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FILE NO:

March 1, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Dear Commissioners:

This letter is sent on behalf of the Association of Oil Pipelines (AOPL). The AOPL writes in response to the Commission's request for comments regarding possible revisions to the guideline treatment for the illegal transportation of hazardous materials.

The AOPL is an unincorporated nonprofit organization started in 1947. AOPL represents 49 common carrier oil pipeline companies. AOPL members carry nearly 80% of the crude oil and refined petroleum products moved by pipeline in the United States. Among other things, the AOPL represents its members on legislative and regulatory matters and in the federal courts.

The Commission has sought comments in response to the August 1, 2003 Department of Justice submission which alleges that the sentencing guideline applicable for hazardous materials, § 2Q1.2 is not adequately suited to illegal transportation of hazardous materials. The Department of Justice suggests two grounds to justify changes to the guidelines: first, that illegal transportation of hazardous material is different from typical pollution offenses covered by § 2Q1.2 and has characteristics not addressed by that guideline; and, second, that the specific offense characteristics set forth in § 2Q1.2 are not characteristic of illegal transportation of hazardous materials. For the reasons set forth below, the AOPL urges the Commission to reject the structure of the Department's approach and offers an alternative approach more closely tailored to the stated need.

The AOPL supports the Department's effort to obtain enhancement of penalties where hazardous materials and/or the hazardous material transportation infrastructure are used to commit (or attempt to commit) acts of terrorism. As described in the attached summary of

industry security efforts[1], the pipeline industry has entered into close cooperation with federal law enforcement and regulatory agencies to address shared concerns about the integrity and security of the nation's critical private infrastructure. In addition, the AOPL support the Department's effort to obtain enhancement of penalties where violations involve controlled substance manufacturing or trafficking offenses.

As set forth below, there are existing provisions of the Guidelines that address the potential misuse of the nation's hazmat transportation infrastructure as a weapon. To the extent further revision is considered appropriate, there is precedent within the guidelines for a much more straightforward approach to this issue.

To address "one-time, catastrophic occurrences," involving illegal hazardous materials transportation by terrorists, the guidelines already provide for a "victim related enhancement" at § 3A1.4 for crimes which involved or were intended to promote terrorism.

If further revision is thought to be necessary, a direct and simple precedent is found in § 2B1.1(b)(12)(B)(i) which provides for a specific offense characteristic in crimes involving theft and embezzlement if:

> the offense (i) substantially jeopardized the safety and soundness of a financial institution . . .[2]

Using this model to address illegal hazardous material transportation by those with the intent to commit acts of terrorism, or to engage in controlled substance manufacturing or trafficking offenses, the guidelines could add a new specific offense characteristic to § 2Q1.2 as follows:

> (7) If the offense: (i) involved, or was intended to promote a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32; (ii) involved, or was intended to promote a controlled substance manufacturing or trafficking offense, increase by 2 levels, but if the resulting offense level is less than level 14, increase to level 14.

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[1] See Attachment 1, "Security Planning and Preparedness in the Oil Pipeline Industry," API-AOPL Environmental and Safety Initiative, August, 2003, available at: http://www.aopl.org/pubs/reports.html.

[2] United States Sentencing Guidelines, § 2b1.1(b)(12)(B)(i) (January, 2003).

This would provide additional specific offense characteristics that would be consistent with the model utilized in § 2B1.1, and with the language for victim-related adjustments for crimes involving terrorism in § 3A1.4 and for transportation offenses involving drugs in § 2D1.12(a)(12)and(b).

The Department correctly notes that § 2Q1.2 was not originally designed to cover hazardous material transportation violations. However, as the Department also notes, since 1993, hazmat crimes were added to § 2Q1.2.

Thus, illegal transportation of hazardous material *is* covered by § 2Q1.2.[3] Further, almost all of the offense characteristics proposed for comment for illegal transportation of hazardous material are covered by the existing guidelines. Thus, a violation of the legal limits on hazardous material transportation results in a base offense level of 8. If there is a release, a four-level enhancement may apply, and if there is a related evacuation or disruption of public utilities or a significant clean up, then another four-level enhancement would apply. Should the offense result in a substantial likelihood of death or serious bodily injury, a nine-level enhancement would apply.[4] The Department has long noted that these sanctions available under § 2Q1.2 provide serious punishments for environmental violations.

Moreover, the use of criminal enforcement of environmental laws has proceeded step-wise, with criminal enforcement following the gradual clarification of regulatory requirements and as a support and enhancement to the government's other enforcement tools of administrative and civil enforcement.

In that context, it should be considered that hazardous material transportation regulation is in a remarkable state of change. In response to 9/11, new partnerships have developed between the private sector and federal, state and local governments to devise the means to identify the areas of greatest potential risk and develop the strategies most likely to address those risks. To the extent that the Department's proposal seeks to increase penalties as a means of reducing those risks, the effort is premature, as the government itself is still determining what acts (or failures

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[3] United States Sentencing Guidelines, Appendix A (November 2002) Listing Statutory Provisions found at title 49.

[4] Of course other enhancements could apply as well, such as those dealing with the offenders role in the offense in Chapter 3B and for acts of obstruction under 3C.

to act) in the area of hazardous material transportation constitute the greatest potential risk (and which therefore might receive greater sanctions should they be violated).[5]

A recent Congressional Research Service Report for Congress noted that after the terrorist attacks:

> Pipeline operators reviewed procedures, tightened security, rerouted transportation patterns, closely monitored visitors and made capital improvements to harden key facilities. The Association of Oil Pipelines (AOPL) and the American Petroleum Institute (API), working together, provided guidance to member companies on how to develop a recommended pipeline security protocol analogous to an existing protocol on managing pipeline integrity.[6]

Ninety-five percent of AOPL operators had developed new security plans and instituted appropriate security procedures by February 2003. Pipeline operators have joined with the Department Homeland Security to establish a cooperative, industry-directed database to provide real-time threat alerts, cyber alerts and solutions. AOPL members have also worked with the Department of Homeland Security to identify critical facilities that warrant government protection should they be threatened and have responded to requests by the DOT's Office of Pipeline Safety and DHS's Transportation Security Administration to conduct vulnerability assessments. These are only a few of the ways that the AOPL and its members have moved to respond to security threats and to increase government-industry partnerships to enhance the protection of the nation's critical infrastructure. These efforts to identify risks and problems in the hazardous material transportation industry are still in process.

In the context of these efforts, most of the suggested revisions to § 2Q1.2 are not focused on the utility of this guideline provision as a means of addressing national security threats or drug trafficking. Guidelines revisions have generally flowed from the careful study of empirical information. Outside of the approach noted above to address acts of terrorism against our nation's critical private infrastructure or drug related offenses, the small number of criminal

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[5] For example, in a proposed rulemaking, the DOT and the Transportation Security Administration are evaluating the need to require further security enhancements on materials or categories of materials that present the most serious security risks in transportation. 68 Fed. Reg. 37,470, 34,477 (June 9, 2003).

[6] CRS Report for Congress, "Pipeline Security: An Overview of Federal Activities and Current Policy Issues," updated February 5, 2004, p. CRS-11.

hazmat cases do not provide a basis for the non-security focused proposals on § 2Q1.2. There is simply too little "additional information and . . . firm empirical basis" which the Commission itself considers a necessary basis for revisions to the guidelines.[7]

* * *

While not the main focus of these comments, the reference to possible changes to the Chapter Eight guidelines to specifically cover hazmat compliance appears to conflict with the past design of Chapter Eight and the Commission's current proposal to revise Chapter Eight. As the Commission is well aware, Chapter Eight provides leniency for effective programs to prevent and detect violations of law. Chapter 8 has long served an outsize role in determining the shape and content of corporate compliance plans. Following the October 2003 report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, the Commission has published proposed amendments to Chapter Eight which propose a new standalone guideline focused on compliance programs.

The provisions of the Chapter Eight guidelines that address compliance programs have been crafted to have broad application. Notably, some concerns over the proposed changes focus on whether or not expanding the specificity of the definition of an effective compliance program is beyond the Committee's purview or expertise. This concern would be amplified should the Commission begin developing industry specific criteria. What is considered to be the most effective compliance program for a given industry is subject to a vast number of economic, technological and other factors. It would undermine the broad impact of the Chapter Eight guidelines in this area should the Commission attempt to make such narrow prescriptions.

* * *

The AOPL hopes that these comments are useful to the Commission. The AOPL would appreciate the opportunity to send a representative to testify before the Commission's public hearing on March 17, 2004.

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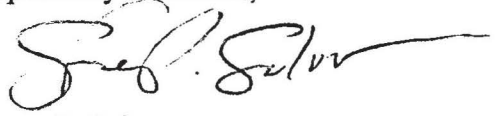
[7] United States Sentencing Commission, Guidelines Manual, Chapter 1, Part A, Introduction and General Application Principles, "A Concluding Note."

