It is noteworthy that two of these cases involved evidence that very young children had been drugged before being transported. This factor, also, does not appear to be adequately considered by the sentencing guidelines.

We are enclosing a draft revision to §2L1.1 of the Sentencing Guidelines reflecting how we would envision a specific offense characteristic could operate to address our concerns. Thank you for your consideration of this matter.

Sincerely,

Cindy K. Jorgenson
District Court Judge

John M. Roll
District Court Judge

JMR:kh/mb

Enclosure

cc: Honorable Ricardo H. Hinojosa, United States District Judge and Commissioner, United States Sentencing Commission
All District Judges in Arizona
Magdeline E. Jensen, Chief United States Probation Officer
Paul K. Charlton, United States Attorney
Jennifer C. Guerin, Chief Assistant United States Attorney

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

(b) Specific Offense Characteristics

insert new specific offense characteristic between the current (b)(1) and (b)(2):

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

Annotations to Draft Language

In the analysis below, sections of the above draft text appear in red. The reference to an analogous guideline or explanation for the red-lined language appears immediately below each section.

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

The same introductory text as §2L1.1(2); however, "minor unlawful alien" is substituted for "six or more unlawful aliens."

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

In determining what age to use, this draft language is analogous to §2A3.1(b)(2) pertaining to Criminal Sexual Abuse. It reads, "(A) If the victim had not attained the age of twelve years, increase by 4 levels; or (B) if the victim had not attained the age of sixteen years, increase by 2 levels." Since this guideline determines an age distinction, presumably on the issue of consent, it makes sense to follow this logic and use "under the age of 12."

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

This text tracks the guideline language at §2A4.1(b)(6), Kidnapping, Abduction, Unlawful Restraint which provides, "If the victim was a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by 3 levels." Since the conduct drafted for §2L1.1 is similar, an analogous increase of 3 levels was drafted.

(2) If the offense involved the smuggling, transporting, or harboring of a minor unlawful alien, under the age of 12, who was placed in the care or custody of a participant who had no right to such care or custody of the minor, increase by 3 levels. If the minor unlawful alien was under the age of 5, increase by 6 levels.

If the minor is under the age of 5, the child is unusually vulnerable because of the child's inability to effectively communicate regarding his/her parentage, family, or destination. We did not locate a guideline with analogous language for this consideration.

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

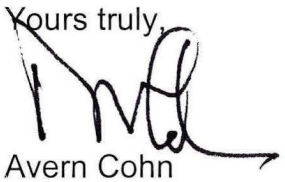
Dear Judge Castillo:

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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600 CHURCH STREET
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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

BILL NELSON
FLORIDA

United States Senate

WASHINGTON, DC 20510–0905

March 17, 2004

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

Dear Mr. Courlander:

This letter responds to the January 14, 2004 request by the Commission for public comment on the implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN SPAM) Act of 2003. The CAN SPAM Act directs the Commission to review and, as appropriate, amend the sentencing guidelines and policy statements to provide appropriate penalties for violations of the Act, and other offenses that may be facilitated by the sending of large quantities of unsolicited electronic mail. As one of the Senators involved in the drafting of this law, I appreciate the opportunity to provide input and background concerning the appropriateness of sentencing enhancements.

By way of background, the CAN SPAM Act incorporates provisions of a bill I introduced with Senator Pryor, S.1052, which contained provisions demonstrating our intent to treat the use of SPAM to commit large-scale criminal activity as a serious offense. While S.1052 was not adopted, the provisions of the bill that were incorporated into the CAN SPAM Act are reflected in the language directing the Sentencing Commission to consider sentencing enhancements for those who send large volumes of unsolicited electronic mail in schemes that involve fraud, identity theft, obscenity, child pornography and the sexual exploitation of children.[1] As indicated in the text of my remarks on the Senate floor during the debate on CAN SPAM, on October 22, 2003, and those of Senator Leahy, the ranking minority member of the Judiciary Committee, and one of the primary authors of the bill, one of the principal aims of the CAN SPAM Act is to provide severe criminal penalties for criminal enterprises that have adopted SPAM as their method of choice for perpetrating their criminal schemes.[2]

---

[1] S.877, 108th Cong. § 4, b (2003).
[2] A copy of the Colloquy is attached.

Proposed Amendments

In the request for public comment, the issues raised by the Commission include:

> What are the appropriate guideline penalties for offenses other than 18 USC § 1037 (such as those specified by section 4(b)2 of the CAN SPAM Act of 2003, i.e., offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children) that may be facilitated by the sending of a large volume of unsolicited mail?
>
> Specifically, should the Commission consider providing an additional enhancement for the sending of a large volume of unsolicited email in any of the following: §2B1.1 (covering fraud generally and identity theft), the guidelines in Chapter Two, Part G, Subpart 2, covering child pornography and the sexual exploitation of children, and the guidelines in Chapter Two, Part G, Subpart 3, covering obscenity?
>
> Alternatively, should the Commission amend existing enhancements, or the commentary pertaining thereto, in any of these guidelines to ensure application of those enhancements for the sending of a large volume of unsolicited email?
>
> For example, should the Commission amend the enhancements, or the commentary pertaining to the enhancements, for the use of a computer in the child pornography guidelines, §§2G2.1, 2G2.2, and 2G2.4, to ensure that those enhancements apply to the sending of a large volume of unsolicited email?
>
> What constitutes "large volume of unsolicited email?"

Provisions Recommended for Enhancement

The sentencing guidelines for offenses, other than those created by the CAN SPAM Act, that may be facilitated by the sending of large quantities of unsolicited electronic mail appear to be appropriate, in so far as they are the guidelines currently in existence and provide significant periods of imprisonment. My recommendation to the Commission is that the existing enhancements in the relevant guidelines are amended to ensure application of those enhancements for the sending of a large volume of unsolicited

email.[3] As stated in the legislative record, SPAM has become the method of choice for those who distribute pornography and perpetrate fraudulent schemes. If a person or organization seeks to defraud senior citizens out of their savings they can reach millions of these potential victims at very low costs using SPAM. With very low costs, and a wide reach, even a one or two percent rate of success can make for a very profitable criminal enterprise. To deter and prevent these abuses from continuing, it is vital that the proper penalties are provided to address these crimes. My comments address the need for sentencing enhancements for fraud, identity theft, child pornography and the sexual exploitation of children, and obscenity, when committed through the use of SPAM.

Fraud and Identity Theft

§2B1.1 of the Sentencing Guidelines addresses a wide range of fraud offenses. The base offense level provided for these types of offenses is a 6 or 7. The specific offense characteristics likely to apply to SPAM cases involve monetary loss caused by the actions of the offender and the number of victims. The existing enhancement levels provide an increase of 30 levels where the loss exceeds $400,000,000, and an increase of 6 levels where the offense involved 250 or more victims. While it is possible that individuals sentenced according to these guidelines will receive significant months of imprisonment, it is my concern that these enhancements do not go far enough to address the specific types of abuses we sought to penalize with the CAN SPAM Act.

The dilemma involving SPAM is that violators are able to reach a significant number of individuals with little effort. There are countless news accounts and government produced data demonstrating the serious effect of SPAM schemes on American citizens. For example, an Ohio woman was convicted of sending out thousands of fake e-mail notifications requesting credit information for existing accounts. The notifications claimed that the companies last attempt to bill the customers' credit cards failed and asked the individuals to update their records. Hundreds of individuals sent sensitive credit card information that allowed this woman to access their accounts. And, this is simply one of the many instances where unscrupulous individuals are able to send 1 million to 10 million emails that results in millions of dollars of loss to thousands of unsuspecting victims. The assistant director of the FBI's Cyber division stated, in a Miami Herald article, dated August 26, 2003, that these fraudulent email schemes are the fastest growing types of Internet scams.

It is my recommendation that the Commission amend the existing enhancements in order to address the instances where the violator exceeds $400,000,000 in the loss their actions cause, or whose actions result in victims exceeding 250. The existing guidelines do not sufficiently address these unique

[3] I have not attempted to define "large volume electronic mail;" however, I will note that in the CAN SPAM Act, multiple electronic mail is defined as "more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic messages during a 1-year period."

situations involving criminal schemes facilitated through the use of SPAM. An enhancement is needed to address these new and creative criminal schemes devised to swindle seniors out of their savings by advertising fraudulent health care products on-line, or tricking them into sharing sensitive personal information that allows the perpetrator to commit identity theft. Such an enhancement will address the instances where an individual is able to cause substantial monetary loss to individuals spanning several states and areas, and in numbers far exceeding 250, by using SPAM.

Child Pornography and the Sexual Exploitation of Children

Chapter Two, Part G, Subpart 2 of the sentencing guidelines addresses crimes involving child pornography and the sexual exploitation of children. These underlying offenses are serious crimes with severe maximum penalties. For example, the sentencing guidelines for §2G2.2: Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic, provides a statutory range of 5 years to life imprisonment for convictions under these provisions. The base offense level is 17 and the offense characteristics provide enhancements where the material involved a minor under the age of 12 years, distribution was for pecuniary gain or to a minor, involved a computer or involved images. The enhancements provided for offenses involving images, however, are limited to situations where there were 600 or more images. Thus an individual sending 600 images is treated the same as an individual who sends 1,000,000. There are no additional provisions where, as is often the case with SPAM, the number of images is significant and can easily reach 1,000,000 with the click of a computer key.

