FAMM notes that because quantity alone is relied on to such an extent in drug calculations, that the least culpable end up with sentences that well exceed the dangerousness or harm of their conduct, and that some even exceed the sentences of the most culpable defendants, even after credit for mitigating role.

FAMM also notes that Senator Jeff Sessions (R-Al) recognized and attempted to fix the problem when he introduced S. 1874, the Drug Sentencing Reform Act of 2001. FAMM states that the bill was designed to more appropriately account for role by increasing sentences for certain kinds of conduct and reducing them for the least involved. In that bill, FAMM states, Senator Sessions called for a cap on base offense levels of down to level 30 for those receiving minimal role adjustments.

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

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

FAMM urges the Commission to exercise restraint and neither eliminate nor adjust the role cap for the time being. However, if the Commission chooses to go forward with an amendment, FAMM strongly encourages it to do so in a way that preserves as much flexibility in achieving sentencing relief for the less culpable who must suffer the brunt of quantity-driven sentences.

Amendment No. 7 - Homicide

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

Homicide Offenses

The Department of Justice (DOJ) believes the guideline penalties for all homicide, other than for first degree murder, are inadequate. It states that while the number of homicides prosecuted in federal court is relatively small because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes.

The DOJ believes that a defendant who accepts responsibility for a second degree murder, regardless of criminal history category, should receive a sentence of approximately 15 years imprisonment. Thus, it thinks the Commission should increase the base offense level for second degree murder to offense level 38.

The DOJ notes the similarities between first and second degree murder, stating the difference in the two degrees of murder is that the more serious form is accomplished with premeditation or in the perpetration of certain enumerated felonies. However, the presence or absence of premeditation is a jury matter that sometimes turns on fine distinctions, arguing that in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, in its view, the relatively low guideline sentence for second degree murder fails adequately to recognize the similarity between the two crimes or the maximum life sentence available for second-degree murder. Further, the DOJ argues the inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

The DOJ recommends the Commission should increase the base offense levels to create an appropriately tiered system of punishment in which first degree murder should result in a life sentence; second degree murder should result in at least a 15 year sentence; voluntary manslaughter should result in at least a five year sentence; and involuntary manslaughter should result in some imprisonment. Further, the DOJ recommends the Commission provide a base offense level of 28 for voluntary manslaughter and a base offense level of 26 for involuntary manslaughter offenses involving the reckless operation of a means of transportation. Lastly, it suggests that enhancements for the use of a weapon and the use of a firearm are appropriate.

Attempted Murder

The DOJ believes that in cases where the attempt may not have been successful because of bad design or interruption by law enforcement or a good Samaritan, the defendant should be sentenced close to the level which would have been applicable had he been successful. It argues

that although elsewhere in the guidelines, an attempt is typically treated 3 levels lower than the underlying offense under §2X1.1(b)(1), attempted murder can be 15 levels lower than the underlying crime, pursuant to §2A2.1. Therefore, the DOJ believes the Commission should reexamine this issue.

The DOJ supports a base offense level of 36 for attempted murder, if the object of the offense would have constituted first degree murder. For attempts to commit second degree murder, it believes the base offense level should be 30, which is eight levels below its recommended base offense level for second degree murder and which would result in sentences of roughly six years to 11 years (depending on criminal history category) for offenders who accept responsibility.

Obstructing or Impeding Officers – §2A2.4 – and the Official Victim Enhancement – §3C1.1

The DOJ fully supports the Commission's proposed increases in the base levels for offenses involving obstructing or impeding officers (§2A2.4), providing a specific offense characteristic if injury occurs, and also increasing the enhancement for the "Official Victim" adjustment (§3C1.1) from 3 levels to 6 levels. The DOJ believes that they are of particular importance because the crimes involved often attack or retaliate against the authority of the law and those who enforce it.

The DOJ also argues that obstructing or impeding an officer should be treated much more closely to aggravated assault. The DOJ does not believe it is justified to differentiate cases based upon distinctions made in §3A1.2(a) and (b). In fact, such an approach would appear to minimize the significance of an assault upon a law enforcement officer or prison guard when done in a manner creating a substantial risk of serious bodily injury as compared to an offense of conviction motivated by the victim's status as a government officer or employee. The DOJ believes there should be an invited upward departure if the assault or threatened assault involved family members of the official victim or if many official victims are placed in peril. The DOJ notes that the Commission proposes amending Application Note 5 of §3A1.2 to provide that an upward departure may be appropriate if the official victim is an exceptionally high-level official, such as the President. The DOJ believes that rather than limiting this upward departure to those rare situations involving an exceptionally high-level official, an upward departure may be appropriate in any instance where the assault or threatened assault results in the disruption of a governmental function.

Amendment No. 8 - Miscellaneous Amendments

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

Multiple Victim Rule in Fraud/Theft Cases – Subpart B

The Department of Justice (DOJ) supports the proposal, but states it should go further as it believes the proposal does not clearly apply to theft of material for delivery by private or commercial interstate carriers.

To ensure that the multiple-victim rule extends to both types of delivery, the DOJ recommends that the proposal be revised, in pertinent part, to read as follows: ". . . or any other thing used or designed for use in the conveyance of United States mail **or any matter or thing to be sent or delivered by a private or commercial interstate carrier** to multiple addresses, whether such thing is privately owned or owned by the United States Postal Service . . ." (Changes in bold).

Use of a Minor in Crimes of Violence – Subpart D

The DOJ recommends §2X6.1 should provide at least a 3 level increase above the offense level for the underlying offense because Congress intended greater protections for children. The new law provides a dramatic increase in the maximum statutory penalty, and if the Commission provides no additional increase in penalty beyond current law, it is the DOJ's opinion that the will of Congress will not have been followed. Further, the DOJ believes §3B1.4 should be amended to provide a similar three level increase.

Double Counting in Certain Firearms Cases – Subpart J

In the DOJ's opinion, an exception is generally not warranted here, because the circumstances are unlike those where the defendant is simply convicted of a violation of only 18 U.S.C. § 924(c). In the case being contemplated here, the defendant has acted illegally and been convicted both of possessing the gun as a felon with a serious criminal background and in addition of using the gun in the commission of a crime of violence or controlled substance offense. A penalty over and above that provided by § 924(c) is warranted in light of the defendant's felon status, the DOJ believes.

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

Multiple Victim Rule in §2B1.1

The Practitioners' Advisory Group (PAG) notes that the proposed amendment to §2B1.1, comment. (n. 4(B)(ii)) would expand a special rule to provide that offenses involving mail stolen from mailboxes serving multiple postal customers, such as those found in apartment complexes, would presumptively involve 50 or more victims. However, although this rule was first created to address special proof problems which exist when mail is stolen from a Postal Service mailbox, vehicle, cart or satchel (because there is usually no way to determine how many pieces of mail were in the container or conveyance at the time of the theft), these proof problems do not exist when dealing with banks of mailboxes at apartment complexes. Further, the PAG argues it is often easier to prove the number of victims when mail is stolen from apartment unit boxes than if it were stolen from individual residence mailboxes; in apartment units, the door to the mailbox will almost always show signs of tampering to the locking mechanism, but mail taken directly from individual home mailboxes, which are rarely locked, will not show tampering.

Additionally, the PAG believes the amendment will not further, and will instead frustrate, the purposes of the guidelines. It does not believe it necessary to the soundness and integrity of the US mail to punish persons who steal from an apartment complex more harshly than those who steal mail from individual residences. Further, in its view, mandating longer sentences for offenders who steal a single welfare check from an apartment cluster of 50 boxes, than for those who steal the same check from a single mailbox on a street with fifty houses, will create sentencing disparity and undermine the objectives of the guidelines.

The PAG also states that the proposed amendment will create confusion as to the meaning of the term 'victim.' It argues the definition of 'victim' has been weakened by the present special rule that does away with the need to identify the victims when mail is stolen from a Postal Service container or conveyance, and states the definition should not be weakened further by adoption of an amendment where the identity of the victims is easily obtainable.

Finally, the PAG argues that the proposed amendment, by requiring the defendant to prove that his mail theft involved less than 50 victims, puts the burden on the party in the worst position to so prove, and further questions the seriousness of the problem addressed by the proposed amendment, stating it can only find one case where a similar situation arose.

Amendment No. 9 - MANPADS and Other Destructive Devices

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

In the Department of Justice's (DOJ) opinion, portable rockets and missiles are a category of destructive device that pose a particular risk to the public due to their range, accuracy, portability, and destructive power.

MANPADS and similar weapons are currently highly regulated under the National Firearms Act ("NFA"), 26 U.S.C. Chapter 53, and the Gun Control Act of 1968 ("GCA"), 18 U.S.C. Chapter 44. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons.

The DOJ believes individuals who are convicted of possessing MANPADS and similar weapons should be treated much more severely than the current sentencing guidelines allow and support an increase to a 15 level enhancement for the unlawful possession of portable rockets or missiles or devices for use in launching a portable rocket or missile in the proposed new §2K2.2(b)(3)(A).

The unlawful possession of other destructive devices also poses a danger to public safety that warrants more severe punishment than that under the current sentencing guidelines and the DOJ supports the highest appropriate increase in the proposed new §2K2.2(b)(3)(B), believing that it should be a six to nine level enhancement. It also recommends that there should be no limitation on the cumulative offense level in §2K2.1 to prevent an inappropriately low offense level from becoming the ceiling in a particular case.

Issues for Comment

The DOJ agrees substantive terrorist offenses in 18 U.S.C. § 1993(a), should be referenced in Appendix A to §2A5.2 rather than, or in addition to, §2A6.1. It also agrees that any or all of the substantive criminal provisions of 18 U.S.C. § 32 should be referenced to §2A5.2, which would allow for the most applicable sentencing guideline to be chosen for a particular case. For the same reason, the DOJ does not believe that Section 32 offenses should only be referenced to §2A5.2, because there are numerous subsections in Section 32 and the most appropriate guideline should be available to the court.

