organization found guilty of a criminal offense is essentially computed by first determining the base fine, which generally involves a determination of the seriousness of the offense, and then multiplying the fine by the "Culpability Score" as determined under Section 8C2.5. The culpability score may be reduced by three points, under certain conditions, if the organization has an "Effective Program to Prevent and Detect Violations of Law." Section 8C2.5(f).

Heretofore, the Commission defined an "effective program to prevent and detect violations of law" in Application Note 3(k) to include seven characteristics, and defined "violations of law" to mean "criminal conduct." Application Notes 3(k) and 3(k)(1). Now, however, the Commission proposes to remove the definition of "effective compliance program" from its current location in the Application Notes and place it in a new stand-alone guideline. More troubling, however, the Commission proposes to broaden the definition of "violations of law" well beyond criminal conduct, and require that an effective compliance program be able to "prevent and detect" violations of any law, including civil and regulatory. In pertinent part, the Commission proposes to define "violations of law" to mean "violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable." Proposed Application Note 1 to Section 8B2.1.

WLF objects to this gross expansion of "violations of law" to include civil and regulatory offenses as unfair, unwarranted, and burdensome. If an organization were placed on probation, it would also involve the expenditure of scarce judicial resources to monitor an organization's compliance with non-criminal laws and regulations. Accordingly, WLF urges the Commission not to expand the definition of "violations of law" to include non-criminal conduct and offenses.

It has been estimated that there are over 300,000 federal regulations that subject a company to criminal liability, and that civil and administrative laws and regulations at both the federal and state level are countless. *See* Comments of the Association of Corporate Counsel at 3 (March 1, 2004). Civil and administrative violations do not involve criminal conduct and may occur inadvertently, despite the best compliance programs. Accordingly, organizations should not be penalized for failing to have a compliance program that, while otherwise effective in deterring and preventing criminal violations, is not designed to ferret out and prevent all manner of minor and trivial regulatory infractions. For example, under the proposed guideline, a company could be found not have an effective compliance program simply because there were inadvertent, minor, and non-harmful exceedences of emission or discharge limits under environmental regulations which would be comparable to driving a car 36 mph in a 35 mph zone. Indeed, an employee driving a company car in excess of the speed limit would disqualify the compliance program, as would other minor regulatory violations, such as allowing more persons in an office elevator or cafeteria than otherwise allowed by local building and safety codes.

The Commission has not articulated any reasons in the Federal Register as to why it believes that expanding the term "violation of law" to include federal, state, and local civil and administrative regulations is necessary. The report submitted by the Ad Hoc Advisory Group on Organizational Guidelines as well as the Commission's yearly sentencing statistics note that over 90 percent of the organizations sentenced under the guidelines had no compliance program at all. This suggests that the current compliance programs are working fairly effectively in detecting and preventing criminal conduct, and/or persuading the Justice Department not to file criminal charges in the first place if an offense occurred.

Indeed, WLF finds it remarkable and troubling that the Commission did not specifically solicit public comment as to whether it should greatly expand the definition of "violations of law" to include non-criminal regulations. Rather, the Commission seems to have already made up its mind on this issue, and is merely requesting comment as to whether the reduction in the culpability score for having an effective compliance program should be increased a paltry one point from the current three points to four points, "*given* the heightened requirements [*viz.*, expanding the definition of "violation of law" to include civil and regulatory offenses] for an effective program to prevent and detect violations of law under the proposed amendment." 68 Fed. Reg. 75360 (emphasis added). If it is a "given" that the Commission will expand the definition to include non-criminal provisions, the reduction in the score should be increased from the current three points to at least five points, rather than four.

Expanding the definition of violation of law to include civil and administrative regulations and provisions would simply be a costly "make work" requirement that would only benefit those who devise and implement compliance programs, or otherwise counsel companies on their compliance programs and the sentencing guidelines. Expanding the definition would skew priorities and drain corporate resources that could be better devoted to improving a compliance program to detect and prevent criminal activity, conduct which presumably is the most harmful to society. While the Advisory Group's desire is to foster a culture of compliance with respect to *all* federal and state regulations that are applicable to organizations, WLF believes that companies, rather than the Commission, can best decide how to devise compliance programs that are cost-effective and meaningful,

As we noted in our prior submission to the Advisory Group in May 2002, commentators have questioned this "feel good" approach to developing sentencing policy.

> One of the continuing debates about criminal punishment concerns the extent to which the precise determination of penalties within the criminal sentencing process effectively serves any utilitarian goal of public law enforcement or is merely political theater. Even if we grant the point that some criminal sanction is more useful than none, there remain the questions of whether and when it is worthwhile at the margin to devote resources to refinements in the formal criminal penalty determination system, except perhaps as required to preserve marginal deterrence.

Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J. Law & Econ. 423, 424 (Apr. 1999). The Commission should keep in mind as it develops and amend the guidelines that while punishment and deterrence are indeed the goals of sentencing, Congress mandated that punishment and fines that are imposed by courts should be "sufficient, *but not greater than necessary*" to comply with the purposes of punishment and deterrence. 28 U.S.C. § 3553(a) (emphasis added). Accordingly, the Commission's and the Advisory Group's rejection of optimal penalties policy, and the lack of empirical evidence to determine what punishments have been effective without causing overdeterrence or gratuitous punishment, runs counter to Congress's express policy of conservation of punishment.

2. Eliminating the Prohibition on Three-Point Reduction for Delaying Reporting of Offense.

The Commission also requested public comment as to whether the current prohibition on the receipt of a three-point reduction under Section 8C2.5 for unreasonably delaying reporting an offense to

the proper authorities should be modified so that the organization could at least be considered for a reduction. 68 Fed. Reg. 75359. WLF agrees with this flexible approach that the organization should be considered for a reduction, and that the current rule should be eliminated. What some may regard as an unreasonable delay, may in fact be legitimate due to the company's desire to investigate the incident thoroughly to determine whether a violation has in fact occurred and the extent of the alleged violation.