It is my recommendation that the Commission amend the existing enhancements in this Chapter to address large volume email where a criminal is able to send 1,000, 10,000, or 1,000,000 images of material in a matter of seconds. An offense characteristic specifically targeted at large volume electronic mail, and commentary describing the types of offenses such a provision is aimed at, will have the desired effect of targeting criminals who are using the Internet to victimize children and minors, and who have acted with little fear of retribution in the past.

Obscenity

Chapter Two, Part G, Subpart 3 of the sentencing guidelines addresses obscenity crimes. The sentencing guidelines included in this section cross reference the guidelines noted above, for offenses involving more than mere possession of obscene material and addresses trafficking in material that involves the sexual exploitation of children and transporting or seeking by notice or advertisement a minor to engage in sexually explicit conduct for the purpose of

producing a visual depiction of such conduct. My recommendation to the Commission concerning amended enhancements for use of SPAM relating to Chapter Two, Part G, Subpart 2 of the guidelines, if adopted, would therefore apply to crimes involving obscenity.

The Sentencing Commission has undertaken an important task, and I hope that these comments will be useful to it in analyzing and developing the appropriate sentencing enhancements for serious crimes made possible by sending large quantities of unsolicited electronic mail. I have noted my involvement with the CAN SPAM Act, and the intent of the drafters of this law. I ask that the Commission provide enhancements to the guidelines that will allow the courts to increase the sentences of criminals who have adopted SPAM as their method of choice for perpetrating their criminal schemes because of their intent to reach millions of potential victims at nominal costs, and a belief that there is a very low risk of punishment for their acts.

If you have any questions about these comments, please contact my legislative assistant, Alea Brown, at 202-224-5274.

Sincerely,

Bill Nelson

Bill Nelson
United States Senator

spam contains some kind of false, fraudulent, or misleading information, and one-third of all spam contains a fraudulent return e-mail address that is included in the routing information, or header, of the e-mail message. By concealing their identities, spammers succeed in evading Internet filters, luring consumers into opening messages, and preventing consumers, ISPs and investigators from tracking them down to stop their unwelcomed messages.

This amendment significantly strengthens the criminal penalties contained in the CAN SPAM Act by striking its misdemeanor false header offense and replacing it with five new felony offenses. The amendment makes it a crime to hack into a computer, or to use a computer system that the owner has made available for other purposes, as a conduit for bulk commercial e-mail. It prohibits sending bulk commercial e-mail that conceals the true source, destination, routing or authentication information of the e-mail, or is generated from multiple e-mail accounts or domain names that falsify the identity of the actual registrant. It also prohibits sending bulk commercial e-mail that is generated from multiple e-mail accounts or domain names that falsify the identity of the actual registrant, or from Internet Protocol, IP, addresses that have been hijacked from their true assignees.

The amendment includes stiff penalties intended to deter the most abusive spammers. Recidivists and those who send spam to commit another felony face a sentence of up to 5 years' imprisonment. Those who hack into another's computer system to send spam, those who send large numbers of spam, and spam kingpins who direct others in their spam operations, face up to 3 years' imprisonment. Other illegal spammers face up to a year in prison. The amendment provides additional deterrence with criminal forfeiture provisions and the potential for sentencing enhancements for those who generate e-mail addresses through harvesting and dictionary attacks.

I commend Senators BURNS, WYDEN, MCCAIN, and HOLLINGS for their hard work over the course of the past several Congresses on the CAN SPAM Act. They have worked diligently to enhance the privacy of consumers without unnecessarily burdening legitimate electronic commerce. The balance is a difficult one to strike. I compliment these fine Senators for being able to strike that balance and get it done.

I believe enactment of the CAN SPAM Act is an important first step toward curbing predatory and abusive commercial e-mail, but it is certainly not the end. We all recognize that there is no single solution to the spam problem. While we must critically and continually monitor the effectiveness of any legislative solution we enact, we must pursue other avenues as well. Technological fixes, education and international enforcement are integral components to any effective solution. To this end, we will need the assistance of private industry and our international partners.

I look forward to working with my colleagues in both Houses as we attempt to confront the spam problem on all fronts. I urge my colleagues to support this amendment which will strengthen the comprehensive legislative package that is before us today.

Mr. WYDEN. Madam President, will the Senator from Utah yield?

Mr. HATCH. I am happy to do that.

Mr. WYDEN. I commend the Senator from Utah for his efforts in this area. The contribution the Senator from Utah makes is not just useful but it is absolutely critical. We can write bills to fight spam until we run out of paper, but unless we have the kind of enforcement the Senator from Utah envisions, we are not going to get the job right.

I am particularly interested in working with the distinguished chairman of the Judiciary Committee in making sure we have some vigorous oversight after this bill is enacted into law. If after this bill is passed we have the prosecutors, the Federal Trade Commission, and others bring some tough enforcement actions, that will be a tremendously valuable deterrent.

I would like to work with the distinguished chairman of the committee to have some vigorous oversight hearings after this bill has gone into effect. That is what it is going to take to make sure we have the teeth in this legislation to make a difference. I thank my colleague.

Mr. HATCH. I thank my colleague for those kind remarks and thank him and Senator MCCAIN for their leadership in the Senate.

I ask unanimous consent to add Senator GRASSLEY as a cosponsor of this amendment, No. 1893. Senator GRASSLEY has worked with me and Senator LEAHY every step of the way and deserves a lot of credit.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Arizona.

Mr. MCCAIN. I thank Senator HATCH and Senator LEAHY for their work to improve the criminal provisions and strengthen the Burns-Wyden CAN-SPAM Act. The active participation of Senator HATCH and his committee on this issue has been extremely valuable.

I join my friend from Oregon in urging Senator HATCH to have oversight on how this law is enforced and that it is properly done. We face challenges in enforcement of this act, particularly in light of the changes in technology that will inevitably occur which will make this legislation even harder to enforce than it is today. I thank Senator HATCH, and I urge adoption of the amendment.

The PRESIDING OFFICER. The Senator from Florida.

Mr. NELSON of Florida. I encourage the adoption of this amendment. I am one of the cosponsors along with Senator HATCH and Senator LEAHY. Let me state for the RECORD the essence of part of a colloquy between myself and Senator LEAHY.

We have all been stunned by how pervasive spam has become in e-mail traffic. We have experienced the way the clogged inboxes, the unwanted solicitations, and the unwelcome pornographic material make a session on the computer less productive and less enjoyable.

I detailed earlier in my remarks the innumerable pornographic messages that come into my Senate office computer in my offices back in Florida. It is one of the top complaints I receive from my constituents. I am very pleased to be working with the Senators from Utah and Vermont to impose tough penalties on those who impose this garbage on others.

I am always concerned with the type of spam that goes beyond the mere nuisance variety. It is becoming clear with each passing month that many criminal enterprises have adopted spam as their method of choice for perpetrating criminal schemes. Spammers are now frequently perpetrating fraud to cheat people out of their savings, stealing people's identities, or trafficking in child pornography. What spam allows them to do is to conduct these criminal activities on a much broader scale at dramatically reduced costs. They can literally reach millions of people at the push of a button.

I have given the example in the old days that someone would use the mail to send out 100 or 150 letters. They would have nefarious schemes such as bilking senior citizens out of money or perpetrating child pornography. Now they do not send out 150 letters to do it. They punch a button and they are sending out 150 million e-mail messages perpetrating their schemes of fleecing senior citizens or perpetrating child pornography.

The colloquy I propose with Senator LEAHY at his convenience would be to reinforce a ban—which is why I had originally introduced S. 1052—in the Deceptive Unsolicited Bulk Electronic Mail Act. I introduced that with Senator PRYOR. That is why I have sought, with the help of the Senator from Vermont and the Senator from Utah, to include provisions in this legislation that make it clear our intent to treat the use of spam to commit large-scale criminal activity as the organized crime that it is.

We do it in two ways. First, by working with the United States Sentencing Commission in the amendment being offered by the Senators toward enhanced sentences for those who use spam or other unsolicited bulk e-mail to commit fraud, identity theft, obscenity, child pornography, or the sexual exploitation of children.

Second, we make the seriousness of our intentions clear in this amendment by urging prosecutors to use all the tools at their disposal, including RICO, to bring down the criminal enterprises that are facilitated by the use of spam.

Specifically, we are talking about the RICO statute which not only comes

with some of the stiffest penalties in the Criminal Code but it allows for the seizure of assets of criminal organizations, it allows the prosecutors to go after the criminal enterprise, and it allows for civil suits brought by injured parties. It is tough enforcement like this that will help bring the worst of the spammers to their knees.

Mr. MCCAIN. Madam President, I ask consent that the following amendments be the only first-degree amendments in order to the bill and that they be subject to second-degrees which would be relevant to the first degree to which they are offered: Corzine amendment, Santorum amendment, Enzi amendment, Landrieu amendment, and Boxer amendment.

Mr. LEAHY. Reserving the right to object.

Mr. WYDEN. I ask unanimous consent to add Senator HARKIN's name to that list and then I support the unanimous consent.

The PRESIDING OFFICER. Does the Senator so modify his request?

Mr. LEAHY. Reserving the right to object.

The PRESIDING OFFICER. Does the Senator from Arizona so modify his request?

Mr. MCCAIN. I do modify my request.

Mr. LEAHY. Where is the Hatch-Leahy amendment?

Mr. MCCAIN. Pending and about to be adopted.

Mr. LEAHY. It is not precluded by the unanimous consent request.

The PRESIDING OFFICER (Mr. CHAMBLISS). It would not be precluded. Without objection, it is so ordered.