Respectfully submitted,



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Security Planning and Preparedness in the Oil Pipeline Industry

August 2003

Almost two years have elapsed since the tragic events of September 11, 2001. The oil pipeline industry is committed to the integrity and security of the national oil pipeline network. We would like to take this opportunity to bring you up to date on oil pipeline industry security actions that have taken place since September 11, but focusing on recent months.

The oil pipeline network is a valuable national asset, which is owned, maintained and operated by private companies. Pipelines are the irreplaceable core of the U.S. petroleum transportation system and the means for both delivery of foreign and domestic crude oil to refineries and for moving finished products from refining and producing centers to consuming regions. Oil pipeline shipments account for 17% of all domestic freight moved nationwide, delivering more than 14 billion barrels (600 billion gallons) per year. The nation's oil pipeline network includes 160,000 miles of interstate transmission pipelines. Those pipelines are regulated from a safety and environmental perspective by the federal government through the U.S. Department of Transportation Office of Pipeline Safety.

Pipelines are physically robust. The vast majority of pipeline systems are underground and less vulnerable than aboveground facilities. Pipeline operators have been managing the integrity, safety and security of pipeline systems for many years. Most damage to pipelines can be readily repaired and pipeline operators have emergency response plans in place. Disruptions in supply can often be avoided by providing alternative forms of transportation for short periods or by using interconnections to move products around the site of damage to a pipeline.

Pipeline operators cooperated readily with the federal government to identify, for preparedness purposes, those pipeline facilities that are critical to the nation. Key critical pipeline assets have been identified using system risk analysis along with mutual discussion between operators and the Department of Homeland Security, the Department of Energy and the Department of Transportation. In addition to key critical assets, other pipeline systems may be considered viable terrorist targets or a release resulting from a terrorist attack from certain pipeline systems might have a significant impact on people,

on public drinking water, on regional energy supply, on military facilities important to national defense, or could potentially impact other modes of transportation or other critical infrastructures (electric power generation, telecommunications, or other utilities). These pipeline systems or portions of pipeline systems, have also been specifically identified by operators. Information about critical assets forms a part of our nation's security and is not subject to public disclosure.

Security guidance for pipeline facilities is in place and pipeline operators are implementing that guidance for critical facilities. In July 2002, the American Petroleum Institute published "Guidelines for Developing and Implementing Security Plans for Petroleum Pipelines." By developing a pipeline security plan operators can improve the security of pipeline systems and develop the knowledge and processes for making security related decisions. Pipeline operators have and will continue to:

- Identify and analyze actual and potential events that can result in pipeline security related incidents
- Identify the likelihood and consequence of such events
- Provide an integrated means for examining and evaluating risks and selecting risk reduction actions
- Establish and track security plan effectiveness
- Establish security conditions (using the national treat advisory system) and specific protective measures based on the threat level

The security of pipeline facilities has also been considered in relationship to other energy assets. The petroleum industry as a whole has published, "Security Guidance for the Petroleum Industry" (April 2003) in close cooperation with the Department of Homeland Security, Information Analysis and Infrastructure Protection division.

The federal government has established pipeline security contingency planning guidance, published that guidance for action by pipeline operators and asked that all pipeline operators submit a written statement concerning security preparedness. In September 2002, the U.S. Department of Transportation, in coordination with the Department of Energy and agencies that became the Department of Homeland Security, published a pipeline security information circular. The circular defined critical pipeline facilities, identified appropriate measures for protecting critical facilities (based on the national threat advisory system) and defined a process by which the federal government would verify that operators had taken appropriate action and implemented satisfactory security procedures and plans. The information circular requested that operators submit a written statement confirming that the operator has:

- Reviewed the information circular and the Pipeline Security Contingency Planning Guidance
- Reviewed the consensus security guidance appropriate to its segment (oil or natural gas) of the pipeline industry
- Identified its critical facilities
- Developed a corporate security plan
- Begun implementing its corporate security plan to protect the physical and cyber security of its critical facilities

As of April 1, 2003, the U.S. Department of Transportation Office of Pipeline Safety has received certifications from operators of 95% of the U.S. oil pipeline infrastructure – more than 150,000 miles – regulated by the U.S. Department of Transportation. The companies that comprise the 95% are substantially all of the operators who operate large oil pipeline systems in the United States, as well as many smaller operators. The remaining 5% include smaller pipeline operators or companies that are primarily in other businesses but may also have pipelines between plant facilities, may connect a manufacturing plant to a larger pipeline, or similar systems. The pipeline industry continues to recommend that all pipeline operators have security plans in place and certify to the federal government as requested by the U.S. DOT Office of Pipeline Safety. In addition to the mileage of pipelines regulated by the Department of Transportation, there are another 30-40,000 miles of small diameter, widely scattered oil pipelines servicing domestic production fields. These pipelines do not pose a security risk to energy facilities, energy supplies or to the public.

Beginning this past April and continuing, the U.S. Department of Transportation and the Department of Homeland Security, Transportation Security Administration are conducting verification checks at pipeline companies to validate the certifications made by pipeline operators. The U.S. Department of Transportation Office of Pipeline Safety is the federal agency responsible for providing oversight for oil and natural gas pipelines. The Office of Pipeline Safety has a trained inspection force in place, which has been conducting safety and environmental audits and inspections of pipeline systems for many years. OPS inspectors operate out of five regional offices and are very familiar with the pipeline operations within and across the regions. The Transportation Security Administration and the Office of Pipeline Safety have prepared a set of protocols for validating pipeline security preparedness and are conducting verification checks. Five pipeline operators have been reviewed as of August 2003 and approximately 30 of the largest operators will be reviewed by the end of 2003.

Pipeline operators are conducting and will continue to conduct vulnerability assessments of critical pipeline facilities as the federal government and the pipeline industry develop a better understanding of terrorist threats and terrorist capabilities. Prior to September 11, 2001, the federal government did not provide guidance nor recommend the need for private industries, such as the energy industry, to conduct vulnerability assessments based on terrorist threats. Many petroleum companies operating globally have had experience planning to prevent terrorists or other criminals from breaching their facilities and committing crimes, including the release of petroleum products or the damaging of facilities and potentially the communities around those facilities. Since 9/11, knowledge from companies operating oversees, from federal agencies responsible for nuclear plants and military facilities, and from security services (the FBI and private security companies) has been mined to provide guidance to domestic pipeline and other energy companies on conducting vulnerability assessments. The national laboratories (National Energy Technology Lab and Sandia) housed in the Department of Energy have made guidance and experts available to the energy industry. Pipeline operators have conducted vulnerability assessments or participated in

vulnerability assessments of larger manufacturing or port facilities encompassing multiple operators, industries, and transportation modes.

A new methodology for assessing the vulnerabilities of petroleum industry operations has been developed in cooperation with the Department of Homeland Security. Vulnerability assessments must encompass specific facilities as well as the supply chain for the distribution of petroleum products. "Vulnerability Assessment for the Petroleum Industry," published by API in May 2003, provides guidance to operators and encompasses the recommendations and concerns of the DHS Information Analysis and Infrastructure Protection division. The methodology is being evaluated by the U.S. Coast Guard for use in petroleum facilities associated with U.S. ports.

The pipeline industry is now developing an industry standard for the protection of control functions and Supervisory Control and Data Acquisitions Systems (SCADA). In addition to the focus on the physical security of pipeline facilities, the industry is also evaluating the potential vulnerabilities of information technology systems, process control and data exchange from the pipeline to the control center. The industry has conducted a review of the SCADA standards for other industries and is now drafting a SCADA security standard for pipelines.

Security actions have taken many forms depending on the specific circumstances an operator faces with a particular pipeline system, the critical nature of the services, and the current level of threat warning issued by the federal government. Provided here is a sampling of the types of actions, other than planning and awareness, which operators have taken, are taking or will take as circumstances dictate. Pipeline operator security plans are in place. Employees have been provided with information and techniques to improve their awareness of the potential for terrorist or criminal acts. Awareness is the single most important aspect of preparedness. It is helpful to understand some of the other types of actions pipeline operators have taken. Some of these actions have taken place at many facilities, some are specific to critical facilities, and some are taken only as the threat level increases. The following are some examples of actions taken to give readers a sense of the oil pipeline industry's preparedness. Pipeline operators have --

- Direct relationships, including telephone contact and face-to-face meetings, with FBI regional field personnel.
- Joined FBI Infragard program
- Established inter-company cooperative efforts for specific locations
- Obtained "secret" level security clearances for selected operational personnel to ensure that threat information can be communicated directly under circumstances when such discussions are warranted
- Joined government-industry threat information dissemination services including API and the Energy Information Sharing and Analysis Center (ISAC)
- Installed surveillance cameras at certain facilities
- Installed physical barriers to entrances to certain facilities

- Conducted response drills using terrorist scenarios as a basis for training personnel and working with new federal partners including law enforcement and the FBI under emergency circumstances
- Used guard patrols at certain facilities under certain threat conditions
- Limited access to facilities and entrance only after positive identification

The pipeline industry and the petroleum industry have been conducting informational briefings on how pipeline systems function to ensure that government agencies and intelligence personnel understand the services provided, the potential risks and vulnerabilities, and what pipeline operators are doing to improve security. The pipeline industry has recognized that it is crucial for those that are evaluating intelligence information to understand the infrastructures they are working to protect. The pipeline industry and individual pipeline companies have briefed officials at the Department of Homeland Security, the Transportation Security Administration, the DOT Office of Pipeline Safety, the U.S. Coast Guard, the Occupational Health and Safety Administration, the Environmental Protection Agency, the Department of Energy, the National Institute for Standards and Technology, the staff of Congressional Committees charged with oversight of security agencies, and intelligence personnel from various federal agencies. This industry will continue to take advantage of opportunities to provide such informational briefings.

