Section 2C1.7 deals with acts of dishonesty by public officials that cause purely *intangible* harm. Section 2B1.1, coupled with a 2-level increase for abuse of trust, would presumably apply in non-bribery cases to acts of public officials which actually cause tangible harm, such as thefts or embezzlements. If the amendment were enacted as proposed, cases of *intangible* harm with multiple incidents would have an offense level of 14, while cases of *tangible* harm would be *5 levels lower* (7+2=9).

Similar disparities result from raising the base offense levels for mere gratuities – cases which by definition do not involve any *quid pro quo* and are largely misdemeanors. These disparities will be furthered amplified by consolidating the bank gratuity cases with 2C1.2 and applying the 2-level multiple incident adjustment across the board. A bank employee who accepts two $3,000 gratuities not causing loss to the bank will be sentenced at the same level (13) as a bank employee who embezzles up to $30,000 directly from the bank. (9+2+2=13 (proposed 2C1.2); 7+2+4=13 (existing 2B1.1)).

To be sure, there are bribery cases in which the harm is largely non-economic because of the impact on the public perception of and faith in governmental decision-making. But this characteristic is more than fully accounted for by the 8-level upward adjustment in cases involving elected officials or officials holding high-level decision-making or sensitive positions. In those cases, the disparity between the bribery guideline and theft guideline will be nothing short of dramatic. For example, if the amendment were enacted as proposed, an official in a high position of public trust involved in more than one incident who accepted $10,000 for the purpose of influencing an official act will be sentenced at the same level (12+2+2+(2 or 4)+(2 or 4)= 20 to 24) as if the official had embezzled from $400,000 to $2,500,000, depending on which options are selected from the proposed increases.

The existing bribery and gratuity guidelines are already out of proportion with the guidelines for economic offenses, and should be reduced by at least 2 levels to eliminated incongruous results. Raising the bribery and gratuity offense levels, particularly in conjunction with applying the 2-level multiple incident adjustment to intangible rights and bank gratuity cases, will lead to results that are intellectually indefensible.

III. Proposed Amendments relating to the Mitigating Role Cap (Amendment # 6)

The PAG will provide a supplemental submission addressing this issue.

IV. Proposed Amendment to Multiple Victim Rule in USSG §2B1.1, (comment.) n. 4(B)(ii) (Amendment #8b)[3]

The proposed amendment to U.S.S.G. §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal

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[3] The PAG thanks Richard Crane for his assistance with this portion of our submission.

customers, such as those found in apartment complexes, would presumptively involve 50 or more victims.

Presently, the special rule provides that when United States mail is taken from a Postal Service relay box, collection box, delivery vehicle, satchel or cart, the offense is considered to have involved at least 50 victims. This rule was added to the guidelines in 2001 because of "(i) the unique proof problems often attendant with such offenses, (ii) the frequent significant, but difficult to quantity, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States Mail." U.S.S.G. Amend. 617 (Reason for Amendment). These reasons provide no support for the changes contemplated in Proposed Amendment 8(b).

A. Amendment Does Not Address Unique Proof Problems

Unique proof problems exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft. Without knowing the number of pieces of mail, the scope of the theft and number of victims is impossible to ascertain.

These proof problems do not exist when dealing with banks of mailboxes. In fact, it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes. For example, if the offender stole mail by entering an apartment unit box from the front,[4] the door to the mailbox will almost always show signs of tampering to overcome the box's locking mechanism. On the other hand, mail taken from individual home mailboxes would not show such tampering because these boxes are rarely locked. If the apartment mail was stolen via the back way, it would be more difficult to determine the number of victims, but no more so than determining the number of victims when mail is stolen from individual home mailboxes.

B. Quantifying Non-Monetary Losses Is No More Difficult Than In Other Cases

As noted above, we do not believe it is more difficult to quantify non-monetary losses resulting from theft of mail from apartment cluster mailboxes than single residence mailboxes.

C. Amendment Will Not Further the Purposes of the Guidelines

It may be important to protect the soundness of the United States Postal Service by providing greater penalties for those who would steal from a Postal Service vehicle or container. But we do not believe it is necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences.