Mr. MCCAIN. Mr. President, I thank Senator LEAHY for his work on this amendment, along with Senator HATCH, who lends and contributes a great deal of teeth to this bill. I know they have worked very hard.

As I mentioned to Senator HATCH, as did the Senator from Oregon, we know that the Senator and his committee will be involved in the oversight of the enforcement of this legislation. We thank you for his valuable contribution.

I urge the sponsors of those amendments, Senators CORZINE, SANTORUM, ENZI, LANDRIEU, BOXER, and HARKIN, to please come to the floor in courtesy to their colleagues so we can take up and dispose of these amendments. Please show some courtesy to your colleagues. If you have amendments pending, please come. We are ready for them.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, when the Senator from Arizona asked to make his unanimous consent request, I was in the process of answering the question of the Senator from Florida, who has spoken to me many times about his interest in these areas.

I appreciate what he has done to strengthen this legislation.

We keep the authority to set sentences where it belongs, with the Sentencing Commission, while remaining deferential, to the discretion of prosecutors.

The provisions from the Senator from Florida make it unmistakably clear that Congress expects this legislation to be used not just to punish spammers but also to dismantle criminal operations that are carried out with spam and other unsolicited bulk e-mail.

I also would note that the Senator from Florida has spoken about spam evolving from being just a nuisance. He is absolutely right. Serious crimes are being committed using this medium, which reaches a large number of people. Senior citizens are more and more often targeted to being bilked out of millions of dollars, and with very little effort on the part of the spammers.

Mr. President, I will engage in a colloquy with Senator NELSON because I think it is important for the purposes of the RECORD. With all the work the Senator from Florida has done, I want the RECORD to be very clear.

Mr. NELSON of Florida. Mr. President, would the Senator from Vermont be willing to engage me in a colloquy?

Mr. LEAHY. I would be pleased to engage in a colloquy with the Senator from Florida.

Mr. NELSON of Florida. Mr. President, I have been stunned, as have so many of my colleagues, by how pervasive spam has become in email traffic. We have all experienced the way clogged in-boxes, unwanted solicitations, and unwelcome pornographic material make a session on the computer less productive and less enjoyable. It is one of the top complaints that I receive from my constituents, and I am very pleased to be working with the Senators from Vermont and Utah to impose tough penalties on those who impose this garbage on others.

But I am also concerned with a type of spam that goes beyond the mere nuisance variety. It is becoming clearer with each passing month that many criminal enterprises have adopted spam as their method of choice for perpetrating their criminal schemes. Spammers are now frequently perpetrating fraud to cheat people out of their savings, stealing people's identities, or trafficking in child pornography. What spam allows them to do is to conduct these criminal activities on a much broader scale at dramatically reduced costs- they can literally reach millions of people at the push of a button.

Mr. LEAHY. The Senator from Florida is correct. Nowadays, we see that spam has moved far beyond being just a nuisance to people trying to use email on their personal computers. Serious crimes are being committed using this medium, which can reach large numbers of people in a matter of seconds. For example, if a person or organization seeks to commit fraud to bilk senior citizens out of their money, with spam they can reach millions of potential victims at very low, even negligible costs. With such low costs, and such wide reach, even a small rate of success can make for a very profitable criminal enterprise.

Mr. NELSON of Florida. The Senator from Vermont has provided an excellent example of the problem that we are trying to address. And that is why I have sought, with the help of the Senator from Vermont and the Senator from Utah, to include provisions in this legislation that make clear our intent to treat the use of spam to commit large-scale criminal activity as the organized crime that it is.

We do this in two ways: First, by working with the U.S. Sentencing Commission toward enhanced sentences for those who use spam or other unsolicited bulk email to commit fraud, identity theft, obscenity, child pornography, or the sexual exploitation of children.

Second, we make the seriousness of our intentions clear by urging prosecutors to use all tools at their disposal to bring down the criminal enterprises that are facilitated by the use of spam. Among other things, we are talking about the RICO statute, which not only comes with some of the stiffest penalties in the criminal code, but also allows for the seizure of the assets of criminal organizations, and for civil suits brought by injured parties. It is tough enforcement like this that will help bring the worst of the spammers to their knees.

Mr. LEAHY. The Senator from Florida has made me aware of his interest in these provisions on several occasions, and I appreciate his contributions to this effort. They strengthen the legislation in important ways. While keeping the authority to set sentences where it belongs- with the Sentencing Commission- and while remaining deferential to the discretion of prosecutors, these provisions makes unmistakably clear that Congress expects this legislation to be used not just to punish spammers, but also to dismantle the criminal enterprises that are carried out with spam and other unsolicited bulk e-mail.

Mr. NELSON of Florida. I thank the Senator from Vermont for his outstanding leadership on this issue, and for his cooperation in including my amendments in the legislation.

Mr. LEAHY. Mr. President, it is increasingly obvious that unwanted commercial e-mail is more than just a nuisance. Businesses and individuals sometimes have to wade through hours of spam. It makes it impossible for them to do their work. It slows down whole enterprises.

In my home State of Vermont, one legislator logged on to his server and found that two-thirds of the e-mails in his inbox were spam. Our legislator is a citizen or legislature. He does not have staff or anything else. This was after the legislator had installed spam-blocking software. His computer stopped about 80 percent of it. But even

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March 1, 2004

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

Re: Response to Request for Public Comment on Proposed Modifications to United States Sentencing Guidelines

Dear Mr. Courlander:

We appreciate the opportunity to comment on the Ad Hoc Advisory Group's recommended modifications to the United States Sentencing Guidelines.

We support the Ad Hoc Advisory Group's recommended modifications to §8B2.1(b)(5)(c). We believe the emphasis on promoting an "organizational culture" that encourages commitment to compliance and mechanisms that allow for "anonymous" reporting is well placed and appropriate. In addition, we would like to recognize the invaluable role Ombudspersons can play as part of a comprehensive approach to crime prevention and detection.

Chevron Texaco has numerous programs and processes in place to ensure legal compliance, including an Office of Ombuds that provides a confidential environment outside of formal reporting channels. Our Ombudspersons are neither an employee advocate nor member of management, but rather independent neutrals who can discuss matters informally and off the record.

Ombudspersons can play a critical role in encouraging employees to step forward and report violations that might otherwise go undetected. Our experience has shown that an essential "first step" for many employees is a confidential discussion with a trusted neutral advisor. For this reason, Ombudspersons in conjunction with other programs and processes can ensure that employees have a safe environment for discussing options without fear of retaliation.

We recognize the difficulty of keeping confidentiality under a formal reporting process and believe the Commission has correctly placed the emphasis on "anonymity" rather than "confidentiality" in the recommended modifications.

We appreciate the opportunity to provide these comments.

Yours truly,

Wm. G. Duck

cc: Broderick W. Hill

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March 5, 2004

VIA HAND DELIVERY

United States Sentencing Commission
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Washington, D.C. 20002-8002

Re: 2004 Proposed Amendments and Issues for Comment (Supplemental Submission)

Dear Commissioners:

We write to supplement our prior letter of February 27, 2004, and to provide our perspective on two other important issues being considered by the Commission.[1]

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

Introduction

Excessive sentences and mandatory minimum sentences have come under heavy fire in the past several years, from all corners. From two Associate Justices of the Supreme Court to the Sentencing Commission itself, reasonable judges, lawyers and citizens recognize that the federal drug sentences and mandatory minimums meted out every day in federal court for low level, first time non-violent offenders are patently excessive.

The Sentencing Commission has understood this for many years – the

[1] We note with disappointment that the Commission did not promulgate any proposals relating to "compassionate release," pursuant to 18 U.S.C. § 3582(c)(1)(A), notwithstanding that this issue was listed as a "priority" for the 2004 amendment cycle. We hope that the Commission will address this important issue during the next amendment cycle.

excessiveness of mandatory minimum sentences is an open secret among those who practice in federal court. It was this knowledge that drove the Commission to enact the mitigating role cap – Amendment 640, effective November 1, 2002. Amendment 640 was an extremely limited, narrow modification that capped the base offense level at 30 for a narrow class of offenders who received minor or mitigating role adjustments. Amendment 640 was limited not only because it benefitted only a small number of the least culpable offenders who had minor involvement, but because its impact was limited – the base offense level for someone who received this benefit would still be 30, and such offenders would still be subject to the mandatory minimum sentence absent a substantial assistance motion by the government, or application of the safety valve.

Without any indication that there is a problem or that the role cap is not operating as expected, and without any indication that persons who should not benefit from it in fact are, Proposed Amendment 6 ("amendment 6") would effectively repeal and cannibalize the mitigating role cap.

The Practitioners' Advisory Group opposes amendment 6 because: it is inconsistent with the limited relief provided by the mitigating role cap; the mitigating role cap as presently constituted is not overly generous (in fact, it is not generous enough); and, the concern that resulted in the enactment of the mitigating role cap is present to even a greater degree today. Finally, repealing, or replacing the mitigating role cap with the various issues for comment is simply unnecessary, given that only the least culpable, lowest level drug mules qualify for the mitigating role cap presently, and any benefit from the cap is at the pleasure of the government. Proposed Amendment 6 should be rejected.

A. The relief afford by the mitigating role cap is limited, and the purpose animating its enactment applies with even greater force today

1. The current mitigating role cap was a reasoned, limited solution

The synopsis of Amendment 6 makes clear that the proposal is designed to replace the current mitigating role cap with a "more gradual and less generous" approach than the current cap. Unstated but implicit in the synopsis in the proposal is that the current mitigating role cap is too generous. Given the limited relief provided by the current mitigating role cap, as reflected in its enactment at Amendment 640, this premise is severely flawed. It is flawed because the concerns that animated the enactment of the cap in the first place apply with greater – not lesser – force today, and the relief provided by Amendment 640 is extremely limited.