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

Issue For Comment No. 10 - Aberrant Behavior

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

Elimination of Aberrant Behavior

The Department of Justice (DOJ) believes that aberrant behavior (§5K2.20 (Policy Statement)) should be eliminated as a ground for downward departure. It states sentences under Criminal History Category I are properly gauged to first time offenders and aberrant behavior as a departure ground is prone to inconsistent application and abuse, since "aberrant" behavior presupposes little more that an otherwise law-abiding life. The DOJ notes that although the aberrant behavior policy statement was amended effective November 1, 2000, to preclude such departures in cases involving, among other things, a firearm or serious bodily injury, the fact that the amendment was even needed illustrates the potential for inconsistency and mischief inherent in such departures.
The DOJ notes that only first offenders will qualify for an aberrant behavior departure, and it believes the guideline definition invites this argument for nearly every first offender because every first offender has no criminal history points and no significant prior criminal activity. Yet in its view, at the same time, the Commission has clearly signaled that first-time offenders are not automatically eligible for an aberrant behavior departure. For example, the Commission has explicitly taken the absence of a prior criminal history into account in setting the guideline ranges for Criminal History Category I offenders, and has prohibited departures below the lower limit of the applicable guideline range for Criminal History Category I. §4A1.3(b)(2)(A). Thus, the DOJ argues Section 5K2.20 seems to be inconsistent with that prohibition.

The DOJ notes that §5K2.20 encourages courts to consider a number of circumstances, many of which are not ordinarily relevant in determining whether to depart. For example, Application Note 3 encourages sentencing courts to consider the defendant's "(A) mental and emotional conditions; (B) employment record; ©) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." Elsewhere in the guidelines it states a defendant's mental or emotional condition and his employment record are "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range, §5H1.3 and §5H1.5, and similarly, "prior good works" are not ordinarily relevant, §5H1.11. The defendant's motivation for committing the offense may already be considered in setting his offense level, and would therefore not be a proper basis for departure in the view of the DOJ. The DOJ believes §5K2.20 is ill conceived because it encourages courts to consider discouraged factors or factors already taken into account elsewhere in the guidelines.

Integration of Aberrant Behavior Into the Defendant's Criminal History Score under §4A1.1

The DOJ strongly opposes integration of aberrant behavior into the criminal history calculation. It argues that the guidelines already account for first offenders through Criminal History Category I, the lowest available criminal history category. Incorporating aberrant behavior into the criminal history calculus will simply exacerbate what it believes is the existing problem under §5K2.20.

The DOJ believes that to give a first offender more lenient treatment than that already allowed by a Criminal History Category I, may run afoul of 18 U.S.C. 3553(a)'s requirement that a sentence "reflect the seriousness of the offense," "promote respect for the law," "afford adequate deterrence to criminal conduct," and "protect the public from further crimes of the defendant," and that it could have a substantial, and potentially devastating, impact on a variety of crime types and enforcement programs, including civil rights, tax, fraud and other white collar, and environmental crimes.

The DOJ suggests that if the Commission chooses to maintain the aberrant departure provision, it should be limited even further than it is today, §5K2.20©) should categorically preclude any offense constituting a crime of violence as defined in §4B1.2. Further, if the sentencing court finds that the defendant meets all of the requirements for a departure, the DOJ believes the extent of the departure should be limited to no more than one or two offense levels, much the same as departure under §4A1.3(b)(3)(A) for career offenders is limited to one criminal history category.

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

The Practitioners' Advisory Group (PAG) opposes as premature the elimination of the aberrant behavior downward departure provision in §5K2.0. In its opinion, while it is true that first offenders should receive more lenient sentences and more opportunities for sentences that do not involve incarceration, it does not make sense for the Commission to eliminate the departure before proposing an amendment to §4A1.1. Because the Commission has been engaged in a two year study of criminal history, the PAG suggests the Commission formulate an appropriate amendment to §4A1.1 based on the results of that study and only at that point consider whether or not the aberrant behavior downward departure remains necessary.

Issue for Comment No. 11 - Hazardous Materials

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

New Guideline for Hazardous Materials Offenses

In the Department of Justice's (DOJ) opinion, because the specific offense characteristics of §2Q1.2 are designed for hazardous waste crimes, their application in hazmat cases will often yield sentences that are inadequate in terms of both punishment and deterrence and believes a new guideline would be relatively easy for courts and probation offices to apply and would yield sentences that are appropriate for hazmat violations.

Key Elements of a Hazmat Guideline

It is the DOJ's view that the hazmat guideline should cover violations of 49 U.S.C. §§ 5124, 46312, and possibly all or part of § 60123. The DOJ recommends that, in order to avoid any confusion over what constitutes a "hazardous material," that term should be defined in a new guideline by specific reference to the appropriate regulatory provision, 49 CFR § 105.5 and in the application notes, both "release" and "environment" should be specifically defined for purposes of hazardous materials transportation crimes. The DOJ offers the following definitions:

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

The "environment" definition is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(8)(B). The proposed definition of "release" is adapted from the Comprehensive Environmental Response, Compensation, and Liability Act,

42 U.S.C. § 9601(22), and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11049(8).

Base Offense Level and Aggravating and Mitigating Factors

The DOJ believes many of the aggravating factors outlined by the Commission in the issue for comment merit some treatment within the guidelines and addresses each of these in turn.

a. Passenger-carrying modes of transportation
The unlawful transportation of hazardous material on any passenger-carrying mode of transportation potentially involves large numbers of victims with limited escape possibilities and, in the DOJ's view, warrants an even higher offense level.

b. Concealment
In its opinion, concealment, by whatever means, is a particularly insidious characteristic of some hazardous material transportation crimes and, therefore, merits an enhancement.

c. Release, damage to the environment, critical infrastructure, and emergency response
These are all factors that, the DOJ feels, if present with respect to a particular hazmat crime, reflect harm or a threat of harm to the public.

d. Repetitiveness
It is the DOJ's view that conventional hazmat crimes are prone to repetitiveness and with each repetition of such a crime there is another chance that the risk of harm will materialize into reality.

e. Serious bodily injury or death
The risk of death or serious bodily injury or their actual occurrence are, in the DOJ's opinion, the most serious harms that the hazmat laws are intended to prevent and recommends they should be treated as specific offense characteristics with significant offense level additions. It recommends the following provision:

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

The DOJ believes the inclusion of a specific offense characteristic for particular types of hazardous materials should be avoided.

a. Particular types of hazardous materials
In the DOJ's view, a problem exists with both the wide variety of materials and the fact that their potential effects can vary widely with circumstances and recommends rather than trying to choose among the lethal qualities of so wide an array of substances, those qualities may better be part of the assessment of the risk involved in a violation.

b. A terrorist motive

In the DOJ's view, a hazmat crime that involves a terrorist motive should be treated by a cross-reference with a provision such as the one below:

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

c. Proper training

The DOJ asserts that training violations are among a number of offenses that can increase the risk of a hazardous material being released into the environment and rather than having separate specific offense characteristics for each of these types of offenses, they could all be addressed in a single "risk-based" specific offense characteristic, the DOJ recommends. The DOJ further states, this specific offense characteristic could be made part of a multi-part guideline provision, such as the example below, that addresses releases of hazardous materials in a descending scale from those that cause damage through releases for which damage is not established to risk of release.

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

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

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

d. The procurement of a license through fraudulent means
In order to reduce the traffic in fraudulent licenses, the DOJ recommends this behavior should be subject to an enhancement.

Interaction with Chapter Eight of the Guidelines

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

The DOJ notes a compliance-related change to Chapter Eight that would be useful for hazmat and other similar regulatory crimes: the expansion of §8D1.4(c)(4), concerning a recommended condition of probation, to allow regular or unannounced physical inspections of property in order to determine whether an organization is in compliance with terms of probation. Currently that provision allows for only inspection of books and records and interrogation of knowledgeable individuals. While that provision may be adequate for conventional financial crimes that are reflected in records, the DOJ feels it does not deal effectively with crimes that involve physical objects or facilities.

Cross References

Because a hazmat violation could well involve an act designed to kill people, perhaps for purposes involving the security of the United States, DOJ recommends the hazmat transportation guideline should be cross-referenced to the homicide and terrorist guidelines and offers the following provision:

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

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

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

Civil Penalties

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

Multiple Counts

It is the DOJ's view that the grouping rules of Part 3D should apply to hazmat crimes just as they would to any other federal crimes and as with other multiple crimes by the same defendant. The circumstances of the various crimes must be analyzed in order to determine whether they would belong in a common group or in separate groups.

Under grouping, for crimes that involve substantial threats to more than one victim, the DOJ thinks it may be appropriate to include a provision that tracks §2Q1.4(d):

(d) Special Instruction

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

American Chemistry Council
James J. Conrad, Jr, Counsel
Arlington, VA

The American Chemistry Council (ACC) strongly opposes creating any new guidelines regarding hazardous materials (hazmat) transportation, stating that pending legislation makes the Department of Justice's (DOJ) concerns moot. According to the ACC, the DOJ's assertions that application of §2Q1.2 to criminal hazmat violations produces inadequate sentences are without merit. Under the Hazardous Materials Transportation Act (HMTA), the knowing violations of proscriptions on tampering with required markings, labeling, placarding or documents and any other willful violation of the statute or regulations or orders under it, are punishable by fines under Title 18. The ACC argues that given this Act and the prospects of new legislation in the HTMA reauthorization legislation that would increase the available jail time to 20 years in any case where a hazardous material was released in connection with the offense, the Commission should defer any further action. Further, the ACC argues that the offense characteristics in §2Q1.2 would substantially elevate sentences under the HMTA.

