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

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

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

* * *

Application Notes:

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

* * * * *

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

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

(b) Specific Offense Characteristics

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

(2) If the value of the gratuity (A) exceeded $2000 but did not exceed $5,000, increase by **1** level; or (B) exceeded $5,000, increase by

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

(3) If the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **15**, increase to level **15**.

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

* * *

Application Notes:

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

* * * * *

DRUGS (INCLUDING GHB)

I. GHB / GBL

Two options are provided for raising sentencing levels for GHB (gamma hydroxybutyric acid) and GBL (gamma-butyrolactone).[11] For GHB, Option One would effectively set penalties so that 1 gallon (3.785 liters) of GHB would result in offense level 26 and 10 gallons in offense level 32. Option Two would make five gallons (18.925 liters) trigger offense level 26 and 50 gallons trigger offense level 32. Either option would be a substantial improvement over the current guidelines, which require over 13 gallons (100,000 "units" as defined at §2D1.1(c) (Drug Quantity Table), Note (F)) to reach offense level 26.

[11]Both options are expressed in the proposed guidelines as liter equivalents to marijuana. GHB and GBL are illicitly distributed both as liters and gallons.

We support Option One, because we believe it is an appropriate approach to sentencing this serious drug of abuse and tool of sexual predators. To begin with, mid-level dealers work in quantities ranging from several ounces to a few gallons, and high-level dealers often sell multi-gallon quantities (even up to 55-gallon drums). We believe it is critical that the ten year guideline sentence apply to most distributors at that level. Second, while GHB is, pharmacologically speaking, a depressant, several factors with respect to its abuse and trafficking counsel against a strict dose-for-dose comparison to heroin or other Schedule I depressants in setting the guideline penalty.

- Perceived effect. Regardless of pharmacology, GHB is not only abused for its depressant /euphoric effects on the central nervous system; it is also abused for its perceived hallucinogenic effects (i.e., altered sensory sensations). GHB is more likely to be trafficked along with other club drugs that have widely accepted hallucinogenic effects, such as MDMA, ketamine and LSD. At least some segments of the abusing population ingest it for these effects, rather than its depressant properties. A very recent study stated: "[o]f the known motives for using GHB, 80% reported psychic effects."[12] GHB's popular street names "liquid ecstasy" or "liquid x" illustrate its close tie to MDMA in the abusers' minds and shows the correlation it has with club drug culture. New GHB guidelines should recognize these trafficking patterns and perceived effects.

- Young user profile. GHB is a "club drug" abused primarily by young people (though not quite as young as MDMA). DAWN statistics for 2001 indicate that 58% of drug-related emergency room episodes involved individuals aged 25 and younger.

- Use in combination. GHB is frequently used with other drugs – most often alcohol – which compounds its effect. According to the study cited above, 84% of GHB users reported using it with other drugs, including alcohol (64%), cocaine (15%), or marijuana (14%).

- "Date rape" drug. GHB is now the most prevalent drug used by sexual offenders to commit drug-facilitated sexual assaults.[13] Neither the availability of the alternative charge in 21 U.S.C. § 841(b)(7) in certain cases, nor an enhancement for drug-facilitated sexual assault along the lines being considered by the Commission, would sufficiently account for this uniquely pernicious use of the drug at the trafficking level of mid- and high-level distributors that are generally the targets of federal prosecution.

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[12]Maxwell, J.C.; *Patterns of Club Drug Use in the U.S., 2004*, Gulf Coast Addiction Technology Transfer Center, Univ. of Texas at Austin, February 2004.

[13]One street name for GHB is "easy lay."

- Ease of trafficking and concealment. GHB is easy to manufacture from widely available precursor chemicals, which are sold under the thin disguise of being "cleaning agents," "organic solvents," and the like. A drug this easy to make, and whose precursors are this easy to traffic and conceal, should be given special consideration.

- High profit margin. Like many other synthetic drugs of abuse, the profit margin for GHB is very high. Gallons of the precursors GBL or 1,4-butanediol might sell at wholesale over the Internet for about $200. They may then be broken down and sold in 4-ounce bottles. Later, after simple conversion to GHB and passing down the distribution chain, capfuls or "drops" of 1-5 grams may eventually be sold at retail for between $5 and $30, with $10 being the prevailing rate at rave events. At each stage, the solution may be diluted several times, multiplying the profit margin. Given that the initial gallon costs only $200 (undiluted) and produces about 1,000 doses, the profit margin is astounding.

In addition, more than for any other Schedule I controlled substance, distributors use the Internet to sell GHB and its analogue (and precursors). This permits high-level traffickers to work in much larger quantities than smaller traffickers, making the 10:1 quantity ratio (between the mid-level and high-level sentences) built into the guidelines somewhat inapposite to the context of Internet GHB/GBL trafficking. The guideline enhancements for use of the Internet, which we address below under "Issues for Comment," would have particular relevance for mid- to high-level GHB traffickers.

With respect to GBL as a precursor chemical addressed in §2D1.11, we understand that this guideline tracks the quantities under the drug guideline, with certain fixed quantity "discounts" used by the Commission. Thus, all things being equal, we expect that whichever decision is made with respect to the treatment of GHB in the drug quantity table would also be reflected in the guideline for GBL as a List I chemical. However, we think the Commission should seriously reconsider one element of the "discount" that assumes a 50% conversion ratio of the precursor chemical to the target controlled substance. While this discount may be appropriate (though very conservative) for ephedrine, pseudoephedrine and phenylpropanolamine – with respect to methamphetamine and amphetamine – it is not appropriate for GBL, which converts to GHB (with addition of sodium hydroxide) at a ratio of approximately 1:1. Accordingly, we do not believe this part of the "discount" calculation should apply to GBL.

