



The safety and security association of the commercial explosives industry • Founded 1913

March 1, 2004

Via Hand-Delivery

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

Re: Comments of the Institute of Makers of Explosives; U.S. Sentencing Commission;
Sentencing Guidelines for U.S. Courts; Notice, 68 Fed. Reg. 75340 (Dec. 30, 2003). Issues
for Comment 11: Hazardous Materials

Dear Sir or Madam:

IME is pleased to provide comments on the above-captioned Federal Register Notice.

IME is the safety association of the commercial explosives industry. Our mission is to promote safety and security and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations.

IME represents all U.S. manufacturers of high explosives and other companies that distribute explosives or provide other related services. Over 2.5 million metric tons of explosives are consumed annually in the United States of which IME member companies produce over 95 percent. These products are used in every state in the Union and are distributed worldwide. The value of these products is estimated to be in excess of \$1 billion annually. The ability to manufacture, transport, store, and use these products safely and securely is critical to this industry. Accordingly, IME is interested in any changes to the U.S. Sentencing Guidelines that have the potential to impact the transportation of hazardous materials.

We submit the following comments on the above-captioned notice.

(1) A New Guideline Should be Created to Address Offenses Involving HAZMAT
Transportation

IME agrees in principle with the concern expressed by the U.S. Department of Justice ("DOJ"), that the current sentencing guideline applicable to hazardous materials (§2Q1.2 *Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce*), is not adequately suited to hazardous materials ("HAZMAT")-related transportation offenses.

As noted in the Federal Register notice, the §2Q1.2 Guidelines clearly are intended to cover offenses under the various U.S. environmental protection statutes and associated regulations and could, conceivably, be difficult to meaningfully apply to Department of Transportation ("DOT")-regulated HAZMAT transportation offenses. For example, the only mention of transportation offenses in the §2Q1.2 Guidelines is at (b)(4); "If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels." §2Q1.2(b)(4). Clearly, this provision is directed at environmental *permitting* violations rather than the types of transportation-related offenses possible under DOT HAZMAT regulations. Where such offenses do not involve permitting, the Guideline is even less relevant as an appropriate tool.

Given the specificity of the current §2Q1.2 Guidelines to violations of environmental statutes, and the narrow, tailored structuring of the guideline to correspond to "typical" environmental recordkeeping and permitting requirements, and environmental "release" events, we believe there is substantial merit to DOJ's recommendation that the §2Q1.2 Guidelines not be the sole frame of reference for sentencing violations of DOT HAZMAT requirements.

Accordingly, IME supports the alternative noted in the Federal Register Notice that a new guideline be created to more adequately and specifically address offenses involving the transportation of hazardous materials.

(2) An Appropriate Base Level For Offenses Involving the Transportation of Hazardous Materials Should Be Conservative Given the Diversity of Potential Hazards Posed by the Transportation of Commercial HAZMAT

As the Commission is no doubt aware, the transportation of hazardous materials is an essential, integral component of industrial and commercial activity and is ubiquitous throughout the United States ("U.S.") and internationally. In addition, the quantity and variety of hazardous materials that are daily shipped in legitimate commerce in the U.S. is enormous, including widely recognizable materials such as gasoline to less obvious HAZMAT substances such as automotive airbags, various cosmetics, and a number of common food additives. Likewise, the relative potential danger – in a criminal context – posed by the myriad materials classified as HAZMAT varies as widely as the nature of the materials themselves.

While IME's expertise in the area of HAZMAT transportation is limited to the transportation of explosives and related products, it is essential that the Commission fully appreciate the diversity and volume of these and other materials that are transported as HAZMAT. Similarly, the Commission should understand the potential (or lack thereof) that such materials might "provide a 'target-rich' environment for terrorists" or others with criminal intent. 68 Fed. Reg. at 75377. Any sentencing guidelines addressing hazardous materials offenses will necessarily and unavoidably have extraordinarily broad potential applicability and impact.