The oil pipeline industry is committed to pipeline safety, to environmental protection and to providing reliable pipeline transportation services. The oil pipeline industry has plans in place to assure pipeline security to the extent that is practical and reasonable. Oil pipeline operators have taken prudent protective actions and will continue to analyze vulnerabilities of pipeline systems. Pipeline operators will be continuously monitoring threat information that is provided by federal, state and local law enforcement agencies. The pipeline industry will continue to work cooperative with the Department of Homeland Security, the Transportation Security Administration, the DOT Office of Pipeline Safety and the intelligence community.

U.S. Sentencing Commission
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January 26, 2004

Re: Proposed Amendments to Chapter Eight

Dear Commissioners:

The United States Sentencing Commission has published and requested comments on proposed amendments to Chapter Eight of the Sentencing Guidelines relating to compliance programs. I offer the following comments as a practitioner in the compliance and business ethics field and as one with a strong interest in the success of the Sentencing Commission's efforts to promote effective compliance programs in organizations[1]. I previously had the opportunity to testify in the Ad Hoc Advisory Group's information gathering process and to provide other information for the Group's use prior to the submission of the proposed amendments. I would be happy to testify regarding these comments or any other matters relating to the proposed amendments, should the Commission desire such testimony during this amendment cycle.

The proposed amendments are a positive step

The Sentencing Guidelines have brought clarity and commitment to the field of compliance. Indeed, one can fairly mark the emergence of compliance as a discrete field to the date the Guidelines went into effect. If this is so, then it could fairly be asked, why is a change necessary? Perhaps the best answer is that the proposed amendments are not really so much of a change as they are a recognition that this field has evolved and changed over time. The proposed amendments, in effect, actually recognize the reality of industry best practices and bring the Guidelines up to date.

Moreover, these revisions serve to strengthen organizational compliance programs and drive them to be more effective. We need programs that will withstand the circumstances we have all seen in the cases, from Enron to Andersen, and from WorldCom to Parmalat. The proposed changes show excellent insight into the dynamics of compliance programs, and what it takes for them to be truly effective.

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[1] Partner, Compliance Systems Legal Group; Vice-Chairman, Integrity Interactive Corporation; Co-editor, ethikos. These comments reflect my personal opinions and may not necessarily reflect the views of any organization with which I am associated.

Comments on question 4

The Commission asks for comment on four questions. These comments address one of those questions.

The challenge: Can we reach smaller organizations? Question four asks if there are factors that could encourage smaller organizations to develop and maintain compliance programs. I strongly believe the answer is "yes." Of course, government could try the stick approach – make it mandatory, legislate or regulate it, etc. But none of these strong-arm approaches will cause companies to be creative and to take initiative in making their programs truly effective. And they will be accompanied by protests about overregulation and expensive bureaucratic requirements. The preferred approach is to provide a real incentive for companies to adopt programs – the same model that worked for larger organizations in 1991.

The Guidelines now offer all organizations the one incentive of lower fines (and avoiding forced imposition of a program through probation). In truth, however, what has meant more to companies is the prospect that prosecutors and regulators will take good corporate citizenship into account when deciding whether to prosecute any company. It is the same carrot and stick model as the sentencing process, but because this carrot occurs so much earlier in the process, and so few major companies take criminal cases to actual trials and sentencing, it is the carrot of not being prosecuted that stands out as being truly worthwhile to larger companies.

Experience shows that larger companies have been much more influenced by the Sentencing Guidelines. Partly this is because just about any large organization knows it is likely to be in the crosshairs of a prosecutor or regulator at some time and place. Perhaps even more importantly, while larger companies have their own in-house legal departments and are more likely to consider such government initiatives, smaller organizations are notorious for being focused primarily on survival and growth. While long-term wellbeing is important to all companies, short term survival and growth opportunities are the greater, sometimes all-consuming demand on the time of managers at smaller companies.

What will actually reach these smaller organizations? The best incentive is an economic one that has real-world meaning for competitive businesses. For this the most practical approach is to look to the supply chains of the larger companies that are committed to compliance and ethics programs. If the leading companies were to ask their suppliers and contractors about having compliance and ethics programs, and if this became a significant factor in winning business and benefits from these larger companies, such a change could cause a dramatic transformation of the compliance landscape.

Just to give one example, Integrity Interactive Corporation, the online compliance

training company I co-founded, has grown dramatically and has instituted its own compliance program, with its own compliance officer, required employee training, and a code of conduct. In 2003 it became a member of the Ethics Officer Association. Integrity Interactive did this because it was the right thing to do, but also because we believed it was something our customers should expect of any substantial supplier.

In contrast, the company has simply not seen compliance officers from the major law firms joining the EOA, or contacting Integrity Interactive for training, or doing any of the other things that Integrity and its customers do. We have not seen stories in the compliance press about the major US law firms adopting Sentencing Guidelines-type compliance programs; even though they are as much "organizations" as the companies they advise.

If law firms and other service providers can successfully offer compliance-related services to compliance sensitive major companies without even being asked if they have compliance programs themselves, this suggests very little market incentive for others to adopt such programs.

It should be noted that many of these smaller organizations may have the type of subject-specific "programs" that were characteristic of large corporations before the Guidelines – perfunctory EEO training, signs over the copiers warning people about copyright infringement, unread labor standards fliers on a bulletin board -. but nothing that matches the management focus and rigor of the Guidelines.

How could larger companies make this change happen? I would not recommend that companies be expected to require that all of their suppliers have compliance programs, or that they be expected to police their entire supply chain. Such a demand would not be realistic, and could be an enormous distraction for companies. On the other hand, the current environment in which companies do not even ask such compliance-sensitive suppliers as their outside counsel whether they have a compliance program, is hard to justify.

Large companies could require that some suppliers in sensitive areas, such as those who handle their hazardous waste, have rigorous programs. (The risk is so high, this is likely already a common practice) But they could also just enquire of other suppliers whether they have such programs. Companies could make it clear that having such a program is a plus factor in selecting suppliers. Any indication that a compliance program at a supplier represents a competitive advantage could have a dramatic effect on this next tier of the economy. Compliance advocates in all companies look to be able to sell management on the advantages of having an effective compliance program, but usually must rely on scare tactics; imagine the impact of being part of the team that actually wins business because of the compliance program; few things could matter more.

What would be the rationale for larger companies to take this step? Perhaps the best reason is that it helps strengthen their own compliance programs and could help cut off problems at the source. For example, a supplier with a strong compliance program is less likely to offer gifts and hospitality that are unethical. It is less likely to get its customer into trouble for environmental violations or improper overseas payments. Its employees are less likely to engage in harassment which could also be attributed to its customer. And it is less likely to engage in the types of aiding and abetting in financial fraud that are alleged to have happened in the Enron case. A contractor, agent, or consultant is less likely to aid a customer's employees in engaging in misconduct if that supplier has instituted strong procedures to ensure legal and ethical conduct.

How would this fit into the Guidelines standards? There are several options. It could be included in item 1, through the Commentary, as one of the standards and procedures a company would adopt. A reference could also be added in commentary on item 4, to the effect that to the extent it was appropriate to have compliance communications to agents, this element could be discharged by having one's agents institute programs of their own. The risk assessment discussion could note that an organization that uses third parties to perform functions for it may require that those third parties themselves adopt compliance programs. Attached is copy of the proposed Guidelines amendments with these insertions marked in.

Comments on the "litigation dilemma" and the Commission's role

Finally, these Comments second a point made by the Advisory Group about the role of the Commission as a catalyst for change. The litigation dilemma identified in the Advisory Group's report needs to be examined, and policy makers need to consider how best to promote compliance consistently. It is also absolutely essential that the Department of Justice and other enforcement and regulatory arms of the government understand how important their role is in getting organizations to energize their compliance programs. If the Department were to be more public about how it takes compliance programs into account and how it measures them, this could add enormous clout to in-house compliance people. For example, if the government were publicly to consider it a sign of bad faith for a company to fail to ask its outside counsel and accountants about those legal and accounting firms' compliance programs, this could change the compliance landscape in entire sectors of the economy.