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

This proposed amendment explicitly adresses, for the first time, controlled substance analogues in Application Note 5 of §2D1.1. It also provides a mechanism to address controlled substances for which there is no current reference in the guidelines in either the Drug Quantity

Table or the Drug Equivalency Tables at Application Note 10. We support the intent behind this amendment, but it has technical flaws that may serve to confuse the issue. However, these shortcomings can be easily addressed.

One problem with the proposed amendment is that it conflates the two distinct issues of sentencing (1) controlled substance analogues as defined at 21 U.S.C. § 802(32) and (2) actual, scheduled controlled substances for which no guideline exists. We suggest instead the following language (strikeouts indicate deletions, boldface indicates additions to the Commission's proposed text):

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

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

Proposed Amendment:

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

Commentary

Application Notes:

* * *

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

In the case of a controlled substance that is not referenced in either the Drug Quantity Table or the Drug Equivalency Tables of Application Note 10, determine the base offense level using the marihuana equivalency of the ***most closely related*** ~~*analogue of that*~~ *controlled substance.* ***See USSG § 2X5.1 and note; see also, United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990). However, the court may, where appropriate, account for the greater or lesser potency of such substance compared to the substance for which there is a specified guideline.***

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

Our revised draft provides clearer guidance for the following reasons. First, it treats separately the two problems of sentences for analogues versus sentences for controlled substances that have no guidelines. Analogues would be sentenced like the drugs they mimic (with any adjustments the court may deem appropriate for potency). Controlled substances for which no guideline or equivalency currently exists – including, but not limited to, temporarily scheduled "emerging" drugs of abuse, most of which are synthetic stimulants and/or hallucinogens – would be sentenced like the "most closely related" substance. By using the term "most closely related," we consciously avoid use of the defined term "analogue" in any form, in order to avoid language likely to confuse litigants and sentencing courts. The use of the phrase "analogue" in the context proposed by the Commission creates confusion (and, in fact, legal impossibility), because the Commission's proposal directs the court to use the "closest analogue" of the scheduled controlled substance for which no guideline or equivalency currently exists. The guidelines and equivalency tables in almost all cases set forth equivalencies for scheduled controlled substances, and scheduled controlled substances, by definition, cannot be analogues. See 21 U.S.C. § 802(32)(C)(I) ("Such term [analogue] does not include a controlled substance").

Thus, the Commission's proposal directs the court to compare two scheduled controlled substances and identifies the relationship between the two to be an "analogue" relationship. This is a legal impossibility since a scheduled drug cannot be an analogue. To remedy the problem, we suggest that the Commission substitute the phrase "most closely resembles" for "closest analogue."

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

Second, our draft provides a measure of needed flexibility for courts to account for variance in potency in determining quantity equivalencies for analogues and controlled substances for which no guideline exists. Even controlled substance analogues can be more or less potent than the scheduled substance to which they are similar. For example, in United States v. Ono, 918 F.2d 1462, 1466 (9th Cir. 1990), the district court accounted for the 100 times greater potency of the drug in question (OPP/MPPP is 100 times more potent than MPPP). The Ninth Circuit Court of Appeals reversed that part of the district court decision, holding that the law requires a 1:1 ratio. The language we propose affords an opportunity for courts to "account" for potency upwards or downwards as they deem appropriate, based on evidence including expert testimony.

III. Correction of Technical Error in Drug Quantity Table

This amendment corrects a technical error where no maximum base offense level was explicitly set forth in the current guidelines for Schedule III controlled substances. We fully support this fix, which clarifies any possible confusion with respect to the limit for Level 20 at 40,000 units or more.

IV. Update of Statutory References in §2D1.11

This amendment updates the statutory references to incorporate the changed designation in Sec. 9 of Pub. L. 106-172, the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000. It also expands the application of the three-level reduction for cases where "reasonable cause to believe," rather than actual knowledge, is proven. The corrected references are a helpful clarification. The inclusion of references to paragraphs in 21 U.S.C. § 960(d) for three-level reductions for "reasonable cause to believe" is appropriate, given that the mens rea is the same and the statutes at issue are generally analogous.

V. Addition of White Phosphorous and Hypophosphorous Acid.

This amendment adds white phosphorous and hypophosphorous acid to the chemical guideline in the same quantities as red phosphorous. This amendment is entirely appropriate, and addresses an oversight in the last amendment cycle. White phosphorous is directly substituted at a 1:1 ratio for red phosphorous by clandestine methamphetamine "cooks" (one part phosphorous to 1.5 parts iodine). Hypophosphorous acid (in a 50% solution) is used at a ratio of

approximately two-thirds of either red or white phosphorous (one part hypophosphorous acid to one part iodine). Actual quantities vary widely in the field, as most clandestine chemists lack training or theoretical understanding of the chemical reactions. The wide variability of quantities used is such that we think it is fair, and is certainly simpler, to lump all three of these related List I chemicals together at the same quantities for guidelines purposes.

VI. Deletion of Reference to § 957 from Statutory Index

This deletion is appropriate, as 21 U.S.C. § 957 is not a substantive criminal offense but a regulatory (registration) provision; violations are prosecuted under appropriate subsections of § 960.

VII. Issues for Comment

A. Offenses Involving Anhydrous Ammonia

The Methamphetamine Anti-Proliferation Act of 2000 (Pub. L. 106-310) established a federal crime for the theft or unlawful transportation of anhydrous ammonia ("AA") knowing, intending or having reasonable cause to believe it will be used to manufacture a controlled substance. The applicable sentencing guideline, §2D1.12, provides for a base offense level of 12 if the defendant intends, knows, or believes the chemicals will be used to manufacture methamphetamine, and offense level nine if he only has reasonable cause to believe such is the case. In either event, a two-level enhancement is applied if the drug involved is methamphetamine.