Amendment 640 enacted the mitigating role cap. The purpose of the amendment was clear:

> This part of the amendment responds to concerns that base

> offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2.

Amendment 640 (Synopsis of Amendment). The cap at level 30 for offenders receiving downward role adjustments was chosen because it was consonant with the purpose of the amendment, and the Commission could not have made its rationale any clearer:

> The Commission determined that, ordinarily, a maximum base offense level of 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment.

Id.

The Commission recognized that the relief afforded was limited, because the new cap only:

> somewhat limited the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., "mules" or "couriers" whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).

Id. (emphasis added). That is, the Amendment was narrow, because it only "somewhat" addressed the real problem of an unjustified sentencing impact of drug base offense level for couriers. The "somewhat" is not only that the cap was at 30 and not a lower, even more reasonable number, but because, to the extent that the anomalous situation could arise where a person could get a role reduction yet other possible enhancers would apply, those enhancements could be applied to raise the total offense level over 30:

> Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at §2B1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments) may increase the offense level about level 30.

Id.

Not only was the solution limited by definition, but it would apply to only those who were the least culpable drug offenders, because "[t]he maximum base offense level is

expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders." Id.

2. The cap has a narrow impact that appropriately caps the base offense level for only the least culpable offenders

Understanding why Amendment 640 was enacted and what it did is essential to understanding why the limited change it made should not be tampered with. Amendment 640 was a reasonable and prudent change to provide some sanity to the unduly harsh base offense levels otherwise applicable to the least culpable federal drug offenders. Mules and couriers are a limited class of offenders who the Commission recognized do not have the same culpability for drug importation or distribution crimes. Part of that limited culpability is reflected by the fact that often, couriers and mules, apart from not having any power within a drug distribution organization, are often unaware of the exact type of substance they are carrying, or the amount of the substance. Most often, they do not package the substance for travel, never see the inside of the package, and universally they receive little remuneration for their efforts.

But the role cap was designed to strike even more narrowly than just couriers or mules: only couriers and mules who played minor or minimal roles would gain the benefit of the enhancement. Put another way, only the least culpable of the least culpable would benefit from the role cap. So, while 25.3 percent of drug offenders received a mitigating role adjustment for fiscal year 2001, the Commission estimated that only six percent of drug trafficking offenders would receive the benefit of the mitigating role cap. We have seen no statistics that indicate that the Commission's estimation was inaccurate, and anecdotal evidence suggests that the Commission's estimate may even have been high.

3. The proposal to mitigate the limited effects of the cap is unreasoned and unnecessary

Against this backdrop, the proposed amendment 6 is wholly unreasoned and unnecessary. While the amendment is defined as "less generous" and "more gradual" than the current mitigating role cap, no reason is given for the proposed amendment. No concerns have been expressed by the Commission that the current role cap is operating in a way other than as it was designed to work. There is no indication that it is being inappropriately or incorrectly applied by District Judges, or that there is an increase in role adjustments to make a defendant eligible for the role cap. There is, so far as we can tell, no increased number of reversals by the courts of appeal for inappropriate role reductions.

To the extent that the current proposal was proposed or initiated by the Department of Justice, it, too, has offered analysis or other information supporting the proposed amendment. In fact, the current practice involving the role cap – where role

reductions are granted by District Judges almost always with the consent of the Department of Justice – renders incredible any concerns the Department of Justice might have – unstated as they may be – about the mitigating role cap.

B. <u>In effect for a less than one and one-half years, the role cap is applied sparingly: only low level offenders, who cooperate, and for whom the government does not oppose the role reduction, actually benefit from the mitigating role cap; in some districts, the cap is used rarely, if ever</u>

While the technical operation of the role cap is easy enough to understand, and there is no claim that is being inappropriately used, and it impacts only a small percentage of all drug offenders, its practical application and its limits might be misunderstood. The cap's impact is further limited in several significant ways.

First, the cap at level 30 makes sense because it is designed to provide a modest reduction for couriers who truly are minor players in the drug distribution or importation enterprise. That is, the typical courier does not know the exact quantity of narcotics they are carrying, and many do not know the type of drug. But experience shows that the typical maximum base offense level for the amount of drugs that couriers who carry a large amount of drugs generally carry falls somewhere in the level 30 or level 32 (5 to 14.99 kg cocaine power; 1 to 2.99 kg heroin; .5 to 1.499 kg methamphetamine) area. Put another way, very few couriers are found carrying amounts of drug that would put them at level 38 (such as 150 kg of cocaine). To the extent that someone is found with that much cocaine, it is extremely unlikely that they are, in fact, simply a drug mule and courier. So, the – again, unstated, unarticulated – idea that there are scores of drug offenders whose base offense level would start at 36 or 38, but now starts at 30 because of the role cap, and thus are receiving runaway offense level reductions, simply does not square with the reality of the amounts of drugs that couriers are normally entrusted with or captured with.

Second, the cap does not allow an offender to be sentenced below the mandatory minimum sentence. A government substantial assistance motion (USSG §5K1.1) or application of the safety valve (USSG §2D1.1(b)(6), USSG §5C1.2; 18 U.S.C. § 3553(f)) is required for a sentence below the mandatory minimum; without either, the role cap's benefits are illusory. We are all familiar with the drug quantity tables and that, generally, the drug amounts required for the 10 year mandatory minimum sentence (21 U.S.C. § 841(b)(1)(A)) line up with the drug weights reflected at base offense level 32 – 5 kg cocaine, 50 g crack, etc.

A real example from a pending case (between plea and sentence) that a PAG member is handling illustrates the application of the mandatory minimum and how it dilutes the role cap. A female drug mule is caught at the border while entering the United States, with just over 1 kg of heroin. She is a first time offender with no previous arrests, did not pack the suitcase she was carrying, never saw the inside of the suitcase, had no

idea how much heroin was involved, and had a minimal role in the offense. The government agrees that she played a minimal role, that the minimal role reduction applies, and that the role cap applies. The sentencing calculations, made in the presentence investigation report, to which neither the defendant nor the government object, are as follows:

•Base offense level, 1-2.99 kg. heroin (USSG §2D1.1(d)(4):	32	=	32
•Reduction by operation of role cap (USSG §3D1.1(a)(3)):	-2	=	30
•Minimal participant reduction (USSG §3B1.2(a)):	-4	=	26

Thus, through application of the role cap, and the role reduction, the sentencing range (before consideration of acceptance of responsibility) at level 26 and Criminal History Category I is 63 to 78 months, instead of the 121 to 151 months that is found at offense level 32 and Criminal History Category I, or the 78 to 97 months at offense level 28 (with the role reduction but with no role cap) and Criminal History Category I. **What all of this overlooks, however, is that this defendant can receive no less than a 120 month sentence of incarceration because of the mandatory minimum.** Thus, even with a role reduction applies and the additional role cap benefit, the Guideline range becomes 120 months, and that will be the sentence, whether or not the role cap is in existence. The defendant, then, will receive no real reduction whatsoever because of her minor role or the role cap. The only way under the mandatory minimum, then, is to cooperate with the government and receive a substantial assistance downward departure motion or the application of the safety valve.

Which leads to the third, and most important point regarding the operation of the role cap: **the government effectively controls which offenders receive the benefit of the role cap, because: 1) experience teaches that most role reductions are awarded only when the government agrees with or does not oppose such a reduction; 2) the benefit only inures when the government makes a downward departure motion for substantial assistance or agrees that the defendant qualifies for the safety valve.** Thus, as currently constituted, the mitigating role cap's application and operation – and attendant benefit – rests exclusively in the hands of the government. The experience of PAG members is that role reductions are rare enough; but where they are granted, they usually are given with the assent of or without opposition by the government. Thus, the agreement of the government – and its view the offender truly played a minor role – is a gateway to any offender receiving a role reduction. But for the offenders who might benefit from the role cap, they will still receive no benefit without cooperating, and without the government making a downward departure motion or the safety valve applying, because the mules/couriers that would benefit from the role cap are almost all subject to the 10 year mandatory minimum sentence.

Thus, any criticism of the current role cap scheme from the Department of Justice does not square with reality, because **the Department of Justice, under the current role cap scheme, is effectively in control of who receives the role cap reduction.** For our defendant whose calculations are outlined above, the sentencing District Judge may find that a minimal role adjustment, and thus the role cap, should apply even if the government does not agree (an extremely rare occurrence), but he will still have to impose a 120 month sentence, unless the government files a downward departure motion or the safety valve applies.

All of this is another way of saying that the mitigating role cap is another arrow in the Department of Justice's quiver: it is another way of encouraging low level defendant drug mules to cooperate and provide substantial assistance to the government. The role cap will **not** benefit drug mules who might benefit from it unless they cooperate with the government, and unless their cooperation is, at the least, complete and truthful (for the safety valve), or helpful (for a substantial assistance downward departure motion). Thus, the concept that the current role cap is too generous certainly misses the point: only those that are deemed worthy of such a reduction by the Department of Justice receive any benefit under the current scheme.

And, while we are not aware of a single instance where the role cap was deemed too generous in the case of a courier drug mule, who escaped the 10 year mandatory minimum because of cooperation with the government, and received the role cap benefit and the role reduction, any such excessive generosity can be mitigated by the government through its assent to a lesser role reduction (a 2 level reduction instead of 4 level reduction).