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[4]From the front" means that the mail was taken out of the box in the same manner as the recipient would have taken it. In some cases, mail can be accessed from the back by unlocking the entire bank of boxes or by approaching the boxes from the rear (as is done with the individual boxes located in a Post Office. [1-71]

On the other hand, the purposes of the guidelines will be frustrated if the proposed amendment is adopted. The basic objective of the guidelines is to provide reasonably uniform sentences for similar offenses committed by similar offenders. USSG Ch 1, Pt. A(3). Mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The proposed amendment will also create confusion as to the meaning of the term 'victim.' For purposes of mail theft, 'victim' is defined as "any person who sustained any part of the actual loss" or "any person who was the intended recipient or addressee" USSG §2B1.1 App. Note 4(B)(i). In either case, the definition requires an identifiable victim. The definition has been weakened, perhaps necessarily, by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance. It should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

D. Placing Burden On Defendant to Prove Number of Victims is Unfair[5]

Requiring a defendant to prove that his mail theft offense involved less than fifty victims puts the burden on the party in the worst position to do so. The government is in a far superior position to prove the number of victims because it can obtain this information immediately upon discovery of the offense. It is one thing to ascertain how many apartments were vacant and how many people had already retrieved their mail when the question is asked the same day as the offense and another to get answers when the questions are asked months later. Additionally, government agents have the perceived authority to ask people if they have already retrieved their mail and, if not, whether they were expecting anything valuable or time-sensitive. An attorney or investigator representing the alleged thief would have a far more difficult time getting answers to these questions.

Additionally, the present rule reasonably assumes that a person who steals from a Postal Service box or conveyance intends to steal all the mail, while breaking into a single apartment mailbox does not evidence such an intent.

E. There Is No Demonstrated Need for the Amendment

Finally, we question the seriousness of the problem addressed by the proposed amendment. We can find only one case where a similar situation arose. In *U.S. v. Gray*, 71

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[5]As published, the amendment provides that any theft from a cluster of mailboxes would be considered to have involved 50 or more victims. This would result in a four level enhancement even if the apartment complex had less than 50 apartments. At the very least, this should be changed to read that where there are multiple boxes, there is a presumption that the number of victims corresponds to the number of boxes. But, even this refinement would not alter our opposition to the amendment for the reasons stated above.

Fed.Appx. 300 (5th Cir 2003), a two-level enhancement was imposed on the defendant for having more than ten and fewer than 50 victims because he pried off the mailbox panels in an apartment building, exposing 42 individual boxes. On appeal the enhancement was vacated because there was no proof that there were at least ten people who had mail in their boxes at the time of the offense. There was, however, no indication that it would have been difficult to obtain sufficient evidence proving the number of victims, especially considering the reduced degree of proof required at a sentencing hearing.

V. Issue for Comment regarding Aberrant Behavior (Amendment #10)

With regard to aberrant behavior, Issue for Comment 10, the PAG opposes as premature the elimination of the aberrant behavior downward departure provision, U.S.S.G. § 5K2.20. While we agree in principle that the mandate of 28 U.S.C. § 994(j) should be implemented and true first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense to eliminate the aberrant behavior downward departure before proposing an amendment to U.S.S.G. § 4A1.1 designed to accomplish this objective. The Commission has been engaged in a two-year study of criminal history. The PAG suggests that the Commission formulate an appropriate amendment to U.S.S.G. § 4A1.1 based on the results of that study. At that point, but not before, it makes sense to consider whether or not the aberrant behavior downward departure remains necessary.

VI. Proposed Amendment to Immigration Guidelines (Proposed Amendment #12)

The PAG intends to comment on this proposed amendment but has not yet finalized its submission on his issue. A supplemental comment addressing this proposed amendment will be forthcoming in the next few days.

As always, we appreciate the opportunity to present our perspective on these important issues. We are available to provide further information or meet with the Commission if it would be useful.

Sincerely,

James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

March 1, 2004

Advance copy by electronic mail
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 6 to the Sentencing Guidelines and Issue for Comment 10.

Dear Commissioners:

I write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to urge that you leave undisturbed for now the mitigating role cap and the aberrant conduct departure. Both provide necessary relief for the very small number of people who qualify. Morever, both the cap and changes to the aberrant conduct departure are so recent that it is too soon to tell if the concerns that motivated them have been addressed or how well they are presently working. Finally, built-in mechanisms ensure correct sentences when the operation of the guidelines fails to properly account for culpability: upward departure in the case of a capped sentence that is too low and either denial of the aberrant conduct departure or, in the case it is invoked, appellate review of the aberrant conduct departure if it is used inappropriately.