Taken as a whole, this guideline is woefully inadequate, and we are pleased that the Commission is seeking comment on a possible revision. By cross-reference to 21 U.S.C. § 843(d), the statutory penalty for offenses involving anhydrous ammonia in § 864 is: (1) generally up to 4 years imprisonment, but (2) up to ten years if it involved the intentional manufacture or intentional facilitation of the manufacture of methamphetamine. The maximum guideline sentence of level 14 (12 + 2) under §2D1.12 yields sentences of under two years – short even of the four year basic sentence, and well under the ten year maximum.

We propose the addition of two alternative specific offense characteristics if the offense involves AA. We would provide (1) a 12-level enhancement for a defendant who violates § 864 with the intent of manufacturing or facilitating the manufacture of methamphetamine – the state of mind required for the ten year maximum sentence to be available under § 843(d)(2) – or (2) a four level enhancement for defendants whose offense conduct otherwise involved AA – including through violations of 21 U.S.C. §§ 864 or 843(a)(6) or (7) – but who can not be shown to have done so with the state of mind set forth in § 843(d)(2). To avoid double-counting under this proposed rubric, the defendant would not receive the two level increase under current

§2D1.12(b)(1) (incorporated into revised and redesignated (b)(3) under the scheme set forth below) if he or she were sentenced under one of the specific AA provisions. The combined effect of our proposal would be to increase guideline sentences from the current level 14 (12 +2) to level 24 (12 + 12) for offenders who steal or transport AA in violation of § 864 with intent to manufacture or facilitate the manufacture of methamphetamine, and otherwise to level 16 (12 + 4) for other offenses covered by the guideline that involve anhydrous ammonia. In addition, in current §2D1.12(b)(2) (as renumbered to (b)(4)), the two level enhancement for specified actions that threaten public health and the environment, could apply to AA cases.

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

§2D1.12(a)(1) & (2):	No change. Level 12 if the defendant intended (or knew or believed substance would be used) to manufacture a controlled substance, and level nine if the defendant had reasonable cause to believe it would be used to manufacture a controlled substance.
§2D1.12(b)(1):	If the defendant stole or transported anhydrous ammonia in violation of 21 U.S.C. § 864 and had the intent to manufacture or to facilitate the manufacture of methamphetamine, increase by 12 levels.
§2D1.12(b)(2):	If the offense involved anhydrous ammonia but §2D1.12(b)(1) does not apply, increase by four levels.
§2D1.12(b)(3):	In circumstances other than those described in §2D1.12(b)(1) or (b)(2), where the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed or had reasonable cause to believe that the prohibited flask, equipment, chemical, product, or material was to be used to manufacture methamphetamine, increase by two levels.
§2D1.12(b)(4)	[Redesignate existing §2D1.12(b)(2) (two level SOC for unlawful discharge or transportation) as (b)(4)]

In addition, although the matter was not placed at issue by the Commission's notice seeking these comments, we believe that a sizeable enhancement under this guideline should not be limited to violations of § 864 involving anhydrous ammonia. It should be available for any

violations subject to the penalty enhancements of § 843(d)(2) – including violations of § 843(a)(6) and (7), if related to methamphetamine manufacture. The referenced provisions make it a crime to possess or distribute substances, materials, or equipment knowing or having reasonable cause to believe they will be used to manufacture a controlled substance. An amended guideline could provide a more appropriate sentence for cases charged under these provisions, which may involve, for example, triple-neck flasks, heating mantels, non-listed chemicals, or listed chemicals. Some prosecutors with expertise in this area have expressed puzzlement and frustration with this guideline. Whereas Congress appears, by its gradation of penalties, to have intended sentences under § 843(d) to occupy a "middle tier" for cases that are more serious than regulatory violations but which lack all the elements to prove a violation of, e.g., 21 U.S.C. § 841(c)(1) or (2), in practice there is no corresponding "middle tier" sentencing guideline corresponding to these violations.

B. Internet Enhancement

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

C. Drug-facilitated Sexual Assault

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

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

The Commission, citing a circuit split, asks if Application Note 12 to §2D1.1 should be amended to clarify whether, in a reverse sting situation (government "selling" drugs to the

defendant), the last sentence of the Note should operate to allow a defendant to establish that he did not intend to purchase or was not reasonably capable of purchasing all of the controlled substance(s) that he negotiated to purchase, and to thereby reduce the amount of controlled substances attributed to him for relevant conduct purposes (typically the amount of controlled substances under negotiation).

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

Typically in a regular undercover "sting" investigation, where a defendant is providing controlled substances to the government, the government is able to engage in multiple transactions with a defendant in order to obtain all of the controlled substance that the defendant has agreed to provide or to otherwise obtain evidence that the defendant is capable of providing the agreed-upon amount. In a "reverse sting" investigation, as observed in Gomez, 103 F.3d 249, 253 (2d Cir. 1997), the defendant may have negotiated to hold money in reserve pending his testing of a sample of the product or to take the drugs on consignment or on partial credit with a down payment, or he may simply seek to do so at the time of the transaction. This may occur because the defendant suspects law enforcement involvement or harbors some other suspicion about the seller. In any event, the government does not release any controlled substances to the defendant in such situations and typically does not have the opportunity for further fruitful investigation to definitively establish a defendant's intent and capability with respect to the negotiated purchase.

Although some defendants have raised the argument that they only intended to purchase the amount of drugs for which they produced payment at the time of the transaction, explicit allowance of such an argument likely would result in its routine use. Although the argument would be without merit, the burden on the government to rebut it would be undue given the investigation circumstances described above.

MITIGATING ROLE

We continue to believe that the Commission erred in 2002, by creating a maximum base offense level for drug defendants who receive a mitigating role adjustment ("mitigating role

cap"). The Department has supported, and continues to support efforts in Congress to repeal the mitigating role cap.