If all of these things fall into place for the lowest level courier/mule offenders, with the assent of the government, we hardly think that the reduction (usually two (from level 32 to 30) or, at most 4 levels (from level 34 to 30)) that the role cap provides can be deemed excessive.

The inducement that the role cap provides – to facilitate cooperation from low level drug mules – works in practice. For example, for our actual offender whose calculations are outlined above, with the additional reductions engendered by her cooperation, her final offense level and sentencing range appear as follows – all with consent of and because of the government's downward departure motion:

•Base offense level, 1-2.99 kg. heroin (USSG §2D1.1(d)(4):	32	=	32
•Reduction by operation of role cap (USSG §3D1.1(a)(3)):	-2	=	30

•Minimal participant reduction (USSG §3B1.2(a)):	-4	=	26
•Safety valve application (USSG §2D1.1(b)(6)):	-2	=	24
•Acceptance of responsibility (USSG §3E1.1(a)):	-2	=	22
•Acceptance of responsibility (USSG §3E1.1(b) (pre-April 30, 2003 factual conduct):	-1	=	21
•Government motion for downward departure based on substantial assistance (USSG §5K1.1)):	-2	=	19
•ADJUSTED TOTAL OFFENSE LEVEL =	19		
•CRIMINAL HISTORY CATEGORY:	I (zero points)		
•SENTENCING RANGE:	30 to 37 months		

Thus, this actual first offender/drug mule, who the government agreed played a minimal role, and who the government affirmed qualified for a downward departure based on her substantial assistance to the government, **still** faces a sentence of between two and one-half and three years in federal prison. For a first time drug courier, reasonable people must agree that such a sentence is extremely stiff and, perhaps, still too harsh.

Nor can the role cap be deemed overly generous: without operation of the role cap for this defendant, she would face a sentencing range of 37 to 46 months instead of 30 to 37 months. The overlapping point in these two ranges at 37 months is a hands on, end-user confirmation that the role cap not is not overly generous.

Notably, even under one of the machinations of proposed amendment 6, providing for two level reduction for offense levels 32 to 34, the outcome for this defendant would be the same: a two level benefit because of the role cap and **the same adjusted total offense level and sentencing range.**

The bottom line is that only the lowest level drug mule/couriers, who cooperate truthfully and completely with the government, as determined by the government, receive any benefit under the role cap system currently in place. There has not been excessive use or incorrect application of the role cap. It is working as designed by the Commission, to reward the least culpable, first time offenders who actively assist the government and confess their crime. The Department of Justice is firmly in control of which offenders will receive any benefit from it. Moreover, from our own experience and talking to supervising probation officers and Sentencing Guidelines Specialists in the districts in which we practice, there are many districts where the

application of the role cap is virtually unknown because there are few role reductions, or few drug mules who would qualify, or both.

And most importantly, **the role cap as currently constituted is not overly generous.** It will benefit only those who are the most minor or minimal offenders, who cooperate and help the government by providing truthful and complete information, and who are deemed worthy of such a modest benefit by the prosecution. Because the benefits of the current role cap are modest, apply to only the most deserving of offenders, and the benefits do not inure without cooperation and government approval, and the role cap is working as designed, Amendment 6 should be rejected in its entirety.

D. The issues for comment, and the proposed additional revisions that they encompass, should be rejected

1. The issues for comment and proposed additional revisions should be rejected

The evidence that the role cap's benefits are limited, it is working as intended, and its application is controlled by the government is compelling. This necessarily leads PAG to conclude that not only should amendment 6 be rejected, but the issue(s) for comment following amendment 6 (and attendant proposed modifications to the role cap) also should be rejected. We address the specific issues seriatim, and provide one alternate proposal to the extent the Commission is determined to tinker with the role cap.

We do not think that certain offenses and/or offenders should be disqualified, for the simple reason that offenders who use weapons, threaten violence or use minors in the commission of drug distribution and importation offenses are almost certainly not minor or minimal participants, and thus will not even qualify for a role adjustment, let alone the role cap. We are confident that the Department of Justice has and would oppose the application of a role reduction for any such offenders, and would not make a downward departure motion (thus allowing the role cap to kick in as an actual benefit) unless those offenders provided substantial assistance to the government in its investigation of others. Moreover, other enhancements under the Guidelines, for using a weapon, involving a minor, and the like, would still apply to enhance the offense level of the rare defendant who took such actions yet was deemed to be a minor participant. Again, the government can effectively halt the benefit of the role cap by opposing a role reduction, declining to allow the defendant to cooperate, asking for such enhancements, and moving for upward departures where appropriate.

Encompassed by our opposition to amendment is that the Commission should not repeat the current mitigating role cap without providing any alternative method. Such an action would be a large step back from the limited sanity that Amendment 640 brought to the sentencing of the least culpable offenders.

2. PAG's proposed alternate amendment if the Commission is determined to adjust the mitigating role cap

With all of that said, if the Commission is determined to modify the role cap in a way that would provide less of a reduction for offenders deemed less worthy – which we think it should not – we would conditionally propose that the reduction should be scaled differently based on base offense level, before application of the role reduction itself. **That is, for persons who will receive a role reduction and whose base offense level is 30, the offense level should be capped at 29. For persons who receive a role reduction and whose base offense level is 32 or 34, the offense level should be capped at 30. For persons who will receive the role reduction and whose base offense level is 36, the offense level should be capped at 32. For persons who will receive the role reduction and whose base offense level is 38, the offense level should be capped at 34.**

We make this proposal conditionally, in the event the Commission is determined to Act, and make plain our belief that the role cap should not be amended at all. However, our proposed conditional amendment would account for any concern that a person at an extremely high offense level of 36 or 38 would receive a more modest benefit from the role cap – a four level reduction at each offense level instead of a six or eight level benefit from the role cap. From what we can tell, there are few drug mules receiving role reductions at offense level 36 or offense level 38, but such an amendment would provide a more scaled and less generous benefit for couriers responsible for such prodigious amounts of drugs. This alternate proposal also conditionally answers the first two issues for comment: if there is a change, the reduction should begin at a lower offense level (the benefit should inure to persons at level 30), and the reduction should be scaled differently.

3. If the Commission adopts amendment 6 as written, it should adopt the greatest "additional reductions" in the proposal as written

Finally, while we oppose the proposed amendment as currently written, if it is enacted as proposed, we urge the Commission to make the "additional reduction" one level at offense level 30, 2 levels at offense levels 32 to 34, and 3 levels at offense levels 36-38. This would be an amendment that would encompass the greatest reduction in the proposed amended USSG §3B1.2(b)(1), (2), (3).

Conclusion

In 2002, less than two years ago, the Commission found that base offense level 30 adequately reflects the culpability of defendants who qualifying for a mitigating role adjustment. That finding is no less true today, and is unchallenged. Given that, and without any indication that the mitigating role cap is operating in a way other than it was

intended, and with our demonstration that the cap is modest and is effectively controlled by the Department of Justice, we respectfully urge the Commission to reject amendment 6 in its entirety.

II. Proposed Amendments to Chapter 8 (Amendment #2)

In our February 27th letter, we addressed the issues for comment relating to proposed Amendment #2. In this letter, we address the proposed amendment to the organizational guidelines commentary where this Commission would, for the first time, take an affirmative position on questions concerning waiver of attorney-client privilege, as well as work product protections. PAG strongly urges the Sentencing Commission not to enact the proposed amendments as currently drafted.

We are aware of the Ad Hoc Advisory Group's Report, issued October 7, 2003. Even that body acknowledged when it presented its report, however, that "[t]his is a topic of hot discussion currently." Oct. 7, 2003 Presentation, at 28. In fact, it noted how "there probably is not a hotter topic right now." *Id.* at 29. As the Report itself also indicates, "there is a significant and increasingly entrenched divergence of opinion between the U.S. Department of Justice and the defense bar as to (1) the appropriate use of, or need for, waivers as a part of the cooperation process, and (2) the value of adding a statement in the organizational sentencing guidelines that would clarify the role of waivers in obtaining credit for cooperation." October 7, 2003 Report, at 103.

We recognize that the Ad Hoc Advisory Group claims to have reached a "consensus" on its recommendations for waivers of privilege and work product protections. The problem with this consensus, however, is that its admittedly "diplomatically articulated language," October 7, 2003 Presentation, at 30, leaves too much undefined and uncertain. *See id.* at 62 (Judge Sessions: noting how provision is "somewhat vague ... in many ways"). The proposed amendments, for example, state that, "in some circumstances waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation." What are these circumstances? Are they frequent or rare? And who is to determine what the circumstances are? More importantly, what standards are to be applied in this determination - or are there even any standards? These crucial questions were apparently passed over in an effort to reach a nominal "consensus," but the result is no real guidance at all.

