.1. **Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition;**

Prohibited Transactions Involving Firearms or Ammunition

* * *

(b) Specific Offense Characteristics

* * *

(3) If the offense involved—

(A) a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by [7-15] levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by [2-9] levels.

* * *

Provided, that the cumulative offense level determined above shall not exceed level ~~29~~ [30-42].

* * *

Commentary

* * *

Application Notes:

* * *

11. A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and ~~a two-level~~ the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

* * *

§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

* * *

(d) Special Instruction

(1) Subsection (b) shall not apply to ~~any of the following offenses~~:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5):

18 U.S.C. § 81;
18 U.S.C. § 930(c);

18 U.S.C. § 1362;
18 U.S.C. § 1363;
18 U.S.C. § 1992;
18 U.S.C. § 2339A;
18 U.S.C. § 2340A;
49 U.S.C. § 46504;
49 U.S.C. § 46505; and
49 U.S.C. § 60123(b).

(B) Any of the following offenses:

18 U.S.C. § 32;
18 U.S.C. § 1993; and
18 U.S.C. § 2332a.

* * *

Issues for Comment:

1. *The Commission requests comment regarding whether the proposed increase in the enhancement in §2K2.1(b)(3) for involvement of a destructive device should pertain to all destructive devices within the meaning of 26 U.S.C. § 5845(f) or only to man-portable air defense systems (MANPADS) and similar destructive devices or to some other subcategory of destructive devices. In addition, what is the appropriate extent of such an increase? Specifically, are there types of destructive devices other than MANPADS and similar destructive devices that should receive a [7]-[15] level enhancement, as is proposed for MANPADS and similar destructive devices? Should the extent of the increase vary according to the kind of destructive device involved? Should the limitation on the cumulative offense level of level 29 in §2K2.1(b) be amended if the extent of the enhancement in §2K2.1(b)(3) is increased, and, if so what should the limitation on the cumulative offense level be? Alternatively, should the limitation on the cumulative offense level be eliminated?*

2. *The Commission also requests comment regarding whether 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a), should be referenced in Appendix A (Statutory Index) to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than, or in addition to, §2A6.1 (Threatening or Harassing Communications).*

   Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. § 32 should be referenced only to §2A5.2.

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

4. *The Commission seeks comment regarding whether the "destructive device" definition at Application Note 4 of §2K2.1(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. Practitioners have commented that it is unclear whether certain types of firearms qualify as "destructive devices". Should the Commission clarify the definition of "destructive device"? If so, what issues should be addressed?*

ISSUE FOR COMMENT 10: ABERRANT BEHAVIOR

Issue for Comment: *The Commission requests comment regarding whether the departure provision in §5K2.20 (Aberrant Behavior) should be eliminated (and departures based on characteristics described in §5K2.20 should be prohibited) and whether those characteristics instead should be incorporated into the computation of criminal history points under §4A1.1 (Criminal History Category). Specifically, are there circumstances or characteristics, currently forming the basis for a departure under §5K2.20, that should be treated within §4A1.1 instead, particularly for first offenders?*

ISSUES FOR COMMENT 11: HAZARDOUS MATERIALS

Issue for Comment: *In its annual submission to the Commission dated August 1, 2003, the Department of Justice urged the Commission to consider revising the guideline treatment for the illegal transportation of hazardous materials. According to the Department, the sentencing guideline applicable to hazardous materials, §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), is not adequately suited to such offenses because (1) such offenses are different from more typical pollution offenses covered by that guideline and have characteristics that are not addressed by that guideline; and (2) the specific offense characteristics in that guideline are not characteristic of such offenses. As a consequence, the offense levels applicable to hazardous materials offenses often are inadequate given the severity of the offense.*

Specifically, the Department stated that §2Q1.2 originally was intended to cover the release of toxic substances and pesticides in the context of ongoing, continuous, or repetitive releases into the environment and the failure to obtain government permits to handle certain materials. Offenses involving hazardous materials, on the other hand, often involve a one-time, catastrophic occurrence that provide a "target-rich" environment for terrorists and that, because of the movement of these materials in commerce, could affect a large population or occur in a setting such as aboard an aircraft where corrective or preventive action is unlikely. Further aggravating the risks inherent in the transportation of hazardous materials is that, unlike other toxins, government permitting is not required.

In light of the Department of Justice's concerns, the Commission requests comment regarding whether existing guidelines should be revised, or whether a new guideline should be created, to address more adequately offenses involving hazardous materials. Specifically:

(1) How should the Commission define key terms regarding offenses involving the transportation of hazardous materials? For example, for purposes of enhanced penalties governing hazardous materials (as opposed to other toxic materials and pesticides) what hazardous materials, and/or what statutory provisions, should be covered? What activities constitute a "release" in the context of transportation of hazardous materials? What is the appropriate definition of "environment" in the context of transportation of hazardous materials?

(2) What is an appropriate base offense level for offenses involving the transportation of hazardous materials?

(3) What aggravating and/or mitigating factors particular to such offenses should be incorporated into the guidelines as specific offense characteristics? For example, should the guidelines provide enhancements if the offense involved any of the following:

(A) The transportation of a hazardous material on a passenger-carrying or other aircraft.

(B) The transportation of a hazardous material on any passenger-carrying mode of mass transportation.

(C) The concealment of the hazardous material during its transportation, such as by misrepresentation, deception, or physical concealment.

(D) The release of a hazardous material.

(E) Disruption of, or damage to, critical infrastructure.

(F) The release of a hazardous material resulting in damage to the environment, or to public or private property.

(G) An emergency response and/or the evacuation of a community or part thereof.

(H) Repetition of the offense.

(I) The substantial likelihood of death or serious injury.

(J) Actual serious bodily injury or death.

(K) A substantial expenditure for remediation.

(L) The failure to provide, submit, file, or retain required information about a hazardous material, including the failure to notify for certain hazardous material incidents under 49 CFR 171.1.

(M) Financial gain to the defendant or the financial loss to others, excluding government costs of cleanup.

(N) The transportation of radioactive or explosive material.

(O) A terrorist motive.

(P) A controlled substance manufacturing or trafficking offense.

(Q) The failure to properly train transporters of hazardous materials (see, e.g., 49 U.S.C. § 5107).

(R) The procurement of a license through fraudulent means.

What should be the extent of any specific characteristic added to the guidelines for these enhancements, including gradation for seriousness of the specific offense characteristic involved?

(4) If a new guideline were to be promulgated covering only offenses involving the transportation of hazardous materials:

(A) What interaction should the new guideline covering hazardous materials transportation offenses have with the guidelines in Chapter Eight (Sentencing of Organizations)? For example, should a separate compliance program be

established for persons involved in the transportation of hazardous materials, or should additional factors be added to the compliance requirements in Chapter Eight?

(B) What cross references, if any, should be included with this guideline?

(C) What impact, if any, should repeat civil penalties or regulatory infractions have on culpability under this proposed guideline?

(D) Under Chapter Three, Part D (Multiple Counts), what would be the appropriate grouping of counts involving the transportation of hazardous materials under this new guideline and counts involving environmental offenses covered under other existing guidelines, particularly §2Q1.2?

PROPOSED AMENDMENT 12: IMMIGRATION

Synopsis of Proposed Amendment: *This proposed amendment addresses issues involving immigration offenses. Specifically, the proposed amendment makes changes to §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). Two issues for comment also are contained in this proposed amendment.*

(1) §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

(A) Entering the United States to Engage in Subversive Activity

The proposed amendment provides alternative enhancements at §2L1.2(b)(4)(A) and (B) if the defendant smuggled, harbored or transported an alien knowing that the alien intended to enter the United States to engage in (1) a crime of violence or a controlled substance offense [; or (2) terrorist activity]. The proposal provides a [2-] [4-][6-] level enhancement if the alien intended to commit a crime of violence or a controlled substance offense[, and a [12-] level enhancement, and a minimum offense level of [32], if the alien intended to engage in "terrorist activity" as defined in 8 U.S.C. § 1182]. An increase equivalent to the terrorism adjustment at §3A1.4 (Terrorism) was chosen to reflect the seriousness of aiding the importation of terrorists. An issue for comment follows regarding the appropriate interaction between the proposed terrorism enhancement and the terrorism adjustment at §3A1.4.