In 1987, the Sentencing Commission tied the sentencing guidelines for drug trafficking offenses to the quantity of drug associated with the offense. The guidelines call for base offense levels ranging from level six to level 38, based on two level increments determined by the quantity of drugs trafficked by the defendant. The guidelines are tied – correctly we believe – to the applicable mandatory minimum drug trafficking statutes. The amount of controlled substance that triggers a mandatory minimum in a given case corresponds to a particular base offense level. For example, 100 grams of heroin triggers a mandatory minimum sentence of five years and is tied to a base offense level of 26, with a corresponding sentence of 63-78 months for a first offender. Congress, in 21 U.S.C. § 841, specified the quantity thresholds that trigger mandatory minimum sentences. Some observers, have criticized this premise of the sentencing guidelines scheme, arguing that this quantity-based scheme does not adequately address other relevant sentencing factors. We disagree with this criticism.

We continue to believe there is no need for a mitigating role cap. Absent such a cap, federal statutes and the otherwise applicable sentencing guidelines appropriately allow for the consideration of aggravating factors such as the use of a gun or a defendant's criminal history or bodily injury in appropriate cases. Also, these statutes and guidelines – through, for example, the so-called safety valve exception to mandatory minimums, the guidelines' mitigating role adjustment, and guideline departures when a defendant provides substantial assistance in the investigation or prosecution of another person – appropriately allow for the consideration of mitigating factors.

The purpose of the mitigating role cap was supposedly to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of a drug-trafficking crime. We continue to believe that, in most cases, the quantity of a controlled substance involved in a trafficking offense is an important measure of the dangers presented by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of the same substance. Further, in establishing mandatory minimum penalties for controlled substance offenses, Congress relied on the type of substance involved. Thus, the most serious drugs of abuse carry the highest statutory penalties, regardless of whether violence or other criminal activity is present in a particular case.

In addition, we strongly believe the "mitigating role cap" provides an excessive windfall to minor role defendants who are involved in large narcotics trafficking transactions. For example, a minor role defendant in a 150-kilogram cocaine transaction will have his offense level reduced from 38 to 28 under the "mitigating role cap," thereby reducing the defendant's guideline range (assuming no criminal history) from 235-293 to 78-97 months incarceration.

Such an extensive sentencing reduction is not appropriate, especially since a minor role defendant in a 3-kilogram cocaine transaction would also end up with an offense level of 28. The minor role defendant in a 150-kilogram transaction should not be placed in the same sentencing position as a minor role defendant in a 3-kilogram transaction.

In sum, we continue believe the mitigating role cap should be repealed.

HOMICIDE AND ASSAULT

I. Homicide Offenses

We commend the Commission both for the amendments passed last year relating to involuntary manslaughter offenses and for agreeing to consider the issue of homicide and assault further this amendment year. As we have stated on several occasions, we believe the guideline penalties for all homicide, other than for first degree murder, are inadequate. 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 guidelines for second degree murder and attempted murder are particularly problematic. We believe 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. We thus think the Commission should increase the base offense level for second degree murder to offense level 38.

First and second degree murder have much in common under federal law. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). 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; in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, 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. The inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

For voluntary and involuntary manslaughter offenses, we believe the Commission should increase the base offense levels to create an appropriately tiered system of punishment. Our basic principle is that first degree murder should result in a life a 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. Based on this and in light of the statutory maximum penalties set by Congress for these various offenses, we believe the Commission should 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. We also believe, in response to the issues for comment, that enhancements for the use of a weapon and the use of a firearm are appropriate.

II. Attempted Murder

We have previously expressed our concern about how attempted murder is treated under the current guidelines, especially where the attempt, had it been successful, would have caused the death of many people (e.g., a bomb on a plane, ship, subway, in a federal building, etc.). 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. Elsewhere in the guidelines, an attempt is typically treated three levels lower than the underlying offense under §2X1.1(b)(1). However, "attempted murder" can be 15 levels lower than the underlying crime, pursuant to §2A2.1. We think this is something that the Commission appropriately is reexamining.

We support a base offense level of 36 for attempted murder, if the object of the offense would have constituted first degree murder. This is seven offense levels below that for first degree murder, and if a defendant accepts responsibility for such a crime, would lead to a sentence of roughly 11 years imprisonment in Criminal History Category I and up to the statutory maximum penalty of 20 years under Criminal History Category VI. For attempts to commit second degree murder, we believe the base offense level should 30, which is eight levels below our 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.

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

Section 1108(e) of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107-273, directed the Commission to review and amend the guidelines to provide an appropriate sentencing enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18. In response, the Commission has proposed increasing the base offense 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 three levels to six levels.

We fully support these increases. While the increases will only be applicable in a handful of cases every year, we believe they are of particular importance because the crimes involved often attack or retaliate against the authority of the law and those who enforce it. In response to one of the issues for comment, we believe that obstructing or impeding an officer should be treated much more closely to aggravated assault. We do not, though, 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. We do believe 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.[14]

MISCELLANEOUS AMENDMENT PACKAGE

We sincerely appreciate the Commission's ongoing efforts to address minor and technical issues through the annual miscellaneous amendments package. We support the package but have comments on several of the pending miscellaneous amendment proposals.

I. Multiple Victim Rule in Fraud/Theft Cases – Supart B

Subpart B would expand the special multiple victim rule in §2B1.1, Application Note 4(B)(ii), to include privately owned mail boxes. The proposal is sound and we support it, although we think it should go further. The proposal does not clearly apply to theft of material for delivery by private or commercial interstate carriers (i.e., courier services), even though such private carriers often are used in lieu of the United States mail to send or receive correspondence and other material in interstate or international shipments. Other substantive sections of the United States Code cover fraud involving either the United States mail or courier services (see 18 U.S.C. § 1341), as well as theft from the United States mail (18 U.S.C. § 1708) and theft from interstate shipment (18 U.S.C. § 659).