Additionally, the ACC states that terrorists are already subject to extraordinary sanctions, with an entire chapter of Title 18 devoted to the criminal punishment of terrorists, some sections specifically addressing domestic terrorists, with punishments under these sections generally any term of years or life, or death if death results from the offense. Also, it argues that a separate section of the guidelines already addresses these terrorist offenses, as well as attempts and conspiracies to commit them, at §2M6.1. In its view, in any case where terrorists use a hazmat to accomplish their goals, the defendants will be punished as severely as the law allows.

A further concern of the ACC is that the DOJ seems intent on preventing terrorist attacks by severely punishing criminally culpable but otherwise patriotic Americans whose hazmat violations could potentially facilitate a terrorist attack. The ACC argues that the DOJ has offered no evidence of an epidemic of such violations. Therefore, the ACC recommends that before the Commission significantly changes the criminal sentences in this area, it is incumbent on the DOJ to offer some empirical substantiation for these changes.

The ACC argues that new hazmat rulemaking already address the problem of inadvertently helping terrorists. In its view, these steps are a far more narrowly tailored, and likely far more effective, approach to this problem than "blunderbuss increases in criminal penalties."

Further, the ACC states that the DOJ's approach is unfair, and it believes the DOJ goes too far in proposing to punish nonterrorist hazmat personnel as severely as the terrorists who attack or exploit them. With so many people filling differing and interdependent roles, it argues, it would be too easy, in the event a terrorist exploited the system, for innocent or at least non-intentional conduct to be elevated to the level of crime; too easy for a less culpable person to become the fall guy for the conduct of the terrorist.

Lastly, the ACC is especially opposed to the creation of a new guideline applicable only to hazardous materials. In its opinion, establishment of such a free-standing guideline would greatly complicate the job of organizations attempting to implement an effective compliance system. It presumes that a separate guideline would have its own concept of such a system, and any business involved in hazmat transportation would need to implement and integrate its generic organizational and hazmat guidelines compliance programs, requiring two compliance systems.

Ballard Spahr Andrews & Ingersoll, LLP
Ronald A. Sarachan
Philadelphia, PA

Mr. Sarachan, a former Chief of the Environmental Crimes Section of the Department of Justice, currently practices in the Government Enforcement/White Collar Crime Group and the Environmental Group of Ballard Spahr Andrews & Ingersoll, LLP..

In Mr. Sarachan's opinion, crimes involving illegal transportation of hazardous materials (hazmat) can be broken into three categories; the first consisting of acts of terrorism, where the actors intend a release of hazardous materials into the environment; the second consisting of other, non-terrorist related hazmat offenses that also result in releases to the environment, usually accidentally; and the third, consisting of hazmat transportation offenses in which there are no releases. He believes that the guidelines already address the first two categories of offenses.

As for the first category of offenses, Mr. Sarachan argues that a guideline calculation should be subject to enhancement if a hazmat transportation offenses involves a terrorist act, however, §3A1.4 already provides for an increase in offense levels for any offenses involving or intending to promote a federal crime of terrorism, providing for an increase of either 12 levels or an increase to level 32, whichever results in a higher offense level. Thus, he argues, there is no need to modify §2Q1.2 or Part Q to take into account terrorism, because it is already covered in chapter 3, and states that adding a specific offense characteristic for a terrorist motive, as proposed in Item O of the proposed SOCs, appears duplicative of §3A1.4.

Similarly, with respect to the second category of offenses, Mr. Sarachan states that the existing specific offense characteristics of §2Q1.2 already provide a series of cumulative enhancements corresponding to the severity of any releases to the environment, and adequately reflect the varying seriousness of offenses that include environmental releases.

In Mr. Sarachan's view, many of the possible specific offense characteristics listed by the Commission in this Issue for Comment regarding hazmat simply repeat ones already included in §2Q1.2, including the one-time release of hazardous materials in §2Q1.2(b)(1)(B), the evacuation of a community, in §2Q1.2(b)(3), a substantial expenditure for remediation, in §2Q.12(b)(3), and the substantial likelihood of death or serious injury, in §2Q1.2(b)(2).

Regarding the third category of hazmat transportation offenses, Mr. Sarachan states this is the only category that arguably is not already addressed under the guidelines, because the enhancement to §2Q1.2 assume a release or a permit violation. In the more typical environmental offenses involving releases, he states, the specific offense characteristics reflect the egregiousness of the offenses based on the actual results caused by the offenses; the repetition and impact of the release or releases of the harmful material into the environment. By contrast, there is no actual harm associated with this third category of hazmat offenses because there are no releases into the environment. Instead, he argues, the severity of these offenses arise from the relative risk of harm to the public. Mr. Sarachan states that the guidelines presently address risk with a departure for offenses that significantly endanger public safety, at §5K2.14. However, he argues, the DOJ seeks to add a new specific offense characteristic. Those that might be relevant are those that serve as surrogates for measuring relative risk to the public, including the proposed SOCs which address the transportation of a hazmat on a passenger-carrying or other aircraft (Item A), the transportation of a hazmat on any passenger-carrying mode of mass transportation (Item B), the concealment of the hazmat during its transportation (Item C), the transportation of radioactive or explosive material (Item N), and the failure to properly train transporters (Item Q).

The difficulty in assessing these proposals, in Mr. Sarachan's opinion, is increased not only by the added difficulty in measuring risk as compared to the impact of actual releases, but also by the absence of a significant body of criminal cases or sentencing experience for hazmat transportation offenses.

Mr. Sarachan argues that the analysis of hazmat transportation offenses should focus on cases which do not involve an environmental release, because this is the only category that may be outside the heartland of environmental crimes cases already adequately addressed by the guidelines. Additionally, the justification for any enhanced sentencing would have to be that the current guidelines do not adequately reflect the increased risk to public safety caused by hazmat offenses that do not include environmental offenses. Therefore, Mr Sarachan argues, the only SOCs relevant to this analysis are those that may reflect increased risk in such cases.

Association of Oil Pipe Lines
Steven P. Solow
Hunton & Williams
Washington, DC

The law firm of Hunton & Williams writes on behalf of the Association of Oil Pipelines (AOPL) which states it represents 49 common carrier oil pipeline companies and members carry nearly 80% of the crude oil and refined petroleum products moved by pipeline in the United States.

The AOPL urges the Commission to reject the recommended changes to §2Q1.2 proposed by the Department of Justice (DOJ), it being the AOPL's opinion that existing guidelines address the potential misuse of the nation's HAZMAT transportation infrastructure.

It is the view of the AOPL, that the victim related enhancement at §3A1.4 can be used to address one time, catastrophic occurrences of terrorism that use illegal hazardous materials. The AOPL states that if additional revision is thought necessary, specific offense characteristics can be added to §2Q1.2 to address acts of terrorism as is done in other Guideline sections (e.g., §2B1.1(b)(12)(B)(I)).

While not originally designed to cover hazardous materials, §2Q1.2 was amended to do so in 1993, as the DOJ also notes. Thus, in the AOPL's opinion, HAZMAT offenses are covered by the guideline and provide serious punishments for environmental violations. Criminal enforcement of environmental laws enhance the government's other enforcement tools of administrative and civil enforcement, the AOPL contends.

Hazardous material transportation regulation has changed remarkably since 9/11 and, in the AOPL's opinion, the DOJ's efforts to increase penalties are premature as private sector and federal, state and local governments are still developing strategies to identify the risks. Ninety-five percent of the AOPL's members have developed new security plans and are working with the Department of Homelands Security to conduct vulnerability assessments, reports the AOPL. The AOPL has attached the "Security Planning and Preparedness in the Oil Pipeline Industry," report to its submission.

Guideline proposals flow from the careful study of empirical information and the small number of HAZMAT related offenses, in the AOPL's opinion, do not provide a basis for the non-security focused proposals suggested by the DOJ for §2Q1.2.

Regarding proposals to add guidelines to specifically cover HAZMAT compliance in Chapter 8, the AOPL believes this would undermine the broad impact the guideline currently has and appears to conflict with the past design of Chapter Eight.

Institute of Makers of Explosives (IME)
Susan JP Flanagan
Counsel, Environment, Safety & Health
Washington, DC

The Institute of Makers of Explosives (IME) states it is the safety association of the commercial explosives industry. The IME represents all U.S. manufacturers of high explosives and other companies that distribute explosives or provides related services. Over 2.5 million metric tons of explosives are consumed annually in the U.S. of which IME member companies produce over 95 percent. The ability to manufacture, transport, store, and use these products safely and securely is critical to this industry and accordingly, the IME is interested in any changes to the U.S. Sentencing Guidelines that have the potential to impact the transportation of hazardous materials (HAZMAT).

New Guidelines for HAZMAT Transportation Offenses

The IME agrees in principle with the concern expressed by the Department of Justice (DOJ) that current guidelines are not adequately suited to HAZMAT related transportation offenses. It is the IME's view that section §2Q1.2 covers only environmental protection statutes, making application of Department of Transportation (DOT) regulated HAZMAT transportation offenses difficult. Accordingly, the IME supports the creation of new guidelines to adequately and specifically address offenses involving the transportation of HAZMAT.

Base Offense Level for HAZMAT Transportation Offenses

The IME observes that the quantity and variety of hazardous materials shipped daily in legitimate commerce is enormous and includes many materials easily recognizable as hazardous (e.g., gasoline) and not so easily recognizable (e.g., various cosmetics and food additives). In the IME's view, a conservative base offense level should be established for general HAZMAT offenses, with a series of enhancements applicable to the potential hazards posed by the above mentioned diverse materials and coupled with the criminal or terrorist uses to which they may be put.