3. Changing Automatic Preclusion under Section 8C2.5(f) To a Rebuttal Presumption.

The Commission also requests comment as to whether Subsection (f) of Section 8C2.5 should be amended as proposed to change the automatic preclusion of a three-point reduction if certain high-level individuals participated in, condoned, or were wilfully ignorant of the corporate offense, to one where there is a rebuttable presumption that the three-point reduction does not apply. 68 Fed. Reg. 75359. WLF supports this more flexible approach and believes that the corporation should be able to show on a case-by-case basis why it believes that its compliance program deserves a reduction. Accordingly, the automatic preclusion should be changed to a rebuttable presumption of preclusion.

4. Other Areas of Sentencing Policy That Should Be Addressed.

Finally, the Commission requests comment on any other areas of sentencing policy that should be addressed. WLF has requested the Commission on several occasions that it should review the application of prison sentences meted out for violations of environmental offenses under Part 2Q. Criminal enforcement of environmental laws of both individuals and corporations have been growing over the years, and raise serious issues both respect to penalties for corporations, as well as those imposed on individuals in the form of lengthy and unwarranted prison terms under Sections 2Q1.2 and 2Q1.3 of the guidelines. In many cases, the Department of Justice overcharges by adding money laundering and other charges to the underlying substantive environmental offenses in order to drive up the sentencing score, resulting in grossly excessive sentences for what otherwise would be minor regulatory offenses.

As noted, a federal judge was forced to impose a draconian 97-month sentence on first offenders, which was at the low end of the 97-127 month range as determined by the guidelines, for the "crime" of importing seafood in plastic bags instead of cardboard boxes under the Lacey Act. *See McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1041; 72 U.S.L.W. 3535. This prison sentence, longer than that meted out to some drug dealers, is, by any reasonable person's standards, clearly *"greater than necessary"* to comply with the purposes of punishment and deterrence under 28 U.S.C. § 3553(a). There are many other examples of unjust and excessive prison sentences that have been and are being imposed under the guidelines which call out for serious reconsideration and revision by this Commission. At a minimum, the Commission should have its staff or an advisory group review this problem area.

Conclusion

WLF appreciates the opportunity to provide these comments and urges the Commission to carefully consider the full impact that its guidelines and the proposed amendments would have on organizations before proposing them to Congress.

Respectfully submitted,

Daniel J. Popeo
General Counsel

Paul D. Kamenar
Senior Executive Counsel

encl

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Lawyers Seeing Red Over Lobster Case

Tony Mauro
Legal Times
02-16-2004

A dispute that began with a shipment of Honduran lobsters into Alabama has turned into an international incident that is now before the Supreme Court, complete with high-powered law firm and interest group participation.

At its Feb. 20 private conference, the Court will consider whether to add *McNab v. United States,* No. 03-622, and *Blandford v. United States,* No. 03-627, to its docket. The cases raise delicate issues of federal court interpretation of foreign law at a time when the Supreme Court itself is taking a fresh look at the importance of international law in its own jurisprudence.

Honduran citizen David McNab, a lobster fleet owner, and Robert Blandford and two other American seafood importers were arrested in Alabama in 1999 for importing 70,000 pounds of Caribbean spiny lobsters, a few of which were undersized and all of which were in plastic bags — in violation of a Honduran regulation that required shipment in cardboard boxes.

The four were indicted in federal court in Alabama for violations stemming from the Lacey Act, which prohibits the import of fish or wildlife taken or sold in violation of U.S. or "any foreign law." The fact that the shipment violated Honduran regulations was the predicate for a range of criminal charges, including money laundering. McNab, Blandford, and a third defendant were convicted and sentenced to eight years in prison. The fourth was sentenced to two years.

Meanwhile, as part of their legal battle, the importers successfully challenged the validity of the regulations in Honduras.

On appeal in the U.S. courts, the lobstermen claimed that the change in Honduran law dictated reversal of their U.S. convictions. The government of Honduras filed a brief in the appeal, asserting that the laws had no force at the time of the arrest, but the U.S. Court of Appeals for the 11th Circuit affirmed the convictions by a 2-1 vote.

The 11th Circuit acknowledged that a nation's own officials are "among the most logical sources" for interpreting that nation's laws. But the court concluded that, when a foreign government changes its position about those laws, the United States is not bound by the new interpretation. Heeding the new interpretation, the 11th Circuit majority stated, would lead to the "endless task of redetermining foreign law."

The 11th Circuit also suggested that future defendants with "means and connections" in a foreign country could lobby that country's officials to invalidate their laws as a way of undermining U.S. prosecutions. Circuit Judge Charles Wilson wrote the opinion,

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joined by Judge Frank Hull.

In dissent, Senior Judge Peter Fay said the current Honduran interpretation should prevail, adding that the process of legal change criticized by the majority "occurs routinely in our country."

Former D.C. Circuit nominee Miguel Estrada, a Honduran native who is a D.C. partner at Gibson, Dunn & Crutcher, represents McNab in his appeal to the Supreme Court. "The 11th Circuit is alone among the courts of appeals in refusing to accord deference to the construction of foreign law adopted by the authorized representatives of the foreign states," Estrada tells the Court.

Former Solicitor General Seth Waxman, now a D.C. partner at Wilmer, Cutler & Pickering, filed a brief in the case for the Honduran government. "Mr. McNab's actions did not violate any valid or enforceable law in Honduras," Waxman says in the brief, also noting that Honduras "desires to protect its citizens from misapplication of Honduran law."

The lengthy prison term for seemingly minor trade violations, as well as the appeals court's decision to not follow Honduran legal authority, has given the case high visibility in Honduras. And it has been framed in the United States as an international criminal law equivalent of the McDonald's too-hot coffee cup — an example of laws and punishment run amok.

"It's a classic case of over-criminalization — honest people being sent to prison for eight years for using plastic instead of cardboard," says Paul Kamenar, senior counsel at the Washington Legal Foundation, which filed the petition on behalf of Blandford.