The Commission is the agency best able to foster the needed discussion in these areas, based on its unique mandate and independent position in the government. I encourage the Commission to formally undertake this mission as a catalyst for change going forward.

The proposed revisions addressing question 4 are in black, in the Commentary.

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1. Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect violations of law; and

(2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense leading to sentencing does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

(1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.

(2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of the law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report on the implementation and effectiveness of the program to prevent and detect violations of law directly to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization

any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.

(4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs, and otherwise disseminating information, appropriate to such individual's respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law;

(B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and

(C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms to allow for anonymous reporting.

(6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.

(7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.

(c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.

Commentary

Application Notes:

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

"Compliance standards and procedures" means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law. To the extent that an organization's culture and ability to comply with the law are affected by those third parties who provide it services, its control systems may include efforts to have such third parties adopt their own programs to prevent and detect violations of law.

"Governing authority" means the (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest level governing body of the organization.

"Organizational leadership" means (A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "high-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations). The term "high-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

Except as provided in Application Note 4(A), "violations of law" means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable.

2. *Factors to Consider in Meeting Requirements of Subsections (a) and (b).—*

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, the organization shall consider factors that include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be

substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of law through relatively informal means. For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business. In appropriate circumstances, this reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require more formally planned and implemented systems.

(C) Applicable Government Regulations.—The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an "effective program to prevent and detect violations of law" within the meaning of this guideline.

3. Application of Subsection (b)(2).—

(A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's compliance efforts.

(B) High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report on the effectiveness and operation of the program to detect and prevent violations of law to the governing authority, or to an appropriate subgroup of the governing authority.

In addition to receiving reports from the foregoing individual(s), the governing authority or an appropriate subgroup thereof typically should receive periodically information on the implementation and effectiveness of the program to detect and prevent violations of law from the individual(s) with day-to-day operational responsibility for the program.

(C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent violations of law pursuant to subsection (b)(2), and to perform their assigned duties consistent with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. *Application of Subsection (b)(3).*—

(A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).

(B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote indiviudals consistent with Application Note 3(C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual's violations of law and other misconduct (i.e., the individual's other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. *Application of Subsection (b)(4).— To the extent it is appropriate to provide training and otherwise disseminate information to the organization's agents, an organization may satisfy this provision if the agent adopts its own program to prevent and detect violations of law that includes such training and dissemination of information..*

6. *Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:*

(A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:

(i) The nature and seriousness of such violations of law.

(ii) The likelihood that certain violations of law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance standards and procedures designed to prevent and

detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud. An organization that uses third parties to perform functions for it may require that those third parties themselves adopt programs to prevent and detect violations of law.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Prioritizing, periodically as appropriate, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A) as most likely to occur and most serious.

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of the law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

January 8, 2004

United States Sentencing Commission
One Columbus Circle, N. E.
Suite -500
Washington, DC 20002-8002

Dear Commissioners:

This letter is in regards to your upcoming hearing and suggestion on your web site to send comments regarding that meeting. I feel the mandatory minimum sentences already being served and the ones still handed out today are far to harsh. We as Americans should seek other remedies for first time non-violent offenders. We have to help our fellow Americans and you are in a position to do this I suggest any and all steps you take to help first time offenders will be appreciated by many. I also think the "Gun Enhancement" handed out via Federal Prosecutor's suggesting such and adding yet more time, should only apply to those without a proper permit or by use only. We should not enhance any sentence unless it is for violence

.
Having a gun and using it are two completely different things, many Americans have guns and have never used them. I know alot of people that have guns and would only use them if their or a loved ones life were in jeporady. I am sure you are able to figure this out just by looking at your family and friends and others you know.

My suggestion would be that you follow common sense and your hearts and when looking at who we have incarcerated in our Federal Prisons today could be you or me. We have all made mistakes in our everday life and been given a second chance. We need to do that with first time offenders and make it retro-active immediately.

We have to help not hinder our families and the mandatory sentences have to address first time offenders in order to do so. I appreciate your taking suggestions and trust you will make the decision and finally say enough is enough lets see if we help first time offenders what happens.

We are incarcerating addicts who need treatment not incarceration. Let's give them a chance to be productive.

Sincerely,

Delores J White
2626 Country Club Road
Indianapolis, IN. 46234

In view of the foregoing, the Commission may wish to consider establishing a conservative base level for HAZMAT offenses in general and devise a series of base level enhancements that, to the extent possible, correspond to the nature of the hazard potentially posed by such materials. For example, if an offense proximately increases the likelihood that hazardous materials could be obtained by those with terrorist intent *and* the materials could be used to inflict the type of catastrophic harm associated with acts of "terrorism," the severity of the enhancement should reflect this potential. This arrangement would both account for the diverse hazardous characteristics of HAZMAT materials and pointedly address the concern expressed by DOJ in the Federal Register Notice.

(3) Base Level Enhancements Should Account for Minor Offenses Involving a Low Potential for Serious or "Catastrophic" Consequences

As in any regulatory scheme, there are any number of potential criminal offenses that involve relatively minor infractions of regulatory requirements and/or may have a limited potential for harmful consequences (e.g., a low or nonexistent likelihood of death or serious bodily injury). Base level enhancements unique to HAZMAT transport offenses should take into account such "lesser" offenses. We note that existing sentencing guidelines for other categories of offenses are oriented in this manner (e.g., offenses involving simple recordkeeping and reporting violations are assigned a base level mitigating factor of 2 levels in the §2Q1.2 Guidelines). Similar "simple" violations should be afforded the same treatment in the context of HAZMAT transportation.

(4) The Commission Should Incorporate the HAZMAT Classification System Devised and Administered by DOT Into Any HAZMAT Offense Sentencing Guidelines

As the Commission may be aware, all HAZMAT transportation in the U.S. is governed by a comprehensive classification system developed and administered by DOT. In preparing any sentencing guidelines specific to HAZMAT, IME recommends that the Commission ensure that the guidelines and associated base level enhancements correspond to and are consistent with this classification scheme.

(5) The Chapter 8 Guidelines for Sentencing of Organizations Should Not Require Amendment To Include a HAZMAT-Specific Compliance Program

The Request for Comments includes an inquiry regarding how new HAZMAT guidelines might interact with the sentencing guidelines for organizations.

The Chapter 8 Guidelines for Sentencing of Organizations appear to be purposely drafted in broad terms to account for offenses committed by organizations under a host of federal regulatory requirements. Accordingly, the guidelines *should* be adequate to cover any violations of HAZMAT regulations attributable to an organization.

In the event the Commission opts to draft new HAZMAT sentencing guidelines, however, the Chapter 8 guidelines will necessarily have to be reviewed and evaluated to ensure their continued relevance, consistency, and effectiveness. IME has not had the opportunity to fully evaluate the how the Chapter 8 guidelines are generally interpreted by the courts. That said, we recommend that, as part of any effort to develop a new HAZMAT sentencing guideline, the Commission also examine the Chapter 8 guidelines to ensure that the guidelines are adequate to accommodate situations unique to the HAZMAT transportation sector.

Specifically, the Chapter 8 Commentary and Application Notes at section (j) and, particularly, at section (k), should be available to limit, if warranted, the severity of any penalties imposed on organizations whose liability stems from the actions of third party shippers, etc. over whom the organization has little or no realistic control.

For example, a shipper contracts with a freight forwarder, broker, or agent to arrange transportation of a hazardous material to a consignee. Even in instances where the shipper arranges the transportation, once the material is no longer physically in the shipper's care and custody, the shipper can exercise little control over the safe handling or security of the material during transit. Likewise, carriers rely on the certification of shippers that the hazmat presented for transportation is correctly identified, documented, marked, labeled, and packaged as required. For these reasons, DOT will reach back to shippers for violations of "shipper/offeror" functions on a carrier's watch, and will charge carriers for knowingly violating "carrier" functions required by statute or the Department's hazardous materials regulations.

* * *

IME appreciates the opportunity to submit these comments. If you have any questions regarding these comments or if we can provide any additional information, please do not hesitate to contact Susan JP Flanagan at sjflanagan@ime.org or 202.429.9280 ext. 315 or Cynthia Hilton at chilton@ime.org or 202.429.9280 ext. 319.

Sincerely,

Susan JP Flanagan
Counsel, Environment, Safety & Health
Institute of Makers of Explosives

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555 Twelfth Street, NW
Washington, DC 20004-1206

March 15, 2004

Michael Courlander
Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Revised commentary to proposed amendments to Sentencing Guidelines

Dear Mr. Courlander:

Enclosed please find a revised copy of the comments we submitted on March 1, 2004, in response to USSC's request for public comment on proposed amendments to the Sentencing Guidelines. I have also sent a revised copy electronically. These revised paper and electronic copies should replace those we originally submitted as the official copies of our comments. Thank you for your help with this revised submission. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

John Gould

John Gould

202 942 6281

Admitted in Pennsylvania only; practicing law in the District of Columbia pending approval of application for admission to the D.C. Bar and under the supervision of attorneys who are members in good standing of the D.C. Bar.