Specific Offense Characteristics for Minor HAZMAT Offenses

The IME believes any guideline should contain specific offense characteristics for relatively minor infractions where the risk of death or serious bodily harm is low. It cites simple violations of recordkeeping and reporting violations as examples. Other guidelines incorporate base offense level mitigating factors and the IME believes this should be followed in any HAZMAT guideline developed by the Commission.

DOT HAZMAT Classification System

Because the DOT governs a comprehensive classification system for the transport of all HAZMAT in the U.S., the IME recommends the Commission use this established system when developing any new guidelines to ensure a consistent classification scheme.

Chapter 8 Organizations Guidelines

The IME believes the Chapter 8 guidelines are adequate to cover any violations of HAZMAT regulations attributable to an organization. However, in the event the Commission develops new HAZMAT sentencing guidelines, the IME recommends the Commission review the Chapter 8 Guidelines to ensure their continued relevancy, consistency and effectiveness to adequately accommodate situations unique to the HAZMAT transportation sector. The IME calls specific attention to §8A1.1 Commentary and Application Notes 3(j) and 3(k) that, in its opinion, limits an organization's responsibility for third party shippers over whom, in the IME's opinion, the organization has little or no realistic control. The IME believes this limit on liability should be incorporated in any new HAZMAT guideline.

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 1, 2004

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

Commissioners:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on December 30, 2003, and January 14, 2004. We thank the members of the Commission – and the Commission staff – for being responsive to many of the Department's sentencing policy priorities this amendment year and for working extremely hard with us to develop proposed amendments to implement these priorities. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

* * * * *

CHILD PORNOGRAPHY AND SEXUAL ABUSE OF MINORS

The proposed guideline amendments for child pornography and the sexual abuse of minors largely implement provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21. Child pornography and the sexual abuse of minors involve many complicated statutory and guideline issues, and the Commission and staff have methodically and diligently worked to both faithfully implement the new law and at the same time strive to make sentencing policy in this area as easy as possible to apply. We support most of the published proposed amendments and offer a host of comments below.

I. Child Pornography Offenses

A. Consolidation of Possession and Trafficking Offenses Under §2G2.2

We agree with the proposed consolidation of child pornography possession offenses and child pornography receipt/trafficking offenses under a single guideline.[1] The existing scheme, with a cross reference from the possession guideline, has created a great deal of confusion and, we believe, has been applied inconsistently. Also, as the Commission is well aware, whether a person can be shown to have received child pornography or simply to have possessed it is often based more on the quality of forensic evidence than on the person's actual culpability. Thus, we support the proposed consolidation, as we believe it is likely to promote greater consistency in sentencing.

1. Option 1 vs. Option 2 – Base Offense Levels

Although we favor consolidation, in light of the fact that Congress has chosen to impose a mandatory minimum sentence for receipt offenses, but not possession offenses, we believe some higher base offense level for receipt offenses is still appropriate. We favor a variation of Option 1; we believe one base offense level should apply to possession offenses without the intent to traffic in, or distribute the material. Other offenses sentenced pursuant to the guideline, all of which are subject to a five year mandatory minimum penalty, should be subject to a higher base offense level.

2. Choice of Base Offense Level and Enhancements, Generally

Currently, the base offense level for possession offenses under §2G2.4 is level 15. The base offense level for receipt and distribution offenses under §2G2.2 is level 17. The new statutory mandatory minimum penalty for receipt and distribution cases is 60 months, which is within the sentence range of offense level 24 or 26, Criminal History Category I. Under Option 1, the Commission has proposed a base offense level of either 15, 18 or 20 for possession, receipt, and solicitation offenses that do not involve the intent to distribute and a base offense level of either 22, 24, 25 or 26 otherwise (which encompasses distribution, transportation, possession with intent to distribute, etc.). As stated above, because possession offenses are not subject to a statutory minimum sentence, we do not believe the base offense level for such offenses should be exactly the same as that for receipt.[2]

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[1]Our comments, infra, are relevant whether or not the Commission chooses to consolidate the guidelines. For example, our recommended alternative base offense levels are suggested for either a consolidated guideline or in two separate guidelines.

[2]We recognize that even if receipt and possession have the same base offense level, the guideline sentence can be meaningfully different in that one convicted of possession can benefit from a downward adjustment for acceptance of responsibility, bringing him below the five year

We believe the base offense level for receipt and distribution offenses should be level 24 or 26.[3] This offense level will ensure that the less serious offenses within Criminal History Category I will be sentenced at the mandatory minimum while at the same time ensuring that sentences for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress. If the base offense level in §2G2.2 is lower than offense level 24, the sentencing enhancements will have not have full effect and dissimilar conduct will be sentenced similarly. In line with our comments above, we would recommend a base offense level of 20 for possession offenses not involving the intent to distribute.

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mandatory minimum that will apply to those convicted of receipt. However, the distinction that Congress sought between possession and receipt offenses in that circumstance will only be reflected in cases where the defendants benefit from the downward adjustment for acceptance of responsibility.

[3] The Commission has historically, and we believe correctly, set the base offense level for offenses subject to mandatory minimum penalties so that the low end of the sentencing range for a defendant in Criminal History Category I would be no lower than the statutory minimum sentence. Thus, for example, the base offense level for drug offenses subject to a five year mandatory minimum sentence is set at level 26, which carries a sentencing range of 63-78 months in Criminal History Category I. We believe this is the proper method of implementing mandatory minimum statutes within the guidelines; a method that keeps the guidelines consistent with all Acts of Congress.

We recognize, however, that in PROTECT Act cases, unlike drug or other cases subject to a mandatory minimum statute, several special offense characteristics will likely apply to the "typical" case. For example, Commission data shows that the enhancement for the use of a computer, included by the Commission in many of the child pornography guidelines as directed by Congress, will apply in about 90% of the cases. Thus, a base offense level of 26 would result in a sentence above the mandatory minimum in 90% of the cases, even assuming no other enhancements applied and a Criminal History Category I. Moreover, there are multiple and cumulative special offense characteristics which are likely to apply in the typical case. Accordingly, we have recommended base offense levels that incorporate the mandatory minimum sentence and, thereby, ensure that the least serious offenses within Criminal History Category I will be sentenced to the mandatory minimum while at the same time ensuring that the sentences for more serious offenses having multiple special offense characteristics and within higher criminal history categories are sentenced more severely and are proportionally distributed between the mandatory minimum and statutory maximum set by Congress. This distribution is analogous to drug cases where the sentences are proportionally distributed between the mandatory minimum and statutory maximum based upon the amount of the drug. A base offense level lower than 24, however, will not give full effect to the special offense characteristics and will result in cases with and without special offense characteristics to receive the same sentence.

More culpable conduct involving distribution offenses would be subject to several enhancements, under proposed subsection (b)(2). The new, broad, definition of "Distribution" contained in the proposed Application Notes would ensure that behavior such as distribution and possession with intent to traffic result in an increased sentence.

We believe one gap in the proposal is that there is no enhancement for advertisement, which also involves the prospect of distribution. Generally, advertising offenses under § 2251(d)(1)(A) (formerly § 2251(c)(1)(A)) now are sentenced pursuant to §2G1.1. To the extent that some advertising offenses (such as § 2252A(a)(3)(B)) will be sentenced pursuant to §2G2.2, we believe a two level enhancement should be provided for advertising. This could be accomplished either by adding a provision to subsection (b)(2) or by expanding the definition of "Distribution" to include advertising.

3. §2G2.2(b)(2) – "Defendant's Conduct" or "Offense Involved"

The Commission has recommended amending the language which triggers the different base offense levels in the consolidated §2G2.2; making the higher base offense level applicable only if "defendant's conduct" included the more culpable factors rather than if the "offense involved" the more culpable factors. The Department strongly disagrees with this approach. Such a change would insulate conspiracies from appropriate upward adjustments, contrary to the generally applicable federal sentencing scheme. We believe a defendant should receive an enhancement for distribution, for example, if he was involved in a conspiracy to distribute, even if he himself did not distribute the material. The Commission's proposal may be motivated by a concern that a defendant not receive an enhancement for distribution when he only received child pornography. This concern is valid. However, a better way to address the concern would be to add an application note making it clear that a defendant should be liable only for his own conduct, unless he is part of a conspiracy or criminal enterprise.

4. Enhancement for Bestiality or Excretory Material

We suggest that the Commission consider clarifying the enhancement in §2G2.2(b)(3) for material that "portrays sadistic or masochistic conduct or other depictions of violence" to ensure that it includes material containing bestiality or depicting excretory functions. Material that depicts bestiality or excretory functions is harmful in ways similar to that depicting sadistic or masochistic conduct or other depictions of violence, and we believe should be treated accordingly. The distribution of such material warrants an enhancement, because of the degradation inflicted on persons depicted in images. While we believe that there is an argument that bestiality and excretory material are already encompassed by the existing sadistic and masochistic enhancement, a clarification making it explicit should be considered.

5. Enhancement for Video Clips

We agree with the definition of "image" proposed by the Commission. However, we urge that an enhancement be provided for "moving images" such as video, streaming video, etc. The proposed definition correctly limits the definition of "image" to the visual depiction itself, rather than the humans depicted in it. Although "image" is not defined in 18 U.S.C. § 2256, the definition of "visual depiction" in § 2256(5) suggests that "image" properly refers to the visual depiction itself, rather than to each human depicted. Defining "image" to include each human depicted is somewhat inconsistent with § 2256 and probably would not make a significant difference in the vast majority of cases.