An unusual coalition of groups — including the National Association of Criminal Defense Lawyers and the National Association of Manufacturers — also filed a brief, bemoaning the increasing use of criminal law to enforce economic regulations when no criminal intent is shown.

In a brief by Paul Rosenzweig, a lawyer at the Heritage Foundation, the groups tell the Supreme Court that the elimination of criminal intent requirements "allows the government to engage in grotesque over-charging such as that demonstrated here — pyramiding trivial civil infractions of uncertain (and now disavowed) foreign law into smuggling and money laundering offenses that carry astronomical and unjust domestic criminal penalties."

The Justice Department defends the conviction before the high court.

"If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act," the government's brief states. "Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions."

Deputy Solicitor General Paul Clement signed the brief, which notes that Solicitor General Theodore Olson is recused in the McNab case. Before becoming solicitor general in 2001, Olson was a partner at Gibson, Dunn, the firm that represents McNab.

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Internet Commerce Coalition

March 15, 2004

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

Re: Comments in Proceeding BAC2210-40/2211-01

Dear Mr. Courlander:

The Internet Commerce Coalition appreciates the chance to respond to the Sentencing Commission's request for comments regarding the guidelines that will apply to criminal spam sent in violation of 18 U.S.C. § 1037. The Internet Commerce Coalition's ("ICC's") members include major ISPs and e-commerce companies and associations: AT&T, BellSouth, Comcast, eBay, MCI, SBC, TimeWarner/AOL, and Verizon, the U.S. Telecomm Association, CompTel and the Information Technology Association of America.

Curbing and deterring spam is a major priority for the ICC and its members. The ICC worked actively to support passage of § 1307 as part of the CAN-SPAM Act, and provided extensive factual and technical information to the authors of this part of the legislation. Section 1037 prohibits the major falsification and hacking methods that professional spammers use to evade software that protects users and ISP networks from spam.

I. OVERVIEW OF THE SPAM PROBLEM

Spam currently constitutes over half of all traffic on the Internet. It floods user inboxes, and burdens ISP and corporate networks. The economic costs of spam have been estimated to be nearly $9 billion in 2002, according to a study by Ferris Research. Spam is also the leading complaint of Internet users regarding their Internet experience.

Most spam is sent in violation of federal and state fair trade practice laws, and civil spam laws. ICC members have sued well over 100 spammers, and the FTC has brought a large number of enforcement actions against spammers. These efforts have thus far not dissuaded professional spammers, who routinely employ falsification and hacking methods prohibited by from continuing to increase the volume of spam on the Internet. Many of the largest spammers continue to live in the United States sending out hundreds of millions of spam emails using these methods with relative impunity. Indeed, 8 of the top 10 spammers worldwide as measured by the anti-spam organization Spamhaus live in the United States. See http://www.spamhaus.org. Foreign governments and ISPs routinely complain about the huge volume of spam that comes from the U.S.

For these reasons, ICC members are convinced that criminal enforcement against professional spammers who rely on the hacking and falsification tactics prohibited by § 1037 is essential to reduce the spam problem. Large-scale professional falsification spammers and their co-conspirators are willing to risk the threat of civil litigation. However, if they perceive that continued violations create a meaningful risk of prosecution and significant prison time (not probation), we believe that U.S. spammers will find a different line of work, and the rising tide of spam will abate.

Section 1037 prohibits knowingly "initiating" illegal messages, and defines "initiate" as including both transmitting and procuring the transmission of the illegal emails. 15 U.S.C. § 7702(9). Spammers who use falsification tactics prohibited in § 1037 and the advertisers who knowingly procure and profit from their activities are fundamentally different from legitimate companies who use email for promotional purposes. These spammers and businesses who rely on spam regularly employ highly fraudulent and deceptive conduct such as computer hacking, wire and mail fraud, false and deceptive advertising, and misappropriating the identities of others in order to obtain computers, email accounts, Internet domains or Internet protocol addresses from which to spam, use of multiple bank accounts and use of sham corporations. These egregious activities are very similar to those of other criminal enterprises that are treated severely under the Sentencing Guidelines. They are also fundamentally different from the ways that legitimate businesses and individuals use email, so that there is little risk of the prohibitions in § 1037 being applied unjustly.

The worst of the advertisers who advertise by means of these outlawed techniques have a policy or practice of paying others to advertise their products and services in ways that violate § 1037. The entities often compensate spammers who send email on their behalf by paying for sales leads or by paying commission on actual sales. In addition to the knowledge of the illegal conduct, factors to consider in sentencing such individuals or corporations include whether the conduct appears to be grounded in either written or unwritten policy or established practice; whether there is evidence of similar conduct in a significant proportion of the defendant's email campaigns; and whether the procurer had the ability to control the illegal spamming activity.

Because of the significant harm caused by and egregious tactics used by professional violators of § 1037, and the need for sufficient incentives for criminal prosecution of spammers, the ICC urges the Commission to set sufficiently strong penalties for violations of this statute.

II. ANSWERS TO THE COMMISSION'S QUESTIONS

(1) What are the appropriate guideline penalties for a defendant convicted under 18 U.S.C. § 1037?

(a) Should the new offense(s) be referenced in Appendix A (Statutory Index) to §§ 2B1.1 (Fraud, Theft, and Property Destruction), and 2B2.3 (Trespass), and/or to some other guideline(s)?

It is our view that § 1037 offenses are properly referenced in Appendix A to § 2B1.1, the fraud, theft, and property destruction guideline. Spammer falsification and hacking tactics are most closely related to conduct covered in this guideline, and particularly to the penalty offense levels provided for computer hacking set forth in § 2B1.1(b)(13) that were implemented after the passage of the Homeland Security Act. On the other hand, the penalties for the more serious § 1037 offenses, including those involving highly organized sophisticated business operations and massive volumes, may deserve more severe penalties than those available for many of the hacking offenses. At the same time, some of the violations may be minor in nature. As a result, the guidelines provisions should not be so inflexible as to prevent probation sentences in some instances.