(B) Offenses Involving Death

The amendment proposes three significant changes to the guideline in cases in which death occurred. First, the proposed amendment removes the increase of eight levels "if death resulted" from the current specific offense characteristic in §2L1.1(b)(6) addressing bodily injury and places this increase in a stand alone specific offense characteristic in §2L1.1(b)(8). This new specific offense characteristic provides an increase of [8], [10], or [12] levels and a minimum offense level of level [25-30]. Second, the cross reference at §2L1.1(c) is expanded to cover deaths other than murder, if the resulting offense level is greater than the offense level determined under §2L1.1. Third, the proposed amendment provides a new special instruction at §2L1.1(d) to address cases involving multiple deaths. If applicable, the guideline will be applied as if the case involved a separate count of conviction for each death.

(C) Number of Illegal Aliens

The proposed amendment provides additional offense level increases to the table in §2L1.1(b)(2) relating to the number of aliens involved in the offense. An increase of [11][12] levels would be applicable under the proposal if the offense involved 200 to 299 aliens, and an increase of [13-18] levels would be applicable if the offense involved 300 or more aliens. The current upward departure provision in Application Note 4 has been modified to reflect this proposed change.

(2) Immigration Documentation Fraud

The proposed amendment makes several changes to §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). First, the proposed amendment increases the base offense level in §2L2.2(a) from level 8 to level [8-12]. Second, the proposed amendment increases by two levels the current enhancements in §§2L2.2(b)(1) (regarding unlawful aliens who have been deported on one or more occasions) and 2L2.2(b)(2) (regarding defendants who commit the instant offense after sustaining a felony conviction for an immigration and naturalization offense). Third, the proposed amendment provides an [4-10]-level enhancement in §2L2.2(b)(3) if the defendant was a fugitive wanted for a felony offense in the United States [or any other country]. An issue for comment follows the proposed amendment regarding whether that enhancement should include fugitive status from a country other than the United States. [Finally, the proposed amendment provides an [2-8]-level enhancement at §2L2.2(b)(4) if the defendant fraudulently obtained or used a United States passport.]

Proposed Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of Unlawful Aliens Smuggled, Transported, or Harbored		Increase in Level
(A)	6-24	add **3**
(B)	25-99	add **6**
(C)	100 ~~or more~~-199	add **9**~~.~~
[(D)	200-299	add **[11][12]**
(E)	300 or more	add **[13][15][18].]**

* * *

[(4) If the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States—

(A) to engage in a crime of violence or controlled substance offense, increase by **[2-6]** levels; or

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

~~(4)~~(5) * * *

~~(5)~~(6) * * *

~~(6)~~(7) If any person ~~died or~~ sustained bodily injury, increase the offense level according to the seriousness of the injury:

~~Death or~~ Degree of Injury		Increase in Level
(~~1~~A)	Bodily Injury	add **2** levels
(~~2~~B)	Serious Bodily Injury	add **4** levels
(~~3~~C)	Permanent or Life-Threatening Bodily Injury	add **6** levels.
~~(4)~~	~~Death~~	~~add 8 levels.~~

(8) If the offense resulted in the death of any person, increase by **[8-12]** levels, but if the resulting offense level is less than level **[25-30]**, increase to level **[25-30]**.

(c) Cross Reference

(1) If death resulted~~any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States~~, apply the appropriate ~~murder~~ homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the death of more than one alien, Chapter Three, Part D (Multiple Counts) shall be applied as if the death of each alien had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline—:

* * *

~~*"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.*~~

* * *

2. *Application of Aggravated Role Adjustment.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.*

~~*3. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, an upward departure may be warranted.*~~

3. *Application of Subsection (b)(2).—For purposes of subsection (b)(2), the number of unlawful aliens smuggled, transported, or harbored does not include the defendant.*

4. *Upward Departure Provision.—If the offense involved substantially more than ~~100~~300 aliens, an upward departure may be warranted.*

5. *Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

[6. Application of Subsection (b)(4).—

(A) Definitions of Terms Used in Subdivision (b)(4)(A).—For purposes of subdivision (b)(4)(A):

"Controlled substance offense" has the meaning given that term in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2.

(B) Definitions of Terms Used in Subdivision (b)(4)(B).——For purposes of subdivision (b)(4)(B):

"Engage in terrorist activity" has the meaning given that term in 8 U.S.C. § 1182(a)(3)(B)(iv).

"Terrorist activity" has the meaning given that term in 8 U.S.C. § 1182(a)(3)(B)(iii).

(C) *Inapplicability of Chapter Three Adjustment.*—If subdivision (b)(4)(B) applies, do not apply the adjustment from §3A1.4 (Terrorism).]

~~*6*~~7. *Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)~~(5)~~(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)~~(5)~~(6) applies solely on the basis of conduct related to*

fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)~~(5)~~(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)~~(4)~~(5).

8. Special Instruction at Subsection (d)(1).—Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the death of more than one alien, whether specifically cited in the count of conviction or not, each such death shall be treated as if contained in a separate count of conviction. For the purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the death of more than one alien are not to be grouped together under §3D1.2 (Groups of Closely Related Counts).

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

(a) Base Offense Level: ~~8~~[8-12]

(b) Specific Offense Characteristics

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by ~~2~~[4] levels.

(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by ~~2~~[4] levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by ~~4~~[6] levels.

(3) If the defendant was a fugitive wanted for a felony offense in the United States, [or any other country,] increase by [4-10] levels.

[(4) If the defendant fraudulently obtained or used a United States passport, increase by [2-8] levels.]

* * *

Issues for Comment:

(1) The Commission requests comment on the proposed enhancement in §2L1.1(b)(4)(B), which provides a significant increase and minimum offense level if the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States

to engage in terrorist activity. Specifically, how should this enhancement interact with the terrorism adjustment at §3A1.4 (Terrorism), as promulgated in response to section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, and amended in response to the PATRIOT Act, Pub. L. 107–56? Should the proposed enhancement instead more closely track the provisions of 8 U.S.C. § 1327, which prohibit, among other things, the smuggling, transporting, or harboring of an alien who is inadmissible under 8 U.S.C. § 1182(a)(3)(B) (because that alien has engaged in terrorist activity, as defined in such provision)? Alternatively, should commentary be added inviting use of the upward departure provision in Application Note 4 of §3A1.4 if the defendant smuggled, transported, or harbored an alien knowing the alien intended or was likely to engage in terrorist activity?

(2) The Commission specifically requests comment regarding whether the proposed enhancement in subsection (b)(3) should include fugitive status in a country other than the United States. Are there application problems that may arise as a result of such inclusion?

* * *

ISSUES FOR COMMENT 13: IMPLEMENTATION OF THE CAN-SPAM ACT OF 2003

Issues for Comment: *Section 4(b)(1) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act of 2003"), Pub. L. 108–187, directs the Commission to review and as appropriate amend the sentencing guidelines and policy statements to establish appropriate penalties for violations of 18 U.S.C. § 1037 and other offenses that may be facilitated by the sending of a large volume of unsolicited e-mail.*

Section 4(b)(2) of the CAN-SPAM Act of 2003 further directs the Commission to consider providing sentencing enhancements for—

(A) defendants convicted under 18 U.S.C. § 1037 who—

(i) obtained e-mail addresses through improper means, including the harvesting of e-mail addresses from the users of a website, proprietary service, or other online public forum without authorization and the random generating of e-mail addresses by computer; or

(ii) knew that the commercial e-mail messages involved in the offense contained or advertised an internet domain for which the registrant of the domain had provided false registration information; and

(B) defendants convicted of other offenses, including fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of e-mail.

The Commission requests comment regarding the most appropriate amendments that might be made to the guidelines to implement the directives in section 4(b) of the CAN-SPAM Act of 2003. Specifically, the Commission requests comment on the following:

(1) What are the appropriate guideline penalties for a defendant convicted under 18 U.S.C. § 1037? Section 4(a) of the CAN-SPAM Act of 2003 created the new offense at 18 U.S.C. § 1037, which makes it unlawful for any person, in or affecting interstate or foreign commerce, to knowingly:

(a)(1) access a protected computer without authorization, and intentionally initiate the transmission of multiple commercial electronic mail messages from or through such computer;

(a)(2) use 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 such messages;

(a)(3) materially falsify header information in multiple commercial electronic messages and intentionally initiate the transmission of such messages;

(a)(4) register, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiate the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names; or

(a)(5) falsely represent oneself to be the registrant or the legitimate successor in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiate the transmission of multiple commercial electronic mail messages from such addresses.