Determining how many "images" are in a video/movie clip is more complex. A definition that treated a video/movie and a still image as both being one image, we believe, would be arbitrary. A video/movie that contains even one second of sexually explicit conduct is a more serious item than a still image. The Motion Picture Association of American defines video as 24 frames per second. Each frame is equivalent to one still image. Thus, a one minute video is equivalent to 1440 still images. While counting each minute of video as 1440 images would be inappropriate, considering the increased harm caused by moving videos, a two or three level enhancement for offenses that involve video clips (defined as any type of moving images) would be appropriate.

6. §2G2.2(c)(1) Cross Reference to Production Guideline

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

B. Production of Child Pornography Offenses – §2G2.1

1. Choice of Base Offense Level

Similar to our analysis regarding §2G2.2, we believe the base offense level for offenses involving the production of child pornography should balance appropriate sentence length (arrived at in consideration of applicable mandatory minimum statutes) with the ability of specific offense characteristics to adjust sentences in appropriate cases. For production offenses, the mandatory minimum sentence was increased from ten to 15 years by the PROTECT Act, which lies within offense level 34 or 36. Similar to the analysis in determining the base offense level in §2G2.2, we believe a base offense level of 34 or 36 will ensure that the least serious offenses within Criminal History Category I will satisfy the mandatory minimum while sentences

for more serious offenses and offenders will be proportionally distributed between the mandatory minimum and statutory maximum set by Congress.[4]

2. Enhancement for Conduct Described in 18 U.S.C. §§ 2241 and 2242

We believe a four level enhancement is warranted if the production offense involved conduct described in 18 U.S.C. § 2241(a) or (b). The same conduct receives a four level enhancement under §2G1.3 and includes the most egregious aspects of sexual abuse, including force and threats of death. It is, however, a significant oversight that the almost equally reprehensible conduct described in 18 U.S.C. § 2242 has not previously led to an enhancement under these guidelines. Section 2241(a)(2), for example, includes causing someone to engage in a sexual act by threatening that person with death or serious bodily injury. Section 2242(1) includes engaging in a sexual act by otherwise threatening the victim. Similarly, § 2241(b)(2) includes engaging in a sexual act with a person after surreptitiously administering an intoxicant that impairs that person's ability to appraise or control his or her conduct. Section 2242(2) includes engaging in a sexual act with a person who is physically incapable of declining participation in that sexual act. The conduct described by both of these statutes involves an even higher level of culpability than the behavior typically covered by §2G2.1 and §2G1.3. Therefore, we believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242."

3. Choice of Enhancement for Sadistic or Masochistic Material

We believe the enhancement at §2G2.1(b)(2) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be four levels, consistent with that in §2G2.2(b)(3). Additionally, this enhancement should be broadened to include material containing bestiality or depicting excretory functions, as described earlier.

4. Choice of Enhancement for Distribution

We believe the table of enhancements for distribution in §2G2.2(b)(2) should similarly apply in the guideline for child pornography production. For example, there should be at least a five level enhancement for production of child pornography for pecuniary gain or the receipt of a thing of value. Similarly, an offense that involved the distribution to a minor should receive a five level enhancement. Other types of distribution should receive a two-level enhancement.

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[4]It is not clear to us that §1591 crimes should be referenced directly to §2G2.1. Rather, we believe such offenses would more logically be sentenced under §2G1.3 and §2G1.1. We do believe a cross reference to §2G2.1 would be appropriate in some cases.

II. Travel and Transportation Cases

A. Proposed Amendment to §2G1.3

1. Choice of Base Offense Level

A five year mandatory minimum prison sentence applies to crimes under 18 U.S.C. §§ 2422 and 2423(a), which is roughly equivalent to an offense level 24 or 26.[5] Hence, we believe the base offense level should be set at 24 or 26.

2. Clarification of Enhancement for Conduct Described in 18 U.S.C. § 2241

Variations of the enhancement contained in §2G1.3(b)(2) – for conduct described in § 2241 – are contained in other guidelines, such as §2G2.1(b)(4) in cases involving the production of child pornography. There are certain complexities in the cases covered by §2G1.3, however, which make this enhancement and its application note confusing. For example, a person convicted of sex trafficking of children under 18 U.S.C. § 1591 may be a pimp who used physical force against a minor to get the minor to engage in commercial sex acts with others. A defendant in such a situation might argue that because the conduct described in § 2241 involves engaging in a sexual act with a person by means such as force or the administration of intoxicants, the offense for which he was convicted is not subject to the enhancement unless he actually had sex with the minor. Similarly, a person may be convicted under § 1591 for harboring a minor knowing that the minor would be caused to engage in a commercial sex act. In addition, such a defendant might know that the pimps with whom he or she was working used physical force to obtain the compliance of minor victims. Such a person, who knowingly benefits from the use of force (by others) to cause minors to engage in commercial sex acts (with others), we believe, should also be subject to the enhancement contained in §2G1.3(b)(2). A clarification could be effected by adding a sentence such as "the enhancement in subsection (b)(2) is to be construed broadly to include all instances in which the offense involved the use of force or other conduct described in § 2241(a) or (b). It may apply even if the defendant did not personally use force against the minor or did not personally engage in a sexual act with the minor."

There is one additional complicating factor, which is that Congress has set a higher maximum sentence of life imprisonment for cases under § 1591 not only involving force, but also those involving fraud or coercion against victims less than fourteen years of age. See 18 U.S.C. § 1591(b)(1). Yet, an enhancement simply tied to conduct described in § 2241(a) or (b) would not cover an offense involving fraud, for example. Additionally, an initial review of other

[5]Section 2G1.3 also applies to sex trafficking offenses, which includes the use of children for commercial sex acts.

statutes and guidelines involving sexual abuse of minors indicates that the age of fourteen is not chosen anywhere else as the cutoff point for liability or enhanced punishment. It may therefore be appropriate to have the enhancement in §2G1.3 tied more broadly to the use of force, fraud or coercion or to add an additional enhancement for offenses involving fraud or other conduct not covered by the enhancement for conduct described in § 2241.

3. Additional Enhancement for Conduct Described in 18 U.S.C. § 2242

As discussed above, we believe it is a significant oversight that the conduct described in 18 U.S.C. § 2242 has not previously triggered an enhancement under the guidelines. We believe an enhancement of three levels should be added to §2G2.1(b) if "the offense involved conduct described in 18 U.S.C. § 2242." Such an enhancement is especially advisable because cases involving conduct described in § 2242 were subject to a cross reference to §2A3.1 under previous guidelines and were thus treated as seriously as offenses described in 18 U.S.C. § 2241(a) or (b).[6]

4. Choice Between Option 1A or 1B

Both Option 1A and Option 1B provide for higher sentences for offenses that involve minors under the age of 12. Option 1A would do so through an enhancement while Option 1B would do so through a cross reference to §2A3.1. The language in Option 1B would also have the effect of cross referencing offenses involving minors of any age in cases involving conduct covered by §2A3.1. This includes conduct described in § 2241, which is already subject to an enhancement under §2G1.3(b)(2). We believe the enhancements in Option 1A provide a much clearer approach as long as the resulting offense level is as high as the offense level that would be imposed under §2A3.1; we believe an eight-level enhancement for offenses involving minors less than twelve years of age would be appropriate.

5. Enhancement for Minor Between the Ages of 12 and 16

Like the child pornography production guideline §2G2.1, §2G1.3 covers offenses involving sixteen or seventeen-year-old victims (for example, offenses under § 1591). Like §2G2.1, we think there should be a second enhancement for minors between the ages of 12 and 16. Under Option 1A, §2G1.2(b)(3) might read: "If the offense involved a minor who had (A) not attained the age of 12 years, increase by eight levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by four levels."

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[6]An application note should be added here as well to clarify that the enhancement applies to those such as recruiters or pimps who may not themselves apply force or coercion against a minor or have sex with a minor but who are nevertheless responsible for the use of such means in connection with the offense.

6. Choice Between Option 2A and 2B: Need for a Broader Enhancement

Because § 1591 cases involving minors are covered by this guideline, Options 2A and 2B are both overly narrow and would lead to inconsistent results. Options 2A and 2B provide an enhancement for the conduct described in 18 U.S.C. § 2423(d), which targets those who facilitate the travel of a participant knowing that the participant is engaging, or will engage, in illicit sexual conduct. Illicit sexual conduct includes both non-commercial and commercial sexual activity. Section 1591(a)(2) has a similar provision covering those who knowingly benefit from a venture involving the use of a minor in commercial sexual activity. This similarly culpable conduct should also result in an enhancement. In addition, §§ 1591 and 2423 both cover the activities of pimps, or those who directly entice, transport, or sell children for commercial sex acts. This extremely reprehensible conduct is not presently subject to any enhancement under §2G1.3. Perhaps the simplest solution is to replace 2A and 2B with an enhancement, such as: "If the offense involved a commercial sex act, increase by three levels." "Commercial sex act" could be further defined by reference to § 1591(c)(1).[7]

7. Multiple Victims

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

8. Comment on Subsection (d)(1)

The special instruction in subsection (d)(1) refers to "victim" instead of "minor." Due to the new definition of "minor," which includes undercover law enforcement officers, we believe "minor" should be substituted for "victim." While the definition of "victim" in Application Note 7 includes undercover law enforcement officers, using two different terms to cover the same situations could cause confusion. The similar instruction in §2G2.1(d)(1) uses the term "minor."[8]

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[7]As is the case with the cross reference contained in §2G2.2(c)(1) (and similar cross references throughout the guidelines), the cross reference in §2G2.4(c)(1) should make clear that it applies when the defendant has unsuccessfully sought or solicited a "minor" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

[8]Application Note 6 addresses the cross reference to the production guidelines contained (c)(1). While the cross reference uses the broadly-defined term "minor," the application note uses the term "person less than 18 years of age." We believe this language is confusing and should be changed to "minor."