The trespass guideline, § 2B2.3, is far less suitable since the offense levels within this guideline are low and do not properly reflect the seriousness of § 1037 violations. There certainly may be situations where § 1037 offenses may be linked to offenses involving sexual exploitation of minors and obscenity (§§ 2G1.1, 2G1.2 and 2G1.3) and offenses involving criminal enterprises and racketeering (§ 2E1.1).

(b) What is the appropriate base offense level for the new offense(s)?

We believe that the base offense level of 6, which is used for § 2B1.1, would be an appropriate starting point for § 1037 offenses. This is particularly the case as just noted because there will be minor offenses that would properly be dealt with by probationary sentences.

(c) Should the offense level vary depending on the seriousness of the offense (for example, should the base offense level for a regulatory violation under 18 U.S.C. § 1037 be the same as the base offense level for a more serious violation under that statute)?

The statute makes it clear that offense levels should vary depending upon the seriousness of the offense and provides the Commission with clear directions in this regard. We take no position with reference to regulatory violations.

(d) If 18 U.S.C. § 1037 is referenced to § 2B1.1, should special offense characteristics be added to that guideline that ensures application of the multiple victim enhancement at § 2B1.1(b)(2)(A)(I) or the mass marketing enhancement at § 2B1.1(b)(2)(A)(ii) to a defendant convicted of 18 U.S.C. § 1037? Should a defendant convicted under 18 U.S.C. § 1037 receive an enhancement under § 2B1.1(b)(2)(A)(i) or (ii) based on a threshold quantity of email messages involved in the offense, and if so, what is that threshold quantity? Another option which might be better is to create special offense characteristics for § 1037 offenses.

We strongly recommend that special offense characteristics be used to enhance sentences for more serious and sophisticated violations of § 1037. First of all, the statute reflects Congress' intent that a threshold quantity of email messages – 2,500 per day, 25,000 per month or 250,000 per year – should be taken into account in determining enhancement of the defendant's sentence.

In order for Internet Service Providers to protect their network and subscribers, they have developed sophisticated techniques to eliminate spam messages before they get into the service.

Spammers typically destroy as much of the technical trail of their spamming as possible in order to avoid detection. Additionally, most ISPs along the trail through which a spam message travels typically do not preserve the relevant transmission logs for an extended period, due to the massive volumes of data involved in keeping track of the communications that cross their networks every day. Some companies (like AOL) may be able to provide evidence of the violation only by obtaining and storing consumer complaints, which have proven to be only a small fraction of the volume of email that a professional spammer actually transmitted or attempted to transmit. In AOL's experience, the volume of email actually sent by a spammer is several orders of magnitude larger than the volume of complaints received about that spammer. Recognizing these factors, Congress set the appropriate felony trigger for volume at 2,500 per day/25,000 per month and 250,000 per year. Proof of a continuing pattern of violations above this level should trigger an enhancement of the sentence beyond the baseline felony level.

Section 1037(a) and (b)(2) offenses should include at least the following special offense characteristics:

1. Increases to the base offense level for each of the factors listed in the statute: offense committed in furtherance of felonies; prior convictions; use of false account or domain name registrations; message volume; proof of victim loss or offender gain, including injuries to consumers caused by loss of access to accounts or equipment or because of identity theft; and major leadership role in the offense;

2. Increases to the base offense level for the use of sophisticated means; and

3. The addition of language to § 2B1.1(b)(8) (the provision which increases the offense level for relocating operations to evade law enforcement) to include specific language addressing evasion techniques spammers use to evade detection.

The sophisticated means enhancement should include using methods that evade secure email systems under development that authenticate senders or Internet domains used by a senders as legitimate by means of digital certificates. If a defendant cracks the security of a sender authentication technology or shares that information with others, or steals the identity of a trusted sender of email in order to send spam, an enhancement of at least 2 levels is warranted, and similar to the provisions of § 2B1.1(b)(9), if the resulting offense level is less than level 12, there should be an increase to that level.

(e) Under what circumstances shall an offense under 18 U.S.C. § 1037 be considered to involve sophisticated means?

As just noted, in light of the serious problems created by "professional spammer" falsification tactics, use of sophisticated means should trigger an enhancement. Section 1037(b) sets out a series of factors that reflect sophisticated means for committing the offense and that merit an enhancement for sophisticated means. These include sending a high volume of email and supervising others in the offense. Presence of these factors might trigger an enhancement to level 14 (15-21 months).

In addition, several other factors not specified in the statute reflect efforts to conceal the offense and would merit enhancements that might be similar to § 2B1.1(b)(8) of the Guidelines. These include:

(a) destruction of email records by a spammer;

(b) use of computer facilities outside the boundaries of the United States, a common method by which sophisticated spammers attempt to evade enforcement in the U.S.; and

(c) use of shell corporations or multiple bank accounts to evade detection.

Each of these factors are sufficiently serious to warrant enhancements of 2 levels.

(f) Consistent with the directive in section 4(b)(2) of the CAN-SPAM Act of 2003, should § 2B1.1 contain an enhancement for defendants convicted under 18 U.S.C. § 1037 who (I) obtain e-mail addresses through improper means, including the harvesting of e-mail addresses from the users of a website, proprietary service, or other online public forum without authorization and the random generating of e-mail addresses by computer; or (ii) knew that the commercial e-mail messages involved in the offense contained or advertised an internet domain for which the registrant of the domain had provided false registration information?

In our view, each of these factors also should trigger enhancements.

1. Harvesting email addresses by automated means, in violation of the rules of the online service or online forum where those addresses are posted, is a significant source of unwanted spam that penalizes the use of public fora such as personal or professional web pages, online marketplaces and Internet discussion fora. It chills free speech on the Internet and chills e-commerce in public fora.