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March 1, 2004

VIA HAND DELIVERY AND ELECTRONIC MAIL

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Request for Public Comment by the United States Sentencing Commission on Proposed Amendments to Sentencing Guidelines

Dear Commissioners:

We are writing on behalf of 22 pharmaceutical companies,[1] in response to the request for public comment issued by the United States Sentencing Commission (USSC) on December 30, 2003.[2] Our comments concern the proposed amendments to Chapter Eight (the Organizational Guidelines), which describes the elements of effective compliance programs.

By way of background, the group of pharmaceutical companies we represent has substantial experience with voluntary compliance programs, and a long-standing commitment to compliance. That commitment is reflected both in individual companies' compliance efforts, and in a variety of collective efforts to improve compliance practices. Along with a number of other pharmaceutical companies, the group's members have been meeting semi-annually for the past five years to identify "best practices" for promoting compliance. Most of the group's current members also submitted comments to the Department of Health and Human Services Office of Inspector General (OIG) to

[1] These companies are: Abbott Laboratories, Alcon Laboratories, Inc., Allergan, Inc., Amgen Inc., AstraZeneca Pharmaceuticals LP, Aventis Pharmaceuticals, Inc., Bayer Corporation, Boehringer Ingelheim Corporation, Bristol-Myers Squibb Company, Daiichi Pharmaceutical Corporation, Eli Lilly & Company, Fujisawa Healthcare, Inc., Genentech, Inc., GlaxoSmithKline, ICOS Corporation, Johnson & Johnson, Merck & Co., Inc., Novartis Pharmaceuticals Corporation, Pfizer Inc., Schering-Plough Corporation, TAP Pharmaceutical Products Inc., and Wyeth Pharmaceuticals.

[2] Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments, 68 Fed. Reg. 75340 (Dec. 30, 2003).

help the OIG develop its voluntary compliance guidelines for the pharmaceutical industry,[3] and submitted comments responding to requests for public comment by the USSC Advisory Group on the Organizational Guidelines. We appreciate the Advisory Group's recognition of our comments. Given the seminal role that the Organizational Guidelines have played in fostering effective compliance programs, we welcome the USSC's initiative to update and refine the Guidelines' criteria.

Our previous comments to the USSC Advisory Group emphasized two key principles: (1) articulating core compliance program standards that give individual companies the flexibility necessary to create "customized" programs tailored to their unique circumstances; and (2) encouraging vigorous self-policing, by reducing the penalties associated with organizational self-analysis and self-reporting. As discussed below, we believe that the proposed amendments promote these principles and will advance the goals of the Organizational Guidelines, although in some instances revisions to the proposal can further advance these goals. Our comments also address: (1) ethics-based compliance approaches; (2) the effect of misconduct by high-level personnel on organizational sentencing; (3) responsibility for compliance program implementation; and (4) proposed language on "model" compliance practices. We hope that these comments will be of assistance to the USSC in finalizing its amendment to the Organizational Guidelines.

* * *

I. Enhancing Compliance Program Effectiveness by Defining Fundamental Standards that Preserve Flexibility

The companies in our group support the proposed amendments, which would retain the seven-element framework of the existing Guidelines, while also creating a number of new obligations and broadening the required scope of effective compliance programs. For instance, the proposed Guidelines would require that companies: establish compliance programs designed to prevent and detect any violations of law or regulation (rather than violations of criminal laws, as in the current Guidelines);[4] promote an "organizational culture" encouraging a commitment to compliance;[5] satisfy new

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[3] See 66 Fed. Reg. 31246 (June 11, 2001) (OIG notice requesting comment on the development of voluntary compliance program guidance for pharmaceutical manufacturers); 67 Fed. Reg. 62057 (Oct. 3, 2002) (draft OIG guidance and request for comment); 68 Fed. Reg. 23731 (May 5, 2003) (final OIG guidance).

[4] Proposed Commentary to § 8B2.1.

[5] Proposed § 8B2.1(a).

internal reporting and more detailed oversight requirements;[6] provide compliance training;[7] periodically evaluate the effectiveness of their compliance programs;[8] provide incentives to employees to follow compliance policies,[9] in addition to enforcing compliance standards through disciplinary measures; and conduct ongoing risk assessments.[10]

These various changes reflect sound compliance principles that have crystallized since the initial adoption of the Organizational Guidelines, and we support their incorporation into the Guidelines.[11] At the same time, we hope the USSC will emphasize that - - within the parameters set by this new and more rigorous framework - - flexibility is still essential for companies to build compliance programs that are genuinely effective. As the USSC has explained previously, the Organizational Guidelines were designed "to encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances."[12] Encouraging flexibility and independence is equally critical today. Without the freedom to use their best judgment - - to develop customized compliance programs tailored to their individual needs and circumstances, their past experience with compliance strategies that have proved successful or disappointing, and their insights on innovations likely to strengthen their compliance efforts - - companies would lack "ownership" of their compliance programs and may not feel empowered to design their programs for maximum effectiveness. The Organizational Guidelines have been "a real success story for the United States

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6 Proposed § 8B2.1(b)(2) requires that: (1) the organizational leadership be knowledgeable about the content and operation of the compliance program; (2) the organization's board of directors be knowledgeable about the content and operation of the program, and exercise reasonable oversight over implementation and effectiveness of the compliance program; (3) specific individuals within high-level personnel have overall responsibility to oversee the compliance program; and (4) these individuals provide periodic reports on compliance matters to the organization's board. The current Guideline commentary only requires (3).

7 Proposed § 8B2.1(b)(4) makes compliance training a requirement, as opposed to an option, and extends the training requirement to the organization's upper levels as well as its employees and agents.

8 See proposed § 8B2.1(b)(5).

9 See proposed § 8B2.1(b)(6).

10 See proposed § 8B2.1(c).

11 Recognizing that the amended Guidelines would create "heightened requirements" for an effective compliance program, the USSC asked whether the credit organizations receive for effective compliance programs should be increased from three to four points. 68 Fed. Reg. at 75359-60. Because these heightened requirements would "raise the bar" for effective compliance programs in a number of significant respects, we believe such a change is warranted. Coupling heightened requirements with a modest increase in the incentives for satisfying these requirements would be a useful step.

12 An Overview of the Organizational Guidelines, Paula Desio, Deputy General Counsel, United States Sentencing Commission, available on the USSC website, http://www.usc.gov.

Sentencing Commission in its work to deter crime and encourage compliance with the law,"[13] and the Guidelines' balance between structure and flexibility has been an important part of that success story. We believe the amended Guidelines can best stimulate ongoing improvements in companies' compliance practices if accompanied by commentary emphasizing that their revised criteria must be interpreted in the same flexible spirit that has characterized the Guidelines since their inception.

One example of why flexibility is important involves the proposed requirement to give employees "appropriate incentives to perform in accordance with [the compliance program]."[14] Companies must be able to implement this provision in a way that reinforces their efforts to make compliance an ingrained part of the organizational culture. We would be concerned with any interpretation of this requirement that mandated "bonuses" for adherence to the law and company policy, which should be a basic obligation of every company employee rather than something "above and beyond" employees' normal duties. Individual companies need the freedom to design incentive systems carefully, so as to ensure that their incentive systems do not inadvertently undermine or dilute the message that compliance with the law and company policy is expected of all employees as an ordinary part of their day-to-day responsibilities.

II. Encouraging Self-Policing

Vigorous self-policing by organizations - - the "first line of defense" in the effort to detect and prevent violations of the law - - is critical to achieving the goals of the Organizational Guidelines. The proposed amendments include two changes that would encourage self-policing, which we strongly support. We hope the USSC will also consider additional measures that would complement these changes: creating a presumption that a company that voluntarily discloses self-discovered violations has an effective compliance program; removing current Guideline language that reduces the incentive for effective compliance programs by tying the credit for an effective compliance program to a requirement for self-reporting; and working with stakeholders to address the "litigation dilemma" confronting companies that embrace self-policing.

Companies today face significant penalties for engaging in candid self-analysis and for reporting self-discovered improprieties to the Government. The USSC Ad Hoc Advisory Group's report on the Organizational Guidelines[15] provides a thoughtful analysis of this problem. According to the Advisory Group, "[a] central objective of the organizational sentencing guidelines is to deter criminal conduct by creating incentives

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[13] Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 Iowa L. Rev. 697, 719 (Jan. 2002).

[14] Proposed § 8B2.1(b)(6).