The criminal penalties for a violation of 18 U.S.C. § 1037 are as follows:

(b)(1) Imprisonment up to five years and/or a fine if—

(A) the offense is committed in furtherance of any other federal or State felony; or

(B) the defendant has previously been convicted under this section [18 U.S.C. § 1037], under 18 U.S.C. § 1030, or under any State law for sending multiple commercial e-mail messages or unauthorized access to a computer system.

(b)(2) Imprisonment up to three years and/or a fine if—

(A) the offense is under subsection (a)(1) (i.e., using without authorization a protected computer to send multiple commercial e-mail messages);

(B) the offense is under subsection (a)(4) (i.e., registering by false identification to e-mail accounts, online user accounts, or domain names) if the offense involved 20 or more falsified e-mail or online user account registrations or 10 or more falsified domain name registrations;

(C) the volume of e-mail messages transmitted in furtherance of the offense exceeded 2,500 during any 24-hour period, 25,000 during any 30-day period, or 250,000 during any 1-year period;

(D) the offense caused a loss to one or more persons of $5,000 or more during any one-year period;

(E) the defendant obtained as a result of the offense conduct anything of value of $5,000 or more during any one-year period; or

(F) the defendant acted in concert with three or more other persons and was an organizer or leader with respect to the others.

(b)(3) Imprisonment up to one year and/or a fine for any other violation of the statute.

Should the new offense(s) be referenced in Appendix A (Statutory Index) to §§2B1.1 (Fraud, Theft, and Property Destruction), and 2B2.3 (Trespass), and/or to some other guideline(s)? What is the appropriate base offense level for the new offense(s)? Should the base offense level vary depending on the seriousness of the offense (for example, should the base offense level for a regulatory violation under 18 U.S.C. § 1037 be the same as the base offense level for a more serious violation under that statute)?

If 18 U.S.C. § 1037 is referenced to §2B1.1, should commentary be added to that guideline that ensures application of the multiple victim enhancement at §2B1.1(b)(2)(A)(I) or the mass marketing enhancement at §2B1.1(b)(2)(A)(ii) to a defendant convicted of 18 U.S.C. § 1037? Should a defendant convicted under 18 U.S.C. § 1037 receive an enhancement under §2B1.1(b)(2)(A)(i) or (ii) based on a threshold quantity of email messages involved in the offense, and if so, what is that threshold quantity?

Are there circumstances under which an offense under 18 U.S.C. § 1037 could be considered to involve sophisticated means, and if so, would it be appropriate to add commentary to §2B1.1 to invite application of the enhancement for sophisticated means at §2B1.1(b)(8) under such circumstances? Alternatively, would it be appropriate to add commentary discouraging application of the enhancement for sophisticated means in certain circumstances and, if so, what would those circumstances be?

Consistent with the directive in section 4(b)(2) of the CAN-SPAM Act of 2003, should §2B1.1 contain an enhancement for defendants convicted under 18 U.S.C. § 1037 who (I) obtain e-mail addresses through improper means, including the harvesting of e-mail addresses from the users of a website, proprietary service, or other online public forum without authorization and the random generating of e-mail addresses by computer; or (ii) knew that the commercial e-mail messages involved in the offense contained or advertised an internet domain for which the registrant of the domain had provided false registration information?

(2) *What are the appropriate guideline penalties for offenses other than 18 U.S.C. § 1037 (such as those specified by section 4(b)(2) of the CAN-SPAM Act of 2003, i.e., offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children) that may be facilitated by the sending of a large volume of unsolicited e-mail?*

Specifically, should the Commission consider providing an additional enhancement for the sending of a large volume of unsolicited email in any of the following: §2B1.1 (covering fraud generally and identity theft), the guidelines in Chapter Two, Part G, Subpart 2, covering child pornography and the sexual exploitation of children, and the guidelines in Chapter Two, Part G, Subpart 3, covering obscenity? Alternatively, should the Commission amend existing enhancements, or the commentary pertaining thereto, in any of these guidelines to ensure application of those enhancements for the sending of a large volume of unsolicited email? For example, should the Commission amend the enhancements, or the commentary pertaining to the enhancements, for the use of a computer in the child pornography guidelines, §§2G2.1, 2G2.2, and 2G2.4, to ensure that those enhancements apply to the sending of a large volume of unsolicited email?

What constitutes a "large volume of unsolicited email"?

(3) *Section 5(d)(1) of the CAN-SPAM Act of 2003 makes it unlawful for a person to initiate in or affect interstate commerce by transmitting, to a protected computer, any commercial electronic email message that includes sexually oriented material and —*

(A) fail to include in the subject heading for the electronic mail message the marks or notices prescribed by the [Federal Trade Commission] under this subsection; or

(B) fail to provide that the matter in the message that is initially viewable to the recipient, when the message is opened by any recipient and absent any further actions by the recipient, includes only—

(i) to the extent required or authorized pursuant to paragraph (2) [i.e., the recipient has given prior affirmative assent to receipt of the message], any such marks or notices;

(ii) the information required to be included in the message pursuant to section 5(a) of the CAN-SPAM Act of 2003; and

(iii) instructions on how to access, or a mechanism to access, the sexually oriented material.

The criminal penalty for a violation of section 5(d)(1) of the CAN-SPAM Act of 2003 is a fine or imprisonment for not more than five years, or both.

The Commission requests comment on how it should incorporate this new offense into the guidelines. Should the Commission reference this offense in Appendix A to §2G2.2, the guideline covering the transmission of child pornography, and/or §2G3.1, the guideline covering the transmission of obscene matter? Are there enhancements that should be added to either of these guidelines to cover such conduct adequately?

THE SECRETARY OF STATE

WASHINGTON

February 25, 2004

To the Sentencing Commission:

I want to thank you for considering the proposal to enhance sentencing guidelines for violations of our passport and visa fraud laws. Ensuring the security of our borders and protecting the safety and security of American citizens at home and abroad are the highest priorities for the Department of State. Maintaining the integrity of U.S. passports and visas is a critical component of our global effort to fight terrorism, in addition to ensuring that our immigration policies and laws are enforced.

A U.S. passport establishes U.S. citizenship and identity, making it the most widely accepted and versatile identity document in the country. It is considered the "gold standard" of all passports and is used by our citizens not only to visit foreign countries and enter the United States, but also domestically to establish bank and credit card accounts, cash checks, apply for a driver's license, apply for welfare or unemployment, and to conduct activities that require proof of U.S. citizenship. Similarly, visas are highly sought after because they allow the bearer to request legal entry into the United States.

Investigations of passport and visa fraud are a vital part of strong border and homeland security procedures. I believe these new guidelines will be a clear signal that the United States Government recognizes the severity of passport and visa fraud and the importance of maintaining our border security. Ambassador Francis Taylor, Assistant Secretary for Diplomatic Security, will address our specific proposal with you in a separate letter. Thank you for your consideration on this important matter.

Sincerely,

Colin L. Powell

The U.S. Sentencing Commission,
One Columbus Circle, N.E.,
Suite 2-500, South Lobby,
Washington, D.C. 20002-8002.

United States Department of State

Assistant Secretary of State
for Diplomatic Security

Washington, D.C. 20520

FEB 25 2004

To All Members of the Commission:

The Department of State and the Bureau of Diplomatic Security's (DS) role to investigate and seek prosecution of those committing passport and visa fraud has increased in the post-9/11 environment. In order to further strengthen our efforts, I believe we need federal sentencing guidelines that are appropriate for the crimes.

While the DS sentencing initiative before you addresses crimes related to the users of false and fraudulently obtained passports and visas, we fully intend to work with the Commission during the next term to propose raising the sentences for crimes relating to the vendors of said documents (falling under Federal Sentencing Guidelines 2L2.1). We strongly believe that higher sentences for those responsible for the illegal sale of passports, visas, and supporting documents is a logical next step in our homeland security efforts.

Likewise, with the integrity of passports and visas at the core of U.S. border security efforts, someone who has obtained a U.S. passport or visa and/or uses a false passport or visa, is obstructing the homeland security efforts of the United States. In the U.S. judicial system, someone convicted of a similar false statement before law enforcement or judicial officials (18 USC 1502, 1505-13, or 1516) would face a base offense level of 14 under current Federal Sentencing Guidelines (2J1.2).

The goal of the Department of State is to achieve sentencing levels appropriate for those individuals convicted of violations of passport or visa fraud. Given the overwhelming importance of the integrity of U.S. passports and visas in the post-9/11 environment, I believe we can obtain these appropriate sentencing levels with a combination of well-defined specific offense characteristics and a slight increase in the base offense level.