2. Dictionary attacks occur through several ways. The first is a "phone book attack," in which a spammer generates email addresses corresponding to all possible name and first initial combinations in the phone book of one or more large metropolitan areas. The second is a pure random alphanumeric attack—the spammer sends to every alphanumeric combination permitted, for example, in a 16 character AOL address prefix. The third method is sending email to "culled" lists originally generated using any of the two previous techniques, but where the spammer has run the list once and culled out the invalid addresses based on records of undeliverable emails. Dictionary attacks are in effective methods used to obtain a password to which to send spam and thereby to access target accounts for illicit purposes. Such attacks generate a very large number of emails sent to false addresses and significantly burden networks with returned emails. Given the seriousness of dictionary attacks, enhancements should be increases of up to 6 levels, comparable to § 2B1.1(b)13(A)(iii) offenses.

3. Advertising or including an Internet domain with false registration information is a common tool by which the spam kingpins who pay for spam to be sent out on their behalf evade detection. Use of any of these means might result in an increase of 5 offense levels.

(g) Which adjustments should be considered directly pertinent to § 1037 offenses?

There are adjustments in Chapter 3 that could be pertinent to § 1037 offenses. These include the vulnerable victim adjustment under § 3A1.1; the role in the offense aggravating and mitigating adjustments under §§ 3B1.1 and 3B1.2; the abuse of trust or use of special skill adjustment under § 3B1.3; and the obstruction or impeding the administration of justice adjustment under § 3C1.1. Unless they are utilized as special offense characteristics in § 2B1.1, these adjustments should be used to significantly increase offense levels (and, in the case of an individual with a minor role in the offense, or a minor duped into spamming activity by a sophisticated spammer, to decrease the levels). In order to ensure that the factors are used in calculating penalties, it might be preferable to incorporate these adjustments as special offense characteristics.

The vulnerable victim adjustment should apply, for example, where spammers impersonate an innocent person in the course of the violation—e.g., by hacking into another person's account and sending spam, falsely placing that person's email address in the "from" line of spam emails, or using another person's identification information in registering for an email account, domain name or to obtain their Internet Protocol address space. Such tactics smear another person's name, can cause that other person to lose good will or to lose access to the Internet, and even to receive death threats from outraged recipients of offensive spam.

(2) What are the appropriate guideline penalties for offenses other than 18 U.S.C. § 1037 (such as those specified by section 4(b)(2) of the CAN-SPAM Act of 2003, i.e., offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children) that may be facilitated by the sending of a large volume of unsolicited e-mail?

Specifically, should the Commission consider providing an additional enhancement for the sending of a large volume of unsolicited email in any of the following: § 2B1.1 (covering fraud generally and identity theft), the guidelines in Chapter Two, Part G, Subpart 2, covering child pornography and the sexual exploitation of children, and the guidelines in Chapter Two, Part G, Subpart 3, covering obscenity? Alternatively, should the Commission amend existing enhancements, or the commentary pertaining thereto, in any of these guidelines to ensure application of those enhancements for the sending of a large volume of unsolicited email? For example, should the Commission amend the enhancements, or the commentary pertaining to the enhancements, for the use of a computer in the child pornography guidelines, §§ 2G2.1, 2G2.2, and 2G2.4, to ensure that those enhancements apply to the sending of a large volume of unsolicited email?

As reflected earlier, violations of § 1037 that involve violations of other serious felony statutes should trigger an enhancement of the § 1037 that makes the offense level comparable to what it would have been if the sentencing guidelines for the other provisions would have been used.

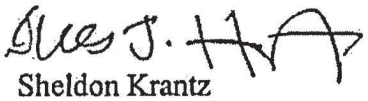
(4) What types of penalties should be considered for violations by corporations?

Section 1037 does not provide specific fine provisions for corporations. If § 2B1.1 will be utilized as the pertinent guideline, corporations will be sentenced under the provisions of §§ 8C2.3-8C2.9 in the absence of other directives. If these provisions are utilized for calculating organizational fines, it will be necessary to specify special offense characteristics for organizations in § 2B1.1 that will increase fine levels to appropriate levels. For large corporate violators, this will require that the total offense level would need to be set at levels of 20 or higher.

In ICC members' experience suing spammers, spammers who engage in conduct that violates § 1037 incorporate as part of a strategy of evading detection. There are usually few employees, all of whom are principals in the act of sending spam. More sophisticated outlaw spammers sometimes use corporate shells to transfer assets (e.g. e-mail lists) in the wake of civil lawsuits. Some spammers also cycle through lots of corporate identities to avoid the effects of recipient opt outs. Use of incorporation as a further form of falsification is very different than questions of whether a legitimate corporate entity has complied with this provision of law. Use of this falsification method should be treated as an enhancing factor, and should under no circumstances entitle a defendant to lesser punishment.

The provisions of § 8C1.1 should be used in situations where an entity has been created entirely or primarily for criminal purposes or to operate primarily by criminal means. Under § 8C1.1, when this occurs, the fine level is set at an amount that divests the entity of all of its net assets.

Respectfully submitted,



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March 10, 2004

MEMORANDUM

TO: Commissioners

FROM: Charles R. Tetzlaff
General Counsel

SUBJECT: Public Comment

We are enclosing additional public comment received since our mailing of last week. The Chapter Eight additional comment is in the same format as last time.

We have also added a letter from ChevronTexaco at the end of the comment letters which was just received today. Any additional comment received after today will be provided to you at next week's meeting.

Enclosures

PUBLIC COMMENT SUMMARIES
Addendum
March 1, 2004

Amendment No. 1 - PROTECT Act, Child Pornography and Sexual Abuse of Minors

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

The Committee on Criminal Law (CLC) fully supports the proposal to consolidate §§2G2.2 and 2G2.4 because it believes sentencing guideline applications will be simplified with this consolidation.

The CLC takes no position on the Commission's response to the directive in the PROTECT Act to increase the penalty for child pornography offenses based on the number of images involved. With respect to defining the term "image" or how such images should be counted, the CLC has no position, but would be willing to review any proposals developed in this regard.