[15] See Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003), available on the USSC website, http://www.usc.gov.

for voluntary compliance and by rewarding organizations that help the government discover misconduct."[16] However, the "litigation dilemma" creates countervailing incentives that can discourage vigorous self-policing. As the Advisory Group explained:

> [T]he same information that an organization should use to improve its compliance and training efforts is also of potentially enormous value to those who may become involved in litigation with the organization, whether it be administrative, civil or criminal litigation. This gives rise to the "litigation dilemma" and often a justifiable reluctance by many organizations to "dig deep" for fear of creating a roadmap for litigants against it.[17]

In elaborating on the risks of effective compliance programs, the Advisory Group noted, for example, that "audits and investigative reports may become litigation roadmaps for potential adversaries" and even compliance training programs are "potentially riddled with peril because of the litigation dilemma."[18] Moreover, since "[u]nder present law, compliance program and audit materials are rarely confidential," they are often subject to disclosure. "[I]f such disclosures are routinely allowed," the Advisory Group warned, "they will undermine the law enforcement policies upon which the organizational sentencing guidelines . . . are premised: that corporate good citizenship can be induced through incentives that promote self-policing."[19] In short, the litigation dilemma "is recognized as one of the major greatest impediments to the institution or maintenance of truly effective compliance programs."[20]

A closely related problem addressed by the Advisory Group, which exacerbates the litigation dilemma, is that companies that voluntarily disclose suspected misconduct to the Government may be required to turn over privileged documents to the Government as a condition of cooperation. However, as the Advisory Group noted, voluntary disclosure of privileged documents may waive the privilege as to all parties who seek the disclosed documents.[21] Consequently, even otherwise-privileged documents generated by a company's voluntary self-policing efforts may become available to litigation adversaries and harm the company. All of these problems penalize companies for

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16 Id. at 92.

17 Id. at 109.

18 Id. at 108, 116.

19 Id. at 117.

20 Id. at 6.

21 Id. at 118.

building strong compliance programs and work against the USSC's goal of rewarding vigorous self-policing.

The USSC proposed two changes designed to help rectify these problems. First, the Guidelines currently require "disclosure of all pertinent information known by the organization" to obtain the 5-point credit for cooperation with authorities.[22] This "all pertinent information" standard requires disclosing enough information to allow law enforcement to identify the nature, extent, and individuals involved in criminal conduct. The proposed amendments clarify that meeting this standard does not necessarily require waiver of the attorney-client and work product privileges.[23] In addition, the proposed amendments would add a similar clarification concerning downward departures for providing substantial assistance to Government authorities.[24] We strongly support these proposals and hope the USSC will also take further steps to bolster the incentives for voluntary self-policing. As noted earlier, we have three specific suggestions in this regard.

First, the current and proposed Guidelines specify certain circumstances that create a presumption that an organization's compliance program is not effective, but do not specify any circumstances that create the opposite presumption. To provide stronger incentives for self-analysis and self-disclosure, we suggest adding a presumption that a compliance program is effective if the company voluntarily self-reports a violation of law to the Government. Where a violation by any company employee (including high-level personnel) is discovered by the company's own efforts and voluntarily disclosed to authorities, the company should benefit from a rebuttable presumption that its compliance program is effective.

Second, organizations that unreasonably delay reporting legal violations to the Government are now penalized, since they are prohibited from receiving credit for effective compliance programs.[25] The USSC noted that "elimination of this prohibition may be appropriate" in light of the fact that § 8C2.5(g) provides a credit for cooperation with Government authorities (including self-reporting), and requested comment on this issue.[26] We agree that self-reporting should be eliminated as a requirement to receive credit for an effective compliance program, and encourage the USSC to do so in the final amended Guidelines. Given the current disincentives for self-policing, fairness suggests that organizations should be rewarded for self-reporting, not denied credit for an effective compliance program if they fail to self-report. Moreover, the risks that may accompany

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22 See current § 8C2.5(g) and accompanying Commentary 12.

23 See proposed Commentary 12 to § 8C2.5(g).

24 See proposed Commentary 2 to § 8C4.1.

25 See current § 8C2.5(f).

26 68 Fed. Reg. at 75359.

self-reporting - - Government requests that the company turn over privileged documents, which may waive the privilege as to all potential litigation adversaries - - means that conditioning the credit for effective compliance programs on self-reporting diminishes the incentive for developing effective compliance programs that can prevent violations from occurring.

Finally, the USSC's Advisory Group recommended that the USSC become a "fulcrum to advance the debate [regarding the litigation dilemma] among policy makers."[27] Specifically, the "Sentencing Commission should consider how . . . it can advance and further the dialogue among the branches of government and interested members of the public," since "a dialogue seeking to resolve the litigation dilemma is fundamental to the full and effective operation of the organizational sentencing guidelines and public polices that they are intended to advance."[28] We endorse this recommendation and encourage the USSC to act on it.

III. Ethics-Based Approach to Compliance Programs

The proposed Guidelines would require that organizations exercise due diligence to prevent and detect violations of law and "otherwise promote an organizational culture that encourages a commitment to compliance with the law."[29] In its synopsis describing the amendments, the USSC explained that this proposal "is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations."[30] The companies in our group strongly support an ethics-based approach to compliance. Nevertheless, "ethics and values" are terms that might inject an unwarranted degree of subjectivity into Government determinations about whether a company's compliance program was effective; whether the company acted diligently to prevent and detect violations of announced legal standards is a more straightforward and objective inquiry. Consequently, we hope the USSC will emphasize the textual requirement that companies "promote an organizational culture that encourages a commitment to compliance with the law,"[31] and make clear that companies have the flexibility to incorporate ethics-based approaches into their compliance programs in a manner best suited to their individual circumstances.

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27 Advisory Group Report at 129.

28 Id.

29 Proposed § 8B2.1(a).

30 68 Fed. Reg. at 75355.

31 Proposed § 8B2.1(a) (emphasis added).

IV. Misconduct By High-Level Personnel

Under the proposed amendments, high-level personnel participating in, condoning, or being willfully ignorant of an offense would create a rebuttable presumption that the organization's compliance program was ineffective, instead of the current conclusive presumption.[32] We support this change. Organizations should be allowed to demonstrate that their compliance programs are effective, and to receive credit for the program if they do so, even in circumstances where an individual at a high level of the organization engaged in misconduct or malfeasance.

The USSC requested comment on: (1) whether the conclusive presumption should continue to apply in the context of large organizations; and (2) whether the rebuttable presumption should apply in the context of small organizations "in which high-level individuals within the organization almost necessarily will have been involved in the offense."[33] We believe it is unfair and counterproductive to apply the conclusive presumption to any organization. We understand the USSC's concern that even a rebuttable presumption can create special problems for small companies, and believe that eliminating the rebuttable presumption for small companies may be an appropriate step to address this concern.

V. Responsibility For Compliance Program Implementation

The proposed amendments add new language stating that "specific individual(s) within high-level personnel [i.e., the compliance officer] shall be assigned direct, overall responsibility to ensure the implementation and effectiveness" of the compliance program,[34] whereas the current Guidelines only require that "[s]pecific individuals within high-level personnel of the organization . . . have overall responsibility to oversee compliance."[35]

We are concerned that the proposed language could be misinterpreted to relieve company managers of their responsibilities for ensuring the implementation and effectiveness of the compliance program - - essentially making compliance efforts a discrete area that can be assigned exclusively to compliance professionals, rather than an integral part of the whole organization's culture. For a compliance program to succeed, all of the organization's operating management must embrace the program, feel a personal investment in its success, and assume accountability for its effective implementation. The compliance officer has critical duties - - providing leadership and

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32 See proposed and current § 8C2.5(f).

33 68 Fed. Reg. at 75359.

34 See proposed § 8B2.1(b)(2).

35 Current Commentary to § 8A1.2.

coordination of the compliance program, monitoring the program's performance, and keeping the company's management and board apprised of program implementation issues - - but cannot be held exclusively responsible for the overall success or failure of the program. We urge the USSC to clarify this point, emphasizing that effective compliance programs call for an organization-wide commitment involving all of the company's management.

VI. Proposed Language on "Model" Compliance Practices

The proposed amendments include language suggesting that organizations' compliance programs be measured against "model" practices. Specifically, a proposed commentary states that the precise actions required for an effective compliance program depend partly on "compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization."[36] By contrast, the current Guidelines provide that failure to follow "applicable industry practice" weighs against the finding of an effective compliance program.[37]

Measuring compliance programs against industry practice is an important means to assess effectiveness. However, since industry guidelines describing "model" practices are often aspirational documents purposely designed to go beyond applicable industry standards - - to promote new approaches that would advance the state of the art in the compliance arena - - requiring compliance with these models is an unwarranted step that could actually discourage their creation. These aspirational models provide an important impetus for improvements in industry compliance practices, and should not be discouraged by making them mandatory. Industry groups may hesitate to develop model guidelines if they fear that the guidelines will be transformed into legal requirements, and there is no basis for a presumption that a company's compliance program is not effective unless it represents a "model" program. Instead, a company's adoption of model compliance practices should create a presumption that its compliance program is effective. We believe the "model" language in the proposed commentary to § 8B2.1 could be counterproductive, and should therefore be deleted. To advance the USSC's goals, industry groups should be encouraged to develop guidelines describing and promoting model compliance practices, and companies that adopt these model practices should be affirmatively rewarded for doing so.