The U.S. Sentencing Commission,
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attached are my comments on the specific issues before the Commission. These comments are meant to clarify and, in some cases, expand on our previously submitted material. Please note that our goal in focusing on Specific Offense Characteristics, as opposed to seeking an overall major increase in the base offense level, is to have guidelines that appropriately address different levels of violations of law related to passport and visa fraud. Individuals who apply for U.S. passports using false and fraudulent information, however, should face an increased sentence. The two primary reasons are that they are already in the United States (in the case of passport applications), having entered illegally or overstayed their legal entry time limit, and are attempting to hide their true citizenship and/or identity to obtain a genuine passport or visa. Finally, someone who applies for a U.S. passport or visa using false statements and is successful in obtaining the documents, should face the stiffest of the penalties.

If the current Federal Sentencing Guidelines for passport and visa fraud are adjusted to the levels indicated above, I believe that future sentences for convictions of these crimes will provide the appropriate deterrence and punishment. With increased sentences, the special agents of the Diplomatic Security Service will have the leverage necessary to enlist the assistance of defendants to identify persons involved in the manufacture and/or sale of illegal citizenship and identity documents, both inside and outside the United States. Further, once federal judges start handing out prison sentences for these crimes, the deterrent effect will reduce the overall number of people inclined to commit these offenses.

On behalf of the Department of State and Bureau of Diplomatic Security, thank you for your efforts and assistance in this matter. I stand committed to this initiative and welcome any further questions from the Commission.

Sincerely,

Francis X. Taylor

Francis X. Taylor
Ambassador

Attachment: Proposed Changes to Sentencing Guidelines

Proposed Changes to Sentencing Guidelines

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

(a) Base Offense Level: **8[8-12]**

DS COMMENT: (Raise to 9, keeping the base 2 levels below 2L2.1)

(b) Specific Offense Characteristics

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by ~~2~~**[4]** levels.

DS COMMENT: (Leave as 2)

(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by ~~2~~**[4] (4)** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4[6] (6)** levels.

DS COMMENT: (Make a conviction under scenario (A) a level 4 and (B) a level 6, providing for appropriate level increases based on the increasing seriousness of the acts)

(3) If the defendant was a fugitive wanted for a felony offense in the United States, [or any other country,] increase by **[4-10]** levels.

DS COMMENT: (If wanted for a crime of violence or controlled substance increase by 8 levels; if wanted for any other felony crime increase by 4 levels. This mirrors similar enhancements in the current guidelines.)

[(4) If the defendant ~~fraudulently obtained or used a United~~

~~States passport, increase by [2-8] levels.]~~

DS COMMENT: (In place of this proposed language insert: used a counterfeit or forged passport or visa increase by 4 levels; if the defendant fraudulently applied for a U.S. passport or visa increase by 6 levels; if the defendant used a fraudulently obtained U.S. passport or visa increase by 8 levels.)

Drafted: DS/MFO:Mike Johnson/DS/BFOClaude Nebel
Cleared: DS/FLD: Wdeering ok
DS/DO: TmcKeever ok
DS/DSS: JMorton

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
PROBATION OFFICE

DAVID D. KEELER
CHIEF PROBATION OFFICER

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REPLY TO: DETROIT

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March 10, 2004

The Honorable Avern Cohn
United States District Judge
Theodore Levin Courthouse, Courtroom 225
231 W. Lafayette Boulevard
Detroit, Michigan 48226

RE: Proposed Guideline Amendment Number 10

Dear Judge Cohn:

On February 19, 2004, Chief United States Probation Officer David D. Keeler sent you a memorandum outlining the Probation Department's comments regarding the proposed amendments to the Sentencing Guidelines. During counsel on February 23, 2004, Your Honor asked this officer to clarify the Probation Department's rationale for our response to Amendment Number 10, the proposed elimination of the Aberrant Behavior provision of the guidelines. At the time, I told Your Honor that I would discuss the matter with Chief Keeler before responding.

After speaking with Chief Keeler, I am submitting the following revision to the Probation Department's response to proposed Amendment Number 10.

10. **Aberrant Behavior:** The Commission requested comment on the elimination of 5K2.20 and inquired as to whether those characteristics should be incorporated into the computation of criminal history points under 4A1.1. The Probation Department would recommend against the elimination of 5K2.20. The guideline was amended twice in 2003, to prohibit application to offenses involving serious bodily injury, death and firearm or drug involvement. To delete the departure provision under 5K2.20 and incorporate these characteristics into the computation of criminal history points would further limit judicial discretion in sentencing first time offenders with no criminal history, the very population to whom this provision would generally apply.

Re: Proposed Guideline
Amendment Number 10

Hopefully, the revised response to the proposed revision of Amendment Number 10 adequately answers the question raised by the Court.

Should Your Honor have any additional questions or requests, please contact this officer at the telephone number below. I am available, as well as Senior U.S. Probation Officers Philip Miller (234-5408) and Lisa Fields (234-5420) to discuss the matter in person.

Respectfully submitted,

David D. Keeler
Chief U.S. Probation Officer

Joseph B. Herd
Senior U.S. Probation Officer
(313) 234-5413

Reviewed and Approved:

Barbara A. Feril
Supervising U.S. Probation Officer
(313) 234-5459

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
THEODORE LEVIN UNITED STATES COURTHOUSE
231 WEST LAFAYETTE- ROOM 219
DETROIT, MICHIGAN 48226

(313) 234-5160

CHAMBERS OF
AVERN COHN
DISTRICT JUDGE

March 12, 2004

Judge Ruben Castillo
Presiding Commissioner
United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500 / South Lobby
Washington, D. C. 20002

RE: Public Hearing of March 17, 2004

Issue For Comment 10: Aberrant Behavior

Dear Judge Castillo:

At my request our Probation Office reviewed the proposed guideline amendment to be considered at your March 17, 2004 meeting. In particular, I asked them to look at the Aberrant Behavior proposed amendment. Attached are the comments on Issue For Comment 10, which I endorse.

I urge you not to tinker with U.S.S.G. § 5K2.20 (Aberrant Behavior) for the reasons stated by our Probation Office.

Please recognize that I have not shared these comments with my fellow judges. However, I have no doubt they would agree with me.

Yours truly,

Avern Cohn

Enclosures

AC:nl

ISSUE FOR COMMENT 10: ABERRANT BEHAVIOR

Issue for Comment: *The Commission requests comment regarding whether the departure provision in §5K2.20 (Aberrant Behavior) should be eliminated (and departures based on characteristics described in §5K2.20 should be prohibited) and whether those characteristics instead should be incorporated into the computation of criminal history points under §4A1.1 (Criminal History Category). Specifically, are there circumstances or characteristics, currently forming the basis for a departure under §5K2.20, that should be treated within §4A1.1 instead, particularly for first offenders?*

March 3, 2004

NOTICE OF PUBLIC HEARING AND MEETING OF THE UNITED STATES SENTENCING COMMISSION

Pursuant to Rule 3.2 and 3.4 of the Rules of Practice and Procedure of the United States Sentencing Commission, the following public hearing and meeting are scheduled:

(1) Public Hearing - Wednesday, March 17, 2004 at 9:30 a.m., and

(2) Public Meeting - Friday, March 19, 2004 at 10:00 a.m.

The **public hearing** will be held in the Thurgood Marshall Federal Judiciary Building in the Federal Judicial Center's Training Rooms A-C (South Lobby, Concourse Level). It is expected that the public hearing will last approximately three and a half hours. The **public meeting** will be held in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., in Suite 2-500 (South Lobby). It is expected that the public meeting will last approximately 45 minutes.

(1) The purpose of the March 17, 2004 public hearing is for the Commission to gather testimony from invited witnesses regarding possible guideline amendments currently under consideration by the Commission.

(2) The purpose of the March 19, 2004 public meeting is for the Commission to conduct the business detailed in the following agenda:

Report of the Commissioners
Report from the Staff Director
Vote to Approve Minutes
Possible Vote to Promulgate Proposed Guideline Amendments in the Following Areas:

- Body Armor
- Public Corruption
- Homicide/Assault
- MANPADS
- Miscellaneous Amendments

Public meeting materials are available at the Commission's website (http://www.ussc.gov/meeting.htm) or from the Commission (202/502-4590).