B. Proposed Amendment to §2G1.1

While the proposed new §2G1.1 would cover only cases involving adult victims, it would nonetheless apply to a broad range of offense conduct. It would cover cases under 18 U.S.C. §§ 2421 and 2422(a), in which the participation of the person transported or enticed to travel for prostitution may have been entirely voluntary; it would also cover 18 U.S.C. § 1591 offenses, in which it must be proven that the defendant knew that force, fraud or coercion would be used to cause a person to engage in a commercial sex act. Given this background, we believe the combination of the enhancement in subsection (b)(1) for "physical force, fraud or coercion" and the cross reference at (c)(1) for criminal sexual abuse is very confusing. Criminal sexual abuse refers back to §§ 2241 and 2242, which include everything subject to the enhancement in subsection (b)(2), except fraud and perhaps some sort of coercion. As an initial matter, then, all § 1591 cases involving adults would seem eligible for the enhancement contained in (b)(2). If the cross reference is properly applied, however, the only § 1591 cases remaining under §2G1.1 would be those involving fraud or some sort of coercion not described in §§ 2241 or 2242. A subset of cases under 8 U.S.C. § 1328 and 18 U.S.C. §§ 2421 and 2422(a) would also be subject to the enhancement under (b)(2) or to the cross reference. The cross reference and enhancement are also marked by some of the complexities discussed in relation to similar enhancements under §2G1.3 involving culpability of those who recruit or harbor a victim knowing that force will be used to cause the person to engage in a commercial sex act but may not themselves use force against the victim or have sex with a victim. We therefore recommend that the enhancement be narrowed so that it does not overlap with the cross reference and that the cross reference itself be clarified.

1. Narrowing the Enhancement for Force, Fraud or Coercion

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

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

2. Clarification of Cross Reference

We believe the cross reference should be clarified to indicate that all offenses involving force or coercion, such as threats of violence, are subject to the cross reference. Whether the language of the cross reference is changed to parallel the language of the enhancement in §2G1.3(b)(2) or not, it is essential to clarify the cross reference through the application note so that it is clear that a pimp who uses force to cause a person to engage in prostitution is subject to the cross reference.

Similar to the application note for §2G1.3(b)(2), Application Note 4 should be revised to clarify that the cross reference applies when the defendant knowingly participates in an offense involving force or threat. The application note could, for example, include the following:

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

III. Obscenity and Misleading Domain Names – §2G3.1

Similar to our earlier comments, the enhancement in §2G3.1(b)(4) for material that "portrays sadistic or masochistic conduct or other depictions of violence" should be broadened to include material containing bestiality or depicting excretory functions.

IV. Conditions of Probation and Supervised Release – §5B1.3 and §5D1.3

We recommend that the language at §5B1.3(d)(7)(B) and §5D1.3(d)(7)(B) read, "A condition limiting or prohibiting the use of a computer or an interactive service in cases in which the offense involved the use of such items." We believe that "or prohibiting" should be included to make explicit the court's ability to ban computer use by the defendant. Additionally, we believe "the offense involved" language is preferable to the "defendant used" in order to account for situations in which the defendant was part of a conspiracy or criminal enterprise.

V. Chapter 2, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

A. Proposed §2A3.1 – Option 1, Option 2, or Option 3

The Commission has provided three options in §2A3.1 to cover cases involving the production of child pornography. Option 1 does not appear separately to account for circumstances in which the offense involved the production of child pornography. Option 2 does account for such circumstances, but by way of an enhancement, which in our view is more likely to cause confusion than a clear cross reference. Accordingly, we support Option 3, as it provides an appropriate cross reference to the production guideline in §2G2.1 and thus ensures that all production cases will be sentenced under the same guideline.[9]

B. Proposed §2A3.2 – Base Offense Level

As currently drafted, the base offense level for §2A3.2 offenses will be 18, with no enhancements for violations of Chapter 117. Given that §2A3.2 would be the guideline applicable to an offender who had sex with a 12-year-old (the oldest victim typically sentenced under this guideline would be 15), we believe the base offense level should at least be commensurate with that for enticing a child (who may be an undercover officer) to engage in sexual activity. Moreover, an offender who had sex with an 11-year-old would be sentenced under §2A3.1, which under any proposal under consideration would have a base offense level of at least 27, and perhaps as high as offense level 36. Under these circumstances, we do not

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[9]If Option 3 is used, we note that Application Note 6 (discussing the enhancement under Option 2 if the offense involved the production of child pornography) should be deleted. If the Commission selects Option 1, we recommend that the base offense level under §2A3.1(a)(1) be 36, and the base offense level under §2A3.1(a)(2) be 30. If Option 2 is chosen, we recommend that the base offense level under §2A3.1(a) be 30. Moreover, if Option 2 is chosen, we recommend that the enhancement under §2A3.1(b)(7) be three levels to avoid inconsistency with §2G2.1. Overall, these recommendations are based on our belief that §2A3 guidelines should be increased to maintain proportionality with increases in the base offense levels in the §2G guidelines.

believe that there should be such a great disparity between the base offense levels for §2A3.1 and §2A3.2. Accordingly, we recommend that the base offense level for §2A3.2 be increased.[10]

C. Proposed §2A3.3 – Base Offense Level

Because we believe that increases in the §2A3 guidelines should be increased to maintain proportionality with the increases in the §2G guidelines, we recommend that the base offense level for §2A3.3 offense be increased to 12. This increase will mean that even if neither enhancement applies and the offender receives all three levels for acceptance of responsibility, the guideline range would still call for at least four months' imprisonment.

D. Proposed §2A3.4

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

VI. Responses to Issues for Comment Not Addressed Above

A. Violent Child Pornography

The Department agrees with the Seventh Circuit's decision in United States v. Richardson, 238 F.3d 837 (7th Cir. 2001), finding strict liability for receiving violent child pornography. We do not believe that the Commission should provide a definition of sadistic or masochistic conduct or other depictions of violence that would unduly constrain courts in determining whether specific images portray sadistic or masochistic conduct. If a definition is proposed, it should be broad enough to include conduct that is per se painful, coercive, degrading or abusive, such as material portraying sexual penetration of prepubescent minors. As we discuss above, we recommend that the Commission clarify that the enhancements for material that "portrays sadistic or masochistic conduct or other depictions of violence" include material depicting bestiality or excretory functions.

B. Offenses Under 18 U.S.C. § 2425

We recommend that offenses under 18 U.S.C. § 2425 be sentenced pursuant to the proposed §2G1.3. We do not believe that § 2425 offenses should be analogized to harassment or threatening communications offenses, because § 2425 offenses include, for example, defendants

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

trafficking in child prostitutes and using interstate facilities to transmit information about the minors. Thus, §2G1.1, which now applies only to offenses involving adults, would not be the appropriate guideline. Similarly, §2A6.1, which covers offenses involving threatening or harassing communications and has a base offense level of 12, would also be inappropriate, because its base offense level does not adequately account for the severity of the conduct involved. We note that other offenses similar to § 2425 offenses, such as §§ 1591, 1421, 2422(b), and 2423 offenses, are all sentenced pursuant to §2G1.3. With respect to the Commission's question concerning whether any specific offense characteristic should be added to a guideline to account for § 2425 conduct, we believe that the enhancement at §2G1.3(b)(7) is sufficient.

C. Incest

Incest is, of course, a particularly heinous crime and usually involves both an abuse of trust as well as care, custody, or control of the victim. We have seen that in cases where incest has occurred, courts have sometimes applied the abuse of trust guideline in §3B1.3. While this guideline seems particularly applicable to incest crimes, we believe the Commission should explicitly specify in §3B1.3 that offenses involving incest should receive the two-level enhancement. The enhancement at §3B1.3 should be in addition to any available enhancement for care, custody, or control of the victim, which may, but does not always, apply. While we recognize that the Commission is considering an enhancement for offenses involving incest in the §§2A3.1 through 2A3.4 and §§2G1.1 through 2G3.1 guidelines, we believe that including such an enhancement at §3B1.3 would maximize the likelihood that the enhancement were applied in all appropriate cases. The relationships that should be listed in §3B1.3 include:

1) Father and daughter or stepdaughter or son or stepson;

2) Mother and daughter or stepdaughter or son or stepson;

3) Siblings of the whole blood or of the half blood;

4) Grandparent and grandchild;

5) Aunt and nephew or niece; and

6) Uncle and nephew or niece.

D. Interactive Computer Service

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

EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

I. Introduction

We commend the Commission for having had the foresight to convene the Advisory Group on Organizational Sentencing Guidelines and in so doing fulfilling the Commission's ongoing statutory responsibility to regularly review the sentencing guidelines, including the guidelines for organizational crime. We also want once again publicly to thank the members of the Advisory Group for their service and for the thoughtful and comprehensive report the Group prepared.

The proposed amendments to the sentencing guidelines for organizational defendants, recommended by the Advisory Group and published by the Commission, are intended primarily to give greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendments add to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies for the first time in the body of the sentencing guidelines the purposes of an effective compliance program, sets forth more clearly the seven minimum steps for such a program, and provides greater guidance for their implementation. We strongly support these amendments. We believe compliance programs are key to reducing crime within organizations and that the sentencing guidelines for organizations have been not only a real innovation but also a great success in providing incentives for organizations to develop and operationalize these programs. The proposed amendments will communicate to the corporate community, with greater emphasis and clarity, the federal policy of encouraging self-policing through effective compliance programs and self-reporting if violations of law are detected. Moreover, the continuing policy of ascribing a benefit to having such programs will, we believe, likely lead to better compliance programs and practices and increased information to corporations about monitoring their own conduct and self-reporting any misconduct.

Despite our general support for these amendments, we do have concerns about a few specific provisions of the proposed amendments.