To ensure that the multiple-victim rule extends to both types of delivery, we recommend 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

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[14]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" etc. We believe 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.

thing is privately owned or owned by the United States Postal Service . . ." (Changes in bold). This revision, which incorporates Option 2 of the Commission proposal, would track the language of 18 U.S.C. § 1341 to ensure coverage of both privately owned mail boxes and privately owned collection boxes, delivery vehicles, and related collection mechanisms for courier service packages.

II. Use of a Minor in Crimes of Violence – Subpart D

Subpart D addresses the new offense, created by the PROTECT Act, of using a minor in a crime of violence, 18 U.S.C. § 25. The new crime provides a maximum penalty of double that of the underlying crime for a first offense and triple for subsequent convictions. Currently, the guidelines provide a two level adjustment for this conduct, §3B1.4. The Commission proposes a new guidelines section, §2X6.1, which would provide an increase of either two, four, or six levels above the offense level for the underlying offense. We believe §2X6.1 should provide at least a three level increase above the offense level for the underlying offense. We believe Congress, in enacting § 25 and the PROTECT Act as a whole, intended greater protections for children. Section 25 provides a dramatic increase in the maximum statutory penalty, and if the Commission provides no additional increase in penalty beyond current law, we think the will of Congress will not have been followed. In response to the issue for comment, we believe §3B1.4 should be amended to provide a similar three level increase.

III. Double Counting in Certain Firearms Cases – Subpart J

The Commission requests comment regarding application of the guidelines in cases in which the defendant (1) is convicted under 18 U.S.C. 922(g) (felon in possession), (2) is an armed career criminal under §4B1.4, and (3) is also convicted under 18 U.S.C. § 924(c) (use of a firearm during a drug trafficking offense or crime of violence). Three options are proposed for addressing this circumstance: (1) leave §4B1.4 in its present form; (2) include an exception in §4B1.4, like that in §2K2.4, that provides that the guideline sentence is the term of imprisonment required by statute; or (3) include the exception, but also add a note that suggests an upward departure when the application of the exception may result in a guideline range that produces a total maximum penalty that is less than the range that would have resulted from applying the enhanced offense level and criminal history category.

We believe an exception is generally not warranted here, because the circumstances are unlike those, described in the issue for comment, where the defendant is simply convicted of a violation of only 18 U.S.C. § 924(c). In that latter situation, with the exception, the defendant still receives an enhanced penalty – pursuant to § 924(c) – for the aggravated circumstance of using the gun in a crime of violence or controlled substance offense. 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. We think a penalty over and above that provided by § 924(c) is warranted in light of the defendant's felon status.

MANPADS AND OTHER DESTRUCTIVE DEVICES

I. MANPADS, Destructive Devices, and Chapter Two, Part K

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. Included within this category of devices are MANPADS (man-portable air defense systems) and similar weapons that have been used by terrorists; for example, in the 2002 attack in Kenya on an Israeli aircraft (using a shoulder-fired missile). They have the ability to inflict death or injury on large numbers of persons if fired at a building, aircraft, train, or similar target. Even if death or injury does not result from such an attack, there may be significant economic consequences and adverse effects on public confidence in the transportation or other industries. For example, if a MANPAD were fired at a commercial aircraft, but no casualties resulted, the news alone that an attempted attack had occurred would likely severely harm the airline industry and create a potential domino effect on industries involved in other forms of transportation.

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. Under the NFA, such weapons are classified as "destructive devices." See 26 U.S.C. § 5845(f). Currently, the sentencing guidelines provide for a two level increase to the base offense level applicable to unlawful possession and certain other offenses involving NFA weapons, if the offense involves a destructive device. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. See §2K2.1. As a result, an offender who unlawfully possesses a MANPAD could face a guideline offense level of 20, which requires only 33-41 months of imprisonment if the defendant is in Criminal History Category I.

We believe individuals who are convicted of possessing MANPADS and similar weapons should be treated much more severely than the current sentencing guidelines allow. Therefore, we 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).[15]

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. In the case of all destructive devices other than portable rockets or missiles, we support the highest

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[15]We note that our original proposal limited the MANPADS increase to portable rockets or portable missiles. We continue to recommend that the proposed amendment be changed to apply the portability criterion to rockets and missiles.

appropriate increase in the proposed new §2K2.2(b)(3)(B) and believe that it should be a six to nine level enhancement. We also believe 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.

II. Issues for Comment

The Commission requests comment regarding whether 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a), should be referenced in Appendix A (Statutory Index) to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than, or in addition to, §2A6.1 (Threatening or Harassing Communications). Similarly, the Commission requests comment regarding whether any or all of the substantive criminal provisions of 18 U.S.C. § 32 should be referenced only to §2A5.2. We agree that there should be cross references, which would allow for the most applicable sentencing guideline to be chosen for a particular case. For the same reason, we do not believe that § 32 offenses should only be referenced to §2A5.2. There are numerous subsections in section 32 and the most appropriate guideline should be available to the court.

The Commission also requests comment regarding whether there should be a cross reference to §2A5.2 or §2M6.1 in any guideline to which offenses under 18 U.S.C. §§ 32, 1993, and 2332a are referenced, if the offense involved interference or attempted interference with a flight crew, interference or attempted interference with the dispatch, operation, or maintenance of a mass transportation system (including a ferry), or the use or attempted use of weapons of mass destruction. We think there should be such cross references for the reasons stated above.[16]

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[16]The Commission also seeks comment on whether the "destructive device" definition at Application Note 4 of §2K2.1(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) should be amended. According to the issue for comment, practitioners have commented that it is unclear whether certain types of firearms qualify as "destructive devices". We do not believe the definition is unclear and therefore do not think an amendment is necessary.