PUBLIC COMMENT SUMMARIES
March 1, 2004

Amendment No. 1 - PROTECT Act, Child Pornography and Sexual Abuse of Minors

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

Child Pornography Offenses

A. Consolidation of Possession and Trafficking Offenses

The Department of Justice (DOJ) agrees with the proposed consolidation of possession offenses and receipt/trafficking offenses under one guideline at §2G2.2, believing consolidation will promote greater consistency in sentencing. It notes that whether one can be shown to have received child pornography or simply to have possessed it is often based more on the quality of forensic evidence than on actual culpability.

Base Offense Levels

Although the DOJ favors consolidation, because Congress has chosen to impose a mandatory minimum sentence for receipt offenses, but not possession offenses, the DOJ believes a higher base offense level for receipt offenses is still appropriate. It favors a variation of Option 1, where one base offense level should apply to possession offenses without the intent to traffic in, or distribute the material. Other offenses sentenced under the guideline, all of which are subject to a five year mandatory minimum, should be subject to a higher base offense level.

The DOJ believes the base offense level for receipt and distribution offenses should be a level 24 or 26. The DOJ notes that the Commission has historically, and it believes correctly, set the base offense level for offenses subject to mandatory minimum penalties so that the low end of the sentencing range for a defendant in Criminal History Category I would be no lower than the statutory minimum sentence. It supports this method of implementing mandatory minimum statutes within the guidelines, arguing it is a method that keeps the guidelines consistent with all Acts of Congress. In its opinion, a base offense level lower than 24 will not give full effect to the special offense characteristics and will result in cases with and without special offense characteristics receiving the same sentence. Similarly, it argues, if the base offense level in §2G2.2 is lower than offense level 24, the sentencing enhancements will not have full effect, and dissimilar conduct will be sentenced similarly. Finally, it recommends a base offense level of 20 for possession offenses not involving the intent to distribute.

Advertising

The DOJ believes a gap exists in the proposed consolidated guideline in that there is no enhancement for advertisement, which also involves the prospect of distribution. To the extent that some advertising offenses (such as § 2252A(a)(3)(B)) will be sentenced pursuant to §2G2.2, it believes a two level enhancement should be provided. In its view, this could be accomplished either by adding a provision to subsection (b)(2) or by expanding the definition of "Distribution" to include advertising.

"Defendant's Conduct" or "Offense Involved" Language

The DOJ notes that the Commission has recommended making the higher base offense level applicable only if the "defendant's conduct" included the more culpable factors rather than if the "offense involved" the more culpable factors. The DOJ strongly disagrees with this approach, arguing it would insulate conspiracies from appropriate upward adjustments, contrary to the generally applicable federal sentencing scheme. In its opinion, although the Commission's proposal may be motivated by a concern that a defendant not receive an enhancement for distribution when he only received child pornography which is a valid concern, a better way to address it would be to add an Application Note making it clear that a defendant should be liable only for his own conduct, unless he is part of a conspiracy or criminal enterprise.

Bestiality or Excretory Functions

The DOJ suggests that the Commission consider clarifying the enhancement in §2G2.2(b)(3) for material that "portrays sadistic or masochistic conduct or other depictions of violence" to ensure that it includes material containing bestiality or depicting excretory functions. While the DOJ believes there is an argument that bestiality and excretory material are already encompassed by the existing sadistic and masochistic enhancement, it supports a clarification which makes it explicit.

Video Clips

The DOJ agrees with the definition of "image" proposed by the Commission. However, the DOJ urges that an enhancement be provided for "moving images" such as video, streaming video, etc. It argues that a video/movie that contains even one second of sexually explicit conduct is a more serious item than a still image. It cites the Motion Picture Association of American, which defines video as 24 frames per second, with each frame equivalent to one still image. Thus, it argues, a one minute video is equivalent to 1440 still images. However, the DOJ admits counting each minute of video as 1440 images would be inappropriate, but recommends, based on the increased harm caused by moving videos, a two or three level enhancement for offenses that involve video clips.

Cross Reference in §2G2.2 to the Production Guideline

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

B. Production Offenses, §2G2.1

Base Offense Level

The DOJ believes a base offense level of 34 or 36 for the production of child pornography will ensure that the least serious offenses within Criminal History Category I will satisfy the mandatory minimum while sentences for more serious offenses will be proportionally distributed between the mandatory minimum and statutory maximum. However, it further states it is not clear that §1591 crimes should be referenced directly to §2G2.1, and believes such offenses would more logically be sentenced under §2G1.3 and §2G1.1, although a cross reference to §2G2.1 would be appropriate in some cases.

Conduct in Sections 2241 and 2242

The DOJ believes a four level enhancement is warranted if the production offense involved conduct described in Section 2241(a) or (b), and notes that the same conduct receives a four level enhancement under §2G1.3, but argues it is a significant oversight that the almost equally reprehensible conduct described in Section 2242 has not previously led to an enhancement. Therefore, the DOJ believes an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242."

Sadistic or Masochistic Material

The DOJ believes the enhancement at §2G2.1(b)(2) for material protraying sadistic or masochistic conduct or other depictions of violence should be four levels, consistent with that in §2G2.2(b)(3). Additionally, it argues this enhancement should be broadened to include material depicting bestiality or excretory functions.

Distribution Enhancements

The DOJ believes the table of enhancements for distribution in §2G2.2(b)(2) should similarly apply in the §2G2.1 guideline for child pornography production.

Travel and Transportation Offenses

A. Proposed §2G1.3

Base Offense Level

Because of the five year mandatory minimum prison sentence applicable to these crimes, the DOJ believes the base offense level in the proposed §2G1.3 should be set at 24 or 26.

Enhancements for Conduct in Sections 2241 and 2242

The DOJ notes that variations of the enhancement contained in §2G1.3(b)(2) for conduct described in § 2241 are contained in other guidelines, such as §2G2.1(b)(4) in cases involving the production of child pornography. However, it further notes there are certain complexities in the cases covered by §2G1.3 which make this enhancement and its application note confusing. In its view, such a person, who knowingly benefits from the use of force (by others) to cause minors to engage in commercial sex acts (with others), should also be subject to the enhancement contained in §2G1.3(b)(2). It recommends the addition of a clarification such as "the enhancement in subsection (b)(2) is to be construed broadly to include all instances in which the offense involved the use of force or other conduct described in Section 2241(a) or (b). It may apply even if the defendant did not personally use force against the minor or did not personally engage in a sexual act with the minor."

The DOJ further argues another complicating factor is that Congress has set a higher maximum sentence of life imprisonment for cases under Section 1591 not only involving force, but also for those cases involving fraud or coercion against victims less than fourteen years of age. Thus, it states it may be appropriate to either have the enhancement in §2G1.3 tied more broadly to the use of force, fraud or coercion, or to add an additional enhancement for offenses involving fraud or other conduct not covered by the enhancement for conduct described in Section 2241.

Additionally, the DOJ believes it is a significant oversight that the conduct described in Section 2242 has not previously triggered an enhancement under the guidelines. The DOJ believes an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242," pointing out that conduct described in § 2242 is subject to a cross reference to §2A3.1 under previous guidelines, and are thus treated as seriously as offenses described in Section 2241(a) or (b). The DOJ suggests the addition of an Application Note to clarify that the enhancement applies to those such as recruiters or pimps who may not themselves apply force or coercion against a minor or have sex with a minor but who are nevertheless responsible for the use of such means in connection with the offense.

Option 1A

The DOJ believes the enhancements in Option 1A provide the clearest approach, as long as the resulting offense level is as high as the offense level that would be imposed under §2A3.1.

Further, the DOJ believes an eight level enhancement for offenses involving minors less than twelve years of age would be appropriate.

Additional Enhancement Based on Age

As in §2G2.1, the DOJ thinks there should be a second enhancement in §2G1.3 for minors between the ages of 12 and 16. It suggests that under Option 1A, §2G1.2(b)(3) might read: "If the offense involved a minor who had (A) not attained the age of 12 years, increase by eight levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by four levels."

Options 2A and 2B

Because Section 1591 cases involving minors are covered by this guideline, the DOJ states both Options 2A and 2B are overly narrow, and argues both would lead to inconsistent results. In addition, it notes Sections 1591 and 2423 both cover the activities of pimps, or those who directly entice, transport, or sell children for commercial sex acts, but that this Section 1591 conduct is not presently subject to any enhancement under §2G1.3. Therefore, the DOJ suggests replacing Options 2A and 2B with an enhancement, such as: "If the offense involved a commercial sex act, increase by three levels," and suggests that "Commercial sex act" could be further defined by reference to Section 1591(c)(1).