The Ad Hoc Advisory Committee's Report suggests that the defense bar wanted the Commission to "explicitly clarify the role of waivers in obtaining credit for cooperation." Report at 103. While it is true that many in the defense bar asked the Commission to clarify that waivers should never be required, this statement is not accurate if it is meant to suggest that the defense bar wanted a clarification at all costs, even if it meant that the defense's requested clarification was rejected, and a green light would be given to some coerced waivers. While we appreciate the Ad Hoc Committee's

willingness to state that waivers cannot always be required in this context, the language that follows and blesses waivers in "some" circumstances essentially vitiates any help this language might provide, particularly when no parameters are placed on what those circumstances are, or how often "some" acceptable circumstances may exist. If the Commission were to simply enact the provisions stating that waivers are not required in order to get a cooperation adjustment or substantial assistance departure, we would concur that this would represent the true clarification the defense bar sought. If the Ad Hoc Committee's entire current recommendation is considered, however, including its blessing of waivers in some circumstances, this is not a clarification at all. *We would rather that the Commission do nothing at this time than do this.*

As the Commission noted during the Ad Hoc Committee's presentation, the Justice Department plans to issue a memorandum soon detailing what it considers "best practices in regard to the waiver of privilege as a basis for cooperation." Presentation at 62. We concur with Judge Sessions that the Commission "need[s] to know specifically what the Justice Department's position is," *id.* at 62, before it codifies these amendments and buys into a process whose parameters could soon change, perhaps even dramatically. At present, there is apparently "a great divergence of opinion" on this issue even among U.S. Attorneys around the country. *Id.* at 63. It is unclear what position will ultimately prevail, particularly when some agencies, such as HHS, have policies that "appear to rule out waiver as a factor in leniency as it pertains to Medicare and other civil fraud investigations," Report at 97 - a significant segment of current organizational guidelines cases. This Commission should not affirmatively bless waivers in the face of such contrary regulations, effectively overruling them and siding with the DOJ.

Moreover, even if this Commission were to decide to bless waivers over our objections, we strongly submit that additional specific limitations should be codified in any such amendment. For example, in arguing why such waivers should not always be prohibited, the Justice Department told the Ad Hoc Committee of circumstances in which such waivers were supposedly "the only means by which a cooperating organization can disclose critical information." Report at 100. The current proposal does not codify this "last resort" exception, however – as would be far preferable. Instead, the proposed amendment does not even build into the new language even the minimal protection expressed in Deputy Attorney General Thompson's Justice Department memo, that any waivers "should be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue," as opposed to advice concerning the criminal investigation itself. Report at 95. Worst of all, the proposed amendments fail even to codify the present state of affairs - that waivers are, and should remain, the "exception rather than the rule." Report at 98. Were these alternatives rejected by the Ad Hoc Committee? If so, why? If not, why not? The answers are unclear.

We recognize the natural tendency for the Commission to view favorably any "consensus" language reached by a committee that has worked for 18 months, even if the

Ad Hoc Committee did also work on many other issues during that time. Nevertheless, doing "something" is not always preferable to doing nothing, particularly when it may bring unintended consequences. Even the Ad Hoc Committee's report suggests that its recommendations would be merely the beginning, and not the end, of discussion on this subject. *See* Report at 5 ("the Advisory Group has identified *a possible approach* to modifying the organizational sentencing guidelines in this regard."); *id.* at 103 ("the Advisory Group suggests [this as] a *possible solution* for *further consideration* by the Sentencing Commission"); Presentation at 30 ("we would expect, *if the Commission does decide to promulgate a proposal based on our report,* that this particular section will engender much discussion during your process.... I'll leave it at that.").

For its part, the Justice Department told the Ad Hoc Committee "that there is no need for language to be added to the organizational sentencing guidelines" on this point. Report at 103. The proposed amendments do the defense bar no great favors, and we submit at a minimum that they should be deferred for further study. *Cf.* Presentation at 55 ("[W]e did run into some real data problems and there just isn't a lot of data out there.... So it's hard to draw any conclusions."). *See also* Report at 98 (only 35 surveys received from U.S. Attorney's offices, with most responders prosecuting only about 2 corporations a year). With only 39% of only 238 organizations last year even subject to the organizational guidelines, Report at 25, the urgency of adopting an amendment on this divisive issue at this time, based on less than complete information, is not apparent.

More time and consideration should be given to the unresolved, and currently unresolvable "litigation dilemma," which currently subject litigants asked to waive privileges in a criminal case "to potentially crippling civil damages in addition to criminal penalties," Report at 102.[2] Greater consideration should be given to defining parameters and specifying limits – so that, if allowed at all, waiver coercions should be permitted, at most, only as a matter of last resort. The Commission should also consider whether further distinctions might be drawn between waivers permitted in the departure context, U.S.S.G. § 8C4.1, and those affecting an organization's mere culpability score, U.S.S.G. § 8C2.5, where we strongly submit none should be allowed. Concern should also be focused on whether any authorization of waivers in these organizational guidelines might be cited in the future as establishing Commission precedent for a change in other guidelines, with individuals perhaps to be asked in the future to waive attorney-client and work product protections in order to receive a U.S.S.G. § 5K1.1 benefit, or even to receive acceptance of responsibility. Given the gravity of these issues, the admitted limits on empirical data, and the divisiveness of debate, we ask that the Commission not enact these provisions at this time.

Again, we appreciate the opportunity to provide the Commission with our perspective on these important issues.

Sincerely,

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

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

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[2] As the Committee seemed to recognize, this "dilemma" cannot be alleviated without passage of new federal legislation, and even the SEC's proposed legislation now before Congress would exempt from a general waiver only disclosures made to the

SEC—not to all federal prosecutors or investigators.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

TELEPHONE
(713) 250-5177

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March 8, 2004

Members of the United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002

Dear Sentencing Commissioners:

The Judicial Conference Committee on Criminal Law reviewed with great interest all of the proposed amendments to the sentencing guidelines published on January 13, 2004, for public comment. We offer the following general and specific comments to the amendment proposals.

The Committee fully supports the proposal to consolidate U.S.S.G. §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) and §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). We also support the proposal to consolidate all four sections of U.S.S.G. §2C1.1 with §2C1.7, and §2C1.2 with §2C1.6. We believe such consolidation efforts may simplify sentencing guideline applications in these cases.

As you may know, in 1995, recognizing the complexity of the sentencing guideline system, the Committee urged the Commission to undertake an extensive assessment of the sentencing guidelines to determine how they might be streamlined or simplified. We understand this effort stalled after extensive Sentencing Commissioner turnover and a prolonged period of vacancies on the Commission. In any event, we support any new efforts in this regard.

With respect to whether the Commission should provide an enhancement in U.S.S.G. §2C1.1 for solicitation of a bribe, and in §2C1.2 for solicitation of a gratuity, the Committee believes that the Commission should not include such an enhancement because it is likely to invite protracted disputes at sentencing over which party initiated the solicitation, which we do not view as vital in terms of relative culpability.

The Committee also opposes any attempt to modify the mitigating role cap. As you know, in November of 2002, after receiving input from the Committee, the Commission created a sentencing cap at a base offense level 30 for drug traffickers who receive a mitigating role adjustment under U.S.S.G. §3B1.2. The Committee does not believe that the current application of this guideline is problematic, and we are unaware of any need to change it.

Likewise, the Committee opposes any attempt to further limit the courts' discretion with respect to aberrant behavior departures. As you may recall, in December of 1999 the Committee determined that the majority view of the circuits was correct that for this departure to apply there must be some element of abnormal or exceptional behavior: "[a] single act of aberrant behavior...generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable."

United States v. Carey, 895 F.2d 318, 326 & n.4 (7th Cir. 1990). Responding to this circuit conflict, in November of 2000 the Commission amended the guidelines by attempting to slightly relax the "single act" rule in some respects and provide guidance and limitations regarding what can be considered aberrant behavior. The Commission also determined that this departure is available only in an extraordinary case.

On October 8, 2003, the Commission adopted emergency amendments, effective October 27, 2003, implementing a number of PROTECT Act directives. Included in these amendments were newly prohibited grounds for departure relative to aberrant behavior. For example, the Commission determined that an aberrant behavior downward departure is not warranted if the defendant has any significant prior criminal behavior, even if the prior behavior was not a federal or state felony conviction. The Commission also determined that an aberrant behavior downward departure is not warranted if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the "safety valve" criterial at §5C1.2. As you know, studies conducted after the enactment of the PROTECT Act show that judges are not abusing their departure authority. As a result, the Committee believes that further downward departure limitations are unwarranted.

The Committee recognizes the need to address proportionality concerns as a result of newly enacted mandatory minimum sentences or direct amendments to the sentencing guidelines by Congress. It appears that some of the proposed amendments, for example, the proposal to increase the offense levels for "date rape" drugs, second-degree murder, voluntary manslaughter, and involuntary manslaughter, are intended to address such concerns. Unfortunately, it appears that the Commission's remedy for these proportionality issues is to increase the penalties for these offenses.

The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes. The Committee continues to believe that the honesty and truth in sentencing intended by the guidelines is compromised by mandatory minimum sentences. The Committee also believes that the goal of proportionality should not become a one-way ratchet for increasing sentences, especially in light of data showing that the majority of guideline sentences are imposed at the low end of the applicable guideline range. This data indicates that in most cases judges find the existing guidelines more than adequate to allow significant punishment.

The Committee takes no position in response to the directive to the Commission in the PROTECT Act to increase the penalty for child pornography offenses based on the number of images involved. With respect to defining the term "image" or how such images should be counted, the Committee has no position, but would be willing to review any proposals developed in this regard. Also, the Committee takes no position with respect to the appropriate guideline for a new offense that prohibits access to or use of a protected computer to transmit multiple commercial electronic messages (18 U.S.C. § 1037). Likewise, the Committee takes no position with respect to the proposals to provide greater penalties for offenses involving official victims.

With respect to immigration offenses, the Commission has already made revisions to U.S.S.G. §2L1.2 in 2001, 2002, and 2003. Since acts of terrorism can be separately charged by the government, we support the delay in any revisions to the immigration guidelines until a comprehensive package can be developed.