ABERRANT BEHAVIOR

I. We Continue To Believe That Aberrant Behavior Should Be Eliminated as a Ground for Departure Altogether

As we have stated on a number of previous occasions, we believe aberrant behavior (§5K2.20 (Policy Statement)) should be eliminated as a ground for downward departure. We continue to believe that sentences under Criminal History Category I are properly gauged to first time offenders and that 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. See, e.g., United States v. Brenda Working, 287 F.3d 801 (9th Cir. 2002) (reversing, for a second time, a departure from sentencing range of 87-108 months to a one day sentence for a defendant/wife who pleaded guilty to assault with intent to commit first degree murder after luring her husband to a remote location and shooting him in the back; the case was reassigned to a different judge for resentencing on the second remand). 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.

Section 5K2.20 allows for a departure "in an exceptional case" if the defendant's criminal conduct constituted aberrant behavior. The court may depart only if "the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." §5K2.20(b).[17] Only first offenders will qualify for an aberrant behavior departure – defendants with no significant prior criminal behavior. We believe the guideline definition invites this argument for nearly every first offender. Every first offender has no criminal history points and no significant prior criminal activity. Each presumably has led an "otherwise law-abiding life" or at least the documented record would suggest an otherwise law-abiding life. Yet 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). Section 5K2.20 seems to be inconsistent with that prohibition.

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[17]The PROTECT Act categorically prohibits aberrant behavior departures for certain offenses listed in §5K2.20(a).

In addition, in determining whether to depart based upon a claim of aberrant behavior, §5K2.20 encourages courts to consider a number of circumstances, many of which are not ordinarily relevant in determining whether to depart. Application Note 3 encourages sentencing courts to consider the defendant's "(A) mental and emotional conditions; (B) employment record; (C) 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, 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. 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. See, e.g. §2L1.1(b)(1) and §2L2.1(b)(1) (each providing for a three level decrease if the offense was committed other than for profit); §2K2.1(b)(2) (providing for a reduced offense level if the defendant possessed firearms or ammunition solely for lawful sporting purposes or collection, and did not unlawfully discharge or use them). And efforts to mitigate the effects of the offense are taken into account under §3E1.1 (Acceptance of Responsibility). We believe §5K2.20 is simply ill conceived because it encourages courts to consider discouraged factors or factors already taken into account elsewhere in the guidelines.[18]

II. Aberrant Behavior Should Not Be Integrated Into the Defendant's Criminal History Score under §4A1.1

We strongly oppose integration of aberrant behavior into the criminal history calculation. As we note above, 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 we believe is the existing problem under §5K2.20. In our view, 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." Further, we think the impact of incorporating aberrant behavior into criminal history 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.

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[18]Another example of the logical inconsistency of this provision is that many of those who may qualify for an aberrant behavior departure – educated people with good employment histories and solid backgrounds – may actually be the least appropriate for such a departure. It is for this reason that socio-economic status is a prohibited ground for departure under §5H1.10.

If the Commission chooses to maintain the aberrant departure provision, we think it should be limited even further than it is today. Rather than disqualifying only offenses involving serious bodily injury or death, or cases in which the defendant discharged a firearm or otherwise used a firearm or other dangerous weapon (which does not include, for example, unarmed bank robberies, unarmed rapes not resulting in serious injury, and many assaults), §5K2.20(c) 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 based on aberrant behavior and that such a departure is appropriate, 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.

HAZARDOUS MATERIALS

As you know, the transportation of hazardous materials poses significant and wide ranging risks to the public. We think the Commission's effort to ensure appropriate sentencing policy for those who violate the law surrounding the transportation of hazardous materials is a significant step toward the goal of reducing those risks, and we appreciate the Commission efforts to address this issue.

I. New Guideline for Hazardous Materials Offenses

As we stated in our August 1, 2003, letter to the Commission, the guideline currently covering hazmat transportation crimes, §2Q1.2, was written chiefly for hazardous waste crimes, not hazardous materials violations. 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. Adoption of a new sentencing guideline for hazmat crimes therefore is a Department priority. We believe a new guideline would focus upon those characteristics that are critical to hazmat transportation crimes, and with such a focus, would be relatively easy for courts and probation offices to apply. We also believe a separate guideline would yield sentences that are appropriate for hazmat violations.

Dealing with hazmat crimes by amending existing §2Q1.2 likely would have two significant negative effects. First, the addition of specific offense characteristics for hazmat transportation violations to a guideline that is designed for pollution crimes could create confusion for sentencing courts. For example, existing §2Q1.2(b)(1)(A) provides an enhancement for repetitive crimes, but only if releases occur. This approach fits the context of pollution crimes that commonly involve repetitive releases of hazardous or toxic substances. However, it is a poor fit for hazmat transportation crimes. For those crimes, both releases and repetitiveness are appropriate specific offense characteristics, but by the nature of the offenses, both do not necessarily occur together. Therefore, application of the §2Q1.2(b)(1)(A) formula to hazmat crimes would ignore any repetitiveness that did not include releases. Amending §2Q1.2

by adding to it provisions to take account of hazmat transportation repetitiveness and releases would cause uncertainty as to when those provisions should be applied versus when existing subsection (b)(1)(A) should be used. Second, amending §2Q1.2 could invite the reopening of issues that courts already have resolved in litigation involving that guideline. The adoption of a new and entirely separate hazmat guideline would allow hazmat crimes to be specifically addressed in a manner that would not involve revisiting well-settled §2Q1.2 issues.