II. Rebuttable Presumption When High-Level Personnel Are Involved In Crime

Currently, there is a provision in §8C2.5(f) that prohibits an organization from receiving a three level downward adjustment to its culpability score for having an effective compliance program if an individual within high-level personnel of the organization, or a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed, or an individual responsible for the administration or enforcement of a compliance program participated in, condoned, or was willfully ignorant of the offense; and there is a rebuttable presumption against receiving the adjustment if an individual within substantial-

authority personnel participated in the offense. The Commission proposes to delete this provision in its entirety and replace it with one that creates a rebuttable presumption against receiving the adjustment where high-level personnel of the organization participated in, condoned, or were willfully ignorant of the offense. The synopsis to the proposed amendment indicates that "this modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f)." In its issues for comment, the Commission "requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?"

We oppose this proposed change for several reasons. First, we do not believe the proposed amendment logically is suggested by or flows from the Advisory Group study, report, or recommendations. The Advisory Group report notes that small organizations rarely qualify for the three level downward adjustment to their culpability score for having an effective compliance program. Two causes are mentioned: one, small organizations frequently fail to establish effective compliance programs, and two, the involvement of high-level officials in the commission of an offense is likely in the case of the small, closely-held organizations that are in fact prosecuted in federal court and that do make up the majority of organizations sentenced under Chapter 8. Report at 131-32. The only recommendation related to small organizations made by the Advisory Group is that "the Sentencing Commission devote resources to reaching and training this target audience (small organizations), perhaps through coordinating with the Small Business Administration and other appropriate policy makers." Report at 133. The Report provides little or no support for the proposed amendment beyond the language already quoted.

Second, we do not believe simply making it easier for small organizations to qualify for the adjustment for having an effective compliance program by creating a litigatable issue is good public policy. By definition, it is more likely that crime involving small organizations (as compared to larger organizations) will involve high-level personnel. But whether in a small organization or large, when high-level personnel are involved in crime, there can be no effective organizational self-policing and therefore no downward adjustment for an effective compliance program is warranted.

Yet, even if the Commission found the small business rationale compelling, the proposed amendment is considerably overbroad. It sweeps away the current automatic preclusions on receiving the adjustment for high-level personnel involvement in the offense, as well as the rebuttable presumption against receiving the adjustment for substantial-authority personnel involvement in the offense, for all organizations, large and small. There is no discussion in the Report concerning the need to make it easier for large organizations to qualify for the adjustment despite high-level or substantial-authority personnel involvement in the offense of conviction. In

fact, such a change would be directly contrary to the thrust of the Report, which is to increase the involvement of governing authorities and organizational leadership both in the oversight of compliance programs and, more significantly, in creating law-abiding organizational cultures.

> [T]he corporate scandals that exploded shortly following the tenth anniversary of the adoption of the organizational sentencing guidelines demonstrated that the involvement of officers and directors in corporate crime was not confined to small businesses. The corporate scandals of 2002 greatly contributed to the public's lack of confidence in the capital markets. In virtually all of the scandals, the alleged malfeasance occurred at the senior management and/or governing authority level. Where there was no actual malfeasance by members of the governing authority, there were often instances of negligence.

Report at 57.

As a result of this finding, the amendments now under consideration would require higher levels of awareness of, and involvement in, compliance programs by governing authorities and organizational leaders in order for those programs to be considered to be effective. They also propose that to be considered effective a compliance program must not only be designed to prevent and detect violations of law, but it must also "promote an organizational culture that encourages a commitment to compliance with the law." Proposal at 60. We believe to propose, at the same time, an amendment that would make it easier to qualify for the adjustment where there is actual involvement in (or willful negligence of) the instant offense by high-level and substantial-authority personnel is inconsistent at best. The involvement of these personnel in compliance programs is the clearest indication of a law-abiding organizational culture and their involvement in criminal activity the clearest indication that the organization's compliance program is ineffective. That was the reason that the limitations on receiving the adjustment were originally imposed, and the spectacular failure of the leadership of numerous large organizations in recent years to obey the law is the strongest possible argument in favor of retaining them.

For example, in many recent major international antitrust/cartel prosecutions, including the prosecutions of Archer Daniels Midland Company, UCAR International Inc., and F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft, high-level personnel participated in and, in fact, were among the leaders of the cartels. It is impossible, as many of the proposed amendments put forward by the Advisory Group and the Commission recognize, to create a law-abiding organizational culture from the bottom up; respect for the law must begin at the top and permeate downward by means of an effective compliance program. If an organization is rotten at the top it cannot be the good corporate citizen that the adjustment for having an effective compliance program was designed to reward.

This is true to an equal, if not greater, extent in small organizations as in large. Clearly, there should be distinctions between what large and small organizations must do to establish effective compliance programs. An effective compliance program in a small organization may be much less formal than in a large organization. The Commission proposes to add commentary to the guidelines making this plain, and we support this commentary. "For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business." This proposal recognizes that in a small organization the personal involvement of an owner/manager is the key element to creating an effective compliance program. Yet how can personal involvement create a law-abiding organizational culture when the manager or proprietor is engaged in unlawful activity?

To the extent that small organizations are not receiving credit for having effective compliance programs, the better solution is the one identified by the Advisory Group: making greater efforts to educate small companies on their obligations under the law and working with them to establish effective compliance programs, rather than giving them credit for compliance programs despite the participation of their owners and high-level managers in criminal activity. Adopting the proposed amendment, even revised to apply only to small organizations, would send exactly the opposite message to the one being sent by virtually every other change being proposed by the Commission regarding compliance programs.

III. Waiver of Attorney-Client Privilege and Work Product Protections

There has been considerable debate – within the Advisory Group and beyond – about the circumstances under which an organization ought to be asked to waive the attorney-client privilege or its work product protections in order to receive a reduction in its culpability score for cooperation with the government or to receive a downward departure for providing substantial assistance in the investigation or prosecution of another. The Department's position on this has been, and continues to be that what is required to receive these reductions is simply cooperation and substantial assistance; and that neither waiver of the attorney-client privilege nor waiver of the work product protections are prerequisites to receiving these reductions. We recognize and the Advisory Group recognized, however, that in many cases, cooperation and substantial assistance will not be fully achieved unless there is a waiver of some kind. It comes down to a case-by-case analysis, depending on the particular circumstances of the investigation.

It is for these reasons that we accept the proposed new language in §8C2.5, Application Note 12, that clearly indicates that in certain circumstances, but not all cases, a waiver will be necessary to receive the reduction in the culpability score for cooperation. Where we believe the Application Note falls a bit short is in recognizing that the government is in a unique position to assist the court in determining whether the defendant has effectively cooperated and whether a waiver if the privilege or work product protection is necessary for full cooperation.

The current guideline Application Note 12 correctly points out that "[a] prime test of whether an organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." We believe that in determining whether sufficient cooperation has occurred, the sentencing court should consider all evidence but should give extra weight to the government's assessment of the defendant's cooperation and the government's assessment of the sufficiency of the cooperation in identifying the nature and extent of the crime and those responsible. We think the language of the proposed Application Note would be improved with the following:

> If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in other circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation. Substantial weight should be given to the government's evaluation of the extent of the defendant's cooperation and whether waiver of either the privilege or work product protections is necessary to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

IV. Substantial Assistance

These same principles surrounding the waiver of the attorney-client privilege and the work product protections apply in the context of substantial assistance motions. However, one critical difference between substantial assistance departures and reductions in culpability score for cooperation is that under existing statutes and guidelines, the availability of a substantial assistance departure is triggered only by the government. Simply put, departures for substantial assistance pursuant to 18 U.S.C. § 3553(e), §5K1.1, or §8C4.1 may not be made absent a motion by the government. In Wade v. United States, 504 U.S. 181, 185-86 (1992), the Supreme Court clearly held that the making of a substantial motion is the sole prerogative of the government. The only authority a district court has to review a prosecutor's refusal to file such a motion and the only authority a court has to grant a remedy is if the court finds "that the refusal was based on an unconstitutional motive." Id. The Court gave as an example of an unconstitutional violation the refusal to file the morion "because of the defendant's race or religion." Id.

We believe that proposed Application Note 2 in §8C4.1, which mirrors Application Note 12 in §8C2.5, suggests that the government's determination of whether or not to file a substantial assistance motion is reviewable, at least to the extent that the government's determination may hinge on a waiver of the privilege or waiver of the work product protections. We think this

suggestion is at best confusing and at worst contrary law. We strongly urge that this proposed application note be eliminated.

BODY ARMOR

We support the Commission proposal to create a new guideline, at §2K2.6, to cover the new offense of possessing, purchasing, or owning body armor by a violent felon – 18 U.S.C. § 931. We believe that a base level of 12 is appropriate for the new guideline, which would provide a sentence of 8-14 months for a typical offender in Criminal History Category II, well below the three year statutory maximum penalty. In creating this new crime, Congress found that body armor enables armed criminals to both cause more harm and be more difficult to apprehend. The congressional findings specifically cite three separate incidents of law enforcement officers who were killed during shootouts with armed criminals shielded by body armor. We share Congress's belief that armed criminals protected by body armor are an extremely serious threat and believe that a base offense level of 12 properly reflects that threat.

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

PUBLIC CORRUPTION

I. Introduction

We support the majority of the proposed changes to the public corruption guidelines, and, in particular, agree with the effort to reduce the emphasis on the dollar amounts involved in the crime in calculating the offense level under the primary corruption guideline, §2C1.1. We appreciate the opportunity over the course of the last several months to work with the Commission to develop a workable and effective sentencing policy for corruption cases. We recognize, however, many of the technical difficulties related to sentencing policy for these cases. For example, we have been working with the Commission closely on the proposed consolidation of the guideline for bribery offenses (§2C1.1) with that for honest services fraud (§2C1.7). In our view, the consolidation is not necessary and raises issues stemming from the special nature of honest services fraud cases. Several of our specific comments are designed to address these issues and insure that no substantive change in the coverage or scope of the guidelines results from the consolidation. For example, we do not think it is the intent of the Commission – and we oppose – any amendments that will have the effect of reducing the number of defendants who will receive an enhancement as a result of holding a high-level decision-making or sensitive position. We have included, at the end of this section of the letter, a draft of the applicable guidelines which include revisions along the lines of our comments below.