Multiple Victims

The DOJ suggests that the language of subsection (d)(1) at §2G1.3 involving multiple victims, in combination with Application Note 7(A), makes it appear as if multiple victims listed in the same count of conviction should only be treated as if they were contained in a separate count of conviction for travel or transportation offenses. Therefore, the DOJ believes this language should be clarified to indicate that victims listed in the same count in offenses under Sections 1591 and 2422 should similarly be treated as if they were contained in separate counts of conviction.

Subsection (d)(1)

The DOJ notes that the new definition in subsection (d)(1) refers to "victim" instead of "minor." Due to the new definition of "minor," which includes undercover law enforcement officers, the DOJ believes "minor" should be substituted for "victim." While the definition of "victim" in Application Note 7 includes undercover law enforcement officers, using two different terms to cover the same situations could cause confusion, in its view.

B. Proposed Amendment to §2G1.1

The DOJ notes that while the proposed new §2G1.1 would cover only cases involving adult victims, it would nonetheless apply to a broad range of offense conduct; it would cover cases

under Sections 2421 and 2422(a), in which the participation of the person transported or enticed to travel for prostitution may have been entirely voluntary, and would also cover Section 1591 offenses, in which it must be proven that the defendant knew that force, fraud or coercion would be used to cause a person to engage in a commercial sex act. Given this background, the DOJ believes the combination of the enhancement in subsection (b)(1) for "physical force, fraud or coercion" and the cross reference at (c)(1) for criminal sexual abuse is very confusing. Criminal sexual abuse refers back to Sections 2241 and 2242, which include everything subject to the enhancement in subsection (b)(2), except fraud and perhaps some sort of coercion. Therefore, all Section 1591 cases involving adults seem eligible for the enhancement contained in (b)(2). If the cross reference is properly applied, however, the DOJ argues, the only Section 1591 cases remaining under §2G1.1 would be those involving fraud or some sort of coercion not described in Sections 2241 or 2242. A subset of cases under Sections 1328, 2421 and 2422(a) would also be subject to the enhancement under (b)(2) or to the cross reference. Lastly, the DOJ argues that the cross reference and enhancement are also marked by some of the complexities discussed in relation to similar enhancements under §2G1.3 involving culpability of those who recruit or harbor a victim knowing that force will be used to cause the person to engage in a commercial sex act but may not themselves use force against the victim or have sex with a victim. The DOJ therefore recommends that the enhancement be narrowed so that it does not overlap with the cross reference and that the cross reference itself be clarified.

Enhancements for Force, Fraud, or Coercion

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

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

Cross Reference

The DOJ believes the cross reference should be clarified to indicate that all offenses involving force or coercion, such as threats of violence, are subject to the cross reference. The application note could, for example, include the following:

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

Obscenity and Misleading Domain Names

The DOJ believes the enhancement in §2G3.1(b)(4) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be broadened to include material depicting bestiality or excretory functions.

Conditions of Probation and Supervised Release

The DOJ recommends that the language at §5B1.3(d)(7)(B) and §5D1.3(d)(7)(B) read, "A condition limiting or prohibiting the use of a computer or an interactive service in cases in which the offense involved the use of such items."

A. Proposed §2A3.1

The DOJ supports Option 3, as it provides an appropriate cross reference to the production guideline in §2G2.1 and thus ensures that all production cases will be sentenced under the same guideline. In its opinion, however, if Option 3 is used, Application Note 6 should be deleted because it discusses an enhancement under Option 2. If the Commission selects Option 1, the DOJ recommends that the base offense level under §2A3.1(a)(1) be 36, and the base offense level under §2A3.1(a)(2) be 30. If Option 2 is chosen, the DOJ recommends that the base offense level under §2A3.1(a) be 30. Moreover, if Option 2 is chosen, the DOJ recommends that the enhancement under §2A3.1(b)(7) be three levels, to avoid inconsistency with §2G2.1.

B. Proposed §2A3.2

The DOJ recommends that the base offense level for §2A3.2 be increased. While the DOJ

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

C. Proposed §2A3.3

The DOJ recommends that the base offense level for §2A3.3 offense be increased to 12, which it notes would still call for at least four months' imprisonment

D. Proposed §2A3.4

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

Issues for Comment

A. Violent Child Pornography

The DOJ agrees with the courts which have found strict liability for the receipt of violent child pornography. Further, the DOJ does not believes that the Commission should provide a definition of sadistic or masochistic conduct or other depictions of violence that would unduly constrain courts in determining whether specific images portray sadistic or masochistic conduct.

B. Offenses Under 18 U.S.C. § 2425

The DOJ recommends that offenses under 18 U.S.C. § 2425 be sentenced pursuant to the proposed §2G1.3 because § 2425 offenses include, for example, defendants trafficking in child prostitutes and using interstate facilities to transmit information about the minors. The DOJ notes that other offenses similar to § 2425 offenses, such as §§ 1591, 1421, 2422(b), and 2423 offenses, are all sentenced pursuant to §2G1.3. With respect to the Commission's question concerning whether any specific offense characteristic should be added to a guideline to account for § 2425 conduct, the DOJ believes that the enhancement at §2G1.3(b)(7) is sufficient.

C. Incest

The DOJ believes the Commission should explicitly specify in §3B1.3 that offenses involving incest should receive the two level enhancement. In its opinion, the enhancement at §3B1.3 should be in addition to any available enhancement for care, custody, or control of the victim, which may, but does not always, apply. The DOJ believes that including such an enhancement at §3B1.3 would maximize the likelihood that the enhancement is applied in all appropriate cases. The DOJ states that those relationships that should be listed in §3B1.3 include:

1) Father and daughter or stepdaughter or son or stepson; 2) Mother and daughter or stepdaughter or son or stepson; 3) Siblings of the whole blood or of the half blood; 4) Grandparent and grandchild; 5) Aunt and nephew or niece; and 6) Uncle and nephew or niece.

D. Interactive Computer Service

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

Amendment No. 3 - Body Armor

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) supports the Commission's proposal to create a new guideline, at §2K2.6 to cover the new offense of possessing, purchasing, or owning body armor by a violent felon at 18 U.S.C. § 931. It believes that a base level of 12 is appropriate for the new guideline, which would provide a sentence of 8-14 months for a typical offender in Criminal History Category II, well below the three year statutory maximum penalty. Further, the DOJ shares Congress's belief that armed criminals protected by body armor are an extremely serious threat and believes that a base offense level of 12 properly reflects that threat.

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

Amendment No. 4 - Public Corruption

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

The Proposed Consolidated Guideline at §2C1.1

The Department of Justice (DOJ) recommends the title of the proposed new §2C1.1 should include the phrase "Conspiracy to Defraud by Interference with Governmental Functions," which is currently included in the title of §2C1.7.

A. More Than One Bribe

The DOJ suggests two alternative ways of dealing with the problem of more than one bribe. First, the two level increase could be folded into the base offense level, raising it to a level 14, and eliminating any litigation regarding the issue and second, if the enhancement remains, it proposes that it remain as it is worded in the current guideline, to avoid any confusion.

B. "Unlawful Payment"

In the DOJ's opinion, the use of this new term, with a new definition in the proposed commentary, is unnecessary, and will inappropriately miss instances that occur frequently in honest services cases and cases involving conspiracies to defraud the United States.

Instead, it suggests that, if there is a consolidated guideline, the language that is currently used in §2C1.7(b)(1)(A), regarding honest services cases, be used in the new, consolidated guideline.

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

The DOJ agrees with the proposal to make this enhancement cumulative with the enhancement for the monetary amount, rather than as an alternative, and states the enhancement should be 4 levels, and the proposed minimum offense level of 18.

The DOJ is concerned about the use of the term "payment" in this specific offense characteristic as this term will not capture aggravating conduct in many honest services cases, which do not involve direct payments to public officials.

The DOJ also has several concerns regarding the proposed language describing the officials who will qualify for this enhancement: "a public official in a high position of public trust," and believes that the proposed change will narrow the scope of the types of officials who will qualify.

Previously, this enhancement has applied to all elected officials, and, under the proposed amendment, elected officials would no longer automatically receive this enhancement. The DOJ believes that this bright line rule is effective and that it is important that this enhancement apply to any public official who is elected by the voters. It also believes the proposed language does not include individuals who hold "sensitive" positions, as the current guideline does.

The proposed commentary indicates, in the DOJ's view, that the "high position of public trust" involves a greater level of trust than that required under §3B1.3 (Abuse of Trust). By placing the bar even higher than this already elevated level, the proposed §2C1.1(b)(3) enhancement will apply to a narrower range of cases than the enhancement in the current guideline, in the DOJ's opinion.