In view of the foregoing, the Commission may wish to consider establishing a conservative base level for HAZMAT offenses in general and devise a series of base level enhancements that, to the extent possible, correspond to the nature of the hazard potentially posed by such materials. For example, if an offense proximately increases the likelihood that hazardous materials could be obtained by those with terrorist intent and the materials could be used to inflict the type of catastrophic harm associated with acts of "terrorism," the severity of the enhancement should reflect this potential. This arrangement would both account for the diverse hazardous characteristics of HAZMAT materials and pointedly address the concern expressed by DOJ in the Federal Register Notice.

(3) Base Level Enhancements Should Account for Minor Offenses Involving a Low Potential for Serious or "Catastrophic" Consequences

As in any regulatory scheme, there are any number of potential criminal offenses that involve relatively minor infractions of regulatory requirements and/or may have a limited potential for harmful consequences (e.g., a low or nonexistent likelihood of death or serious bodily injury). Base level enhancements unique to HAZMAT transport offenses should take into account such "lesser" offenses. We note that existing sentencing guidelines for other categories of offenses are oriented in this manner (e.g., offenses involving simple recordkeeping and reporting violations are assigned a base level mitigating factor of 2 levels in the §2Q1.2 Guidelines). Similar "simple" violations should be afforded the same treatment in the context of HAZMAT transportation.

(4) The Commission Should Incorporate the HAZMAT Classification System Devised and Administered by DOT Into Any HAZMAT Offense Sentencing Guidelines

As the Commission may be aware, all HAZMAT transportation in the U.S. is governed by a comprehensive classification system developed and administered by DOT. In preparing any sentencing guidelines specific to HAZMAT, IME recommends that the Commission ensure that the guidelines and associated base level enhancements correspond to and are consistent with this classification scheme.

(5) The Chapter 8 Guidelines for Sentencing of Organizations Should Not Require Amendment To Include a HAZMAT-Specific Compliance Program

The Request for Comments includes an inquiry regarding how new HAZMAT guidelines might interact with the sentencing guidelines for organizations.

The Chapter 8 Guidelines for Sentencing of Organizations appear to be purposely drafted in broad terms to account for offenses committed by organizations under a host of federal regulatory requirements. Accordingly, the guidelines *should* be adequate to cover any violations of HAZMAT regulations attributable to an organization.

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In the event the Commission opts to draft new HAZMAT sentencing guidelines, however, the Chapter 8 guidelines will necessarily have to be reviewed and evaluated to ensure their continued relevance, consistency, and effectiveness. IME has not had the opportunity to fully evaluate the how the Chapter 8 guidelines are generally interpreted by the courts. That said, we recommend that, as part of any effort to develop a new HAZMAT sentencing guideline, the Commission also examine the Chapter 8 guidelines to ensure that the guidelines are adequate to accommodate situations unique to the HAZMAT transportation sector.

Specifically, the Chapter 8 Commentary and Application Notes at section (j) and, particularly, at section (k), should be available to limit, if warranted, the severity of any penalties imposed on organizations whose liability stems from the actions of third party shippers, etc. over whom the organization has little or no realistic control.

For example, a shipper contracts with a freight forwarder, broker, or agent to arrange transportation of a hazardous material to a consignee. Even in instances where the shipper arranges the transportation, once the material is no longer physically in the shipper's care and custody, the shipper can exercise little control over the safe handling or security of the material during transit. Likewise, carriers rely on the certification of shippers that the hazmat presented for transportation is correctly identified, documented, marked, labeled, and packaged as required. For these reasons, DOT will reach back to shippers for violations of "shipper/offender" functions on a carrier's watch, and will charge carriers for knowingly violating "carrier" functions required by statute or the Department's hazardous materials regulations.

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IME appreciates the opportunity to submit these comments. If you have any questions regarding these comments or if we can provide any additional information, please do not hesitate to contact Susan JP Flanagan at sjflanagan@ime.org or 202.429.9280 ext. 315 or Cynthia Hilton at chilton@ime.org or 202.429.9280 ext. 319.

Sincerely,



Susan JP Flanagan
Counsel, Environment, Safety & Health
Institute of Makers of Explosives