II. The Proposed Consolidated Guideline at §2C1.1

A. Title

The title of the proposed new §2C1.1, which is a product of the consolidation with §2C1.7, we believe should include the phrase "Conspiracy to Defraud by Interference with Governmental Functions," which is currently included in the title of §2C1.7. Similarly, the Statutory Provisions section of the commentary should include a reference to18 U.S.C. § 371. As mentioned above, we do not believe it is the intent of the Commission, and we do not believe the consolidation of §2C1.1 and §2C1.7 should result in any change to the sentencing for this conspiracy offense, which is closely related to the honest services mail and wire fraud offense, but which is grounded in a different statute. Absent this revision, an inference will be drawn that this conspiracy offense is no longer covered by this guideline.

B. More Than One Bribe

The proposed specific offense characteristic §2C1.1(b)(1) would require a determination of whether the offense involved more than one "incident" of bribery or honest services fraud. In the context of corruption cases, and honest services fraud in particular, the use of the term "incident" would be ambiguous and difficult to apply. We suggest two alternative ways of dealing with this problem. First, the two level increase could be folded into the base offense level, raising it to a level 14, and eliminating any litigation regarding the issue. Given that this enhancement applies in a large majority of cases, we think this would be an appropriate step. Second, if the enhancement remains, we propose that it remain as it is worded in the current guideline, to avoid any confusion.

C. "Unlawful Payment"

The proposed language for §2C.1.1(b)(2) reflects the addition of a new phrase: "unlawful payment." We believe that the use of this new term, with a new definition in the proposed commentary, is unnecessary, and will inappropriately miss instances that occur frequently in honest services cases and cases involving conspiracies to defraud the United States. In those cases, the corruption may occur despite the absence of any payment. For example, an honest services case might involve a city council member who has an undisclosed financial interest in a company that is a bidder on a contract on which the city council votes. The city council member's hidden financial interest is not in the form of a payment, but it is a financial interest that causes corruption, and it should be taken into account in calculating the appropriate offense level.

Instead, we suggest that, if there is a consolidated guideline, the language that is currently used in §2C1.7(b)(1)(A), regarding honest services cases, be used in the new, consolidated guideline. Specifically, we believe that the specific offense characteristic should begin with the following language: "If the value of anything obtained or to be obtained by a public official, the

benefit received or to be received in return for the payment, or the loss to the government from the offense . . ." This broad language covers all things of value obtained by public officials as a result of the offense, whether it is in the form of a payment or, as in some honest services cases, an undisclosed financial interest that may take a form other than an actual payment.

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

We agree with the proposal to make this enhancement cumulative with the enhancement for the monetary amount, rather than as an alternative. We believe that the enhancement should be four levels – currently it is eight – and also agree with the proposed a minimum offense level of 18.

We are concerned about the use of the term "payment" in this specific offense characteristic as well. As discussed above, this term will not capture aggravating conduct in many honest services cases, which do not involve direct payments to public officials. The proposed enhancement begins with the following language from the bribe guideline: "If the offense involved an unlawful payment for the purpose of influencing an official act of a public official [holding a high-level position] . . ." Consistent with the language currently used in §2C1.7, we suggest that the enhancement should simply read: "If the offense involved [a high-level official] . . ."

We have several concerns regarding the proposed language describing the officials who will qualify for this enhancement: "a public official in a high position of public trust." We believe that the proposed change will narrow the scope of the types of officials who will qualify, thus lowering the total offense levels in corruption cases. In addition, we believe that this revision to guideline language and commentary that has been used for many years will unsettle matters unnecessarily.

First, for many years now, this enhancement has applied to all elected officials, and, under the proposed amendment, elected officials would no longer automatically receive this enhancement. We believe that this bright line rule is effective and that it is important that this enhancement apply to any public official who is elected by the voters. Regardless of the particular title that a person holds, when a populace or government determines that a position is of sufficient importance that the officeholder should run for office and be elected by the voters, that person holds a position of elevated public trust that warrants a sentencing enhancement if corrupted. We are not aware of any federal case in which this enhancement has been applied to an elected official whose authority and position of trust did not warrant such an enhancement. To the extent that courts may have been hesitant to apply the enhancement in a particular case, that hesitancy will be reduced by the fact that, in most cases, the enhancement will now be only four levels, rather than eight.

Second, the proposed language does not include individuals who hold "sensitive" positions, as the current guideline does. Thus, for example, there is no enhancement for someone who is not an "agency head" but who holds a position in which he is entrusted with particularly sensitive information or decisions. Similarly, we believe that a juror holds a sensitive position, but not a "high position," and, as the proposed commentary indicates, an offense involving a juror should qualify for this enhancement. If the language regarding sensitive positions is removed, we are concerned that the enhancement will apply only to "agency heads."

Third, the proposed commentary indicates that the "high position of public trust" involves a greater level of trust than that required under §3B1.3 (Abuse of Trust). The language in the commentary to §3B1.1 indicates that §3B1.1 applies only where the public official has "substantial discretionary judgment that is ordinarily given considerable deference." By placing the bar even higher than this already elevated level, the proposed §2C1.1(b)(3) enhancement will apply to a narrower range of cases than the enhancement in the current guideline. We do not believe that the amendments should reduce the range of cases in which this enhancement will apply.

Finally, the language that is currently employed in §2C1.1 and §2C1.7 ("high-level decision-making or sensitive position") and accompanying commentary has been used and interpreted by prosecutors, probation officers, and the courts for years now. We believe that adopting new language will unsettle matters considerably as the courts attempt to discern precisely how much higher the new bar should be placed relative to where it has been. We do not see a corresponding benefit to be derived from the change.

E. Enhancement for Public Officials

The proposed amendment includes an enhancement for defendants who are themselves public officials, as opposed to the defendants who bribe and corrupt them. Although we agree with a two level enhancement for public officials as part of the overall revisions proposed by the Commission, we note that this automatic enhancement may be inconsistent with proposed Application Note 8, which indicates that the non-public official may be more culpable in some cases. We do not see any need for this proposed application note, given that it should be clear to prosecutors, probation officers, and judges that the relative culpability of participants in any crime depends upon their individual roles in the crime.

F. Enhancement for Border Related Crimes

We agree with the proposal to add an enhancement for an offense that involves allowing people, vehicles, and cargo into the county. We do not, however, believe that the enhancement should single out the United States Customs Border Protection Inspectors for the enhancement. Instead, we think it should apply in any case involving anyone, including a Border Protection Inspector, who commits an offense that permits things to enter the country illegally. The

potential defendants could include data entry personnel, administrative assistants, supervisors, law enforcement personnel, and the people who corrupt them.

We believe that the enhancement should not use the term "unlawful payment." As discussed above regarding §2C1.1(b)(2), we believe that this will fail to cover certain forms of honest services mail and wire fraud, or conspiracies to defraud the United States.

G. Proposed Application Note 1 – Definitions

We do not believe that there is any need to define the term "bribe." There is no such definition in the current guideline or in title 18, and we are not aware of any difficulty caused by this absence. We also do not believe that the term "official act" should be included in §2C1.1(b)(3), and thus see no reason to include it in the definitions. We note that bribery includes instances in which the public official refrains from taking some official action, 18 U.S.C. § 201(b)(1)(B), and instances that involve defrauding the government without taking official action, 18 U.S.C. § 201(b)(1)(B). As a result, using this term in the guideline may result in excluding certain bribery offenses from the reach of the enhancements. We do not believe that this was the intent of using and defining this term.

We do not believe that there is any need for a definition of the term "public official." If such a definition is included, we believe that it should simply parallel the definition in 18 U.S.C. § 201(a)(1), which is designed to include individuals, such as government contractors, who act "for or on behalf of" the government under some official authority. See, Dixson v. United States, 465 U.S. 482 (1984). We also believe that the language in the proposed definition regarding a government contractor and the contractor's position of trust "with respect to a government agency" is not sufficiently clear.

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

H. Cross References

We believe the cross references for cases where the offense was committed to facilitate another criminal offense or to conceal or obstruct the investigation of another offense are important and should be maintained. For example, in a case in which a law enforcement officer solicits a bribe or extorts a payment from a drug dealer, this cross reference provides a vehicle for insuring that the offense level for the bribe or extortion will reflect the relative seriousness of the drug dealer's underlying crime. Department prosecutors have used this cross reference in such cases, and obtained substantially higher (and appropriate) sentences than would have applied without the cross-reference.

I. Issue for Comment – Election and Balloting Integrity

In response to one of the issues for comment, we think the Commission should seriously consider the addition of a two level enhancement for a bribe, extortion, or honest services offense that may affect the integrity of the balloting, voting, and election process. For example, such an enhancement might apply to an offense involving a local election official or clerk who does not hold a "high level" position, but whose position is important to the integrity of the election process.

II. Gratuity Offenses

We agree with the Commission that the gratuity guideline should be amended proportionally with the bribery guideline and that the language used should parallel the language used in the bribery guideline. However, all of the language adjustments that we propose for the bribery guideline, to ensure coverage of honest services fraud and conspiracy to defraud the United States, need not be made to the gratuity guideline.

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

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

(b) Specific Offense Characteristics

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

(2) If the loss to the government or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greatest (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.