Proposed Amendment 6: Mitigating Role

The guidelines overemphasize drug quantity as a measure of blameworthiness and frequently cannot adequately account for role in the offense. FAMM's case files are filled with defendants serving unconscionably long sentences for drug offenses. Many are first-time, non-violent offenders. The relevant conduct rules and severe mandatory minimums drive these low-level participants' sentences well beyond those warranted. Many of their stories are truly disturbing. The mitigating role cap provides some limited relief to defendants like them. Below are a few examples of defendants who received mitigating role reductions. They are meant to illustrate the kinds of defendants this cap is designed to assist.[1]

Lori Gibson's boyfriend, Larry Copeland, was a drug dealer. Ms. Gibson had heard that Mr. Copeland dealt drugs but had never discussed his business with him. He had never included her in his illegal activities and had never, to her knowledge, brought the drug trade home with him. He was also alcoholic and abusive. She was used to doing as she was told. Once, while out

[1] None of these defendants received the cap as it was instituted after they were sentenced and has not been made retroactive.

of town, Mr. Copeland called Ms. Gibson and asked her to pick up something from a man named Eric McKinnon. Unaware of what she was picking up or why, Ms. Gibson did as she was asked. She met Mr. McKinnon, who she did not know, in a parking lot and received $3,600 from him. She did not know that the money was intended to settle a debt from a sale by Larry Copeland of 113 grams of cocaine base. At Mr. McKinnon's direction, she called Mr. Copeland, told him she had the money, and gave the telephone to Mr. McKinnon. They arranged another drug deal, but in coded language that Ms. Gibson did not understand. Mr. McKinnon was an informant and Ms. Gibson was arrested within minutes of leaving her meeting with him.

Ms. Gibson went to trial and was found not guilty of conspiracy but guilty of one count of possession with intent to distribute cocaine base. She was originally sentenced at level 34 to 151 months (for the crack cocaine from the prior sale as well as that arranged while she was in the car) and did not receive a mitigating role adjustment despite counsel's arguments. Her case was affirmed but remanded for resentencing by the Eleventh Circuit Court of Appeals. In 1998, she was resentenced to 126 months, receiving a reduction of 2 levels in recognition of her minor role in the offense. Ms. Gibson has two children, now 11 and 18 years old. Their 66-year-old grandmother cares for them. Ms. Gibson will be released in early 2005.

Tammi Bloom's husband of 15 years distributed cocaine from an apartment that he shared with his mistress in Ocala, Florida. Ms. Bloom testified at her trial that she was unaware of her husband's affair or the sales in Ocala. A confidential informant said that she was present for other sales at her own home with Mr. Bloom in Miami and counted money for him.

After Ronald Bloom and his mistress were arrested, the police searched the home he shared with Ms. Bloom and discovered cocaine, cocaine base, 3 firearms and drug ledgers. Besides a small bag of cocaine on her husband's nightstand, she did not know about the other evidence as it was hidden, even from her, in a septic tank and in a part of the house used primarily by her husband.

The PSI identified Mr. Bloom as the most culpable defendant in the case because he exercised decision-making authority over his wife and others. Ms. Bloom was held accountable for drugs distributed from the home in Miami on three occasions for a total of 2.41 kilograms of cocaine and 510.05 grams of cocaine base. She received a two-level enhancement for the guns and a two-level obstruction of justice enhancement for testifying, allegedly falsely, to her innocence at trial. While she received a two-level reduction for minor participant, she still received the longest sentence of anyone convicted in the conspiracy: 235 months or19 years and seven months. Her husband received 210 months, or 17.5 years, his mistress 78 months and another asociate, 168 months.

Ms. Bloom has two children, 16 and 18, who are being raised by their maternal grandmother. Ms. Bloom's father died in 2002 and her mother is struggling to keep the family

going without him.

Tammi Bloom will leave prison in late 2015.

In October 1990, **Daisy Diaz** accompanied her husband and others on a boat trip to several Caribbean islands. She believed the trip was for pleasure. After 41 kilograms of cocaine were discovered on an island the boat had just departed, the boat was searched by Bahamian police. The party was arrested and a gun found in a bag carried by Ms. Diaz. She and the boat's captain, Antonio Mateau, said he placed the gun there as he anticipated being arrested. (Mr. Mateau later provided an affidavit to that effect after he was finally captured, years later.) The party was released but later detained again. The vessel was searched and found to contain 176.1 kilograms of cocaine hidden near the fuel tank. Ms. Diaz denied knowledge of the drugs, which were so well hidden it took more than a day to locate them. She was considered, even by the prosecuting attorney, to be merely a decoy to make the trip appear not a drug smuggling run but a family vacation. She was charged with the amount of drugs found on the boat as well as the 41 kilograms found on the island. Ms. Diaz was convicted and sentenced to 235 months, a base offense level of 38, with an enhancement for Mr. Mateau's gun.