II. Key Elements of a Hazmat Guideline

The hazmat guideline should cover violations of 49 U.S.C. §§ 5124, 46312, and possibly all or part of § 60123. 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. In application notes, both "release" and "environment" should be specifically defined for purposes of hazardous materials transportation crimes. Appropriate definitions for those terms are as follows:

> "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). Since both statutes deal with releases of dangerous materials into the environment, they are logical sources for definitions of "release" and "environment." The additional language in the latter portions of both definitions makes clear that they do not apply only within the jurisdiction of the United States. As long as the crime itself is committed within the jurisdiction of the United States, a sentencing court should be able to take into account a release into the environment wherever it may occur.

III. Base Offense Level and Aggravating and Mitigating Factors

Given the inherent danger posed by the transportation of hazardous materials, the appropriate base offense level is eight, as it is for dangerous pollutants under §2Q1.2. We believe many of the aggravating factors outlined by the Commission in the issue for comment merit some treatment within the guidelines and we address each of these in turn.

- 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. An even higher offense level, we believe, should attach to hazmat crimes involving passenger-carrying aircraft, because successful escape from an aircraft is even less likely than it is from other modes of transportation.

- Concealment. Concealment, by whatever means, is a particularly insidious characteristic of some hazardous material transportation crimes and, therefore, merits an enhancement. First responders, innocent cargo handlers, and the public at-large are especially vulnerable to harm when they are not even aware of the presence of hidden hazmat.

- Release, damage to the environment, critical infrastructure, and emergency response. The release of a hazardous material, the disruption of, or damage to, critical infrastructure, the release of a hazardous material resulting in damage to the environment, or to public or private property, and required emergency response and/or evacuation of a community or part thereof are all factors that, if present with respect to a particular hazmat crime, reflect harm or a threat of harm to the public.

- Repetitiveness. A hazmat crime arising from a terrorist act likely would be a one time violation. However, conventional hazmat crimes are prone to repetitiveness. The person who reduces shipping costs by failing to identify materials as hazardous, for example, is likely to do so as often as he thinks he can get away with it. With each repetition of such a crime there is another chance that the risk of harm will materialize into reality; hence it also is a characteristic meriting an enhancement.

- Serious bodily injury or death. The risk of death or serious bodily injury or their actual occurrence are the most serious harms that the hazmat laws are intended to prevent. Therefore, they should be treated as specific offense characteristics with significant offense level additions. We recommend 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 (A) portion of this provision would be consistent with §2Q1.2(b)(2), which adds 9 levels for a substantial likelihood of death or serious bodily injury. However, subsection (b)(2) deals only with the likelihood, not with the actual harms (except through departures). In (B) and (C) above, the recommended language would add four levels for actual serious bodily injury and four more levels for death (to which an application note should add an upward departure option for multiple victims).

Increasing the offense levels for actual serious bodily injury or for death would provide greater certainty of sentencing and would be consistent with a number of other guidelines. Among those that include increases for injury are the following:

§2A2.2(b)(3)(B)	Aggravated Assault
§2B3.1(b)(3)(B)	Robbery
§2B3.2(b)(4)(B)	Extortion by Force, etc.
§2E2.1(b)(2)(B)	Extortionate Extension of Credit, etc.
§2L1.1(b)(6)(2)	Alien Smuggling

While death is not as commonly dealt with by specific offense characteristics, there are precedents for doing so. For death under the air piracy guideline, §2A5.2(b)(1), five levels are added. The same is true for §2D2.3 (operating a common carrier under the influence), although the five levels are added by an alternative base offense level rather than a specific offense characteristic, a distinction without a difference. (Note that §2D2.3 also adds eight levels for serious bodily injury, again through an alternative base offense level.) Under §2M6.1(b)(2), four levels are added for death.

Express additions of levels for death or serious bodily injury would avoid heavy reliance upon departures and they would step beyond §2Q1.2's focus only upon risk to address the actual harm to people that occurs when risk turns to reality.

- Particular types of hazardous materials. We believe the inclusion of a specific offense characteristic for particular types of hazardous materials should be avoided. The problems with such an approach lie with both the wide variety of materials and the fact that their potential effects can vary widely with circumstances. Explosive materials provide a good illustration. They vary so much in their power that the Department of

Transportation has placed them in six different labeling categories, all of which might not merit tougher treatment than, for example, inhalation poisons. See 49 C.F.R. § 172.400. Rather than trying to choose among the lethal qualitites of so wide an array of substances, those qualities may better be part of the assessment of the risk involved in a violation.

- A terrorist motive. 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.

- Proper training. Training violations are among a number of offenses that can increase the risk of a hazardous material being released into the environment. Other examples include packaging or packing violations. 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. 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.

A risk-based specific offense characteristic as in subsection (C) should be accompanied by an application note explaining some of the types of behavior to which it would apply. Below is language that could be incorporated into such an application note:

> If the offense resulted in a risk of a hazardous material being released, then two offense levels are added under Subsection (C). This subsection is intended to apply to violations including, but not limited to, inadequate packaging, packing, or training. Packaging or packing violations increase the likelihood of hazardous material releases even if all other requirements are met. Failure to properly train people working with hazardous material transportation increases the likelihood that those people will mishandle hazardous materials and that those materials will be released.

- The procurement of a license through fraudulent means. Fraudulently obtained commercial drivers' licenses with hazmat endorsements could allow persons to transport hazmat with the intent to use it to commit other crimes. For example, a person with a fraudulent license could drive a tanker filled with anhydrous ammonia to a point where he could release it into subway vents, causing widespread death. In order to reduce the traffic in fraudulent licenses, this behavior should be subject to an enhancement.

IV. 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. We believe, therefore, there is no need for additional compliance requirement factors.