Finally, the Committee reviewed the proposed revisions to the organizational guidelines. The Committee opposes the elimination of the prohibition for the three-point reduction in the culpability score for an effective compliance program if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The Committee believes that the claim to have an effective compliance program is inconsistent with unreasonable delay in reporting the offense after its detection. The Committee generally supports the increase in the reduction of the culpability score under §8C.25(f) for an effective compliance program.

We appreciate the opportunity to present our views. If you need any additional information, please feel free to contact me at (713) 250-5177, or Judge William T. Moore, Jr., Chair of the Committee's Sentencing Guidelines Subcommittee, at (912) 650-4173.

Sincerely,

Sim Lake

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Sincerely,

Sim Lake

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

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Chair, 1st Circuit

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March 5, 2004

United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Dear Commissioners:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on February 3 and 4, 2004 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments published for comment January 13, 2004. We are submitting comments relating to the following proposed amendments.

Proposed Amendment #1 - Child Pornography and Sexual Abuse of Minors

POAG strongly supports the consolidation of §§2G2.2 and 2G2.4. It is the experience of the group that the current cross references create a tremendous amount of confusion and disparity in application, often resulting in lengthy sentencing hearings. When viewing the new combined guideline, POAG chose Option 1 for ease of application and notes that Option 2 could produce the same issues in the existing cross reference applications.

Issue for Comment #1

POAG thinks it is appropriate to consider relevant conduct and recognizes that this approach is consistent with guideline application as a whole. There does not appear to be any compelling reason to justify treating child pornography cases differently from those defendants who commit bank robberies, drug crimes, or fraud.

Issue for Comment #2

POAG suggests the proposed definitions would assist the field in guideline application. There are continuing concerns as to the lack of instruction for counting the number of images and POAG would request more guidance in the form of an application note. In addition, if the existing specific offense characteristics (SOCs) regarding an increase for the number of items as well as the number of images remain, the group would request an application note explaining whether this is "permissible double counting" or whether these SOCs should be applied in the alternative.

Issue for Comment #3

The group does not think the Commission should include definitions for sadistic or masochistic or other depictions of violence (which may include bestiality or excretory functions). It is our experience that this SOC is factually based and not difficult to apply given the existing case law. POAG suggests the interpretation for these definitions should remain with the courts.

Issue for Comment #4

POAG supports the creation of a new guideline for "travel act" offenses at §2G1.3 with specific offense characteristics to distinguish these acts from other crimes. In addition, the group recommends Option 1A as it provides ease of application by remaining in a "travel act guideline." Option 2A is preferable to the group as Option 2B could pose ex post facto problems if there are changes to the statutory definitions. In addition, there may be some confusion over whether a conviction of 18 U.S.C. § 2423(d) is required for this enhancement.

Issue for Comment #5

POAG proposes there should be some proportionality between the §2A3.1-2A3.3 guidelines and the §2G guidelines. In §2A3.1, there is a concern regarding a potential double counting issue between Option 1 and §2A3.1(b)(2) as this SOC already provides for increases based on the age of the minor. If Option 1 is chosen, the group would request an instruction as to whether this is "permissible double counting."

POAG recognizes the Native American Advisory Group has concerns about the interaction between the new definition for pattern of activity enhancement at §4B1.5 and offenses sentenced under § 2A3.2. POAG defers to their judgement on this issue.

Issue for Comment #6

While recognizing that incest cases may be more egregious than other types of sexual assaults due to the loss of trust issue, POAG believes a significant problem could arise if the Commission attempted to define "incest." The group discussed whether it is worse to be sexually assaulted by an "absent" blood relative versus a live-in step parent who has had a long term relationship with the victim. Perhaps the relationship between the abuser and the victim is the more critical factor than the familial bloodline.

Other Application Issues

During our meeting, POAG agreed that the guidelines for production of child pornography should be higher than mere receipt or possession of child pornography. In addition, POAG noted no application difficulties with the proposed SOCs in the production guideline.

In addition, as to §2A3.3, we would recommend an application note be added directing whether or not a Chapter Three adjustment for Abuse of Position of Trust should apply.

POAG recognizes conditions of probation and supervised release are an area of increasing litigation and suggest a complete ban of computer use would be inappropriate. However, in an attempt to safeguard the public, a limit on the defendant's use of a computer needs to be established. This is best left to the Court's discretion at sentencing hearings when imposing limited restrictions.

Proposed Amendment #3 - Body Armor

In viewing the January 13, 2004 draft of this proposed amendment, POAG believes the active employment of body armor should be included in the commentary notes. Otherwise, there are no application difficulties associated with this new guideline.

Proposed Amendment #4 - Public Corruption

POAG agrees with the proposal to consolidate §§2C1.1 and 2C1.7, and §§2C1.2 and 2C1.6, with the inclusion of attempts and conspiracies under these guidelines. The group also reviewed the cross reference in §2C1.1 and noted no application issues rising to a level warranting removal. We take no position on Issue for Comment #3 as our experience reveals that offense conduct varies widely in public corruption cases.

In analyzing Issue for Comment #4, POAG suggests there may be a double counting concern if both SOCs at (b)(3) and (b)(4) regarding public officials are applied. POAG would not recommend tiered enhancements based on the degree of public trust held by the public official involved in the offense as application difficulties could arise in establishing the defendant's actual job duties. The proposed SOC at (b)(5) was discussed, with the group not reaching a consensus. Another double counting concern was raised as to why a specific group of individuals and documents were identified as warranting the increase at (b)(5) or whether this conduct was already included in the base offense level (BOL).

According to staff, based on the quoted percentages, raising the BOL to accommodate multiple incidents could unduly punish as many as one-third of the defendants sentenced under these guidelines. Therefore, POAG suggests not increasing the BOL as the enhancement at (b)(1) is a preferable way to sanction this conduct.

Lastly, the group is appreciative of the proposed definitions and examples contained in the application notes as inclusion of these should decrease disputed application issues.

Proposed Amendment #5 - Drugs (Including GHB)

Issue for Comment #2

In discussing this issue, the group had concerns with this concept. For example, a person who is publicizing the sale of drugs over the Internet in an attempt to create a larger distribution network is easier to factually distinguish from an individual who may be a lower level purchaser of the drugs but who then redistributes the drugs to a friend using the Internet. Potentially both could receive an increase for use of the Internet in the distribution drugs. It is suggested that a mass marketing approach may be more appropriate method to sanction distributors using the Internet to sell drugs. The definition and the resulting increase in offense levels could be similar to that found in §2B1.1.

Issue for Comment #3

In discussing this issue with staff, it appears these cases are minimal and POAG suggests an encouraged upward departure be added to include this conduct. This would allow the sentencing court discretion in imposing an appropriate sentence.

Issue for Comment #4

POAG encourages the Commission to resolve the circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. The group did not reach consensus on this issue.

Proposed Amendment #6 - Mitigating Role

POAG generally agrees with the tiered approach to the mitigating role cap, however, we suggest unless the language is modified, application difficulties will result. Applying a Chapter Three adjustment based on a Chapter Two offense level may be confusing in itself. As currently proposed, §3B1.2(b) refers to "the defendant's Chapter Two offense level." This leaves open the possible application of the reduction after specific offense characteristics have been added or subtracted. POAG suggests that the language be explicit in that the reduction should be premised on the "base offense level" with clear instructions including an example to be added in the commentary at §3B1.2.

Currently, defendants sentenced using the §2D1.2 guideline receive the benefit of the mitigating role cap, however, under this new provision, they would not receive this reduction. Similar application problems might also be present at §§2D1.6, 2D1.7, 2D1.10, and 2D1.11. There may be other guidelines that also contain a cross reference instruction to the 2D1.1 guideline where this issue may arise. Perhaps if the word "pursuant" was changed to "using" this issue would be resolved. A separate issue was discussed whereby a defendant was a minor participant for behavior accounted for at §2D1.1, but a full participant for behavior accounted for at the original guideline. POAG requests some clarification regarding these application issues.

Historically, POAG has requested guidance and examples in application of role reductions. This also extends to the current mitigating role cap issue.

Proposed Amendment #7 - Homicide and Assault

The Chapter Two Homicide and Assault guidelines as written and the current proposals will produce appropriate punishment and pose little application difficulty. In fact, the group recognizes these guidelines along with the robbery guideline to be among the easiest to apply. As to the Chapter Three

issue for comment, POAG does not recommend a tiered approach in application of §3A1.2 as additional fact-finding issues would be required and could increase the number of contested sentencings.

Proposed Amendment #8 - Miscellaneous Amendment Package

(D) USSG §2X6.1 -Use of a Minor

POAG noted some concerns with the guideline as written in the January 13, 2004 version. In particular, a question arose as to how multiple counts of this offense would be grouped and suggest a commentary note be added regarding grouping instructions. In addition, POAG found the language in §2X6.1, comment. (n.1) to be confusing and we had difficulty interpreting the wording "the offense of which the defendant is convicted of using a minor." POAG noted a problem in applying role adjustments to this guideline absent additional instruction.

Proposed Amendment #12 - Immigration

Members of POAG suggest gathering the facts to warrant the proposed enhancements at §2L1.1(b)(4) may be difficult for the probation officer to obtain. This issue may be resolved if the language tracks the provisions found in 8 U.S.C. § 1327 wherein the charging document would outline the specifics of the conduct.

POAG supports an enhancement for multiple deaths noting there are certainly several cases in which more than one illegal alien has died while being smuggled into the United States. However, there would seem to be problems in applying a multiple count calculation from Chapter Three. Therefore, an encouraged upward departure either in the commentary at §2L1.1 or in §5K2.1 could address this issue.