The two-level downward adjustment was warranted, according to the Probation Officer, who agreed with the AUSA that she was merely a decoy.

Ms. Diaz, who had no criminal history, received the longest sentence of the party -- with the exception of Mateau who died in prison -- including that of her husband, who received 12 years. She maintains her innocence to this day. She will not be released in September 2008.

The mitigating role cap is an effort to account for a defendant's minor or mitigating role by establishing a realistic base offense level. It is an explicit recognition that quantity alone is relied on to such an extent in the guideline drug calculations that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct. Some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

Senator Jeff Sessions (R-Al), speaking for himself and Senator Orrin Hatch (R-UT), recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. The bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved.

He remarked, when introducing the bill that "the primary focus of the mandatory minimums and the Sentencing Guidelines on quantity has resulted in a blunt instrument that data now shows is in need of refinement." 178 Cong. Rec. S13962 (daily ed. Dec. 20, 2001). First-time, non-violent offenders were least likely to be rearrested and the presence of violence or a dangerous weapon, he concluded, were better predictors of recidivism than drug quantity.

Sen. Sessions called for a cap on base offense levels of down to level 30 for those receiving minimal role adjustments:

> This is very significant because couriers, who are often low-level participants in a drug organization, can have disproprotionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession. By capping the impact of drug quantity on the minimal role offenders, the bill allows a greater role for the criminality, or lack of criminality, of their conduct in determining their ultimate sentences.
>
> For example, the bill provides a decrease for the super-mitigating factor of the girlfriend or child who plays a minimal role in the offense. These are often the most abused victims of the drug trade, and we should not punish them as harshly as the drug dealer who used them.

178 Cong. Rec. S13964 (daily ed. Dec. 20, 2001).

Defendants receive reductions for minor or minimal participation in fewer than 15 percent of drug distribution cases. In 2001 for example, only 2.3 percent of defendants received a minimal role reduction, 10 percent received a minor role reduction and .9 percent received one in between. No data is publicly available since the institution of the cap, but these numbers do not suggest an excess of leniency on the part of sentencing judges prior to its adoption.

It is particularly disturbing that the Commission chooses to revisit the cap, which it passed unanimously, so soon after it was instituted. There is simply no basis to judge whether and how it is affecting sentences, whether mitigating role adjustments are being invoked more or less frequently, and whether the government is appealing the adjustments. Furthermore, it is unclear how judges are handling cases where they believe a defendant warrants a mitigating role adjustment but may not warrant a reduction to level 30. Presumably, those sentences are subject to upward departure where the weight attached to the mitigating role adjustment is excessive. The better course would be to study how the cap is working before eliminating it or reducing its impact.

In light of the terrible outcomes that quantity-driven guideline sentencing guarantee, the recency of the amendment, and the few sentences it affects, we urge you to exercise restraint and neither eliminate nor adjust the role cap for the time being. Of course, if you choose to go forward with an amendment, we strongly encourage you to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

Issue for Comment 10 Regarding Aberrant Behavior

FAMM urges that the Commission not eliminate or amend the ability of courts to depart on the basis of aberrant conduct at this time. Not only was the departure significantly amended and its use restricted recently, the Commission has not completed its study and recommendations concerning criminal history. It strikes us as at least premature to remove an entire ground for downward departure on limited information The Commission can make a significant contribution to understanding the place that criminal history plays and should play at sentencing by staying its hand and studying the impact of the various changes to the departure made so far.

Departures from the guidelines were fashioned in part to provide feedback on the operation of the guidelines. That a departure is invoked teaches that judges feel the need to account for a factor or feature not provided for in the guidelines. That the departure is invoked, should never lead to the conclusion that it ought to be eliminated, even in this post-Feeney era.

We urge you to wait until you have complete information before you eliminate this important ground for departure.

Thank you for considering our views.

Sincerely,

Mary Price
General Counsel

March 1, 2004

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

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

Dear Sir or Madam:

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

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

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http://www.americanchemistry.com

[1-79]

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

Executive Summary

Effective Compliance Programs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Request for Comments re Hazardous Materials

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

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

[1-81]

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

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

Discussion

I. Effective Compliance Programs

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

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

A. Corporate Governance.

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

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

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

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

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

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

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