The DOJ believes that adopting new language will unsettle matters considerably as the courts attempt to discern precisely how much higher the new bar should be placed relative to where it has been, and sees no corresponding benefit to be derived from the change.

D. Enhancement for Public Officials

Although the DOJ agrees with a two level enhancement for public officials as part of the overall revisions proposed by the Commission, it notes that this automatic enhancement may be inconsistent with proposed Application Note 8, which indicates that the non-public official may be more culpable in some cases, and it sees no need for this proposed application note.

E. Enhancement for Border Related Crimes

The DOJ agrees with the proposal to add an enhancement for an offense that involves allowing people, vehicles, and cargo into the county, it does not, however, believe that the enhancement should single out the United States Customs Border Protection Inspectors for the enhancement. In its view, it should apply in any case involving anyone who permits things to enter the U.S. illegally, including a Border Protection Inspector. The DOJ believes that the enhancement should not use the term "unlawful payment."

F. Proposed Application Note 1 – Definitions

The DOJ does not believe that there is any need to define the term "bribe," as there is no such definition in the current guideline or in Title 18, and it is not aware of any difficulty caused by this absence.

The DOJ does not believe that there is any need for a definition of the term "public official," however if such a definition is included, it believes that it should simply parallel the definition in 18 U.S.C. § 201(a) (1). It also believes that the language in the proposed definition regarding a government contractor and the contractor's position of trust "with respect to a government agency" is not sufficiently clear.

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

G. Cross References

The DOJ believes the cross references for cases where the offense was committed to facilitate another criminal offense or to conceal or obstruct the investigation of another offense should be maintained. The DOJ prosecutors have used this cross reference in such cases, and obtained substantially higher (and appropriate) sentences than would have applied without the cross-reference, it reports.

Issue for Comment – Election and Balloting Integrity

The DOJ recommends the Commission should seriously consider the addition of a 2 level enhancement for a bribe, extortion, or honest services offense that may affect the integrity of the balloting, voting, and election process.

Gratuity Offenses

The DOJ agrees with the Commission that the gratuity guideline should be amended proportionally with the bribery guideline and that the language used should parallel the language used in the bribery guideline, however, all of the language adjustments that it proposes for the bribery guideline, to ensure coverage of honest services fraud and conspiracy to defraud the United States, need not be made to the gratuity guideline.

* * * * *

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

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

(b) Specific Offense Characteristics

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

(2) If the loss to the government or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greatest (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000,

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

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

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

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

* * *

Application Notes:

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

* * * * *

§2C1.2 **Offering, Giving, Soliciting, or Receiving a Gratuity**

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

(b) Specific Offense Characteristics

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

(2) If the value of the gratuity (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4**

levels. If the resulting offense level is less than level **15**, increase to level **15**.

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

* * *

Application Notes:

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

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss and Jim Feldman
Washington, D.C.

The Practitioners' Advisory Group (PAG) states that it is unaware of any data or anecdotal examples suggesting a need for increased penalties under these guidelines. The PAG argues that although the synopsis of the proposed amendment states the aim as "moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense," it does not appear that the proposed amendment does so, as the new guidelines incorporate the §2B1.1 loss table in the same fashion as the existing guidelines. Therefore, the PAG does not believe any increase to the base offense level for bribery and gratuity cases is warranted. The PAG argues that the base offense levels could be reduced to achieve proportionality with §2B1.1. The PAG suggests that the existing bribery and gratuity guidelines are already out of proportion with those for economic offenses, and should be reduced by at least 2 levels to eliminate incongruous results. Raising the bribery and gratuity offense levels, it states, particularly in conjunction with applying the 2 level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

In the PAG's opinion, because the base offense level for economic crimes is either 6 or 7, depending on the statutory maximum, the current base offense level of 10 for bribery offenses results in an unwarranted disparity. It believes that increasing the base offense level from 10 to 12 would exacerbate this unwarranted disparity rather than cure it.

The PAG agrees that §§2C1.1 and 2C1.7 may be consolidated, but argues that the 2 level enhancement for multiple incidents should be limited to those cases currently sentenced under §2C1.1 to avoid even further unwarranted disparity between cases involving intangible rather than tangible harm. The PAG notes if the amendment were enacted as proposed, cases of

intangible harm with multiple incidents would have an offense level of 14, while cases of tangible harm would be 5 levels lower.

The PAG offers two examples of typical bribery cases in which disparate results would occur. The first example involves a low-level public official accepting two bribes to award a contract, totaling $10,000, in which the contractor would make $20,000 profit. If the base offense level is increased 2 levels as proposed, the adjusted offense level would be an 18. This example is contrasted with another in which a public official steals $10,000 from the public fisc, using the mails, resulting in an adjusted offense level of 13, or a 15 if the proposed amendment is adopted. In PAG's view, this unwarranted disparity would be further exacerbated by the consolidation of §§2C1.7 with 2C1.1 if the 2-level increase for multiple incidents is applied across the board.

The PAG points out that there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But the PAG argues this characteristic is more than fully accounted for by the 8 level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic, in its view.

The PAG states that if §§2C1.2 and 2C1.6 are consolidated, the 2 level enhancement for multiple incidents should be limited to cases currently sentenced under §2C1.2 to avoid unwarranted disparity between cases involving gratuities rather than actual theft. Raising the base offense level for mere gratuities which are largely misdemeanors, the PAG notes, would result in similar disparities, further amplified by consolidating the bank gratuity cases with §2C1.2 and applying the 2 level multiple incident adjustment. The example the PAG gives is a bank employee who accepts two $3,000 gratuities yet causing no loss to the bank who is sentenced at a level 13, the same level as a bank employee who embezzles up to $30,000 directly from the bank.

Amendment No. 5 - Drugs

U.S. Department of Justice
Criminal Division
Deborah J. Rhodes, Counselor to the Assistant Attorney General
Washington, D.C.

GHB / GBL

The Department of Justice (DOJ) believes that either option expressed in the proposed guidelines would be a substantial improvement over the current guidelines.

However, the DOJ supports Option One. The DOJ notes that mid-level dealers work in quantities ranging from several ounces to a few gallons, and high-level dealers often sell multi-gallon quantities (even up to 55-gallon drums). The DOJ believes it is critical that the ten year guideline sentence apply to most distributors at that level. The DOJ also notes that while GHB is, pharmacologically speaking, a depressant, several factors with respect to its abuse and trafficking counsel against a strict dose-for-dose comparison to heroin or other Schedule I depressants in setting the guideline penalty. Such factors include: the perceived hallucinogenic effects of the drug; the drugs' "club drug" profile abused by primarily young people; the drugs' use with other drugs such as alcohol, cocaine, and marijuana; the use of GHB as a "date rape" drug; the ease of trafficking and concealment; and, the high profit margin.

The DOJ makes note that distributors use the Internet to sell GHB and its analogue (and precursors), which permits high-level traffickers to work in much larger quantities than smaller traffickers, making the 10:1 quantity ratio (between the mid-level and high-level sentences) built into the guidelines somewhat inapposite to the context of Internet GHB/GBL trafficking. The guideline enhancements for use of the Internet, addressed in the DOJ's "Issues for Comment" section would have particular relevance for mid- to high-level GHB traffickers.

The DOJ assumes that whichever decision is made with respect to the treatment of GHB in the drug quantity table would also be reflected in the guideline for GBL as a List I chemical. But the DOJ recommends that the Commission reconsider one element of the "discount" that assumes a 50% conversion ratio of the precursor chemical to the target controlled substance. The DOJ believes that while this discount may be appropriate (though very conservative) for ephedrine, pseudoephedrine and phenylpropanolamine with respect to methamphetamine and amphetamine – it is not appropriate for GBL, which converts to GHB (with addition of sodium hydroxide) at a ratio of approximately 1:1, and the DOJ does not believe this part of the "discount" calculation should apply to GBL.

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

The DOJ supports the intent behind this amendment, but believes it has technical flaws that may serve to confuse the issue.

The DOJ is concerned that the proposed amendment conflates the two distinct issues of sentencing (1) controlled substance analogues and (2) actual, scheduled controlled substances for which no guideline exists.

The DOJ suggests the following language (strikeouts indicate deletions, boldface indicates additions to the Commission's proposed text):

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

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

Proposed Amendment:

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

Commentary

Application Notes:

* * *

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

In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marihuana equivalency of the ***most closely related*** ~~*analogue of that*~~

controlled substance. See USSG § 2X5.1 and note; see also, United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990). However, the court may, where appropriate, account for the greater or lesser potency of such substance compared to the substance for which there is a specified guideline.