* * *

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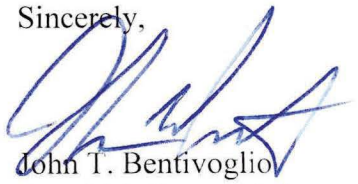
36 Proposed Commentary 2(A) to § 8B2.1 (emphasis added.)

37 Current Commentary to § 8A1.2.

We hope that these comments will be useful to the USSC. We appreciate your consideration of these comments, and appreciate all of your efforts in this critical area.

Sincerely,



John T. Bentivoglio
Arnold & Porter LLP
(202-942-5508)

United States Senate

WASHINGTON. DC 20510-0905

BILL NELSON
FLORIDA

April 6, 2004

Michael Courlander, Public Affairs Officer
C/O Commissioners
United Sentencing Commission
Thurgood Marshall Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

The United States Sentencing Commission is scheduled to vote April 6-8, 2004, on possible amendments to the sentencing guidelines relating to the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN SPAM) Act of 2003. The CAN SPAM Act was the result of a bipartisan effort in both the Senate and the House, and ultimately passed both bodies with overwhelming support. In fact, the measure passed the Senate by a vote of 97-0.

The Congressional directive contained in CAN SPAM instructs the Commission to amend the guidelines to provide penalties for violations of the Act. The proposals being considered by the Commission for CAN SPAM offenses created in 18 U.S.C. § 1037, are consistent with the intent of the Act in that they carry significant penalties for the transmission of unsolicited commercial mail through the Internet. As one of the Senators involved in the drafting of CAN SPAM, I appreciate the Commission's thoughtful approach to these provisions.

The Commission was also directed in the Act, P.L. 108-187, § 4 (b) (2), to consider sentencing enhancements for non-CAN SPAM Act offenses, including those involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if these offenses were facilitated by the transmission of large quantities of commercial mail over the Internet. However, the proposals being considered by the Commission as of last week do not provide sentencing enhancements that are directly correlated to the transmission of large quantities of commercial e-mail. As discussed when Commission staff met with Senate Judiciary Committee staff and representatives from my office on March 30, 2004, the sentencing enhancements with respect to these offenses should, consistent with the intent of Congress, provide tangible penalties for offenders who are able to inflict large-scale harm due to their ability to effortlessly send

large quantities of electronic mail, and these enhancements should reflect the passage of the CAN SPAM Act.

I urge the Commission to adopt sentencing enhancements that reflect the intent of the drafters of this Act to create serious consequences for offenders abusing the Internet, and to do so with respect to all sections of the Act.

Sincerely,

Bill Nelson

Bill Nelson
United States Senator

OFFICE OF SENATOR BILL NELSON
UNITED STATES SENATE
WASHINGTON, DC 20510-0905
202-224-5274
FAX 202-228-2183

TO: Michael Commander c/o Commissioners

FROM: Alea Brown

SUBJ: CAN SPAM Act

NO OF PAGES INCLUDING COVER: 03

COMMENTS: Please Contact me if you have any questions at 202-224-8730

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

April 1, 2004

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

Commissioners:

Following my testimony on March 17, 2004, the Commission asked for clarification about the data cited regarding the number of sexual assaults involving victims under the influence of GHB. The Commission also asked about the dangers of GHB, including emergency room mentions, and the relative harm to the body caused by GHB and MDMA.

Sexual Assaults: The reference at pages 9-10 of the testimony to 15 sexual assaults involving 30 victims,[1] was cumulative data that DEA collected from hospitals, law enforcement agencies, and rape crisis centers between 1996 and April 2000. The information regarding 48 GHB positive urine samples, out of 711 drug-positive urinalysis samples submitted by victims of alleged sexual assault, was based upon samples collected over a 26 month period, and the data was derived from a study, the results of which were reported in M.A. ElSohly and S. J. Salamone, "Prevalence of Drugs Used in Cases of Alleged Sexual Assault," Journal of Analytical Toxicology, Volume 23, No. 3, May/June 1999, pp. 141-146.

Dangers of GHB: GHB is a central nervous system depressant with perceived hallucinogenic effects. Ingestion of GHB can produce severe physical responses such as drowsiness, dizziness, nausea, vomiting, severe respiratory depression, seizures and death. See D. Zvosec, "Adverse Events, Including Death, Associated with the Use of 1,4 Butanediol," New England Journal of Medicine, Vol. 344, No. 2, pp. 87-93, at 87 (2001)(describing toxic effects of GHB).[2] GHB dependent individuals experience withdrawal symptoms, some of which include anxiety, insomnia, psychosis and delirium. See K. Miotto, et al., "Gamma-Hydroxybutyric Acid:

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[1]This information appears on the website of DEA's Office of Diversion Control, www.deadiversion.usdoj/drugs_concern/ghb/summary.htm

[2]See also, Drugs and Chemicals of Concern, GHB, www.deadiversion.usdoj.gov/drugs_concern/ghb/summary.htm

Patterns of Use, Effects and Withdrawal," American Journal of Addictions, Vol. 10, pp. 232-241, at 239 (2001).

As noted at pages 2-3 of the testimony, GHB emergency room mentions have increased more than fifty fold over the last 10 years: from 56 in 1994; to 1,282 in 1998; to 3,200 in 2002. Further as noted on page 10 of the testimony, 58% of all GHB emergency room mentions are young people between the ages of 18 to 25. This data, from the Drug Abuse Warning Network (DAWN), indicate both the increased use of GHB and the harm it causes to young people.

Although it is difficult to compare the relative dangers posed by MDMA and GHB, recent DAWN data for the respective drugs suggest approximate parity in terms of emergency room (ER) mentions, indicating similar adverse consequences when ingesting either drug. For instance, in 2000, there were 4,511 and 4,969 ER mentions involving MDMA and GHB, respectively, and in 2002, there were 4,026 and 3,330 ER mentions involving MDMA and GHB, respectively. In addition, both drugs are marketed to young people as a "club" drug.

We contend that MDMA serves as an appropriate benchmark for establishing base offense levels for GHB, because of their similarity in marketing, abuse and resulting harm – a so-called "club" drug that targets young people and sends thousands of them to the emergency room. Although GHB is pharmacologically distinct from MDMA,[3] both are dangerous drugs that deserve appropriately strict sentences under the guidelines.

Dangers of MDMA: In considering whether MDMA and GHB were appropriate points of comparison for sentencing purposes, the Commission also expressed concern that it may have acted on incorrect information when it established the MDMA guidelines. The Department of Justice reiterates its strong support for the current base offense levels for MDMA.

As background, the guidelines pertaining to MDMA were last amended on May 1, 2001, in response to § 3664 of the Ecstasy Anti-Proliferation Act of 2000, P.L. 106-310, which directed the Commission to act under emergency amendment authority to increase the penalties for MDMA offenses. In establishing a base offense level of 26 at 800 MDMA pills, the Commission explained its rationale as follows:

> Much evidence received by the Commission indicated that Ecstasy: (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults.

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[3]See K. Nicholson, et al., "GHB: A New and Novel Drug of Abuse," Drug and Alcohol Dependence, Vol. 63, pp. 1-22, at 15 ("[G]HB is not pharmacologically equivalent to any existing controlled substances").

Amendments 609 (May 1, 2001) & 621 (November 1, 2001), U.S.S.C. Guidelines Manual, Appendix C, Vol. II, pp. 88; 621-22 (November 21, 2003).

The rationale set forth by the Commission remains as true today as it was in 2001. Known to affect the brain's serotonin system, MDMA produces both hallucinogenic and stimulant effects. Ingestion may cause acute short-term effects such as tremors, muscle tension, dehydration, hyperthermia, or organ failure[4] as well as long term effects including memory loss and behavioral disorders.[5] Ecstasy is toxic to the central nervous system and its use may lead to brain damage.[6] See J. Obracki, et al., "Specific Neurotoxicity of Chronic Use of Ecstasy," Toxicology Letters, Vol. 127, pp. 285-297, at 293 (2002)("There is strong evidence that MDMA is a potent serotonergic neurotoxin....Teenagers seem to be more susceptible to neurotoxicity than adult ecstasy users").