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

The Probation Officers Advisory Group (POAG) strongly supports the consolidation of §§2G2.2 and 2G2.4 as, in its opinion, the current cross references create confusion and disparity in application, often resulting in lengthy sentencing hearings. The POAG chooses Option 1 for ease of application and notes that Option 2 could produce the same issues as in the existing cross reference applications.

Issue for Comment #1

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

Issue for Comment #2

The POAG suggests the proposed definitions would assist the field in guideline application. It notes there are continuing concerns as to the lack of instruction for counting the number of images and requests more guidance in the form of an application note. In addition, if the existing specific offense characteristics (SOCs) regarding an increase for the number of items as well as the number of images remain, the POAG

requests an application note explaining whether this is "permissible double counting" or whether these SOCs should be applied in the alternative.

Issue for Comment #3

The group does not think the Commission should include definitions for sadistic or masochistic or other depictions of violence. The POAG recommends leaving the interpretation of these definitions with the courts.

Issue for Comment #4

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

Issue for Comment #5

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

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

Issue for Comment #6

The POAG believes a significant problem could arise if the Commission attempted to define "incest" and suggests that the relationship between the abuser and the victim is the more critical factor rather than the familial bloodline.

Other Application Issues

The POAG agrees that the guidelines for production of child pornography should be higher than mere receipt or possession of child pornography.

As to §2A3.3, the POAG recommends an application note be added directing whether or not a Chapter Three adjustment for Abuse of Position of Trust should apply.

The POAG, recognizing conditions of probation and supervised release are an area of increasing litigation, recommends leaving restrictions to the sentencing court's discretion.

Amendment No. 3 - Body Armor

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

The Probation Officers Advisory Group (POAG) believes the active employment of body armor should be included in the commentary notes.

Amendment No. 4 - Public Corruption

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

The Committee on Criminal Law (CLC) supports the proposal to consolidate all four sections of §2C1.1 with §2C1.7, and §2C1.2 with §2C1.6. The CLC reminds the Commission that in 1995 it urged the Commission to undertake an extensive assessment of the sentencing guidelines to determine how they might be streamlined or simplified, and it supports any new efforts in this regard.

Additionally, the CLC believes that the Commission should not include an enhancement in either §2C1.1 for solicitation of a bribe or in §2C1.2 for solicitation of a gratuity. It argues that these enhancements are likely to invite protracted disputes at sentencing over which party initiated the solicitation and it does not view this dispute as vital in terms of relative culpability.

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

The Probation Officers Advisory Group (POAG) agrees with the proposal to consolidate §§2C1.1 and 2C1.7, and §§2C1.2 and 2C1.6, with the inclusion of attempts and conspiracies under these guidelines, but takes no position on Issue for Comment #3 as its experience reveals that offense conduct varies widely in public corruption cases.

The POAG would not recommend tiered enhancements based on the degree of public trust held by the public official involved in the offense as, in its opinion, application difficulties could arise in establishing the defendant's actual job duties.

In the POAG's opinion, raising the base offense level to accommodate multiple incidents could unduly punish up to one-third of the defendants sentenced under these guidelines and, therefore, the POAG suggests not increasing the base offense level, but instead argues the enhancement at (b)(1) is a preferable way to sanction this conduct.

Amendment No. 5 - Drugs

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

Issue for Comment #2

The Probation Officers Advisory Group (POAG) suggests that a mass marketing approach may be a more appropriate method to sanction distributors using the Internet to sell drugs, and recommends making the definition and the resulting increase in offense levels similar to §2B1.1.

Issue for Comment #3

The POAG suggests an encouraged upward departure be added to include this conduct, and further suggests allowing the sentencing court to use its discretion when imposing an appropriate sentence.

Issue for Comment #4

The POAG encourages the Commission to resolve the circuit split regarding the interpretation of the last sentence in Application Note 12 of §2D1.1.

Amendment No. 6 - Mitigating Role Cap

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

The Committee on Criminal Law (CLC) opposes any attempt to modify the mitigating role cap. The CLC does not believe that the current application of this guideline is problematic, and is unaware of any need to change it.

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

The Probation Officers Advisory Group (POAG) generally agrees with the tiered approach to the mitigating role cap, however, it suggests modifying the language to prevent application difficulties as, in its opinion, current language leaves open the possible application of the reduction after specific offense characteristics have been added or subtracted. The POAG suggests that the language be explicit in that the reduction should be premised on the "base offense level" with clear instructions including an example to be added in the commentary at §3B1.2.

Currently, defendants sentenced using the §2D1.2 guideline receive the benefit of the mitigating role cap, however, under this new provision, they would not receive this reduction, the POAG states. It also notes similar application problems might be present at §§2D1.6, 2D1.7, 2D1.10, and 2D1.11 and suggests the word "pursuant" be changed to "using" as a way to resolve this issue.

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

The Practitioners' Advisory Group (PAG) opposes the proposed changes to the mitigating role cap provision. In its opinion, the changes are inconsistent with the limited relief provided by the cap, the cap as presently constituted is not overly generous and the concerns that led to the enactment of the cap are present to a greater degree than at the time of its enactment. The PAG notes that only the lowest level drug couriers and mules qualify for it and any benefits from the cap are obtained only at the government's pleasure.

In the PAG's opinion, the cap is a reasoned, limited solution to what is still a pressing problem, enacted in response to concerns that base offense levels from the Drug Quantity Table in USSG §2D1.1 overstate the culpability of certain drug offenders deemed eligible for the mitigating role adjustment. The PAG believes the cap was set at 30 because defendants receiving the mitigating role adjustment could still have a total offense level above 30 due to other adjustments.