In determining "the most closely related controlled substance" to a controlled substance not identified in the Drug Quantity Table or Drug Equivalency Tables, the court should consider the marijuana equivalency of the substance that is most similar to the unlisted controlled substance in question. Relevant factors could include, for example, the class of the substance (opiates, stimulant, depressant, hallucinogen); relative potency; the structure, pharmacology and effect of the substance; the appearance and representations with respect to the substance; and other harms associated with the drug. Expert testimony may be the best means to ascertain an appropriate equivalency.

The DOJ believes its revised draft provides clearer guidance for the following reasons. First, it treats separately the two problems of sentences for analogues versus sentences for controlled substances that have no guidelines. Analogues would be sentenced like the drugs they mimic (with any adjustments the court may deem appropriate for potency). Controlled substances for which no guideline or equivalency currently exists – including, but not limited to, temporarily scheduled "emerging" drugs of abuse, most of which are synthetic stimulants and/or hallucinogens – would be sentenced like the "most closely related" substance. The use of the phrase "analogue" in the context proposed by the Commission creates confusion in its view, (and, in fact, legal impossibility), because the Commission's proposal directs the court to use the "closest analogue" of the scheduled controlled substance for which no guideline or equivalency currently exists. The guidelines and equivalency tables in almost all cases set forth equivalencies for scheduled controlled substances, and scheduled controlled substances, by definition, cannot be analogues. Thus, the Commission's proposal directs the court to compare two scheduled controlled substances and identifies the relationship between the two to be an "analogue" relationship. The DOJ argues this is a legal impossibility since a scheduled drug cannot be an analogue. To remedy the problem, the DOJ suggests that the Commission substitute the phrase "most closely resembles" for "closest analogue."

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

Second, the DOJ's draft provides a measure of needed flexibility for courts to account for variance in potency in determining quantity equivalencies for analogues and controlled substances for which no guideline exists. Even controlled substance analogues can be more or less potent than the scheduled substance to which they are similar. The language the DOJ

proposes affords an opportunity for courts to "account" for potency upwards or downwards as they deem appropriate, based on evidence including expert testimony.

Correction of Technical Error in Drug Quantity Table

The DOJ fully supports the correction of this technical error.

Update of Statutory References in §2D1.11

The DOJ believes the corrected references are a helpful clarification, and that the inclusion of references to paragraphs in 21 U.S.C. § 960(d) for three-level reductions for "reasonable cause to believe" is appropriate, given that the mens rea is the same and the statutes at issue are generally analogous.

Addition of White Phosphorous and Hypophosphorous Acid

The DOJ supports this addition to the chemical guideline. The DOJ notes that White phosphorous is directly substituted at a 1:1 ratio for red phosphorous by clandestine methamphetamine "cooks" (one part phosphorous to 1.5 parts iodine). Hypophosphorous acid (in a 50% solution) is used at a ratio of approximately two-thirds of either red or white phosphorous (one part hypophosphorous acid to one part iodine). Further, it states that actual quantities vary widely in the field, as most clandestine chemists lack training or theoretical understanding of the chemical reactions. The wide variability of quantities used is such that it thinks it is fair, and is certainly simpler, to lump all three of these related List I chemicals together at the same quantities for guidelines purposes.

Deletion of Reference to § 957 from Statutory Index

The DOJ supports this deletion.

Issues for Comment

A. Offenses Involving Anhydrous Ammonia

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

The DOJ believes this guideline is woefully inadequate, and is pleased that the Commission is seeking comment on a possible revision. By cross-reference to 21 U.S.C. § 843(d), the statutory

penalty for offenses involving anhydrous ammonia in § 864 is: (1) generally up to 4 years imprisonment, but (2) up to ten years if it involved the intentional manufacture or intentional facilitation of the manufacture of methamphetamine. However, the DOJ notes the maximum guideline sentence of level 14 (12 + 2) under §2D1.12 yields sentences of under two years – short even of the four year basic sentence, and well under the ten year maximum.

The DOJ proposes the addition of two alternative specific offense characteristics if the offense involves AA. It would provide (1) a 12-level enhancement for a defendant who violates § 864 with the intent of manufacturing or facilitating the manufacture of methamphetamine – the state of mind required for the ten year maximum sentence to be available under § 843(d)(2) – or (2) a four level enhancement for defendants whose offense conduct otherwise involved AA – including through violations of 21 U.S.C. §§ 864 or 843(a)(6) or (7) – but who can not be shown to have done so with the state of mind set forth in § 843(d)(2). To avoid double-counting under this proposed rubric, the defendant would not receive the two level increase under current §2D1.12(b)(1) (incorporated into revised and redesignated (b)(3) under the scheme set forth below) if he or she were sentenced under one of the specific AA provisions. The combined effect of the DOJ's proposal would be to increase guideline sentences from the current level 14 (12 +2) to level 24 (12 + 12) for offenders who steal or transport AA in violation of § 864 with intent to manufacture or facilitate the manufacture of methamphetamine, and otherwise to level 16 (12 + 4) for other offenses covered by the guideline that involve anhydrous ammonia. In addition, in current §2D1.12(b)(2) (as renumbered to (b)(4)), the two level enhancement for specified actions that threaten public health and the environment, could apply to AA cases.

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

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

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

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

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

or material was to be used to manufacture methamphetamine, increase by two levels.

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

In addition, the DOJ notes that although the matter was not placed at issue by the Commission's notice seeking these comments, it believes that a sizeable enhancement under this guideline should not be limited to violations of § 864 involving anhydrous ammonia. It should be available for any violations subject to the penalty enhancements of § 843(d)(2) – including violations of § 843(a)(6) and (7), if related to methamphetamine manufacture. The referenced provisions make it a crime to possess or distribute substances, materials, or equipment knowing or having reasonable cause to believe they will be used to manufacture a controlled substance. The DOJ states that an amended guideline could provide a more appropriate sentence for cases charged under these provisions, which may involve, for example, triple-neck flasks, heating mantels, non-listed chemicals, or listed chemicals.

B. Internet Enhancement

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

C. Drug-facilitated Sexual Assault

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

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

The DOJ believes that Application Note 12 to §2D1.1 as currently written is fairly interpreted as excluding from relevant conduct (negotiated amount) the amount of drugs that the defendant did not intend to provide or was not reasonably capable of providing in situations where the defendant was distributing or selling (rather than purchasing) drugs. The DOJ supports resolving the circuit split by clarifying that the last sentence of Note 12 does not apply to situations involving a defendant's negotiation to purchase drugs. The DOJ opposes amending the Note to allow defendants in reverse sting situations to argue that they did not intend to purchase or were not reasonably capable of purchasing the controlled substances for which they negotiated.

Amendment No. 6 - Mitigating Role Cap

U.S. Department of Justice
Deborah J. Rhodes,
Washington, D.C.

The Department of Justice (DOJ) believes that the Commission erred by creating a maximum base offense level for drug defendants who receive a mitigating role adjustment, and the DOJ supports efforts in Congress to repeal the mitigating role cap.

The DOJ believes that the guidelines are correctly tied to mandatory minimum drug trafficking statutes. It states that some observers have criticized this premise of the sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors, and the DOJ disagrees with this criticism.

The DOJ argues that absent such a mitigating role cap, federal statutes and the otherwise applicable sentencing guidelines appropriately allow for the consideration of aggravating factors such as the use of a gun or a defendant's criminal history or bodily injury in appropriate cases. Also, it states these statutes and guidelines through, for example, the so-called safety valve exception to mandatory minimums, the guidelines' mitigating role adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person appropriately allow for the consideration of mitigating factors.

The DOJ believes that in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense and that the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance. Further, in establishing mandatory minimum penalties for controlled substance offenses, Congress relied on the type of substance involved, it argues.

The DOJ strongly believes that the mitigating role cap provides an excessive windfall to minor role defendants who are involved in large narcotics trafficking transactions. Therefore, the DOJ believes the mitigating role cap should be repealed.

Families Against Mandatory Minimums Foundation (FAMM)
Mary Price

According to Families Against Mandatory Minimums (FAMM), the guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense, and the mitigating role cap provides some limited relief to defendants like them. FAMM has provided examples of defendants who received mitigating role reductions to illustrate the kinds of defendants this cap is designed to assist.