The study questioning the toxicity of MDMA to which the Commission may have been referring was one that was subsequently retracted. In that study, "Severe Dopaminergic Neurotoxicity in Primates After a Common Recreational Dose Regimen of MDMA ('Ecstasy')," Science, September 26, 2002, by George A. Ricaurte, et al., the authors reported that MDMA produced neurotoxicity in the dopamine system of the brain and therefore, "recreational" MDMA users may place themselves at risk of developing Parkinson's Disease. In September 2003, Science published a retraction of the article after the authors reported that due to an inadvertent error, their chemical supply company mistakenly packaged methamphetamine rather than MDMA in the boxes that were delivered to the research laboratory, and as a result, the monkeys

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[4]See MDMA (Ecstasy) Fast Facts, National Drug Intelligence Center, March 2003, at 2-3; J. Morland, Toxicology Letters 112-113, at 151 (2000)("A series of possible adverse acute mental and behavioral effects have been observed in people shortly after a single dose use of MDMA"); Gowing, et al., "The Health Effects of Ecstasy: a literature review," Drug and Alcohol Review, Volume 21, pp. 53-63 (2002)("The incidence of serious acute adverse events related to ecstasy is low. It is the unpredictability of those adverse events and the risk of mortality and substantial morbidity that makes the health consequences of ecstasy use significant").

[5]See M.J. Morgan, et al., "Ecstasy (MDMA): Are the Psychological Problems Associated with its Use Reversed by Prolonged Abstinence?," Psychopharmacology, Volume 159, pp. 294-303, at 294 (2002)("Selective impairments of neuropsychological performance associated with regular ecstasy use are not reversed by prolonged abstinence. This is consistent with evidence that ecstasy has potent and selective neurotoxic effects on brain serotonergic systems in humans").

[6]See Reneman, L., et al., "Memory Disturbances in 'Ecstasy' Users Are Correlated with an Altered Brain Serotonin Neurotransmission," Psychopharmacology, Vol. 148, pp. 322-324, at 322 (2000).

that were the subject of the study received methamphetamine rather than MDMA. Methamphetamine is known to cause neurotoxicity to the dopamine system.

The Ricaurte study in no way undermines the well-established body of research that demonstrates the harmful effects of MDMA, particularly to the body's serotonin system. See S. Verheyden, et al., "Acute, Sub-Acute and Long-Term Subjective Consequences of 'Ecstasy' (MDMA) Consumption in 430 Regular Users," Human Psychopharmacology, Vol. 18, pp. 507-517, at 515 (2002)(users self-report long-term effects of MDMA to be depression and loss of concentration); "Ecstasy and Pot: Double the Memory Damage," Atlanta Journal Constitution, January 15, 2004 (reporting on recent study published in the Journal of Psychopharmacology, newspaper article notes: "Adding to an already hefty body of evidence, a new study finds ecstasy users suffer from long-term memory problems while marijuana smokers struggle with short-term memory lapses").[7] The Department of Justice stands behind the data that we presented to the Commission in 2001, and we believe that the current MDMA base offense levels are appropriate.

In sum, both GHB and MDMA are dangerous controlled substances. Both drugs are distributed in the "club" scene to young people and are consumed for similar perceived effects. Consequently, the Department believes that they are appropriate for comparison purposes when establishing base offense levels under the sentencing guidelines.

Sincerely,

Jodi L. Avergun, Chief
Narcotic and Dangerous Drug Section

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[7]See also A. Montoya, et al., "Long-Term Neuropsychiatric Consequences of 'Ecstasy' (MDMA): A Review," Harvard Rev. Psychiatry, Vol. 10, No. 4: pp. 212-220, at 213 (2002)(Literature review)("The toxic effect of MDMA on central serotonergic systems in animal models has a clear parallel in humans"); G. Gerra, et al., "Long-Lasting Effects of [Ecstasy] on Serotinin System Function in Humans, Biological Psychiatry, Vol. 47, pp. 127-136 (2000)("Our data indicate long-lasting 5-HT system impairment in abstinent MDMA users although the hypothesis of serotonergic changes attributable to a premorbid condition cannot be excluded"); B.V.S. Murphy, et al., "Biochemical Implications of Ecstasy Toxicity," Ann Clin Biochem, Vol. 34, pp. 442-445, at 442 (1997)("Recreational use of ecstasy is associated with a definite morbidity and mortality. We report a case of ecstasy toxicity with severe multiple organ failure, who went on to make a full recovery after prolonged hospitalization").

March 29, 2004

MEMORANDUM

TO: All Commissioners

FROM: Mike Courlander

SUBJECT: Public Comment

Just wanted to make sure that you had copies of all public comment that has been submitted. Attached is a late-arriving piece.

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).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
PROBATION OFFICE

DAVID D. KEELER
CHIEF PROBATION OFFICER

P.O. BOX 8289
200 EAST LIBERTY
ANN ARBOR, MI 48107-8289
(734) 741-2075

REPLY TO: DETROIT

THEODORE LEVIN UNITED STATES COURTHOUSE
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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

Avern Cohn

Bill Nelson

John Roele

✓ Chevron Texaco

✓ March 5th PAG Supplement

✓✓ March 8th CLC

✓ PAG - Mar 5

✓ Allina Hospitals

✓ Sheri Huber

✓ Wharton School

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, Arizona 85701-5053

Telephone: (520) 205-4520
Fax: (520) 205-4529

March 16, 2004

Honorable Ruben Castillo
Vice Chair
United States Sentencing Commission
One Columbus Circle NE
Washington, D.C. 20002-8002

Re: Guideline Calculations for Bringing In and Harboring Certain Aliens

Dear Judge Castillo:

We write to express our personal views regarding the need for certain amendments to the guidelines.

We share an abiding concern about the absence of appropriate guideline adjustments for the crime of bringing in and harboring certain aliens, in violation of 8 U.S.C. § 1324, when young children are being transported by strangers.

We have noticed an alarming increase in cases in which very young children are being smuggled into the United States by strangers who have no connection to the children's parents. In brief, they do not know what awaits these young children after the smugglers deliver them to their destination points.

Currently, the guidelines provide for no specific enhancement for this factual scenario. The smuggling, transporting, or harboring of unaccompanied children is not sufficiently addressed under the present two- to four-level increase for intentional or reckless creation of substantial risk of death or serious bodily injury. At most, a two point enhancement might arguably be assessed based upon vulnerable victim status. However, even as to that minimal enhancement, it is probably an open-question as to whether, for purposes of the crime of transportation of illegal aliens, the children being transported are "victims." Since these children are in a displaced condition, offenses involving unaccompanied children raise the level of severity of the criminal conduct.

Last month, we imposed sentences in four such cases.

On February 10, 2004, sentence was imposed in *United States v. Anna Quintero*, CR 03-2119-TUC-JMR. The defendant had attempted to bring two infants, ages 4 years and 8 months respectively, into the United States. The two infants appeared to be drugged. She had two birth certificates, but she noticed that the ages on those certificates did not correspond to the ages of the children she was transporting. The defendant was to be paid $150.00. She did not know the parents of the children or to whom she was delivering the children.

On February 11, 2004, sentences were imposed in *United States v. Bertha Tomasa Rabago and Cecilia A. Montano-Garay*, CR 03-1642-TUC-JMR. There, the defendants, with Rabago's two children and Montano's one child, attempted to transport two young girls, five and seven years old respectively, into the United States. When arrested, Montano said she did not know the names of the children, had received them at a hotel in Mexico, and was to bring them to her

home in Arizona, where they would be picked up. Rabago invoked her rights. When the Probation Officer interviewed the two defendants, Rabago told the probation officer that a friend of her sister wanted her to pick up the children. Montano said her friend had asked Montano to pick up his children. The friend, when contacted by agents, denied knowing anything about Montano's story. He is the not related to the two children.

On February 19, 2004, sentence was imposed in *United States v. Silvia Ayala*, CR 03-2108-TUC-CKJ. There, the defendant attempted to smuggle a six year old boy through the Douglas Port of Entry on September 24, 2003. She stated a man and woman she had never met before gave her the child to deliver to a man at a gas station in Douglas, Arizona. She did not know if these people were the parents of the child and therefore had no idea if she was participating in a kidnapping attempt. The child appeared to be lethargic and began to hyperventilate when talking to inspectors. The child stated that he had been given medication by a man he did not know.

On February 23, 2004, sentence was imposed in *United States v. Chrystal Salazar,* CR 03-2297-TUC-CKJ. There, the defendant attempted to smuggle a one year old infant into the United States at the Douglas Port of Entry. She admitted to inspectors that she was hired by "Luis" to transport the child from Agua Prieta, Mexico to Douglas, Arizona for $300.00. Luis provided her with a car and another man loaded the child into the car. The defendant had no knowledge as to whether either of these men had any legal relationship to the child.

The sentencing guidelines for alien smuggling do not adequately take into consideration the heightened danger to young children smuggled by strangers having no connection to the parents of the smuggled children. We respectfully urge that you consider a significant upward adjustment for such conduct.