It is the PAG's argument that mules and couriers are a limited narrow subclass of drug offenders who have no power within the drug trafficking organization and are often unaware of the exact type or amount of substance they are carrying and the cap is even narrower than this subclass: it is limited to mules and couriers who qualify for mitigating role reduction. The PAG asserts that only the least culpable of the least culpable benefit from the cap and although 1/4 of traffickers received a mitigating role adjustment in 2001, the Commission estimated that only 6% of traffickers benefitted from the cap. The PAG believes no statistical evidence indicates that the 6% figure is too low and the PAG's anecdotal evidence suggests that it might be too high.

The PAG notes that the proposal is described as "less generous" and "more gradual" but no reason is given for a change and no claim has been raised that the cap is operating differently from the way it was designed to work. The Department of Justice (DOJ) has not supported its request for the change by any analysis or evidence, the PAG states, and indeed, the current practice, that the role cap is granted by a judge almost always with the consent of the prosecutor, belies DOJ's position on the cap.

The government effectively controls which offenders receive the benefit of the role cap, in the PAG's opinion, because (1) most role reductions are awarded only when the government concurs in or does not oppose them; and (2) the benefit of the cap only inures when the government makes a substantial assistance motion or the defendant qualifies for the safety valve. Thus it is the PAG's contention that the cap's application is controlled for the most part by the government and the government can reduce the generosity of the cap by opposing anything more than a two level mitigating role adjustment. The PAG states, moreover, the inducement the cap provides in principle for mules and couriers to cooperate with the government actually works in practice. Also, the PAG's own experience and information gathered from supervising probation officers and guideline specialists in many districts reveal that there are many districts in which the cap is virtually unknown and inoperative.

The PAG also believes that the Commission should reject proposals in the issues for comment following this Amendment. The PAG does not believe certain offenses or certain offenders should be categorically disqualified from the cap such as those who use weapons, threaten violence or use minors in the commission of drug crimes as such persons will not qualify for the cap. Already existing guideline enhancements will serve to escalate the offense levels for these offenders, the PAG states. Moreover, in its opinion, the government will still control the outcome for these offenders by its decision not to offer a cooperation deal, by asking for enhancements, by opposing reductions, and by moving for upward departures.

If the Commission is determined to modify the cap, the PAG would propose an alternative amendment. The PAG would have the cap reduction scaled to the offender's base offense level before application of the role reduction. For example, for a person with a base offense level 30, the cap should be 29, for those with a base offense level 32 or 34, the cap should be 30, for those with a base offense level 36, the cap should be 32, and for those with a base offense level 38, the cap should be 34.

Finally, if the proposed amendment is enacted as currently written, the PAG urges the Commission to make "additional reduction" one level at base offense level 30, two levels at base offense level 32 or 34, and three levels at base offense level 36 or 38.

Amendment No. 7 - Homicide

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

The Committee on Criminal Law (CLC) recognizes the need to address proportionality concerns as a result of newly enacted mandatory minimum sentences or direct amendments to the sentencing guidelines by Congress. It states that some of the proposed amendments are intended to address such concerns, but further states that the Commission's remedy for these proportionality issues seems to be to increase the penalties for these offenses. It reminds the Commission that the Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which it argues both skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes

Additionally, the CLC states that it takes no position with respect to the proposal to provide greater penalties for offenses involving official victims.

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

In the Probation Officers Advisory Group's (POAG) opinion, the Chapter Two Homicide and Assault guidelines as written with the current proposals will produce appropriate punishments and pose little application difficulty. As to the Chapter Three issue for comment, the POAG does not recommend a tiered approach in application of §3A1.2, as additional fact-finding issues would be required and could, in its opinion, increase the number of contested sentencings.

Amendment No. 8 - Miscellaneous Amendments

Probation Officers Advisory Group
Cathy A. Battistelli, Chair
Concord, New Hampshire

(D) USSG §2X6.1 -Use of a Minor

The Probation Officers Advisory Group (POAG) noted some concerns as to how multiple counts of this offense would be grouped and it suggests a commentary note be added regarding grouping instructions. In addition, the POAG found the language in §2X6.1, comment. (n.1) to be confusing and it had difficulty interpreting the wording "the offense of which the defendant is convicted of using a minor," and it recommends additional instructions for this guideline.

Issue for Comment No. 10 - Aberrant Behavior

Committee on Criminal Law (CLC)
of the Judicial Conference of the United States
The Honorable Sim Lake, Chair
Houston, TX

The Committee on Criminal Law (CLC) opposes any attempt to further limit the courts' discretion with respect to aberrant behavior departures. It argues that studies conducted after the enactment of the PROTECT Act show that judges are not abusing their departure authority, and as a result, the CLC believes that further downward departure limitations are unwarranted.

COMMITTEE ON CRIMINAL LAW
of the
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March 8, 2004

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

Dear Sentencing Commissioners:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Sim Lake

PRACTITIONERS' ADVISORY GROUP
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March 5, 2004

VIA HAND DELIVERY

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

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

Dear Commissioners:

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

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

Introduction

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

The Sentencing Commission has understood this for many years – the excessiveness of mandatory minimum sentences is an open secret among those who practice in federal court. It was this knowledge that drove the Commission to enact the mitigating role cap – Amendment 640, effective November 1, 2002. Amendment 640 was an extremely limited, narrow modification that capped the base offense level at 30 for a narrow class of offenders who received minor or mitigating role adjustments. Amendment 640 was limited not only because it benefitted only a small number of the least culpable offenders who had minor involvement, but because its impact was limited

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

– the base offense level for someone who received this benefit would still be 30, and such offenders would still be subject to the mandatory minimum sentence absent a substantial assistance motion by the government, or application of the safety valve.

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

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

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

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

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

Amendment 640 enacted the mitigating role cap. The <u>purpose</u> of the amendment was clear:

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

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

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

Id.

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

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

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

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

Id.

Not only was the solution limited by definition, but it would apply to only those who were the least culpable drug offenders, because "[t]he maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders." Id.

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

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

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

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

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

To the extent that the current proposal was proposed or initiated by the Department of Justice, it, too, has offered analysis or other information supporting the proposed amendment. In fact, the current practice involving the role cap – where role reductions are granted by District Judges almost always with the consent of the Department of Justice – renders incredible any concerns the Department of Justice might have – unstated as they may be – about the mitigating role cap.