The group found no application problems if the table for the number of aliens smuggled is amended.

POAG opposes an enhancement in the case of a fugitive from another country. Probation officers have a difficult time obtaining criminal record information within the United States and foresee greater difficulty in timely obtaining foreign arrest information. In addition, there are concerns about defendants who are fugitives from countries who are escaping political or religious persecution. There also seem to be inherent conflicts within the guideline structure in that a defendant is prohibited from receiving criminal history points for foreign convictions, but may receive an increase for a mere warrant. POAG takes no position with regard to fugitive status from a United States jurisdiction but notes a potential conflict with Chapter Four in that mere arrests cannot be considered in determining an upward departure in a defendant's criminal history category.

Remaining Amendments

POAG takes no position on remaining amendments and relies on the expertise of the Commission staff and other working groups.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed

amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarifications, please do not hesitate to contact us.

Sincerely,

Cathy Battistelli

Cathy A. Battistelli
Chair

Mailing Address:
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ALLINA
Hospitals & Clinics

February 25, 2004

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

Thank you for offering this opportunity to respond to the proposed changes in the Federal Sentencing Guidelines. Allina Hospitals & Clinics, a family of hospitals, clinics and care services, believes the most valuable asset people can have is their good health. We provide a continuum of care, from disease prevention programs, to technically advanced inpatient and outpatient care, medical transportation, pharmacy and hospice services. Allina serves communities throughout Minnesota and western Wisconsin. We are a mission-driven organization with a solid commitment to compliance.

I appreciate that the Commission is placing an increased emphasis on the importance of compliance programs and the role of the Compliance Officer as a member of senior leadership. I completely support this effort. As the Compliance Officer at Allina, I am part of the Allina Leadership Team and report directly to our Chief Executive Officer. This structure permits me to be effective in my position.

Moreover, I agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for Compliance Officers to have sufficient authority and resources to oversee the organization's compliance program. While Allina supports the proposed changes to the Guidelines, we do have the following three concerns.

First, the proposed amendments suggest that the Compliance Officer of the organization is accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high-level person responsible for the program (the Compliance Officer) has the responsibility to "ensure the implementation and effectiveness of

the program." This amendment does not recognize that a Compliance Officer cannot truly be responsible for the effectiveness of the program. Implementing and maintaining a compliance program is an integral part of running an effective organization. Operating leadership of an organization must embrace the program and assume accountability to ensure that the compliance program is working.

The role of the Compliance Officer is to create compliance strategies that, if implemented by operational leaders, will lead to an effective and efficient compliance program. It is not realistic to hold the Compliance Officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the Compliance Officer or may reside with any number of other leaders within the organization. The proposed amendments could be interpreted as relieving operational leaders of their responsibility to ensure the organization is compliant.

We believe that the Guidelines should strengthen rather than weaken leadership accountability for an organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified as follows:

"Specific individuals(s) within high-level positions in the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws."

Our second concern relates to the treatment of organizations that encounter trouble even though the organization has a compliance program in place. While the proposed changes are an improvement over the existing Guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we would propose that a program is effective when an organization discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose – an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

Finally, although we fully support the proposed amendment that requires the organization to take reasonable steps to "evaluate periodically the effectiveness of the organization's program," more guidance is needed to understand this requirement. The Commission should add clarifying language to indicate the high-level requirements for this evaluation.

In summary, Allina supports the proposed changes to the Guidelines and applauds the hard work of the Commission. The changes proposed by the Commission will help strengthen organizational compliance programs and the role of the Compliance Officer. We would strongly encourage the Commission, however, to revise the proposed Guidelines on the three important points discussed above.

Sincerely,

DAVID B. ORBUCH
Executive Vice President
Compliance and Public Policy
612-775-5819

Mailing Address:
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ALLINA
Hospitals & Clinics

February 25, 2004

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Subject: United States Sentencing Commission Proposed Changes

Dear Commissioners:

Thank you for offering this opportunity to respond to the proposed changes in the Federal Sentencing Guidelines. Allina Hospitals & Clinics, a family of hospitals, clinics and care services, believes the most valuable asset people can have is their good health. We provide a continuum of care, from disease prevention programs, to technically advanced inpatient and outpatient care, medical transportation, pharmacy and hospice services. Allina serves communities throughout Minnesota and western Wisconsin. We are a mission-driven organization with a solid commitment to compliance.

I appreciate that the Commission is placing an increased emphasis on the importance of compliance programs and the role of the Compliance Officer as a member of senior leadership. I completely support this effort. As the Compliance Officer at Allina, I am part of the Allina Leadership Team and report directly to our Chief Executive Officer. This structure permits me to be effective in my position.

Moreover, I agree with the many changes proposed by the Commission to provide additional guidance and direction to organizations regarding compliance programs and to emphasize the need for Compliance Officers to have sufficient authority and resources to oversee the organization's compliance program. While Allina supports the proposed changes to the Guidelines, we do have the following three concerns.

First, the proposed amendments suggest that the Compliance Officer of the organization is accountable for the effectiveness of the program. The proposed changes have added language to § 8B2.1(b)(2) which states that the high-level person responsible for the program (the Compliance Officer) has the responsibility to "ensure the implementation and effectiveness of

the program." This amendment does not recognize that a Compliance Officer cannot truly be responsible for the effectiveness of the program. Implementing and maintaining a compliance program is an integral part of running an effective organization. Operating leadership of an organization must embrace the program and assume accountability to ensure that the compliance program is working.

The role of the Compliance Officer is to create compliance strategies that, if implemented by operational leaders, will lead to an effective and efficient compliance program. It is not realistic to hold the Compliance Officer alone responsible for the overall success or failure of the compliance program. If there are failures, the responsibility may reside with the Compliance Officer or may reside with any number of other leaders within the organization. The proposed amendments could be interpreted as relieving operational leaders of their responsibility to ensure the organization is compliant.

We believe that the Guidelines should strengthen rather than weaken leadership accountability for an organization's compliance efforts. For the reasons stated above, we would recommend that the proposed amendment be modified as follows:

"Specific individuals(s) within high-level positions in the organization shall be assigned direct, overall responsibility to coordinate the design, oversee the implementation, and evaluate and report to management and the board on the effectiveness of the program to prevent and detect violations of laws."

Our second concern relates to the treatment of organizations that encounter trouble even though the organization has a compliance program in place. While the proposed changes are an improvement over the existing Guidelines, it is our view that the proposed changes could do more to promote effective compliance programs.

As drafted, the proposed amendments create a rebuttable presumption that the compliance program was ineffective. However, we would propose that a program is effective when an organization discovers and brings the offense to the attention of the government. The rebuttable presumption of ineffectiveness creates a disincentive for organizations to thoroughly investigate and disclose wrongful conduct. Conversely, a rebuttable presumption that the program is effective (where the organization has uncovered and disclosed the wrongdoing) creates incentives to both investigate and disclose – an approach that is more consistent with the overall emphasis on compliance in Chapter 8 of the Guidelines.

Finally, although we fully support the proposed amendment that requires the organization to take reasonable steps to "evaluate periodically the effectiveness of the organization's program," more guidance is needed to understand this requirement. The Commission should add clarifying language to indicate the high-level requirements for this evaluation.

In summary, Allina supports the proposed changes to the Guidelines and applauds the hard work of the Commission. The changes proposed by the Commission will help strengthen organizational compliance programs and the role of the compliance officer. We would strongly encourage the Commission, however, to revise the proposed Guidelines on the three important points discussed above.

Sincerely,

DAVID B. ORBUCH
Executive Vice President
Compliance and Public Policy
612-775-5819

February 25, 2004

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

The California County Issues HIPAA Workgroup is a collaborative statewide focus group created as an information and resource sharing forum for California counties as we face the challenge of applying the HIPAA Administrative Simplification Rules to our complex community healthcare delivery systems. Our membership of over 1,000 strives to resolve the unique implementation issues and myriad compliance problems with which counties are confronted.

The purpose of this letter is to express our collective support of the comments and concerns submitted by the Health Care Compliance Association with regard to the proposed changes to the Federal Sentencing Guidelines.

Sincerely,

Cheri Huber

Cheri Huber
Co-Chair
California County Issues HIPAA Workgroup

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February 9, 2004

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

Re: Response to Request for Public Comment re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment Published in the Federal Register on December 30, 2003, and January 14, 2004 (Proposal #2, "Effective Compliance Programs in Chapter 8")

To the United States Sentencing Commission:

Thank you for the opportunity to comment on the above-referenced proposal regarding the Federal Sentencing Guidelines for Organizations (FSGO). Before offering my commentary, I would like first to express my appreciation to the United States Sentencing Commission for creating an Ad Hoc Advisory Group that, from this outsider's perspective, appears to have conducted a focused and balanced review of the elements of an "effective program to prevent and detect violations of law" as set out in Chapter 8.

Focus of my commentary

My commentary in this letter focuses on §8B2.1.a.2 as designated in the proposal (the italicized portion of the quotation below), which (more than the original FSGO) seems formally to acknowledge the benefits that ethics can bring to compliance management:

> 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.*

The proposal's restrained reference to ethics is implied by the words, "promote an organizational culture," recalling the Advisory Group's August 21, 2002 "Request for Additional Public Comment" in which commentators were asked to remark on whether the revised FSGO should "encourage organizations to foster ethical cultures to ensure compliance." Indeed, the "Synopsis of Proposed Amendment" confirms that the implied