There is, however, 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, it does not deal effectively with crimes that involve physical objects or facilities. For example, an inspection of books and records will not reveal that a convicted violator has continued to conceal hazmat in shipments of otherwise benign cargo. In other regulated areas neither will such an inspection of books and records alone uncover the critical facts, such as a convicted hazardous waste generator's disposal of waste by dumping it on the ground.

V. 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, a hazmat transportation guideline should be cross-referenced to the homicide and terrorist guidelines. We recommend that a provision such as the one below be included in the guideline:

(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.

For examples of other guidelines containing provisions similar to (1) and (2), see §2N1.1(c)(1) and (2) covering tampering with consumer products and §2Q1.4(c)(1) and (2) relating to Safe Drinking Water Act offenses.

VI. Civil Penalties

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

VII. Multiple Counts

The grouping rules of Part 3D should apply to hazmat crimes just as they would to any other federal crimes. (Note, though, that §§2Q1.1-2Q1.6 are neither specifically included in nor specifically excluded from operation of the grouping rule at §3D1.2(d).) For example, if a transporter hauled a hazardous waste (which also would be a hazardous material; see 49 C.F.R. § 171.8) to an unpermitted disposal site in violation of 42 U.S.C. § 6928(d)(1) and also failed to appropriately placard the load in violation of 49 U.S.C. § 5124(b), those two violations might be grouped for sentencing purposes. See §3D1.2, Application Note 6, Example (7). On the other hand, for pollution and hazmat crimes that are not closely associated, grouping would not be appropriate. 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.

While generally we believe that the grouping rules should apply to a hazmat crime as they would to any other Part 2Q guideline, for crimes that involve substantial threats to more than one victim, 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.

IMMIGRATION

I. Alien Smuggling

We agree with the underlying premise of the proposal – i.e., that those who illegally smuggle people into the country should be punished differently depending upon the alien's purpose. However, we believe it should go further if it is to have effect.

A. Entering the United States to Engage in Certain Activity

The proposed new specific offense characteristic would require that the defendant have "knowledge" of the alien's intended unlawful activity within the United States at the time the defendant assisted the alien to illegally enter the country. However, a defendant who "smuggled, transported, or harbored" an alien knowing that the alien intended to engage in terrorist activity could also be charged as a co-conspirator in the underlying terrorist activity and thus already would be subject to a substantial sentence. Significantly, this proposal does not address the more typical situation of smugglers who assist "all comers" and who are often deliberately ignorant of the identity or motive of the person entering the country illegally.

We believe this proposal is far too restrictive. Aliens who are inadmissable pose a serious threat to the security of the United States. The guidelines and laws already address individuals, who with direct knowledge, facilitate those entering illegally to commit acts of terrorism and other specific crimes. What the guidelines do not adequately address are the smugglers who are used by terrorists and others to gain entry, but do so without fully revealing to the smugglers their real identity or intent. The smugglers who enable terrorists to illegally enter

this country undetected should not be able to escape increased liability simply because they did not "know" what specific illegal act the alien intended to commit.

As such, we recommend that the guidelines impose a strict liability standard rather than imposing a knowledge requirement. We believe that once a defendant has been convicted of the underlying smuggling offense, the offense level should be increased under a new specific offense characteristic that would take into account the reason the alien was coming into the country (to engage in terrorist activity, in a crime of violence or controlled substance offense) or why they were barred from entry pursuant to 8 U.S.C. § 1182(a)(2) or (3). This could be accomplished by changing proposed specific offense characteristic §2L1.1(b)(4) to read:

"(4) If the defendant smuggled, transported, or harbored an alien, who -

(A) entered the United States

A. to engage in a crime of violence or controlled substance offense, increase by:

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored.

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

(2) was inadmissable as defined in 8 U.S.C. §1182(a)(2) or (3) increase

i) two levels, if only one such alien was smuggled, transported or harbored;

ii) four levels, if two-five such aliens were smuggled, transported or harbored; and

iii) six levels, if six or more such if aliens were smuggled, transported or harbored."

This alternative is similar to the criteria used in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms). An individual found guilty of illegally possessing a firearm faces a base offense level of 12. However, if the weapon is one that is particularly dangerous – as described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30) – then the offense level is increased six levels to a level 18. It is not necessary that the defendant have knowledge of the restricted nature of the weapon. See, e.g., United States v. Fry, 51 F.3d 543 (5th Cir 1995).

This proposal would also increase the enhancement commensurate with the number of dangerous aliens smuggled, in a manner similar to that used in §2L1.1(b)(2). A person who smuggles six aliens barred from entry because they were designated terrorists should receive a substantially higher increase than just the three levels under current §2L1.1(b)(2)(A).

B. Offenses Involving Death

The published proposal suggests three changes that would impact the treatment of deaths resulting from alien smuggling. The first removes the specific offense characteristic subcategory from its present grouping with other injuries and creates a new specific category and suggests, in the alternative, increases of eight (current), 10, or 12 levels. The second proposed change expands a related cross-reference to include deaths involving manslaughter and not just murder,[19] while the third proposed amendment would also address incidents of multiple deaths.

We support the three amendments. The first change, separating the death enhancement from the other injuries and providing a minimum offense level of 25, will have an impact on those cases where the death results from negligence rather than just intentional or reckless conduct. Under the proposed §2L1.1(b)(8), alien smuggling resulting in a death due to negligence would result in an offense level of at least 25 (57-71 months under Criminal History Category I) while under exiting guidelines it would most likely result in a level 20 (33-41 months). We support increasing the minimum offense level for these cases to any of the

[19]A similar provision exists at §2K1.3(c)(1)(B); §2K2.1(c)(1)(B); §2K2.5(c)(1)(B); §2M5.3(c)(1); §2M6.1(c)(1); §2Q1.4(c)(1)