B. <u>In effect for a less than one and one-half years, the role cap is applied sparingly: only low level offenders, who cooperate, and for whom the</u>

government does not oppose the role reduction, actually benefit from the mitigating role cap; in some districts, the cap is used rarely, if ever

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

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

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

A real example from a pending case (between plea and sentence) that a PAG member is handling illustrates the application of the mandatory minimum and how it dilutes the role cap. A female drug mule is caught at the border while entering the United States, with just over 1 kg of heroin. She is a first time offender with no previous arrests, did not pack the suitcase she was carrying, never saw the inside of the suitcase, had no idea how much heroin was involved, and had a minimal role in the offense. The government agrees that she played a minimal role, that the minimal role reduction applies, and that the role cap applies. The sentencing calculations, made in the presentence investigation report, to which neither the defendant nor the government object, are as follows:

•Base offense level, 1-2.99 kg. heroin

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

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

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

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

impose a 120 month sentence, unless the government files a downward departure motion or the safety valve applies.

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

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

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

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

•Base offense level, 1-2.99 kg. heroin (USSG §2D1.1(d)(4):	32	=	32
•Reduction by operation of role cap (USSG §3D1.1(a)(3)):	-2	=	30
•Minimal participant reduction (USSG §3B1.2(a)):	-4	=	26
•Safety valve application (USSG §2D1.1(b)(6)):	-2	=	24
•Acceptance of responsibility (USSG §3E1.1(a)):	-2	=	22
•Acceptance of responsibility (USSG §3E1.1(b) (pre-April 30, 2003 factual conduct):	-1	=	21

•Government motion for downward departure based on substantial assistance (USSG §5K1.1)):	-2	=	19
•ADJUSTED TOTAL OFFENSE LEVEL =	19		
•CRIMINAL HISTORY CATEGORY:	I (zero points)		
•SENTENCING RANGE:	30 to 37 months		

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

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

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

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

And most importantly, **the role cap as currently constituted is not overly generous.** It will benefit only those who are the most minor or minimal offenders, who cooperate and help the government by providing truthful and complete information, and who are deemed worthy of such a modest benefit by the prosecution. Because the benefits of the current role cap are modest, apply to only the most deserving of offenders,

and the benefits do not inure without cooperation and government approval, and the role cap is working as designed, Amendment 6 should be rejected in its entirety.

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

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

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

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

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

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

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

reduction and whose base offense level is 32 or 34, the offense level should be capped at 30. For persons who will receive the role reduction and whose base offense level is 36, the offense level should be capped at 32. For persons who will receive the role reduction and whose base offense level is 38, the offense level should be capped at 34.

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

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

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

Conclusion

In 2002, less than two years ago, the Commission found that base offense level 30 adequately reflects the culpability of defendants who qualifying for a mitigating role adjustment. That finding is no less true today, and is unchallenged. Given that, and without any indication that the mitigating role cap is operating in a way other than it was intended, and with our demonstration that the cap is modest and is effectively controlled by the Department of Justice, we respectfully urge the Commission to reject amendment 6 in its entirety.

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

In our February 27th letter, we addressed the issues for comment relating to proposed Amendment #2. In this letter, we address the proposed amendment to the organizational guidelines commentary where this Commission would, for the first time, take an affirmative position on questions concerning waiver of attorney-client privilege,

as well as work product protections. PAG strongly urges the Sentencing Commission not to enact the proposed amendments as currently drafted.

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

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

The Ad Hoc Advisory Committee's Report suggests that the defense bar wanted the Commission to "explicitly clarify the role of waivers in obtaining credit for cooperation." Report at 103. While it is true that many in the defense bar asked the Commission to clarify that waivers should never be required, this statement is not accurate if it is meant to suggest that the defense bar wanted a clarification at all costs, even if it meant that the defense's requested clarification was rejected, and a green light would be given to some coerced waivers. While we appreciate the Ad Hoc Committee's willingness to state that waivers cannot always be required in this context, the language that follows and blesses waivers in "some" circumstances essentially vitiates any help this language might provide, particularly when no parameters are placed on what those circumstances are, or how often "some" acceptable circumstances may exist. If the Commission were to simply enact the provisions stating that waivers are not required in order to get a cooperation adjustment or substantial assistance departure, we would concur that this would represent the true clarification the defense bar sought. If the Ad Hoc Committee's entire current recommendation is considered, however, including its blessing of waivers in some circumstances, this is not a clarification at all. *We would rather that the Commission do nothing at this time than do this.*

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

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

We recognize the natural tendency for the Commission to view favorably any "consensus" language reached by a committee that has worked for 18 months, even if the Ad Hoc Committee did also work on many other issues during that time. Nevertheless, doing "something" is not always preferable to doing nothing, particularly when it may bring unintended consequences. Even the Ad Hoc Committee's report suggests that its recommendations would be merely the beginning, and not the end, of discussion on this subject. *See* Report at 5 ("the Advisory Group has identified *a possible approach* to modifying the organizational sentencing guidelines in this regard."); *id.* at 103 ("the Advisory Group suggests [this as] a *possible solution* for *further consideration* by the Sentencing Commission"); Presentation at 30 ("we would expect, *if the Commission does decide to promulgate a proposal based on our report,* that this particular section will engender much discussion during your process.... I'll leave it at that.").

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

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

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

Sincerely,

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

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

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

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March 5, 2004

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Dear Commissioners:

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

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

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

Issue for Comment #1

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

Issue for Comment #2

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

Issue for Comment #3

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

Issue for Comment #4

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

Issue for Comment #5

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

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

Issue for Comment #6

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

Other Application Issues

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

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

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

Proposed Amendment #3 - Body Armor

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

Proposed Amendment #4 - Public Corruption

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

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

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

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

Proposed Amendment #5 - Drugs (Including GHB)

Issue for Comment #2